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## EVIDENCE ADMISSIBILITY— THE COMMON DENOMINATOR

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### I. THE PROBATIVE FORCE TEST

Justice does not have a fair chance. Its administration is handicapped by the prevailing philosophy concerning evidence and its admissibility. This critical situation will not be solved until the probative force test is recognized as the only proper standard for determining admissibility of evidence. The probative force test, simply stated, is: *Evidence is admissible when it is of sufficient force that it logically tends to prove or disprove a fact or issue necessary to the decision of the particular case, unless such evidence is excluded by a rule of law or policy not primarily concerned with the probative force of evidence.*

This test is the basic requirement for the admissibility of evidence. It is not new. As early as 1890 it was discussed by Thayer<sup>1</sup> and subsequently by other authorities such as Wigmore,<sup>2</sup> McCormick,<sup>3</sup> Fisch,<sup>4</sup> and Morgan.<sup>5</sup> For at least the last half century, courts have directed attention to the probative force test as one of the basic standards governing admissibility of evidence. References to probative force in appellate court decisions have become increasingly frequent.<sup>6</sup>

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1. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, ch. VI (1898).

2. 1 WIGMORE, EVIDENCE §§ 9-12 (3d ed. 1940).

3. MCCORMICK, EVIDENCE § 152, at 320-21 (1954).

4. FISCH, NEW YORK EVIDENCE § 3 (1959).

5. MORGAN, BASIC PROBLEMS OF EVIDENCE, ch. 4 (1963).

6. McIntosh v. Eagle Fire Co., 325 F.2d 99 (8th Cir. 1963); Sears v. Southern Pac. Co., 313 F.2d 498 (9th Cir. 1963); Weinstock v. United States, 231 F.2d 699 (D.C. Cir. 1956); Hadley v. Baltimore & O. R. R., 120 F.2d 993 (3d Cir. 1941); Larson v. Solbakken, 221 Cal. App. 2d 410, 34 Cal. Rptr. 450 (1963); Dougherty v. White, 25 Del. 316, 80 Atl. 237 (1911); Bogorad v. Kosberg, 81 A.2d 342 (D.C. Mun. Ct. App. 1951); Georgia Sav. Bank & Trust Co. v. Marshall, 207 Ga. 314, 61 S.E.2d 469 (1950); Dent v. Hardware Mut. Cas. Co., 86 Idaho

But the basic probative force test is used by appellate courts only when resort to fundamentals is necessary in order to explain a decision which would otherwise be inconsistent with the historical formalized rules of evidence. This basic test has been buried and forgotten under volumes of discourse on the historical formalized rules, logical relevance, legal relevance, conditional relevance, prospectant evidence, concomitant evidence, and retrospective evidence. While such discussion may be interesting, it should be relegated to history. Generally, it is not helpful to the courts and bar, which are faced with the problem of determining the admissibility of evidence on a practical, as well as a rational, basis.

American jurisprudence is and must remain a viable process which adapts itself to modern life and is governed by intelligent analysis in the search for truth.<sup>7</sup> Therefore, it should now be clearly recognized that the historical formalized rules are merely explanations of the application of the probative force test and should no longer be used as tests themselves.

The probative force test has been denied its proper place in the rules of evidence for various reasons, none of which appears to be sound upon analysis. First, many of the historical formalized rules were stated by courts as merely explanatory matter for the administration of the basic test in a particular case. Then subsequent courts, without acknowledging that the application and statement of the ruling by the first court was merely an application of the basic test of admissibility, followed the precedent of the first court.<sup>8</sup> Thus a formalized rule of evidence was created out of context and without proper reference to the entire problem. This formalization was accelerated by reliance by members of the bar

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427, 388 P.2d 89 (1964); *Torrey v. Congress Square Hotel Co.*, 145 Me. 234, 75 A.2d 451 (1950); *Haile v. Dinnis*, 184 Md. 144, 40 A.2d 363 (1944); *Baker & Theodore, Inc. v. Quinn*, 400 S.W.2d 477 (St. L. Mo. App. 1966); *Daley v. Metropolitan Life Ins. Co.*, 81 N.H. 502, 128 Atl. 531 (1925); *Miller v. Trans. Oil Co.*, 18 N.J. 407, 113 A.2d 777 (1955); *Simon v. Graham Bakery*, 17 N.J. 525, 111 A.2d 884 (1955); *People ex rel. Gannon v. McAdoo*, 117 App. Div. 438, 102 N.Y. Supp. 656 (1907); *Davies v. Columbia Gas & Elec. Co.*, 68 N.E.2d 571 (Franklin County, Ohio Ct. C.P. 1938), *aff'd*, 36 Ohio Law Abstract 335, 68 N.E.2d 231 (Franklin County Ct. App. 1939); *Trook v. Sagert*, 171 Ore. 680, 138 P.2d 900 (1943); *Clark v. Essex Wire Corp.*, 361 Pa. 60, 63 A.2d 35 (1949); *E. R. Wiggins Builders Supplies, Inc. v. Bathgate*, 123 Vt. 418, 192 A.2d 461 (1963); *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 74 S.E.2d 165 (1953); *Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp.*, 66 Wash. 2d 469, 403 P.2d 351 (1965); *Kirchner v. Smith*, 62 W. Va. 639, 58 S.E. 614 (1907).

7. JONES, EVIDENCE § 1, at 3 (5th ed. 1958).

8. Lehman, *Technical Rules of Evidence*, 26 COLUM. L. REV. 509 (1926).

upon the formalized specific rule as a shorthand method of expressing the fundamental rule.

Second, early textwriters and theorists, in discussing the entire topic of evidence and its admission, recognized the one fundamental test, but in the author's opinion, were fearful that without further guides its administration by the courts in specific cases would be subject to abuse and distortion. Apparently for this reason, most of the early authorities adopted the position that the basic standard was not sufficient and must be supplemented by formalized rules. Later authorities have tended to adopt the same skepticism and have been unduly influenced by the earlier authorities. The fears of the early authorities and the reasons given for the application of formalized rules in addition to the basic test cannot now stand modern analysis.

Third, it appears there has been general failure to recognize that the formalized historical rules were developed only as an indication of the reliability of evidence in specific situations. For example, the development and application of the hearsay rule and its numerous exceptions are nothing more than applications of the probative force test.

Hearsay was originally excluded because it was considered unreliable. However, certain situations gave a guarantee of reliability so that hearsay did meet the probative force test. This required a development of the exceptions to the hearsay rule under the handy nomenclature of *res gestae*, admissions against interest, declarations against interest, dying declarations, and similar categories. To illustrate, the business record rule does nothing but state that certain recorded items kept in the ordinary course of business which might be hearsay are maintained and recorded under circumstances that sufficiently guarantee their probative force and reliability; therefore, such records are admissible.

A similar review of each formalized historical rule of evidence reveals that it is founded upon and is an application of the probative force test. The difficulty is that what started out to be a means of expressing the probative force test in a particular case has become an end in itself. The formalized historical rules of admissibility have become so established that little inquiry is made as to the basic reason for their existence. Further, the application of formalized historical rules from case to case obviously creates inconsistencies and conflicts which have to be resolved unless a just result is denied. Consequently, in the same jurisdiction there are conflicting decisions by the same appellate court which can only be explained by returning to the fundamental probative force test.

## II. THE URGENT NEED FOR ONE SIMPLE TEST

Because of the application of historical formalized rules of evidence, facts necessary to the proper determination of disputed issues are frequently either excluded or improperly presented to those who must make the decision. Too often the application of these rules is without sound reason in the particular case before the court. In each instance in which this occurs, it can be fatal to achieving justice.

Substantive law is created by society through its judicial or legislative representatives. It is and should be governed by precedent. When it is changed, the change is accomplished with the knowledge of those concerned with its application. Uncertainty as to substantive law arises only on questions of interpretation. Whether a fair result may be obtained upon varying interpretations of substantive law may depend upon the viewpoint or position of the parties concerned. However, no fair interpretation can be achieved with respect to any particular set of facts if those facts are incompletely presented.

The one occasion when justice usually fails is when the historical formalized rules of evidence are applied without reason to determine admissibility of evidence. If a just result is obtained on such occasions, it is in spite of and not because of the formalized rules of evidence. It is then due to factors not inherent in the administration of law.

Those who may believe that such statements are extreme fail to give credence to stronger indictments made by others. Professor Thayer stated:<sup>9</sup>

The few principles which underlie this elaborate mass of matter are clear, simple, and sound. But they have been run out into a great refinement of discrimination and exception, difficult to discover and apply; and have been overlaid by a vast body of rulings at *nisi prius* and decisions *in banc* impossible to harmonize or to fit into any consistent and worthy scheme. A great portion of these rules, as laid down by the courts and by our text writers, are working a sort of intellectual fraud by purporting to be what they are not. To the utter confusion of all orderly thinking, a Court is frequently represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or procedure. The rules are thus in a great degree ill-apprehended, ill-stated, ill-digested.

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9. THAYER, *op. cit. supra* note 1, at 511.

Professor Thayer again said:<sup>10</sup>

In part the precepts of evidence consist of many classes of exceptions to the main rules,—exceptions that are refined upon, discriminated, and run down into a nice and difficult attenuation of detail, so that the Courts become lost, and forget that they are dealing with exceptions; or perhaps are at a loss to say whether the controlling principle is to be found in the exception or in the general rule, or whether the exception has not come to be erected into a rule by itself. In part, our rules are a body of confused doctrines, expressed in ambiguous phrases, Latin or English, half understood, but glibly used, without perceiving that ideas, pertinent and just in their proper places are being misconstrued and misapplied.

These indictments of the formalized rules of evidence were published by Professor Thayer as early as 1898. Forty-one years later Professor Wigmore dedicated the third edition of his work on evidence to Professor Thayer and Judge Charles Doe of New Hampshire. In it he recognized the three main faults in the rules of evidence, as they existed in 1939, as being inflexibility, magnification of details, and overemphasis on errors.<sup>11</sup> He stated that a complete abolition of the rules as they then existed was at least arguable—not merely in theory, but in realizable fact. He suggested that this was “not so impossible as the Bar would have supposed, a few years ago.”<sup>12</sup>

Wigmore proceeded to argue that the time was then not ripe for such massive reformation in the rules of evidence and that any such attempt would be futile. His reasons were that most practitioners are unskilled in the rules of evidence; jurors must be reckoned with as laymen; the system of evidence was sound on the whole because it is based on the experience of human nature; and the judges and members of the bar must improve in spirit as a prerequisite for any hope of real gain to be secured from better rules.<sup>13</sup> The reasons given by this foremost authority for continuation under the present formalized rules of evidence constitute an indictment not only of the rules themselves, but also of the judiciary and the trial bar, those members of society charged with the administration of the rules. It is submitted that these are neither presently acceptable nor valid practical reasons.

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10. *Id.* at 512.

11. 1 WIGMORE, *op. cit. supra* note 2, § 8c at 264.

12. *Id.* at 259.

13. *Id.* at 259-63.

If a problem exists, a solution should be found. It is no excuse that juries are composed of laymen; so much the better reason to have facts submitted to them by rules less complex and confusing. It is particularly unacceptable to defer immediate reform for the stated reason that most practitioners today are unskilled in the formalized rules of evidence or that the judges and the practitioners must improve in spirit. This is not a justifiable excuse if the judiciary and the bar are willing to accept, as they have, responsibility for the administration of justice. Any conclusion that our present system of evidence admissibility is sound on the whole is defeated by the very reasons given for its continuance and the flaws which Professor Wigmore and other authorities recognize.

With the passage of additional time the problem presented by formalized rules of evidence has become more acute. The solution is available and reliable, and it should be followed. In 1939 Professor Wigmore remarked that the law of evidence was changing, that it was forward looking, that the last decade had seen a willingness and determination to improve the law of evidence, and that the forward movement was destined within the coming generation to renovate radically the rules and the practice under the rules.<sup>14</sup> In the passage of time between the comments of Thayer and of Wigmore, there was little change for the better. If anything, the situation progressively worsened. The hopeful prediction of Wigmore has not come to pass, and a massive effort for improvement is now required.

### III. THE ROLE OF THE ACTIVE JUDICIARY AND BAR IN OBTAINING A SOLUTION

As Professor Morgan has pointed out,<sup>15</sup> every informed lawyer knows that the present law of evidence has its defects. Lawyers are inclined to view horrible examples of the application of formalized rules as idiosyncrasies of a particular court, perhaps used to secure a desired result in a difficult case. Neither ignorance nor indifference can change the situation. In attempting to escape the dilemma posed by the formalized historical rules, courts have engrafted qualifications, refinements and exceptions upon the earlier rules, so that the law of evidence has grown irregularly and in a haphazard fashion.

Professor Morgan remarks that, if an observer confines his examina-

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14. *Id.*, *Preface* at vii.

15. Morgan, *Forward* to MODEL CODE OF EVIDENCE at 4-5 (1942).

tion to a single compartment of the law of evidence, the observer may not be shocked by the nature of the animal he views. It may be curious, but it perhaps appears to have some semblance of uniformity. However, if the partitions between the compartments are broken down, the observer will be amazed that anyone should contemplate turning into a single field such diverse and antagonistic creatures. Thus, Professor Morgan relegates the law of evidence as it now stands to the same place as the early nineteenth century forms of action in common law pleading. Surely it must be recognized that any field of the law that is over one century behind the times is now inadequate. In no other area of the law have basic principles been so hidden and relegated to the background.<sup>16</sup>

Reform will not occur unless it is applied by those engaged in the actual administration of the law; namely, the active members of the judiciary and the bar. The existence of the problem and the need for a solution have been recognized by the American Law Institute's Model Code of Evidence<sup>17</sup> and the reports and actions of various committees, legislatures, and changes in the rules of various courts. The Model Code of Evidence was a major step forward. Basically, it was a clarification and simplification of the then existing historical formalized rules. Unfortunately, it generally has been neither followed nor applied by the courts and its effectiveness diminished or lost.

One of the difficulties in this major effort to substitute realism for "rule-ism" and its attendant confusion is that the Model Code did not reduce the test of admissibility to one simple standard. The reluctance to recognize and apply one test for determining the admissibility of evidence is due to two conflicting considerations. As was recognized by Judge Irving Lehman,<sup>18</sup> a lawyer preparing for trial desires to know with as much certainty as possible what evidence will be admissible. Superficially, the formalized historical rules appear to give a certain guide as to admission or exclusion. Thus, they are relied upon both by the courts and the lawyers. Unfortunately, such reliance is misplaced and the unexpected occurs. For every rule or exception that is applied to a particular set of facts, another formalized rule or exception is lurking in

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16. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

17. Morgan, *Forward* to MODEL CODE OF EVIDENCE at 2 (1942). Cf. CAL. EVIDENCE CODE (1965) (effective Jan. 1, 1967); ORE. REV. STAT. tit. 4, ch. 41 (Supp. 1963), ch. 42 (Supp. 1965), ch. 43 (Supp. 1961), ch. 44 (Supp. 1963), ch. 45 (Supp. 1961).

18. Lehman, *supra* note 8, at 512.



the shadows waiting to be cited and applied to achieve an opposite result.

The general countervailing consideration is that the trial court should have the discretion to exercise its common sense and place before the trier of fact all of the essential elements of probative value upon which to reach a fair determination. The argument against this is that no lawyer could determine in advance the court's concept of common sense. Yet in various types of specialized cases the court's power of broad discretion has not made it impossible for trial advocates reasonably to determine the probable outcome. A common sense application of the probative force test supplies more certainty than presently exists through application of the confused formalized rules of evidence.

The irrational development of the historical rules and the resulting injustice was noted by Judge Lehman.<sup>19</sup> He remarked that most of the formalized rules developed from administrative reasons for excluding evidence in a given case. Such a sound administrative reason in a particular case became a hard and fast precedent which must be applied in all cases. Rules of administration thus assumed the appearance and effect of established rules of law. Instead of hastening the course of a trial, they often confuse and delay. Being so intricate, they often baffle the judge who seeks to ascertain the truth and the lawyer who seeks to persuade the judge, and they sometimes astound the layman by their apparent lack of logic and common sense.

Judge Lehman observed that, to preserve our system of evidence, some means must be found of refitting it to present conditions.<sup>20</sup> He recognized the problem and suggested that a differentiation be made between fundamental rules of universal application and rules of administration which should be applied only within the limits of sound judicial discretion. He did not outline the method by which this differentiation was to be established.

Only active judiciary and the trial bar can effect any practical reform. It is suggested that by two fundamental steps they can effect the reform and prevent injustice without any new legislation or radical procedural changes. First, the basic definition of what constitutes evidence should be determined, recognized, and applied; second, the basic reason for the admission or exclusion of evidence not only should be recognized as it really exists today, but should be applied in practice.

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19. *Id.* at 513.

20. *Id.* at 520.

## IV. WHAT IS EVIDENCE?

The word "evidence" is not self-defining. Standard dictionaries usually define it as that which is "legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it."<sup>21</sup> This avoids a true definition. It relies upon the answer to the question we are seeking, that is, whether something constitutes evidence so that it can be legally submitted. Legal dictionaries are of even less help because they rely upon the result of legal presentation at trial and sometimes confuse proof or persuasion with the definition of evidence itself.<sup>22</sup> Definitions of the word "evidence" by most authorities avoid the basic definition of the term by relying upon an artificial rule as to admissibility or legal force as definitive or by confusing persuasion and proof with basic evidence.

Best defined judicial evidence as natural evidence restrained or modified by rules of positive law.<sup>23</sup> Thayer correctly pointed out that one fact could be established by another fact only by inference, but in doing so he tended unduly to emphasize the element of ultimate persuasion.<sup>24</sup> It should be noted that, according to Thayer, a great portion of the rules of evidence as formulated by the courts and text writers is working a sort of intellectual fraud by purporting to be what they are not, that "to the utter confusion of all orderly thinking, a court frequently is represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or of procedure."<sup>25</sup> This illustrates the importance of the fundamental basic definition of evidence.

Bentham defined evidence as "any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion affirmative or disaffirmative of the existence of some other matter of fact."<sup>26</sup> More modern writers apparently have not improved upon this definition. If his language concerning the tendency or design to effect affirmative or disaffirmative persuasion is converted to the modern terminology of logically tending to prove or disprove another fact or issue, a definition

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21. WEBSTER, NEW INTERNATIONAL DICTIONARY (3d ed. 1961).

22. BLACK, LAW DICTIONARY (4th ed. 1951).

23. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE 34 (1870).

24. THAYER, *op. cit. supra* note 1, at 411-12.

25. *Id.* at 511.

26. 1 JONES, EVIDENCE 1 n.1 (5th ed. 1958); see 6 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 208 (Bowring's ed. 1827).

which is relied upon by modern court decisions materializes. Jones referred to Bentham's definition, but modified it by commenting that "manifestly the term [evidence] must be given a more restricted meaning when used with reference to the judicial process of resolving legal disputes."<sup>27</sup> This approach is adopted by most of the other authorities in this field, including Thayer<sup>28</sup> and Wigmore.<sup>29</sup>

The difficulty with this approach is that it uses the result to establish the means by which the result is achieved. When an authority on evidence states that evidence is matter which is admitted before a tribunal deciding a fact, or is matter admitted under judicial process to determine a fact or issue, he does little to explain either what evidence is or what evidence should be admitted. By any rationale, this is no definition.

Greenleaf states that, in legal acceptance, evidence includes all the means by which any alleged matter of fact is established or disproven when the truth of such fact is submitted to investigation.<sup>30</sup> This definition has been criticized as being susceptible to the interpretation that it includes establishment of the truth based not only upon facts or inferences directly arising from facts, but also upon argument. This criticism is specious. The real criticism should be that it does not actually define evidence but again relies upon "legal acceptance." It relies upon the action of a judicial tribunal without referring to any standard upon which the judicial tribunal should act. The definition contained in the Uniform Rules of Evidence<sup>31</sup> is subject to the same criticism.

It is submitted that the correct definition of evidence which should be used in determining whether any particular matter is to be submitted to a judicial tribunal is simply:

Evidence is any matter which in and of itself, or by direct inference, reasonably and logically tends to prove or disprove another fact or matter which the trier of fact is called upon to determine.

Undoubtedly, this definition can be improved, but at least it is a step in the right direction. Of course, it assumes that individual members of society do have some ability to logically reason on a rational basis and

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27. 1 JONES, *op. cit. supra* note 26, at 1.

28. Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 147 (1889).

29. 1 WIGMORE, *op. cit. supra* note 2, § 1.

30. 1 GREENLEAF, EVIDENCE § 1 (5th ed. 1850).

31. *Appendix* to UNIFORM RULES OF EVIDENCE, Rule 1(1) (1953).

to recognize when one fact or series of facts or reasonable inferences therefrom do directly bear upon proving or disproving another ultimate fact or issue. This definition is incorporated in the present statement of the probative force test.

#### V. RELIABILITY AS ADMISSIBILITY

The importance of reliability was indicated early in history. The Old Testament of the Bible at various places stated requirements for reliability of evidence. Thus, in Deuteronomy it was required that the testimony of two, and preferably three, witnesses be given before a person could be convicted of a capital offense.<sup>32</sup> As further protection in any controversy, if a person was found to have borne false witness against another, he was to be subjected to the same punishment as that to which the accused would have been subjected if convicted.<sup>33</sup>

If evidence is reliable to prove or disprove an ultimate fact or issue, then it meets the probative force test unless it is excluded by a rule of law or policy not primarily concerned with the probative force of evidence. It is this element of reliability which leads textbook authorities and the courts to support the use of formalized historical rules and to discard mere probative force as not being enough. This is illustrated by Wigmore's two axioms of admissibility:

- I. None but facts having rational probative value are admissible.
- II. All facts having rational probative value are admissible unless some specific rule forbids.<sup>34</sup>

Wigmore states that the first axiom prescribes merely "that whatever is presented as evidence shall be presented on the hypothesis that it is calculated, according to the prevailing standards of reasoning, to effect rational persuasion."<sup>35</sup> This states nothing more than the obvious. The question may well be asked as to why Wigmore's first axiom is needed. If only facts having rational probative value are admissible, then it follows that none but facts having rational probative value are admissible. It is unnecessary refinement to add "only" to Wigmore's second axiom as its first word. Although Wigmore appears at first to be discussing relevancy, his discussion in context, can only refer to reliability.

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32. *Deuteronomy* 17:6-7, 19:15.

33. *Deuteronomy* 19:16-19.

34. 1 WIGMORE, *op. cit. supra* note 2, § 9, at 289, § 10, at 293.

35. *Id.* § 9, at 289.

Wigmore continues that it would be a complete misconception to interpret his second axiom to mean that anything that has probative value is admissible. But in the very next sentence in his text, he states that "the true meaning [of the second axiom] is that everything having a probative value is 'ipso facto' entitled to be assumed to be admissible, and that therefore any rule of policy which may be valid to exclude it is a superadded and abnormal rule."<sup>36</sup>

If Professor Wigmore made an argument like that in court, his remarks would be considered so much double talk. Why use superadded and abnormal rules? They are unnecessary. It would seem better merely to state that evidence is admissible unless precluded by some rule of law or policy, so long as the standard stated in the probative force test is applied. The rule of law or policy referred to in the probative force test is clearly defined, is not based upon the law of evidence, and does not become ensnared in the fundamental problem of admissibility based upon the reliability of evidence to prove or disprove an ultimate fact or issue.

As early as 1910 a Maine decision quoted Thayer<sup>37</sup> on the principles of admissibility and established the rule that anything which is logically probative of a fact in issue, to the ordinary reasoning mind, should be prima facie admissible and should not be excluded unless its admission would conflict with some principle of law or rule of policy.<sup>38</sup>

Defendant had appealed on the ground that allowing evidence concerning past acts of negligence of defendant's trolley conductor was prejudicial. The decision noted that twenty-nine states allow such evidence, only Massachusetts and Pennsylvania disagreeing. The Maine court, in substance, stated and used the probative force test. However, it was not heeded, and when Wigmore complicated Thayer's rules of admissibility and surrounded them with refining detail, the old and cumbersome rules continued to be followed.

Earlier and more succinct was the Supreme Court of West Virginia in furnishing its admissibility rule: "All facts having rational probative value are admissible unless some specific rule forbids."<sup>39</sup> This rule has suffered three more years than Maine's rule in being ignored.

36. *Id.* § 10, at 293.

37. THAYER, *op. cit. supra* note 1, at 530.

38. *Robbins v. Lewiston, A. & W. St. Ry.*, 107 Me. 42, 77 Atl. 537 (Sup. Jud. Ct. 1910).

39. *Kirchner v. Smith*, 61 W. Va. 434, 449, 58 S.E. 614, 620 (1907), quoting 1 WIGMORE, EVIDENCE § 10 (1904).

There is no rational basis to exclude evidence which tends to prove or disprove another fact or an issue necessary to the decision of the case if that evidence is reliable. The development of the hearsay rule and its exceptions has previously been referred to as an illustration. The real excuse for the hearsay rule is simply to guarantee reliability and nothing more.

Generally, two reasons are ascribed by textbook authorities for the present existence of the hearsay rule. The first reason is that no testimony should be accepted until it has been tested by cross-examination.<sup>40</sup> However, the Supreme Court of South Carolina in *Wimberly v. Sovereign Camp, W.O.W.*,<sup>41</sup> did not think that cross-examination testing was primarily important in affirming a verdict for plaintiff. Defendant alleged error in admitting a written record made by defendant's deceased agent which showed payment of dues by plaintiff's deceased. The court held that such a record was a declaration against interest or an admission of an agent acting within the scope of his authority. In effect, the court stated that the first requirement of cross-examination under the hearsay rule was unnecessary and resorted to the business record or admission against interest exceptions to achieve the result. Actually, the basis for the court's decision was reliability.

Wigmore considers abandonment of the hearsay rule in the vital aspect of requiring cross-examination as unthinkable.<sup>42</sup> Yet, this requirement is repeatedly abandoned under exceptions to the hearsay rule, which exceptions Wigmore supports because such evidence meets the requirements of reliability without being subject to cross-examination.

The second reason normally given for the hearsay rule is the requirement for personal knowledge before a witness can testify. This, too, seems to be concerned with the reliability of evidence. Wigmore is of the opinion that this reason is the aspect of the hearsay rule which is enforced in too great detail. He maintains that such detailed enforcement of this aspect has deprived the effect of natural narration of events by a witness and that the result has been to multiply tenfold the time and tedium of trial. A vast amount of evidential facts has been excluded, and the hearsay rule brought into disrepute, by the abuse of this modern and unessential feature of it.<sup>43</sup>

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40. 1 WIGMORE, EVIDENCE § 8c at 277 (3d ed. 1940).

41. 190 S.C. 158, 2 S.E. 2d 532 (1939).

42. 1 WIGMORE, *op. cit. supra* note 40, § 8c at 277.

43. *Id.* at 277-78.

No matter how it is described or analyzed, the hearsay rule is primarily concerned with reliability, and reliability is guaranteed by the probative force test properly applied.

Another illustration of not only the concern with reliability, but also the ridiculous situation which application of the historical formalized rules engender, is the development of the various dead man's rules or statutes. These statutes, which exist in most states, merely formalized a rule of policy, and they should be so recognized. Originally, the prohibition against letting a living party testify to the actions or statements of a deceased party arose because of the suspicion that the living party might not tell the truth. The deceased party could not confront him or testify as to the deceased party's version.

Yet in most states the dead man's statute is not applied if the suit is against a corporation whose president is now dead. Neither is it applied in most states if plaintiff's cause of action is directly against the administrator of the estate of a deceased, as opposed to actions originally against the deceased which have been revived. The same basic objection as to reliability exists in each of these situations. If there is any validity to the dead man's statute, it is recognized by that portion of the probative force test which excludes evidence otherwise barred by a rule or policy of law not concerned with probative force.

No matter how formalized or detailed the rules of evidence are made and no matter how confusingly they departmentalize the fundamental standards of admissibility, the ultimate determination of the reliability and admissibility of evidence is upon the trial judge. If a trial judge thinks evidence is reliable and should be admitted to achieve justice, he will find a way. The point is, reliance is still placed upon human beings to determine admissibility, no matter what test is applied. This fact should be recognized. The probative force test does afford a workable guarantee of reliability.

## VI. THE PROBATIVE FORCE TEST AND MATERIALITY

Materiality is a completely different consideration from relevancy. Evidence may be logically, or even legally, relevant to prove an ultimate fact or issue. That is, it may have probative force to prove such fact or issue. However, if that ultimate fact or issue is not necessary for deciding the matter before the court, then it is completely immaterial. Professor

Trautman, recognizing that materiality and relevancy are often confused, has stated the clear distinction between each.<sup>44</sup>

For example, if a person is charged with murder and admits having shot the deceased with a revolver, the only justification offered being self-defense, it is entirely immaterial whether the accused had a permit for the gun. If suit is brought upon a contractor's performance bond and the bonding company pleads a complete release, admitting that the bond was issued, then the circumstances under which it was issued become completely immaterial. Evidence might be offered on each of these issues which would logically tend to establish them, but they are not necessary to a decision of the case.

To put it in the simplest terms, fact A may prove fact B. If fact B is not before the court for decision, and fact A proves nothing but fact B, then both fact A and fact B are immaterial and subject to exclusion on that ground. This requirement of materiality is taken into consideration in the probative force test when it requires that the offered evidence must tend to prove or disprove a fact or issue *necessary to a decision of the case before the court*. It is stressed, however, that this requirement should not be confused with relevancy, as Professor James has pointed out.<sup>45</sup>

## VII. THE CASE AGAINST LEGAL RELEVANCY

At least two modern scholars have recognized that legal relevancy is misleading and has no place in the field of evidence under modern jurisprudence. Professor Trautman in his excellent article<sup>46</sup> concludes that the concept of legal relevancy, when applied literally, excludes logically relevant evidence unless legal precedent otherwise admits it. He notes that this results in the exclusion of circumstantial evidence without reason or explanation, that it creates a large number of cumbersome rules with exceptions and exceptions to the exceptions, and that true relevancy is an affair of logic and experience. Indeed, Professor Trautman states it is difficult to understand how there can be a concept called "legal relevancy."

Professor James concludes that the ambiguous phrase, "legal relevancy," should be disentangled and returned to the grave where Pro-

44. Trautman, *supra* note 16, at 386.

45. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

46. Trautman, *supra* note 44, at 412-13.



fessor Thayer laid it almost fifty years ago.<sup>47</sup> Both of these modern scholars argue that there is no other true measure of relevancy than the empirical experience of what fact tends to establish or prove another fact. Both reject the concept of legal relevancy. Some modern court decisions agree, and the Supreme Court of New Jersey has specifically rejected legal relevancy in at least one leading decision.<sup>48</sup>

That which is logically relevant must be admitted, unless barred by an established rule or policy of law not having to do with probative force. Both Professor Trautman and Professor James adopt the position that even the exclusionary policies or rules of law should be narrowly viewed. Regardless of any differences of opinion as to whether such policies or rules should be narrowly viewed, the probative force test does take into consideration logical relevancy, while recognizing the existence of the exclusionary rules and policies.

The concept of legal relevancy is nothing more than logical relevancy restricted by what a court legally excludes as evidence. This again resorts to using the result to explain or justify the means of admission or exclusion. This is circuitous reasoning; but the reasoning of Professors Trautman and James does not appear subject to such attack. The concept of legal relevancy cannot stand analysis. The best way to eliminate its meaningless and confusing influence is by the use of the probative force test.

### VIII. THE EFFECTIVENESS OF THE PROBATIVE FORCE TEST

The best argument for the use of the simple probative force test is that it works. It establishes a sound basis for the admissibility of evidence upon which a rational determination of the facts and issues can be made by those charged with that responsibility. The fundamental purpose of evidence is not lost.

If the bench and bar continue to refer to the historical formalized rules of admissibility, they should recognize certain facts. First, such rules are nothing more than the application of the probative force test to a specific piece of evidence under the circumstances of a particular case. Second, when the application of any historical formalized rule in a particular situation is inconsistent with or violates the application of the pro-

47. James, *supra* note 45, at 705.

48. *Miller v. Trans Oil Co.*, 18 N.J. 407, 113 A.2d 777 (1955). Cf. *Simon v. Graham Bakery*, 17 N.J. 525, 111 A.2d 884 (1955).

bative force test, then the rule should be disregarded and admissibility determined by the probative force test. Third, indiscriminate and literal application of the historical formalized rules creates inconsistencies which can only be resolved by resort to the fundamental probative force test. In other words, it must be recognized that the probative force test is the governing factor.

The last portion of the present probative force test consists of the clause, *unless such evidence is excluded by a rule of law or policy not primarily concerned with the probative force of evidence*. This clause gives recognition to the fact that, in order to enable the judicial process to function, certain policies have to be established either by the courts or by legislators. The testimony of a witness may well meet the first portion of the probative force test but still be excluded under the Fifth Amendment to the Constitution of the United States. Certain communications, such as those between client and attorney, are, and should be, absolutely preserved by statute. The dead man's statute excludes evidence, but this, too, is a matter of social policy rather than one of probative force. Such a policy may be questioned, but so long as society has seen fit to express it, obedience to society's dictate must be observed.

Actual judicial process recognizes exclusion of evidence as a practical matter on bases other than the probative force test alone.<sup>40</sup> One example is the exclusion of admissible evidence which would open up collateral issues to such an extent that confusion would be created and would impede the decision of the main issue being tried. In exercising discretion to exclude such evidence involving collateral issues, the court is not concerned primarily with whether the evidence meets the probative force test. Such evidence may so meet the test and yet be subject to exclusion because it hinders making a rational decision on the main issue.

The exclusion of repetitious or cumulative evidence is another such policy area normally not incorporated in statutes or codes. Once evidence reaches the point where it is repetitious or merely cumulative, it should be excluded for the very practical reason of the limits of time. Conceivably, it could be argued that such evidence does not meet the probative force test because, standing alone, it does not have sufficient probative force

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49. Cf. Nagy Appeal, 169 Pa. Super. 388, 392, 82 A.2d 591, 593 (1951), where the court excluded evidence because of a policy against injecting collateral matters in trial, in spite of its having probative force as to a mental condition.

to aid in a rational decision of the issue to be decided. This is not a true application of the probative force test and does violence to its meaning. Cumulative or repetitious evidence may have as much probative force as the first evidence introduced on the same subjects. Whether evidence is cumulative or repetitious depends entirely upon the point of time in the judicial proceeding at which it is offered. The real reason for exclusion is a practical consideration in the administration of justice. This should be so recognized.

A most practical application of the probative force test is in adapting the judicial process to the modern computer age. Under proper circumstances statistical runs or compilations from a myriad of facts or data processed by a computer should be available to the trier of fact charged with making a decision in a particular case. It is no answer to state that, upon proper evidence, computerized data or analysis can qualify for admissibility. If the historical formalized rules of admissibility are literally applied, it is seldom that this type of evidence would be admissible. Further, the testimony of experts and those programming the computer may take far more time than is justified, if compliance with the historical formalized rules is required without reference to the fundamental probative force test.

This problem has already been encountered, particularly in patent litigation, anti-trust litigation, and protracted cases of all types. The historical formalized rules simply are not adequate to reasonably determine the admissibility of this type of evidence. It is submitted that when this type of evidence is offered the probative force test will have to be resorted to by requiring the establishment of reliability and a showing that such evidence logically tends to prove or disprove an issue in the case. Otherwise, yet another formalized rule is going to be developed to add to the general confusion.

## IX. CONCLUSION

The probative force test as now stated is, and always has been, the only true standard for determining the admissibility of evidence. It eliminates misleading concepts and applies a rational basis for determining admissibility of evidence. In simple language, it provides a single and exclusive measure for admissibility so that both the trial judge and lawyer have a practical guide.

The present trend is to recognize the probative force test and to give

less emphasis to the historical formalized rules. Any searching analysis of the historical formalized rules or the reasons given for their existence casts grave doubt upon their justification and emphasizes that there is only one basic test of admissibility—the probative force test. The sooner this is recognized, the sooner the administration of justice will be improved.