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Can Rules of Evidence Be Codified

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CAN RULES OF EVIDENCE BE CODIFIED?

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The topic of my paper is entitled "Can Rules of Evidence Be Codified?" My answer is that of course they can. I was therefore very much pleased when Chief Justice Warren announced that rules of evidence would be drafted.[1] Sir James Stephen of England did it in the Indian Evidence Act enacted in 1872.[2] This Act applies to this day in India, Pakistan, and Burma, and has been adopted in Ceylon, and the African countries of Kenya, Nigeria, and Uganda. The American Law Institute adopted a Model Code of Evidence in 1942, and the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws were approved in 1953. In 1953 the Evershed Committee proposed the codification of the English statutory law of evidence from 1609 to 1938. Israel is now codifying its law of evidence. There is thus ample precedent for the codification of evidence. After all, evidence is a phase of procedure just as are pleading and practice. If pleading and practice can be codified, as they have been, it follows that evidence can be also. One must never forget that on a great many subjects one can scarcely distinguish a rule of evidence from one of pleading or practice.[3] It is a significant fact that one fourth of the Rules of Federal Civil Procedure and Federal Criminal Procedure actually do deal with evidence topics or topics on the borderline of evidence[4]. To that extent, the law of evidence in federal civil cases has been brought up to date, but only to that extent. Unhappily, the great bulk of evidence remains outside of these specific rules.

The rules of evidence in federal civil cases are in greater need of reform than those in criminal cases. As to criminal cases, state law does not apply, hence the law is uniform throughout the United States. The federal courts under Rule 26 of the Federal Rules of Criminal Procedure are to look to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." But as to civil cases the

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1. 36 F.R.D. XVIII (1965).
2. Orfield, *Uniform Federal Rules of Evidence*, 67 Dick L. Rev. 381, 387 (1963).
3. 1 WIGMORE, EVIDENCE, § 3 (3d ed. 1940).

federal courts under Rule 43 of the Federal Rules of Civil Procedure may look to only three sources: federal statutes, federal equity decisions, and state law. But federal statutes cover only a small part of the field of evidence. The federal equity precedents are few and have seldom been applied. Thus, as to most points, state law must be looked to. And the state law has not been modernized except in Kansas which has adopted the Uniform Rules of Evidence. While the rules of pleading and practice in federal civil cases are up to date, those as to evidence are behind the times and extremely confusing.

One basic question the Advisory Committee on Rules of Evidence must face at the outset is whether there should be one set of rules for both civil and criminal cases. It seems to me that the answer must be in the affirmative.[5] This is the approach of both the Model Code of Evidence of the American Law Institute of 1942 and the Uniform Rules of Evidence of 1953. This is the view of Dean Wigmore.[6] Casebooks in courses in Evidence in the law schools are constructed on that basis. One of the leading members of the Supreme Court, Justice Story, stated in 1827: "In general rules of evidence in criminal and civil cases are the same."[7] A district judge has concluded that the rules are the same as to what is evidence, its competency, admissibility, and order of production.[8] The important difference is as to the quantity of evidence required.

The federal trial judge may sum up the evidence and may comment on the facts in both civil and criminal cases.[9] The rules as to judicial notice are the same.[10] As to statutes, in civil cases the court will notice federal statutes.[11] The same is true in criminal cases although this weakens the impact of Rule 7 (c) of the Federal Rules of Criminal Procedure that the indictment or information shall cite the statute violated.[12] The jury "may make common sense inferences from the proven facts in both civil and criminal cases."[13]

In both civil and criminal cases a party has no right to cross-examine a witness, without leave of court, as to any matters not connected with matters stated in his direct examination.[14] In both there can be no impeachment by inconsistent statements unless the

4. Orfield, *The Reform of Federal Criminal Evidence,* 32 F.R.D. 121, 158-160 (1963).
5. See Note, 1964 Duke L.J. 867, 885-886.
6. 1 WIGMORE, EVIDENCE, § 4, 16-19 (3d ed. 1940).
7. United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469 (1827). See also United States v. Page, 302 F.2d 81, 85 (9th Cir. 1962); United States v. Wood, 39 U.S. (14 Pet.) 430, 437 (1840); United States v. Winchester, 28 Fed. Cas. 731, 732, No. 16,739 (C.C.D. Ill. 1840).
8. United States v. Hutchins, 26 Fed. Cas. 442, 445, No. 15, 430 (C.C.S.D. Ohio 1876).
9. Simmons v. United States, 142 U.S. 148, 155 (1891).
10. Garner v. Louisiana, 368 U.S. 157 (1961); Carroll v. United States, 16 F.2d 951, 955 *cert. denied* 273 U.S. 763 (2d Cir. 1927).
11. See 5 MOORE, FEDERAL PRACTICE 1341 (1964).
12. Orfield, *Judicial Notice in Federal Criminal Procedure,* 31 Fordham L. Rev. 503, 505-506 (1963).
13. United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958).
14. McKnight v. United States, 122 Fed. 926, 928 (6th Cir. 1903).

impeachor at a former trial asked the preliminary question.[15] Prior inconsistent statements of a witness do not constitute substantive evidence.[16] The same rule applies as to whether a witness may be impeached by asking the impeaching witness whether he would believe the witness under oath.[17] Where a criminal defendant called government agents the court applied as to impeachment Rule 43(b) of the Federal Rules of Criminal Procedure by way of analogy.[18] The trial judge may direct the attention of the jury to the interest which any witness may have in the result of the trial.[19]

The rules as to offer of proof are the same.[20] Objections to evidence must be specific.[21] Where the intent of a party is in issue, evidence of other acts of that party at or near that time of a kindred character is admissible to show intent and motive.[22]

The rules as to ancient documents and their authentication are the same.[23] In both civil and criminal cases parol proof of the contents of a written agreement cannot be given in evidence where the agreement is in the hands of the opposite party unless notice is served on the party or his attorney to produce it.[24]

Proof of testimony at a former preceeding is alike[25] although there is subsequent contrary authority.[26] Medical treatises are not admissible.[27] Proof of business records is the same.[28] The rule that secondary evidence of the contents of books of account is admissible where the books are voluminous is the same.[29] Where an article is introduced in evidence there is no rule in either civil or criminal cases requiring the party to produce all persons who were in a position to come into contact with the article.[30] In both civil and criminal cases the declarations of the master of a ship are binding on the owner.[31]

The instances in which the rules are different in criminal cases are neither numerous nor important. The right of the adverse party when the witness seeks to resort to a memorandum to refresh his recollection, to inspect the memorandum so that he may object to its use if proper grounds appears, is more "rigorously adhered to

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15. Mattox v. United States, 156 U.S. 237, 247 (1895). Three justices dissented.
16. United States v. Rainwater, 283 F.2d 386, 389 (8th Cir. 1960).
17. Colbeck v. United States, 10 F.2d 401, 403 (7th Cir. 1925), *cert. denied* Lanham v. United States, 271 U.S. 662 (1926).
18. United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962).
19. Reagan v. United States, 157 U.S. 301, 306 (1895).
20. Price v. United States, 68 F.2d 133, 135 (5th Cir. 1934).
21. Wright v. United States, 288 Fed. 428, 431, 433 (D.C. Cir. 1923).
22. Chitwood v. United States, 153 Fed. 551, 553 (8th Cir. 1907); Schultz v. United States, 200 Fed. 234, 238 (8th Cir. 1912).
23. Hartzell v. United States, 72 F.2d 569, 580 (8th Cir. 1934).
24. United States v. Winchester, *supra*, Note 8.
25. United States v. Macomb, 26 Fed. Cas. 1132, 1133, No. 15,702 (C.C.D. Ill. 1851).
26. United States v. Sterland, 27 Fed. Cas. 1307, 1308, No. 16,387 (W.D. Va. 1858); United States v. Angell, 11 Fed. 34, 42 (C.C.D. N.H. 1881).
27. United States v. Perkins, 221 Fed. 109, 110 (E.D.S.C. 1915).
28. Phillips v. United States, 201 Fed. 259, 269 (8th Cir. 1912).
29. Shreve v. United States, 77 F.2d 2, 6 (9th Cir. 1935), *cert. denied* 296 U.S. 654 (1936).
30. Gallego v. United States, 276 F.2d 914, 917 n. 1 (9th Cir. 1960).
31. United States v. Gooding, *supra*, Note 8 at 469.

in criminal than in civil cases."[32] While in civil cases the wife may be a competent witness against her husband, this is usually not true in criminal cases.[33] The Supreme Court, while holding that in civil cases, a juror may not impeach the verdict of the jury, intimated that the rule in criminal cases might be different.[34] A district court has stated that "greater latitude is allowed in the examination of motions for a new trial" on the ground of insufficiency of the evidence in criminal than in civil cases.[35] While in civil cases the appellate court will not review the sufficiency of the evidence unless there was a motion for a directed verdict, in criminal cases the court may review to avoid a miscarriage of justice.[36] A court has stated that "the rule which excludes offers of compromise in civil cases does not apply to criminal cases."[37] But a subsequent decision held contrary.[38] A court has stated: "In criminal cases, and especially in cases of rape, and in cases of abuse of children, the principle of what is called *res gestae* has been, from the necessity of the case, extended beyond the limits that generally obtain in civil cases."[39] The Civil Rules do not provide for the appointment of impartial experts by the courts whereas the Criminal Rules do.[40]

There remains then only a small number of situations in which separate rules for criminal cases may be necessary. These include confessions, burden of proof, presumption of innocence, character of the defendant, corroboration in perjury, the two witnesses rule in treason, and accomplices.

Occasional authority doubts that the rules of evidence are the same in civil and criminal cases.[41] Frankness requires me to say that there is no clear answer, as the two have never been compared in detail. There is no systematic statement of the law of federal civil evidence available. Professor Moore[42] covers the whole field in only 78 pages and Professor Wright in Barron and Holtzoff[43] in only 72 pages. Professor Wright expressly states that he does not cover the detailed case law and refers the matter to the Federal Digest and Corpus Juris Secundum and textbooks on evidence.[44] Nor is Wigmore much more helpful. His discussion does not segregate the federal civil cases. They are lumped together with federal

32. Morris v. United States, 149 Fed. 123, 127 (5th Cir. 1907).
33. Johnson v. United States, 221 Fed. 250 (8th Cir. 1915).
34. McDonald v. Pless, 238 U.S. 264, 269 (1915). But see Jorgenson v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947).
35. United States v. Daubner, 17 Fed. 793, 808 (E.D. Wis. 1883).
36. Fielder v. United States, 227 Fed. 832, 833 (8th Cir. 1915); Smith v. United States, 173 F.2d 181, 184 (9th Cir. 1949).
37. Christian v. United States, 8 F.2d 732, 733 (5th Cir. 1925).
38. Ecklund v. United States, 159 F.2d 81 (6th Cir. 1947).
39. Snowden v. United States, 2 App. D.C. 89, 94 (1893).
40. Walton v. Arabian American Oil Co., 233 F.2d 541, 546 n. 16 (2d Cir. 1956).
41. Fowks and Harvey, *The New Kansas Code of Civil Procedure*, 36 F.R.D. 51, 63 (1964).
42. 5 MOORE, FEDERAL PRACTICE 1301-1354, Supp. 79-98 (2d ed. 1964).
43. 2B BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 205-268, Supp. 44-58 (1961, Supp. 1964).
44. *Id.* at 236, 248.

criminal cases and state criminal and civil cases. Moreover his third and last edition covers the case law only until 1940, except as to the revised volume eight on privileges. Yet it seems likely that half of the federal civil cases have been decided since 1940.[45] McCormick on Evidence deals with the case law only until 1954. I have myself summarized all the law on federal criminal evidence up to 1963. My summary appears in about 750 printed pages.[46] I was engaged in the preparation of this summary from October 1961 to March 1964 and examined between 3,500 and 4,000 cases. There is no such summary of federal civil evidence decisions to compare with it to see how much they are alike. It seems to me that the Advisory Committee on Evidence should prepare such a summary, even though it must be rather fragmentary, to make such comparison possible.[47] Such a study will also make for continuity in the law. Finally, it will be useful even after the adoption of rules of evidence as obviously the rules can cover only a fraction of the whole law of evidence.

The Advisory Committee should also consider very seriously the matter of having separate provisions for jury and nonjury cases. It is a truism that more liberal and progressive rules may be applied in nonjury cases than in jury cases.[48] Professor Kenneth Culp Davis of Chicago has pointed out five of six trials in courts of general jurisdiction are without juries.[49] In Illinois in a recent year the superior and circuit courts had 1,716 civil jury trials and 28,975 nonjury civil cases; and in criminal cases 369 jury and 1,932 nonjury cases.[50] In 1961 in the federal courts there were 2,911 civil

45. More than half of the cases on federal criminal evidence have been decided since 1938. Orfield, *The Reform of Federal Criminal Evidence*, 32 F.R.D. 121, 161 (1963).

46. *The Reform of Federal Criminal Evidence*, 32 F.R.D. 121-161 (1963); *Judicial Notice in Federal Criminal Procedure*, 32 Fordham L. Rev. 503 (1963); *Burden of Proof and Presumptions in Federal Criminal Cases*, 31 U. Kan. City L. Rev. 30 (1963); *Examination of Witnesses in Federal Criminal Cases*, 4 Ariz. L. Rev. 215 (1963); *Impeachment and Support of Witnesses in Federal Criminal Cases*, 11 Kan. L. Rev. 447 (1963); *Admission and Exclusion of Evidence in Federal Criminal Cases*, 41 Texas L. Rev. 617 (1963); *Competency of Witnesses in Federal Criminal Cases*, 46 Marq. L. Rev. 324 (1963); *Relevancy in Federal Criminal Evidence*, 43 Neb. L. Rev. 485 (1964); *Privileges in Federal Criminal Evidence*, 40 U. Det. L. J. 403 (1963); *The Husband-Wife Privileges in Federal Criminal Procedure*, 24 Ohio St. L.J. 144 (1963); *Confessions of Federal Criminal Defendants*, 16 U. Fla. L. Rev. 219 (1963); *The Privilege Against Self-Incrimination in Federal Cases*, 25 U. Pitt. L. Rev. 503 (1964); *Searches and Seizures in Federal Criminal Cases*, 24 La. L. Rev. 665 (1964); *Wiretapping in Federal Criminal Cases*, 42 Texas L. Rev. 983 (1964); *Demonstrative Evidence in Federal Criminal Cases*, 15 S.C.L.Q. 777 (1963); *Writings in Federal Criminal Evidence*, 9 S.D. L. Rev. 17 (1964); *The Hearsay Rule in Federal Criminal Cases*, 32 Fordham L. Rev. 499-556, 769-802 (1964); *Corroboration of Accomplice Testimony in Federal Criminal Cases*, 9 Vill. L. Rev. 15 (1963); *Proof of Perjury and the 'Two Witnesses' Requirement in Federal Criminal Cases*, 17 Sw. L.J. 227 (1963); *Discovery During Trial in Federal Criminal Cases: The Jencks Act*, 18 Sw. L.J. 212 (1964); *Uniform Federal Rules of Evidence*, 67 Dick. L. Rev. 381 (1963).

47. It is clear that in a great many federal civil cases the courts have applied rules of their own making which were contrary to the state rules of evidence. See *Rules of Evidence-A Preliminary Report*, 30 F.R.D. 73, 83-84, 95 (1962); Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 Va. L. Rev. 692, 707-710 (1963); Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L. J. 622, 627-628, 632-638 (1936); Note, 34 Cornell L. Q. 238, 241 (1948); Note, 46 Colum. L. Rev. 267, 272-274 (1946); WRIGHT, FEDERAL COURTS 360, 361 (1963); 1 WIGMORE, *op. cit. supra*, note 3 at 179-189, 194-197, 201.

48. See 2B BARRON AND HOLTZOFF, *op. cit. supra*, note 44 at 267, 268; MCCORMICK, EVIDENCE, 137, 138 (1954).

49. Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A.J. 723 (1964).

50. *Id.* at 726.

jury trials, and 3,245 nonjury civil trials; and 2,456 criminal jury trials and 982 nonjury criminal cases.[51]

It could be that in nonjury cases we could obtain rules of evidence as liberal as those in Europe. Professor Schlesinger has pointed out: "To continental lawyers it is a cause of pride that they have essentially freed their courts from the fetters of artificial restrictions on the admission of relevant evidence."[52] "Except for matters of privilege and of personal incompetence to testify on account of age or kinship, the civilian codes contain no exclusionary rule of evidence, and particularly no hearsay or opinion rule."[53]

A third basic problem is that of the scope of the rules. To my way of thinking the Advisory Committee should start with the notion that the scope be as broad as those of the Model Code of Evidence and the Uniform Rules of Evidence.[54] A complete body of law as to evidence is desirable if possible. This is particularly true if the states are to use the federal rules as models. Reasons of constitutional law, the extent of the rule making power conferred by Congress, and the doctrine of *Erie v. Tompkins*[55] may somewhat reduce the scope of the rules. But those wishing reduction of the scope should have the burden of proof.

In my opinion, the rules of evidence for the federal courts should cover the following topics: judicial notice, examination of witnesses, the opinion rule, impeachment and support of witnesses, the procedure of admitting and excluding evidence, competency of witnesses, privilege, relevancy, demonstrative evidence, writings, and hearsay.

Rules as to presumptions, if they cannot be laid down as to diversity cases, could nevertheless be laid down in nondiversity, criminal and admiralty cases. After all, such cases account for three-fourths of the cases in the federal courts.[56] I would not go along with the view that no rules be adopted when they cannot be made to include diversity cases.[57] This latter problem of possibly having separate rules as to diversity cases will be one of the major problems confronting the Advisory Committee.

The Advisory Committee should formulate privilege rules for at

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51. *Id.* at 727.
52. SCHLESINGER, Comparative Law, p. 251 (2d ed. 1959).
53. *Id.* at 218.
54. I like the list of topics prepared by Dean Wigmore in his proposed amendment to Rule 43 of the Federal Rules of Civil Procedure: burden of proof, documentary evidence, parol evidence, judicial notice, judicial admissions, number of witnesses required or allowed, impeachment and corroboration of witnesses, qualifications of witnesses, make and time of offering evidence, privilege of witnesses, and any other rule controlling the use of evidence to a jury. 1 Wigmore, *op. cit. supra,* note 3 at 203, 204. See also 2B BARRON AND HOLTZOFF, *op. cit. supra,* note 44 at 248-250.
55. 304 U.S. 64 (1938).
56. Note, 1964 Duke L.J. 867, 882 n. 68.
Using the Thayer-Wigmore approach to presumptions as embodied in the Model Code of Evidence might permit rules even as to diversity cases. Note, 1964 Duke L.J. 867, 884
57. See Degnan, *The Law of Federal Evidence Reform,* 76 Harv. L. Rev. 275, 287 (1962).

least nondiversity cases. The authority to do so seems clear.[58] There are no decisions of the Supreme Court indicating that state law must be applied in diversity cases; and the lower federal courts are divided.[59] Rule 26 of the Federal Rules of Criminal Procedure makes it clear that privileges are governed by federal law.

Parol evidence[60] and burden of proof[61] should not be covered as to diversity cases. But I see no reasons why they should not be dealt with in other cases.

Should the rules deal with subjects now covered by specific federal statutes?[62] It seems to me that they should to the same extent as the Model Code of Evidence and the Uniform Rules of Evidence cover them. Many assert that the Business Records Act has been too narrowly and conservatively construed. The official records statutes have been freely dealt with by the Advisory Committee on Rules of Civil Procedure. On the other hand, the wiretapping statute raises enormous questions of public policy which perhaps should be left to Congress. It would seem that the same thing goes for the Jencks Act. If the Committee were to deal with these two statutes, it would be very time consuming and might endanger the adoption of the other rules.

A final question of scope is whether the Advisory Committee on Evidence should deal with the rules of evidence now included in the Federal Civil and Criminal Rules of Procedure.[63] It seems to me that the answer is in the negative. The evidence rules in the Civil Rules have been given careful consideration three or more times. The evidence rules in the Criminal Rules have twice received attention. The Advisory Committee on Evidence will have more than enough to do without attempting to improve the work of the Committees on Civil and Criminal Procedure. Of course to some extent the rules proposed by the Evidence Committee may impinge upon and overlap with the Civil and Criminal Rules. To that extent the Evidence Committee will be entitled to revise the work of the other two committees.

In my judgement the greatest hope—possibly the only hope—for the improvement of the law of evidence both in the federal and state courts lies in the promulgation by the Supreme Court of rules of evidence. I would therefore urge upon you, the lawyers who work with the rules of evidence, to convey to the Advisory Committee on Evidence of the Judicial Conference your ideas on improvement of the law of evidence.

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58. Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 Va. L. Rev. 692, 714 n. 63 (1963); WRIGHT, FEDERAL COURTS 360 (1963).
59. WRIGHT, FEDERAL COURTS 359 (1963).
60. Note, 62 Colum. L. Rev. 1049, 1069, 1073 (1962).
61. Joiner, *Uniform Rules of Evidence in Federal Courts*, 20 F.R.D. 429, 435 (1957).
62. See Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 622, 638-641 (1936).
63. The Federal Civil Rules are listed in 1 Wigmore, EVIDENCE, 201, 202 (3d ed. 1940); *Rules of Evidence—A Preliminary Report*, 30 F.R.D. 73, 89 (1962).