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I. INTRODUCTION

A trial always involves two basic problems—the problem of ascertaining the truth of the matter in issue, and the problem of resolving a dispute. The former can be characterized as the probative problem, arising from the problem of proving, and the latter as the forensic problem, arising from the procedural problem of proving-in-a-trial. The probative problem is a problem of evidence in that it is the problem of using evidence to ascertain the truth by "the ratiocinative process of continuous persuasion."[1] The forensic problem is a problem of the admissibility of evidence, and it is the forensic problem which has loomed largest in the field of evidence. The law of evidence consists of "procedural rules devised by the law, and based on litigious experience and tradition, to guard the tribunal (particularly the jury) against erroneous persuasion."[2]

The unsatisfactory state of these procedural rules is no longer open to question. Most would agree that, "The law of evidence is sagging to the point of collapse under its own weight."[3] Few would dispute that much of the law of evidence is "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other."[4] A primary factor contributing to this condition seems to be that the prominence of the forensic problem in the law of evidence has obscured the importance of this probative problem.[5] The reason for

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1. WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d ed. 1937).
2. *Ibid.*
3. Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277 (1952).
4. Mr. Justice Jackson in Michelson v. United States, 335 U.S. 469, 486 (1948).
5. Wigmore in his *Science of Judicial Proof* recognized that the procedural rules have "loomed largest in our formal studies—has, in fact, monopolized them," and that this was error. "For one thing, there is, and there *must* be, a probative science—the principles of proof—independent of the artificial rules of procedure; hence, it can be and should be studied. . . . And, for another thing, the judicial rules of Admissibility are destined to lessen in relative importance during the next period of development." WIGMORE, *op. cit. supra* note 1, at 3-4.

this is not hard to see. The use of evidence in a trial presents problems which are unique to the proceeding. A trial is an adversary proceeding in which the trier of fact must resolve issues on the basis of the evidence presented, and there must be some evidence offered before it can be used. The preliminary problem is that of admitting evidence, and the admission of evidence involves primarily procedural difficulties peculiar to a trial. The task of resolving these difficulties is such that it is easy to assume either that their solution is also the solution of any probative problems that may exist, or that the solution of the probative problem must give way to solutions of the forensic problems demanded by the exigencies of a trial.

The genesis of this assumption is probably the fact that evidence in the general sense differs from legal evidence, the former being a matter of logical considerations, the latter a matter of logical and forensic considerations combined with judicial experience.[6] This is the excuse for giving forensic considerations a higher priority. Under this view, however, legal evidence is a system unto itself owing only a secondary allegiance to logic. Legal evidence is then evidence only because the rules say it is evidence. For some practical purposes, this position may suffice; for analytical and critical purposes, it does not provide a sound basis either for resolving problems of evidence or evaluating the rules of evidence.

The word evidence is used in the law with different meanings, and there is little point in saying that any of the meanings is wrong. Words mean what they are used to mean, at least to the writer or speaker, and the varied uses of the term merely indicates that evidence is a thing of many aspects. The most common meaning given to evidence seems to be, "that which tends to produce conviction in the mind as to the existence of a fact,"[7] or "all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."[8] Below this level of generality, the mean-

6. See State v. McFarland, 83 N.J.L. 474, 479, 83 A. 993, 997 (1912).

7. Evansville R.R. v. Cochran, 10 Ind. 560, 561 (1858). See also *Ex parte* Lam Pui, 217 F. 456 (E.D.N.C. 1914); Knox County Feed & Hatchery, Inc. v. Ivers, 130 Ind. App. 481, 166 N.E.2d 132 (1960); Magazine v. Shull, 116 Ind. App. 79, 60 N.E.2d 611 (1945); Creen Mountain Mushroom Co. v. Brown, 117 Vt. 509, 95 A.2d 679 (1953).

8. Application of Everts, 175 Neb. 310, 316, 121 N.W.2d 487, 490 (1963). See also Tift v. Jones, 77 Ga. 181, 3 S.E. 399 (1887); Auditor General v. Menominee County Sup'rs, 89 Mich. 552, 51 N.W. 483 (1891); McEntyre v. Tucker, 5 Misc. 228, 25 N.Y. Supp. 95, 96 (1893). *Cf.* UNIFORM RULES OF EVIDENCE 1(1), the definition in which defines "'evidence' [as] . . . the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay." The Model Code does not define evidence. The latest attempt at an authoritative definition appears to be that of the California Law Revision Commission: "'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove

ings are varied. Despite this variation, little difficulty is encountered in the practical use of the word, because evidence is a relative term, the particular context of which usually makes clear the purpose for which it is used.[9] When we move beyond the particular situations involving concrete problems to the general situations involving theoretical ones, however, the variation in the particular meanings creates confusion, and the general definitions are of little help. Yet, a satisfactory solution to the concrete problems owes a larger debt than is usually acknowledged to the satisfactory solution of theoretical problems.

The difference between concrete problems and theoretical problems of evidence is one of degree, but significant degree; it is that of determining whether certain evidence should be admitted in a particular case, and whether a certain type of evidence should be admitted generally. Theory is appropriate and necessary in both instances, but it is indispensable in the latter. The general problems, however, can never be satisfactorily resolved by theory alone, because the problems of using evidence are infinite in their variety. But the purpose of theory in the law of evidence is not to provide an answer; the purpose is to provide a means for obtaining a better answer. A theory consists of fundamental ideas which are employed consistently, and which serve as a basis for evaluating, relating, and using other ideas in resolving problems in a given area. In a very real sense, it is an analytic tool, though the tool is more an anvil than a hammer. And the infinite variety of evidentiary problems which faces lawyers and judges enhances its importance.

The most convenient starting point for treating theoretical problems is a definition of evidence constructed for this purpose. The difference between such a definition and the above definitions is the difference

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the existence or nonexistence of a fact in judicial or factfinding tribunals." CAL. L. REV. COMM., TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 8 (1964). Thayer defined evidence as follows: "Evidence, then, is any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact." Thayer, *Presumptions and the Law of Evidence,* 3 HARV. L. REV. 142, 143 (1889). Wigmore defined evidence as: "Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked." 1 WIGMORE, EVIDENCE § 1(c) (3d ed. 1940). For definitions of other authorities, see 1 WIGMORE, *op. cit. supra.* Neither McCormick nor Morgan define evidence in their respective works in the field. MCCORMICK, EVIDENCE (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE (1963).

9. "Many text writers have accumulated innumerable attempts to define or explain what evidence is, each fitting the facts of a particular case or elucidating at length the views of the author. . . . A review of all these authorities makes clear that evidence is that probative material, legally received, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue." People v. Leonard, 207 Cal. App. 2d 409, 24 Cal. Rptr. 597, 600 (1962).

between a descriptive meaning and a functional meaning. It is the difference between saying that hearsay is rumor, gossip, mere speculation, and saying that hearsay is an extrajudicial statement used to prove the truth of the matter contained therein. Neither meaning is better or worse; they are simply different. And because they are different, one is more or less helpful than the other, depending upon the purpose for which it is used.

Evidence takes many forms and a determination of what evidence is for analytical purposes is primarily an effort to reduce evidence to its lowest common denominator. The analysis required for this purpose results in fundamental ideas which can be used as theoretical concepts in resolving problems of evidence generally as suggested above. The resulting definition, however, must itself be functional, and the problem is whether it should be related to the function of proving, or the function of proving-in-a-trial. The answer here is that it must be related to the former, without regard to the latter. This does not mean that the function of proving-in-a-trial is not important, or that it does not present real and difficult problems. It means only that these problems are temporarily by-passed in order to fashion a tool of analysis for dealing with them more effectively at a later day.

II. WHAT IS EVIDENCE?

To determine the functional meaning of evidence, three questions must be answered: (1) Of what does evidence consist? (2) What is the function of evidence? (3) What is the condition necessary for fulfilling this function? The answers to these questions will explain what is evidence, why we use evidence, and when we use evidence.

A. *The What*

The key to a determination of what evidence consists is the distinction between fact and proposition of fact.[10] The difference between a fact and a proposition of fact is the difference between a rock and a statement about a rock. The rock is a fact, the statement is a proposition of fact, and the point of difference is so obvious that it suffers from its simplicity. Custom and usage have blurred the distinction between fact and proposition of fact to the extent that the terms are used interchangeably, and often indiscriminately, causing many to fail to recognize that evidence consists not of facts, but of propositions of fact.[11]

10. See Michael & Adler, *The Trial of An Issue of Fact*, 34 COLUM. L. REV. 1224 (1934).

11. "While the term, evidence, is sometimes used as synonymous with the term, facts, they are not really synonymous. Evidence, broadly defined, is the means from

Propositions of fact to which all evidence can be reduced, however, are not necessarily propositions of actual fact. All propositions, as a matter of form, are propositions of fact because the subject must be a fact of some kind. Generally, the term proposition of fact is reserved only for propositions which are correct. The statement, "Water boils at 112 degrees Farenheit," is a proposition, but it is not a proposition of fact, as the phrase is commonly understood, because it is incorrect. The proposition of fact is "Water boils at 212 degrees Farenheit," since the prepositional phrase "of fact" serves to distinguish true propositions from false propositions.

For evidentiary purposes, proposition of fact takes on a quite different meaning. The prepositional phrase "of fact" should not indicate the truth or falsity of the proposition, but only that the proposition purports to be based on a fact of which the person making the proposition purports to have knowledge. Thus, proposition of fact as evidence means a proposition purportedly based on a fact.

This distinction helps to resolve the problem of whether an incorrect proposition can be evidence. When evidence is defined as "Any knowable fact or group of facts,"[12] the implication is that a false fact, so to speak, is not evidence. For legal evidence, however, this position will not withstand analysis.[13] The common law system of evidence is an adversary system wherein a large portion of the evidence in any given trial will almost inevitably be false for a number of reasons. The perception, language, memory or sincerity of the witnesses may be faulty singly or in various combinations. The point is perhaps best illustrated by the fact that, while all the evidence in a trial relates to the same issues, the jury does not get the case unless the evidence is in conflict. If the evidence is all consistent, the judge will either dismiss the action, direct a verdict, or by a similar procedural device dispose of the case without the jury's aid.

Even though this is so of legal evidence, what of evidence generally, *i.e.*, evidence not used in an adversary proceeding? Is it proper to say that a false proposition used by an individual in the process of confirming or denying a proposed conclusion is evidence? The answer is yes. If we view evidence as an end in itself, as something which is correct and which justifies the conclusion, then it is difficult to see how a false proposition can be evidence. But if we view evidence as material used in the process of proving a proposition, as a means to an end, then a false proposition can be evidence. The latter view

which an inference may logically be drawn as to the existence of a fact." Tjernstrom v. Ford Motor Co., 285 Mich. 450, 454, 280 N.W. 823, 825 (1938).

12. 1 WIGMORE, *op. cit. supra* note 8, § 1(c).

13. See State v. Howard, 162 La. 719, 111 So. 72 (1926).

is the proper one. To say otherwise is to ignore the fact that what is evidence is determined by use, not by a set of arbitrary rules. Whenever propositions are used as the basis for a conclusion, they are evidence, regardless of whether they are true or false. If the evidence is false, of course, the conclusion will probably be false. We no longer believe, for example, that the earth is the center of the universe as the Ptolemaic theory suggests. But this does not mean that the Ptolemaic theory was not based on evidence.

Evidence is a relative term, and for present purposes the important point about propositions which constitute evidence is not that they are true or false, but that they serve as the basis of a conclusion. This explains why even though evidence consists of propositions, not all propositions are evidence. We do not say of a proposition, "This is evidence," but, "This is evidence of X," because a proposition is not evidence unless it is related to a proposed conclusion.[14] All propositions, of course, can be evidence because they can be related to a proposed conclusion; but we do not treat them as evidence until we are interested in proving another proposition. Evidence, then, is evidence only because it is used as evidence.

That a false proposition can be evidence is not as surprising as it may first seem. Propositions reflect our perception of facts, and all of us perceive individually, and thus differently. In a larger sense, propositions simply express what we know, or think we know, or presume to know about facts. When we do know, *i.e.*, when the proposition is true, there is no difficnlty. When we think we know or presume to know, we do not see any difficulty, and we will use the resulting propositions as if they are correct. It is only when we know that we do not know, *i.e.*, when we know that a proposition is false, that we cannot properly use the proposition as evidence.

To answer the question of what does evidence consist, then, we can say that it consists of propositions purportedly based on fact.

B. *The Why*

Of the three questions, the what, the why, and the when, the answer to the question why appears to be the easiest to state, for, obviously, the function of evidence is to serve as a basis from which to confirm or deny a definite proposition. Yet the answer to this question is the most important of the three, and the most difficult to understand, because an understanding of why requires an appreciation of the relationship of evidence to proof.

14. "[E]vidence is always a relative term. Yet there is a constant in it, viz. the relation between the proposition to be established and the material evidencing the proposition." Kings County Lighting Co. v. Nixon, 268 Fed. 143, 146 (S.D.N.Y. 1920). See also State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957).

The first step in understanding this relationship is to make a careful distinction between what is evidence and what is proof. Evidence is a proposition which is relevant to a proposed conclusion and tends to justify the conclusion; proof, we say, is evidentiary propositions which warrant the conclusion. Thus, proof is a body of evidence sufficient to produce a conviction that the proposed conclusion is true or false. However, to say this is not very helpful. In an actual case, we are not so much interested in what is proof in general as in whether "this evidence" is proof, and why "this evidence" may convince one person but not another. If the evidence is to be called proof, then what may be proof for one is not proof for another, and there are many instances when this is so. In *United States v. Ellicott*,[15] a case tried without a jury, the district judge found defendants guilty, and the court of appeals split two to one in reversing on the ground that the government had not proved its case. How can we explain that the evidence became proof for two able and competent judges, but remained evidence short of proof for two other equally able and competent judges? To answer this question, it is necessary to look to the process by which the conviction is produced.

To prove, as a verb of action, implies a process. The process may involve one person, or two or more persons. For example, in determining whether to prosecute, a prosecutor proves to his own satisfaction that "*X*" is guilty; but, under our system of justice, he must then prove "*X*'s" guilt for the jury. Thus, a person acting alone may prove a proposition for himself, or one person may prove a proposition to another. In the former instance, proving means an inferential process; in the latter, proving means a demonstration or presentation of evidence. Proving as a demonstration of evidence, however, is basically a matter of form and this meaning of prove can be said to be secondary. A trial, of course, always involves two or more persons, and the importance of the lawyer's role in demonstrating the evidence has given this meaning of prove a disproportionate significance. As a result, in a legal context, we tend to think of proving as consisting only of a presentation or demonstration of evidence.

This meaning of prove, however, is of little aid in analyzing the term proof and relating it to the meaning of evidence. It emphasizes the importance of the role of the person who presents the evidence and tends to obscure the whole purpose of presentation, which is to produce a conviction in the mind of the person who receives the evidence. The process of presenting the evidence obviously does not of itself produce the conviction, because the recipient of the evidence

15. 336 F.2d 868 (4th Cir. 1964).

must understand it. Thus, the primary meaning of prove has to do with the process in the mind of the recipient of the evidence. In this primary sense, proving is a process of reasoning by the recipient, or more particularly, the process of drawing inferences. Because this process is essential to proving regardless of how many persons are involved, it is most useful to think of proving as essentially an inferential process. Although the form varies, the substance does not.

The fact that there are two different, yet complementary, meanings of prove emphasizes the importance of distinguishing between the two. The difference between proving where only one person is involved and where two or more persons are involved is that in the former, the one person has both the tasks of gathering the evidence and of making the necessary inferences; in the latter, the person who is to make the necessary inferences has only that task, since the evidence is assembled and presented to him by others. In the primary meaning of the term, the one who proves is the one who must make the inferences; in the secondary meaning of the term, the one who proves is the one who demonstrates the evidence. The former may be thought of as subjective proving and the later as objective proving, but unless otherwise indicated, the term proving is here used to mean proving in the subjective sense.

Since proving is essentially an inferential process, what produces conviction in the mind of a person is not the evidence, but the inferences drawn from the evidence. From this, it follows that proof should not be thought of as consisting of the evidence, but of these inferences. This explains why the same evidence may be "proof" for one person and not another. With this understanding of proof as inferences and evidence as propositions of fact, the following scheme evolves: Fact—Proposition of Fact—Inference. Thus, a fact (or supposed fact) is a basis of a proposition of fact, *i.e.*, evidence, and evidence is the basis of inference, *i.e.*, proof.

Although an inference is a proposition derived from a proposition of fact, the distinction between propositions of fact and inferences serves a useful purpose for analysis. First, it shows the relation between evidence and proof; second, this relationship explains why that which we ordinarily call proof (evidence) may be called proof for one, but not another; third, and most important, it emphasizes the subjective aspect of proving, which is necessary if one is to define evidence functionally. It means that the important person in the process of proving is the recipient of the evidence. That the recipient is the important person is indicated by the fact that he is the person who is to be convinced, and if he is not convinced, the purpose of the process for the person presenting the evidence is defeated.

The importance of the subjective aspect of proving, perhaps, can be made clearer by analogizing the process of proving to the educational process. The purpose of proving is either to confirm or deny a proposition, or to get another to confirm or deny a proposition. Thus, proving to another involves both a teaching and a learning process. To learn that a proposition is true or false is to enlarge one's knowledge and, in a larger and more comprehensive sense, proving is a process for enlarging one's knowledge either by oneself or with the aid of another. Generally, because we think in terms of one person's proving to another, we tend to think of proving as a process of teaching. We say that *X* proved a proposition to *Y* in the same manner that we say *X* taught *Y* to add and subtract. However, if proving is essentially a reasoning process, the weakness of this view is that reasoning by its very nature is subjective. One cannot reason for another anymore than he can learn for another. It is this difficulty which suggests that we should think of proving as primarily a learning, not a teaching process.

To extend the teaching-learning analogy further, when we say that *X* taught *Y* to add and subtract, we mean only that *X* demonstrated to *Y* the principles and rules of subtraction and addition. We may mean that *X* demonstrated the principles and rules in the sense that we say *X* taught certain courses, without any intimation as to whether *Y* understood the material presented. Or we may mean that *X* did succeed in getting *Y* to understand the material, in which case we mean that *Y* learned. Thus, when we say that *X* taught, we may refer only to *X's* conduct merely, or we may refer to *X's* conduct as being successful. However, the correctness of the statement in the latter sense is determined not by *X's* teaching, but by *Y's* learning. If, after *X* has demonstrated the principles and rules, *Y* can add and subtract, we mean that *X* was successful in his teaching. If *Y* cannot add and subtract, we mean that *X* attempted to teach *Y*. To illustrate with another example. If *X* proves the Pythagorean theorem to *Y*, *Y* may be convinced that it is true that the square of the hypotenuse of a right triangle equals the sum of the squares of the other two sides. But unless *Y* understands why and can prove this proposition for himself, *X* has not actually proved anything to *Y*, because *Y* has not learned.

The analogy to proving a proposition is complete, except for one point. Proving a proposition to another is a teaching process in that one presents material to be learned. But it is a special type of teaching process in that its scope and aim are limited. Generally, teaching is concerned with a subject. The subject may be as broad as mathematics or history, or as narrow as driving a car or dancing.

But in any case, a subject involves a series of related principles and rules. Proving, on the other hand, is limited to determining the correctness or falsity of a definite proposition. The point of difference is that for teaching to be successful, the one who is taught must understand the principles and rules. For proving to be successful, we assume that the only thing necessary is that the person to whom the evidence is presented be convinced of the correctness of the proposition in issue. Learning is the aim of teaching, persuasion, we assume, is the only aim of proving.

Proving in the objective sense may be thought of as a type of persuasion, but it is persuasion which, for its effectiveness, is dependent upon the reasoning of the person to whom the evidence is offered. If persuasion alone is the aim of demonstrating the evidence, then it is not true that proving is a matter of learning, for the success of proving then is measured by whether the recipient of the evidence is convinced of the proposition in issue. But there is a distinction between proving a proposition and persuading another of the correctness of a proposition, and the real test of one's success in demonstrating the evidence is the same as that of one's success in teaching—understanding by the person to whom the evidence is presented.

The point which obscures proving as essentially a process of learning is that when we think of learning we think in terms of acquiring information, rules and principles which can be used generally. When we think of proving, at least in a legal context, we do not think in terms of acquiring information, but simply in terms of whether a proposed conclusion is right or wrong. Once the determination is made, there may or may not be any further use for the conclusion, depending upon the type of proposition being proved. Insofar as proving in a legal trial is concerned, the utility of the conclusion is limited to the purposes of the trial. But this should not be allowed to obscure the point that the essential aspect of the process of proving in a legal trial is the inferential process just as in the matter of proving generally.

It is because proving is essentially a process of learning, *i.e.*, a matter of inferences, that what is proof for one may not be proof for another. This point makes clear the relationship of evidence to proof. Evidence is simply the information used in proving a proposition. Whether the evidence is treated as proof is determined not by the person presenting the evidence, but by the recipient of the evidence, as in the *Ellicott* case discussed above. Thus, when we say that evidence serves as a basis from which to confirm or deny a proposition, it is important to realize that a meaningful confirmation or denial can be made only by the person to whom the evidence is presented.

With this understanding, we can add the why portion of our definition to the what. Evidence is a proposition purportedly derived from a fact and used as a basis of inference for confirming or denying another proposition.

C. *The When*

When do we use evidence? If *X* wishes to persuade *Y* of the truth of the proposition, "The coat is red," he can do one of two things. He can show the coat to *Y*, or he can offer evidence of the correctness of the proposition to *Y* in order that *Y* might prove the proposition himself. If *X* shows the coat to Y, there is no need for him to offer evidence that the coat is red, because *Y*, assuming that he has normal vision, can see for himself. If *Y* cannot see the coat, *X* must offer evidence, and the only evidence he can offer is the proposition, "The coat is red." He may offer this proposition in as many forms as he wishes and by as many witnesses as he wishes, but they will all amount to an assertion that the coat is red and nothing else.

If *Y* sees the coat, he cannot avoid the conclusion that the coat is red. If he receives only evidence of the conclusion, no matter what the weight or amount of the evidence, he can avoid the conclusion that the coat is red. The former instance involves direct perception and the latter requires that he prove. The point is that if *Y* directly perceives that the coat is red, he will not prove the proposition. When one perceives a fact, this perception will result in a proposition. If he seeks to prove this proposition, the proposition which he seeks to prove will be the same proposition that resulted from perception. Since the proposition which is a result of direct perception is also the evidence, he will be using a proposition to prove itself. Thus, if *Y* sees that the coat is red, the proposition he will seek to prove is: "The coat is red." His evidence will be: "The coat is red." His proof will be the inference: "The coat is red." His conclusion will be: "The coat is red." The starting point of the proving is the same as the finishing point and the conclusion is not based on reasoning at all, but on sensory perception.

This example suggests that we use evidence only when the fact which is the basis of the proposition to be proved is one which is not directly perceived by the person who is to prove the proposition in the subjective sense. The point is fairly obvious when we are dealing with a fact such as color. This is because color is a fact which can be identified only descriptively, *i.e.*, it is identified only by a characteristic which can be perceived through one of the five senses. In contrast to this type of fact, however, most facts are capable of identification not only descriptively, or on the basis of form, but also operatively, or on the basis of content or function. For example, salt

is a substance which can be identified by direct perception, *i.e.*, by taste. But whether a particular substance is or is not salt can also be determined by chemical analysis, because salt is a substance of a particular chemical composition. The problem here is whether the condition stated above—that the condition for the use of evidence is that the fact which is the basis of the proposition to be proved will be one not directly perceived by the person who is to prove the proposition—is true for facts which are capable of identification operatively as well as descriptively.

The first point which must be clarified is that the condition applies only to the person who is to prove, *i.e.*, who is to engage in the necessary inferences to reach the desired conclusion. This is clear when one seeks to prove without the aid of another, but it should be remembered that when *X* offers evidence to *Y*, the condition refers to *Y* and not to *X*. This is important because although one does not prove a proposition based on a fact he directly perceives, the propositions which constitute evidence are, by and large, the result of direct perception. Even though one who directly perceives that the coat is red does not prove this proposition, he can offer this proposition to another as evidence to enable the other to prove.

The condition for the use of evidence stated above is based on the distinction between acquiring knowledge by direct perception and acquiring knowledge by proving. These two means of acquiring knowledge are complementary, but they are not interchangeable. Direct perception is a means of acquiring knowledge through the use of one or more of the five senses. Proving is the acquisition of knowledge by a reasoning process. One perceives a fact, and one proves a proposition.

The acquisition of any knowledge requires perception. One must be able to perceive words before he can read. However, it is only when the perception requires no reasoning at all that knowledge results from direct perception. Whenever reasoning is required, the knowledge cannot be said to result from direct perception.

The point of difficulty here is that there are some instances where a proposition resulting from direct perception is seemingly proved by the person perceiving the fact. This difficulty, however, disappears when one realizes that the proposition which is proved is not actually a proposition resulting from direct perception, but only appears to be. For example, consider the proposition, "This substance is salt." A taste of the substance will convince most persons that the substance is salt, and the proposition they will derive from their direct perception will be: "This substance is salt." But the only proposition which can properly be derived from the taste of the substance is: "This

substance tastes like salt." The substance may be a salt substitute, in all sensory aspects similar to salt. The only way to prove that the substance is salt is by chemical analysis, and the chemical structure of the substance is not subject to direct perception. Thus, the condition for the use of evidence prevails even though the fact which is the basis of the proposition exists on more than one level, because in such instances, the proposition proved never results from direct perception.

The same reasoning applies when the fact which is the basis of the proposition is an act, but with some qualification. If the proposition is derived from a single act, and is limited to the single act, there is no difficulty. However, most propositions which supposedly result from direct perception of an act are not based on a single act, but on several acts. Thus, if *Y* sees *A* shoot *B*, the proposition which results is that *A* shot *B*. The proposition, however, is not derived from a single act, but from the observation by *Y* of a series of acts. Even though each of these acts is directly perceived by *Y*, he may still prove that *A* shot *B*, because the conclusion is based on a series of propositions, all being derived from different acts, which must be related to each other and to the proposed conclusion.

To complete the definition of evidence, then, we can say: Evidence is a proposition purportedly based on a fact and used as a basis of inference for confirming or denying a proposition based on a fact not directly perceived.

III. An Analysis

The above definition is based on three factors: (1) All evidence can be reduced to propositions. (2) Proving requires the application of an inferential process on the part of the person to whom the evidence is presented. (3) This inferential process is not necessary to prove a proposition based on a fact one perceives directly. Each of the factors is well recognized, but they are seldom brought together in a definition. The reason for combining them is that they are fundamental and constant, and together they provide a basis for analyzing problems of evidence with a precision not usually accorded them. The use of the three factors and their relation to each other can be made clearer by a brief summary of the process of proving-in-a-trial.

The process of proving-in-a-trial has two major aspects, the process of presenting the evidence, or the objective aspect, and the process of inference to be made by the trier of fact, the subjective aspect. Both the objective and the subjective processes in turn have two aspects. The objective process involves the presentation of the

evidence by the proponents and the ruling on the admission or exclusion of proffered items of evidence by the judge. The proponents of the evidence are guided by the rules in presenting their evidence, and the judge relies on the rules in determining whether proffered items to which objection is made shall be admitted or excluded. The two aspects of the subjective process in the trial of a case are reliability and inference. The jury determines the reliability of the evidence and draws inferences therefrom. Although the rules of evidence are not usually thought of as related to the subjective aspects of proving, there is in fact a close relationship, for the whole function of the trial is directed to this concluding point.

The exclusionary rules of evidence based on the policy of ascertaining the truth are generally thought of as being procedural in that they are used as procedural guides in determining the admissibility of evidence. This view, however, is engendered largely by the objective process of proving. If we view the exclusionary rules from the standpoint of the subjective process of reliability and inference, it appears that most of them are directed primarily to the problem of reliability, although some are clearly designed to prevent the jury from making erroneous inferences. Such, for example, is the rule excluding evidence of other crimes against a defendant in a criminal case. The prime example of an exclusionary rule directed to reliability appears to be the hearsay rule. Analysis, however, reveals that the hearsay rule is directed as much to the inferential aspect as to the reliability aspect of proving, if not more so. The rule of admissions, an exception to the hearsay rule, illustrates the point. An analysis of the rule of admissions, although here necessarily condensed, shows that the function it fulfills is much more than a procedural one serving as a guide for determining that a certain kind of evidence is not excludable. The rule of admissions, in fact, fulfills a probative function.

An admission is a statement made out of court by a party opponent receivable in evidence when offered against him.[16] In analyzing the probative effect of an admission, it is necessary to determine the propositions of which an admission consists and then to determine what type of evidence these propositions constitute, *i.e.*, direct or circumstantial, as discussed below.. Evidence of a personal admission always takes the form, "Defendant (or Plaintiff) said X," where X is the proposition to the proved. There are actually two propositions here, "Defendant said X," and the proposition represented by X. And for the purpose of proving X, as in a negligence action in which X is alleged, there are two possible probative propositions, "Defendant

16. 4 WIGMORE, *op. cit. supra* note 8, § 1048.

said X," and "X", one contained in the other. Where X is not a proposition to be proved, as in an action for defamation in which X is not alleged, the only probative proposition for purposes of admissibility will be, "Defendant said X," because the proposed conclusion will be, "Defendant said X." It may be that X is true and truth is a good defense, but this is a matter for the defendant to prove after it has been shown that he said X.

The problem becomes more complicated in determining the type of evidence an admission is because of its double proposition form. There are two types of evidence predicated on the basis of function. Functionally, the proposition which is evidence must be related to the proposed conclusion, and it is apparent that it will be related in one of two ways. The proposition will be either consistent with the proposed conclusion and no other, or it will be consistent with the proposed conclusion but not inconsistent with other conclusion. Propositions which are consistent only with the proposed conclusion will be called direct evidence; propositions which are consistent with the proposed conclusion, but not inconsistent with other conclusion will be called circumstantial evidence. While these meanings of direct and circumstantial evidence may at first appear to be contrary to the traditional meanings of the terms, this is not so. Traditionally, direct evidence is testimony and the term direct means that the testimony must be the result of the witness' direct knowledge. However, since all testimony of a witness must be the result of his direct knowledge, circumstantial evidence, which is simply evidence of circumstances within his knowledge, is also direct evidence of a sort under the traditional meaning. To make a useful distinction between direct evidence and circumstantial evidence, it is necessary to distinguish them on the basis of their relationship as propositions to the proposed conclusion, and doing this explains more than it changes the traditional meaning. To say (1) that direct evidence is consistent only with the proposed conclusion and (2) that circumstantial evidence is consistent with the proposed conclusion, but not inconsistent with other conclusions limits the traditional meaning of direct evidence, and states in another way the traditional meaning of circumstantial evidence. This becomes obvious when one realizes that evidence of circumstances, *i.e.*, circumstantial evidence, under the traditional definition is always a proposition consistent with the proposed conclusion, but not inconsistent with other conclusions.

Using the above analysis, assume, as in *Janus v. Atskin*,[17] that the proposed conclusion is X, representing the proposition, "Defendant's dog knocked the old lady down." The evidence as presented by the

17. 9 N.H. 373, 20 A.2d 552 (1941).

witness is, "Defendant said his dog knocked the old lady down." The witness' testimony includes both a proposition as to the making of the statement and the statement itself. But what is the evidence —that the defendant made the statement, or the statement? Which it is determines the type of evidence an admission is. If the evidence is the statement of the witness, "Defendant said his dog knocked the old lady down," it is circumstantial evidence, because it is not inconsistent with conclusions other than the proposed conclusions, which is that the defendant's dog knocked the old lady down. If the evidence is the statement of defendant only, it is direct evidence, because it is consistent only with the proposed conclusion. The position here is that the evidence is the statement of the witness, and that an admission is a proposition of circumstantial evidence containing a proposition of direct evidence.

That an admission is circumstantial evidence containing a proposition of direct evidence shows why the rule of admissions is more than a rule of procedure and in fact functions as a rule of proof. An admission is sufficient to support a verdict only because the proposition X, the statement of defendant, is deemed to be direct evidence, *i.e.*, consistent only with the proposed conclusion. However, to use the proposition, "Defendant said X" as the basis for inferring that X did occur, it is necessary only for the jury to determine the reliability of the proposition that defendant said X, and not the reliability of the proposition X. If the plaintiff produces reliable evidence that defendant said X, regardless of what evidence defendant introduces to contradiet X, the jury will be justified in returning a verdict for plaintiff on the basis of the evidence, "Defendant said X."[18] Thus, it seems justified to say that the rule of admissions is a rule of proof, rather than merely a rule of procedure, because it permits a conclusion which need not, as a matter of law, be the result of proper inferences. And what is true of admissions is also true of other exceptions to the hearsay rule, such as declarations against interest and dying declarations.

That the rule of admissions is a rule of proof becomes readily apparent when we remember that hearsay is generally excluded because it takes the form, "A said X," where X is the proposition to be proved. Although it is generally said that hearsay is excluded because it is unreliable, the bedrock reason for excluding hearsay that analysis brings forth is that the jury may use the evidence as the basis for erroneous inferences. If the proposed conclusion is X and the evidence is "A said X," the witness on the stand is available for cross-examination, and it is no more difficult to determine the

18. *Ibid.*

reliability of this testimony than it is to determine the reliability of any other testimony. However, if the evidence is admitted and the jury determines that "*A* said X," the jury has a proposition of circumstantial evidence containing a proposition of direct evidence. The danger, of course, is that the jury will use the proposition of direct evidence as the basis of a direct inference that X occurred.

To view the rule of admissions as a rule of proof and to see the hearsay rule as one directed to the process of inference is to have a better understanding of these rules. The better undrstanding does not tell us whether the rules are good or bad, because this is a matter of judgment which analysis does not perform. Analysis only enables one to make better informed judgments on the basis of a more complete understanding of the problems involved.

IV. Conclusions

The preceding analysis necessarily goes beyond the proposed definition of evidence, but the definition is the starting point. In a similar manner, it is believed, the definition can be used for overcoming a primary obstacle in dealing with problems of evidence generally—the infinite variety and source of the content of propositions which constitute evidence, by providing the basis for a meaningful framework for the analysis of evidentiary problems. Some aspects of the framework have been briefly discussed to make the definition and the point of the analysis clear. Later articles, dealing with the proof, the types of evidence, and the relationship of evidence to rules of evidence, will, it is hoped, develop these points in detail.