OUR "MODEL CODE OF EVIDENCE": HOW SHALL IT BE ADOPTED?

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I. INTRODUCTORY

On May 15, 1942, The American Law Institute formally approved its "Code of Evidence"—its first avowed venture into the field of codification. For, in publishing its previous twenty-one volumes, the Institute was content to call them "Restatements" and disclaimed a codifying purpose. But this latest product of the Institute's labors is not only designated a "Code" but Director Lewis, in his last annual report (p. 6) expresses the belief that "the members and guests of the Institute, will have that enthusiasm for it necessary to secure the Code's adoption in the several states."

For, while this instrument is the result of careful effort and discussion for over three years, has gone through two "Tentative Drafts" before the "Final" one, and has been considered at four sessions of the Institute, it needs more than the approval of that body to become a real "Code". As the Director himself clearly recognizes in the passage above quoted, it awaits "adoption in the several states" (and I would add in the Federal jurisdictions); and "adoption" requires action by some body empowered to give it legal force.

The practical problem is thus presented, How shall such adoption be achieved? Must the "Code" run the gauntlet of Congress, now absorbed in the prosecution of the war and with its calendar expanded far beyond that of any previous period? Again, must the "Code" be

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submitted to each of the forty-eight legislatures, likewise concentrated upon problems arising from the war and equally disinclined to consider measures not directly connected therewith?

If the sole answer to these questions is in the affirmative, the prospects of even a perfunctory consideration of this important instrument are anything but promising. Indeed the danger would seem to be that it will be laid aside and forgotten (meanwhile remaining merely an unofficial "Restatement") amid the flood of war and post-war problems which are pressing for solution.

If, however, the courts have the power, and can be persuaded, to put this "Code" in force in their respective jurisdictions, we may expect earlier action because (1) the courts are not so over-burdened with problems of the war, (2) they are better qualified to pass on the merits of the instrument and (3) they do, or should, appreciate the need of an authoritative settlement of disputed questions in the law of evidence and of uniformity in its rules.

As an academic question this method was much discussed some years ago; but it is doubtful if the last word has been spoken about it and now that we are faced with "a condition and not a theory" a reexamination thereof seems timely. In resolving the question I believe that we may derive much valuable aid from legal history and that no sound or satisfactory solution may be expected without carefully tracing the development of our principles of both proof and judicial power. In doing so I find arguments (which I shall now attempt to set forth seriatim) (I) From Precedent; (II) From Inherent Power; and (III) From "Delegated" (Acquired) Power; in support of the view that authority pertains to the courts to promulgate rules of evidence.

II. THE ARGUMENT FROM PRECEDENT

1. The Classical Background. For the beginnings of our law of evidence we must go far back of English history—back even of organized courts—for already then men had found methods, crude and barbaric though they were, which seemed to them sufficient for determining a disputed question. These were utilized later by primitive tribunals until they could develop better ones. In the more advanced


2. "We cannot then doubt that the violence and bloodshed which the law licensed under certain circumstances were generally rife during the infancy of Courts of Justice, and that their earliest service to mankind was to furnish an alternative to savagery, not to suppress it wholly." MAINE, EARLY LAW AND CUSTOM (1886) 387.
states, fundamental principles of proof were worked out by the judges or their advisers which foreshadow those recognized and applied today. Passing over other ancient systems let us glance at the Roman, where basic rules of proof (probatio) were formulated by jurisconsults three centuries before the Angles and Saxons invaded Britain. There we find Paulus (2d-3d cent. A.D.) applying the onus probandi rule in precisely its modern form, rules as to the competency of witnesses, and even the “parol evidence” rule. These were not the products of Roman legislation (although the Emperors did apply and extend them to new situations) they were “the decisions and opinions of individuals licensed to lay down the law,” which the praetor utilized and which had an authority at least equal to that of our reported cases. Hence the tradition which Rome handed on to the new nations was not legislative but juristic. Their law of proof came from the courts and those who equipped them.

In the Hebrew law, both biblical and talmudic, rules of evidence, often quite modern, were formulated by the rabbis and ecclesiastical lawyers, independently of legislation, and afforded a background for Christian law whose promoters, the canonists, likewise developed a system of proof which contributed not a little to the English law of that subject. But here again the canonists were jurists; they formu-

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3. “Among his works I may mention Institutionum Libri Duo, Sententiarum ad Filium Libri Quinque, commonly called Paul’s Sentences—a very valuable little work for the law of the classical period, a commentary on Sabinus in sixteen books and a commentary on the Edict in seventy-eight books. . . . They extend . . . over the period 193-222 A. D. . . .” Walton, INTRODUCTION TO ROMAN LAW (2d ed. 1912) 286.

4. Paulus, Edictum LXXIX, quoted in Dig. XXII (III), 2; Paulus, Opiniones IX, quoted in Dig. XXII (III) 5; Paulus, Quaestiones III, quoted in Dig. XXII (III), 25, 26.

5. Paulus, De Sabinum I, quoted in Dig. XXII (V), 9, 10; Pomponius, De Decretis XXXIII, quoted in Dig. XXII (V), 11; Paulus, De Adulterio II, quoted in Dig. XXII (V), 18.

7. Codex, IV (XIX), (XXX).
12. “The canonists were evolving a law, and a vigorous law, of evidence.” 2 Pollock and Maitland, History of English Law (2d ed. 1911) 659.
13. “The rule (presumption of innocence) thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law.” White, J., in Coffin v. U. S., 156 U. S. 432, 455 (1895), citing Decretum Gratiani de Presumptionibus, L. ii, T. xxiii, c. 14, A. D. 1198; Corpus Juris Canonici Hispani et Indici, R. P. Murillo Velarde, Tom. i, L. ii, n. 140.

Sometimes the borrowing was indirect. E. g., Canon law rules as to the competency of witnesses “filtered through the rules as to the competency of jurors.” 9 Holdsworth, History of English Law (2d ed. 1937) 180.
lated their rules by using materials from Hebrew, Roman and Germanic systems and adapting them to new conditions; but they received little, if any, aid from legislation, even of the ecclesiastical type.

2. Anglican Law. Precedent has ever furnished material for the growth of English law; and nowhere is this more apparent than in evidence rules. The great dramatist found seven ages of man and our great authority on the law of evidence (now, alas, no more) "marked seven divisions of (its) chronology". But in the first, the courts were still struggling to unshackle themselves from obsolete methods of proof. It was only in the third period (A.D. 1500-1700) that he found "the whole question of admissibility" discussed. That was because the jurors were ceasing to be witnesses and becoming real triers of fact and the necessity for rules of admissibility had arisen. Here, too, was laid the cornerstone of our law of proof—and it was laid by judges. Of the superstructure, slowly raised through the ensuing centuries, the builders were mainly the same.

Nor was this true of the common law courts only. Of the Star Chamber and Chancery, Holdsworth says, "it became necessary for these courts to make their own rules and... some of these have had a considerable influence upon the making of our present law." The fourth period (1700-1790) is marked by "the final establishment of the right of cross-examination" and "the rules of evidence were now developed in detail upon such topics as naturally came into new prominence." Of course, they were developed by judges; no one else could have done it. The fifth period (1790-1830) was "the full spring-tide of the system" when "the established principles began to be developed [again, of course, by judges] into rules and precedents.

14. See Symposium on Natural Law, 15 Notre Dame Lawyer 36, 45.
16. In fact, it had arisen some time before, since in the Year Book of 21 Edw. IV (1481) we find Chief Justice Brian submitting to the jury "all the evidence of both parties which could influence the jury as to the truth of the issue and all the evidences which were not material, he would not allow to be delivered."
17. Holdsworth, op. cit. supra note 13, at 131 et seq.
18. "This control laid the foundation of the rules excluding certain kinds of testimony, which are the most characteristic feature of the English law of evidence." Id. at 132.
19. "The exercise of this kind of control was in truth the foundation of that system of rules concerning evidence before juries which has since constituted so large and important a branch of the law of England." Starkie, Trial by Jury (Little & Brown's ed.) reprinted in 2 Law Review 379.
21. E.g., he adds the dying declaration rule, "the earliest statement of which is to be found in a dictum of Coke in the Star Chamber". Ibid. So of the privilege of professional communications to counsel. Id. at 333, and cases cited note 6 therein.
of minutiae relatively innumerable to what had gone before."  

The sixth period (1830-1860) was brief but eventful, due to the labors of a new type of lawyer, foremost among whom was Bentham (1748-1832). He belongs in the category of jurisconsults and his series of works paved the way for "a rational law of evidence." Treatises on the general subject had been appearing for almost a century; but none of them had the spirit or the effect of Bentham's. In time "the influence of his thought upon the law of evidence gradually became supreme", but he was ably assisted by two eminent judges—Brougham (1778-1866) and Denman (1779-1850) who, not only in exercising judicial functions, but before Parliament, labored unceasingly to secure the reforms which Bentham had advocated.

In all this there is no indication that the judges, or their advisers, limited themselves to any particular branch of the law of evidence; nor did they confine their efforts to formulating new principles. They developed rules governing all phases of proof and they never hesitated, when the time was ripe, to change rules and customs already in vogue or to replace them with better ones. By way of illustrating their methods we may trace three fundamental rules:

(1) The presumption of innocence was unknown to Anglo-Saxon law; there the opposite presumption prevailed in practice; but in the English law, "... very little is said about it before this (19th) century" and its first announcement in its precise modern form appears to have been made by Chief Justice Shaw.

(2) The sufficiency of a single witness. The rule, testis unus, testis nullus, borrowed from both Hebrew and Roman sources, appears in England at least as early as 1470; the sufficiency of a single witness is not "stated as a positive rule of law" until 1662 and then by judicial decision.

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23. *Id.* at 238. "In the nisi prius reports of Peake, Espinasse and Campbell, centering around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries." *Ibid.*

24. Most of Bentham's works (74 Titles) are listed at the close of his sketch in the Dictionary of National Biography, IV, 279; a complete bibliography, by C. W. Everett, is appended to HALEVY, *LA FORMATION DU RADICALISME PHILOSOPHIQUE* (Paris, 1901-4, 3 vols.), translated by Mary Morris (London, 1928). His *RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE* (1827) was first published in France in 1818.

25. Beginning with Chief Baron Gilbert's (1726).


27. THAYER, *op. cit.* supra note 1, at 329.


31. HOLDSWORTH, *op. cit.* supra note 13, at 207.

32. *Rex* v. *Tong*, Kelyng, 18. But the original rule was retained in treason cases—obviously as a measure of protection.
(3) The hearsay rule. "There was no thought of prohibiting hearsay until the middle of the 16th century," says Morgan, and in its modern form, adds Holdsworth, "it was not fully established until the end of the 17th century." Here again, the change was effected by judicial, and not by legislative, action.

But it may be urged that the formulation of rules by judicial decision is a different process from that of promulgating them as a code. A little reflection, however, will disclose that the difference is purely a matter of form. The practical identity of the two processes may be illustrated by recent decisions of the United States Supreme Court. In one the court avowedly changed the common law rule disqualifying a wife as a witness in behalf of her accused husband. About a year later it announced what was virtually a new rule, viz., that a confidential communication by a husband to his wife, through a stenographer, was admissible in evidence.

To sum up: Courts of the Anglo-American system, for nearly four centuries, have been making, changing and formulating, rules of evidence governing all subjects and situations which confronted them. If we are to resolve our inquiry in the light of legal history and precedent, we must conclude that these judges and tribunals considered their powers in that regard as extending to the whole field of evidence.
Finally, we should not overlook the contemporary processes of evidence rule-making by both international and administrative tribunals. The former have already developed a new law of proof, borrowing some of the best features of the world’s chief legal systems. The latter bid fair to develop a situation where “the hard rules of exclusion will soften into standards of discretion to exclude.” Here, we see not only new rules formulated, but old ones modified by the tribunals themselves. And in this they were merely following an age-long precedent.

III. The Argument From Inherent Power

1. Conceded Scope. Much has been written of the inherent power of judges to frame rules. Dean Wigmore long since claimed it for “all rules of procedure not expressly or impliedly prescribed by the constitution.” That claim has been challenged in part; but we need not stop to resolve the merits of that controversy as a whole; for the challenger virtually concedes enough of the claim to sustain our present thesis. As a result of his exhaustive study he finds the courts themselves asserting inherent power over three subjects, the third of which is “the conduct (or administration) of the court’s business.” He gives various illustrations of this inherent power’s exercise—the

42. See Dean Wigmore’s article on these (1939) 25 A. B. A. J. 25.
45. Our judges and legislators would do well to note, in this connection, Dean Wigmore’s lament of their lack of “acquaintance with legal history. . . . Whenever there is an expounding of history, Blackstone still suffices”. Of. cit. supra note 15, at 115.
48. Hibschman, supra note 47, at 625.
50. “It is undoubtedly true that courts of general and superior jurisdiction possess certain inherent powers not derived from any statute. Among these are the power to punish for contempt, to make, modify, and enforce rules for the regulation of the business before the court, to amend its record and proceedings, to recall and control its process, to direct and control its officers, including attorneys as such, and to suspend, disbar, and reinstate attorneys. Such inherent powers of courts are necessary to the proper discharge of their duties.” In re Evans, 42 Utah 283, 299, 130 Pac. 217, 224 (1913) (italics supplied). “. . . many courts have adhered to the theory of their own inherent power to prescribe rules governing procedure. . . .” Stein, To What Extent May Courts under the Rule-Making Power Prescribe Rules of Evidence? (1940) 26 A. B. A. J. 639, 640, citing examples.
appointment of an auditor for complicated accounts, determination of when an action shall be tried, or whether it shall be continued, etc.; but it is not apparent that any of these is more essential to the "control of the court's business" than is the determination of how it shall receive and weigh the evidence upon which its judgment shall rest. Without rules governing that process, courts could not function properly at all. If every judge and juror were free to follow his notions as to what constitutes proof, they would revert to the status of the oriental cadi, judging at the city gate. More than a century ago, Lord Brougham—a disciple of Bentham, as we have seen, and a pioneer in the field of evidence law reform—judicially declared: "Those principles which regulate the admission of evidence are the rules by which the courts of every country guide themselves in all their inquiries." 54

2. Coextensive with Procedure. Now such rules are the very ones "for the conduct (or administration) of the court's business" and are included under the term "procedure" as defined by the experts, and which Sir Henry Maine termed "the motive-power of the law"; because from them the other (substantive) branch of a legal system develops. He showed how primitive tribunals, forced to provide for their own operation, often utilized existing, though antiquated, institutions and concepts and thus laid the groundwork for the earliest

50. "An official called 'auditor' had long been known as part of the judicial machinery in certain cases brought in the common-law courts both of England and of the colonies; but the functions of the auditor in those cases were different. In the common-law action of account auditors were appointed in England, from the earliest times, to take the account, after the interlocutory judgment *quod computet* had been entered. . . . No act of Congress has specifically authorized the adoption of the practice in the federal court. . . . The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law." *Ex parte Peterson*, 253 U. S. 300, 308, 309, 314 (1920).


52. Lorraine v. McComb, 220 Cal. 753, 32 P. (2d) 960 (1934).

53. Page 585 *supra*.

54. Yates v. Thomson, 3 Cl. & Fin. (H. L.) 544, 587, 590 (1835). Of course, the more complicated their inquiries, the greater is the need of that guide.


57. Id. at 387.
branch of the law,\textsuperscript{58} which included rules of proof, crude and barbaric though they sometimes were.\textsuperscript{59} Nevertheless, the term "procedure" is not an ancient one in our legal terminology; but when it did arrive, it supplanted a phrase which included "evidence." \textsuperscript{60} By the great weight of authority that inclusive signification continues,\textsuperscript{61} and the tendency,
at least in England, 62 has been to enlarge rather than to curtail it. Moreover, evidence is generally treated as a branch of remedial law and hence a part of lex fori, 63 which includes procedure.

3. Self-authorized Procedural Rule-Making. Until the recent revival of interest in the rule-making authority, few in America realized its antiquity. It was only when American juridical scholars 64 had pushed their investigations far back into Roman and English legal history that we learned how the courts had led the way in the development of procedure. We have seen 65 that questions of evidence were being decided at least as early as the 15th century; court-made rules of procedure appeared far earlier 66 and these sometimes related to evidence. That they did not contain more on that subject was doubtlessly due to the production of such rules by decision so that their formulation as a whole was not necessary nor practicable. In the United States rule-making, in both state 67 and federal 68 courts, has continued.

judicial function.” State v. Superior Court, 148 Wash. 1, 4, 267 Pac. 770, 771 (1928), followed in State v. Pavelich, 150 Wash. 411, 273 Pac. 182 (1928), prescribing when depositions might be taken. Wis.—Sietto’s Estate, 224 Wis. 178, 272 N. W. 42 (1937).

Riedl, To What Extent May Courts under the Rule-Making Power Prescribe Rules of Evidence? (1940) 26 A. B. A. J. 601, 605, lists twenty leading “Specific Rules” of evidence, thirteen of which the courts “would be able to prescribe under the rule-making power.”

62. In connection with attempts to harmonize the conflict of laws, a situation has arisen in which “the law of the United States is in an unsettled condition” while that of England is “one of extreme simplicity.” Lorenzen, supra note 55, at 313, 314. The latter is the result of a liberal interpretation of the term “procedure,” treating it invariably as a part of lex fori (Leroux v. Brown, 12 C. B. 801 (1852)). The former seems to have been produced by a persistent attempt to find “substantive” rules of evidence which foreign courts need not apply.

63. Remedy is the means employed to enforce a right or redress an injury, and is governed by lex fori. Buffalo Forge Co. v. Fidelity, etc., Co., 142 Misc. 647 (N. Y. 1917). “... procedure is governed by the rule of the forum and the law of Evidence is a part of the law of Procedure.” Wigmere, op. cit. supra note 15, at 159. “The law of evidence is the lex fori.” Jones v. C., St. P., M. & O. R. Co., 80 Minn. 486, 83 N. W. 446 (1900), and see infra notes 97 and 98.


65. Supra note 16 and see infra note 66.


67. “Examination of the origins of Anglo-American procedure indicates that courts conceived it to be an intrinsic prerogative. Rules appropriate to specific cases were applied and made applicable to similar future cases so that a body of common law in procedure emerged by the natural operation of the doctrine of stare decisis.” Harris, The Extent and Use of Rule-Making Authority (1939) 23 J. Am. Jud. Soc. 28.

68. “There is a paucity of cases holding invalid a rule of court on the ground that the court had no power to promulgate it . . . . The federal government and every state except Nebraska and Iowa have statutes ‘granting’ to the courts the power to
IV. The Argument From Acquired Power

1. Legislative Authorization. Not until the 19th century was legislation in the field of evidence more than ancillary. But the revolutionary proposals of Bentham seemed to his followers to call for a speedier course of action than that promised by judicial change. Hence they sought, and helped to obtain, passage of the Civil Procedure Act of Parliament of 1833 (under which the Hilary Rules of the following year were promulgated), the acts of 1850, including the Chancery Amendment Acts, 1852, 1854, 1858, culminating in the Supreme Court of Judicature Act of 1873. Further changes were left to the Rules Committee, consisting of eight judges and four members of the Bar; with the necessary implication that Parliament did not consider such changes as belonging exclusively to it.


68. Certain rules were adopted by the Supreme Court at its first session, in February, 1790. See CARSON, *The Supreme Court of the United States, Its History* (Philadelphia, 1891) 152. In Hayburn's case, 2 U. S. 409, 411, 413, 414 (1792) Chief Justice Marshall, speaking for the court, told the Attorney-General in response to a request for information as to rules, that the court considered "the practice of the Courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary." As early as 1823 the Circuit Court for Georgia had adopted a rule which was construed by the Supreme Court in *Patterson v. Winn*, 30 U. S. 232, 243 (1831). In 1928, effective July 1, the Supreme Court adopted "Revised Rules" for its own operation, of which rules 8, 15, 16, 18, 41 (4) pertained to evidence. Most of these rules affected the production of evidence, perhaps because of the Supreme Court's desire to leave questions as to the nature and effect, to follow the State Court's rule in accordance with Sec. 34 of the Judiciary Act of 1789; but there was no intimation that the court considered its field restricted as regards rules of evidence for the Federal Courts.

69. "The character of English statutes . . . from the earliest days is strong evidence that Parliament confined itself to acting in aid of the courts, leaving to them the general management and control of practice." Tyler, *supra* note 64, at 774. What was true of procedure in general was even more so as regards its most important branch—proof. It was not until the middle of the 16th century that Parliament enacted a "comprehensive statute" against perjury and the remedy for compulsory attendance of witnesses. Meanwhile, however, the common-law courts had "used the efficient processes of subpoena which had been invented [rather borrowed from the Ecclesiastical courts] by the Chancery in the . . . fourteenth century." HOLDSWORTH, *supra* note 13, at 184, referring to the statute of 5 Eliz. c. 9 (1562-3), which he says "begins a new epoch in the law of evidence." But here again the judges had anticipated the legislature.

70. See Marvel, *supra* note 64, for a brief sketch of this movement.

71. The Judiciary Act of 1789 (1 Stats. c. 20) Sec. 17, "authorizes the courts 'to make and establish all necessary rules for the orderly conducting (of) business in said courts'" and was applied by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 22 (1825). Pursuant to the same section, and to a special act of Congress of 1824, Judge Harper of the Eastern District of Louisiana, promulgated, on Dec. 14,
more than one-half of the states and practically all the territories; so that by the opening years of the 20th century, legislation seemed so effectively to have crowded out judicial rule-making that when the need for judge-made rules came to be recognized, appeal was made to the legislatures, instead of to the courts themselves, for authority.


In 1848 Congress passed an Act (9 Stats. 276, c. 150, § 4) empowering the American Commissioners in China "by decrees and regulation which shall have the force of law, (to) supply such defects and deficiencies" (in the common law and statutes). This authority was later transferred to the Ministers, one of whom (Burlingame) framed extensive court regulations in 1864 (reprinted in HINCKLEY'S AM. CONSULAR JUR. IN THE ORIENT (1906) 226-235), containing rules of evidence. When the United States Court for China was established, in 1906, its Judge was authorized "to modify and supplement said rules of procedure" (34 STAT. 816, 22 U.S. C. 196 (1926)), and under this authority an "Extraterritorial Remedial Code", including rules of evidence, was formally promulgated in 1910. (See Lobingier, A Quarter Century of Our Extraterritorial Court (1932) 20 Geo. L. J. 427, 443, 448.) Pursuant to the bankruptcy act of Congress of July 1, 1898, the Supreme Court promulgated its "General Orders in Bankruptcy" which have been amended at various times and are not affected by the Civil Procedure Rules of 1938 (Rule 81 (a)). Under the Act of Congress of March 4, 1909, the Supreme Court promulgated (effective July 1, 1909) "Rules for Practice and Procedure Under Section 25 of an Act to Amend and Consolidate the Acts Respecting the Copyright" and on June 5, 1939, certain amendments thereto were adopted (effective September 1), applying thereto, so far as applicable the Rules of Civil Procedure for the District Courts which, effective September 1, 1938, had meanwhile been promulgated.

Pursuant to 28 U.S. C. § 723 (Judiciary Act of 1789, Sec. 21) the court in 1912 promulgated its "Equity Rules", pronounced by Chief Justice Hughes, before the American Law Institute, one of the outstanding landmarks of the court's history. Rules 46-58, incl., relate to evidence.

In 1920, effective March 7, 1921 (254 U.S. 671) the Supreme Court promulgated "Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction" of which, 45-47 relate to evidence. These were amended on May 22, 1939 (effective September 1) by provisions which included some relating to evidence.

Of the Civil Procedure Rules (effective 1938) Rules 11, 26-36, incl., 43 (admissibility) and 45 are especially important in the field of evidence. Rule 43 (a) was applied in U. S. v. Aluminum Co. (2 cases) (S. D. N. Y., Dec. 4, 1939). As to Rule 8 (c) see note 96 infra. In Rule 11 the court expressly stated that "... the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses ... is abolished." Here we have a late instance of judicial legislation by our highest court in the field of evidence. Cf. Hunter, One Year of our Federal Rules (1940) 5 Mo. L. Rev. 1.

Rules of Administrative Tribunals: "... the power to prescribe its own rules of practice and procedure has been given to the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Board of Tax Appeals [now Tax Court], the Board of General Appraisers, the Court of Customs Appeals, the Commerce Court, the Court of Claims, the United States Court for China, and the present Supreme Court of the District of Columbia." Marvel, supra note 64, at 57. Since the above was written various other administrative agencies have been established, most of which are empowered to frame rules of procedure. See Wigmore, Federal Administrative Agencies (1940) 25 A. B. A. J. 25. Notable among these are the Rules promulgated pursuant to the Securities Exchange Act (1934), Sec. 23 (a), and the N. L. R. B. Act (1935), Sec. 6. On Administrative Rules see Postal S. S. Co. v. S. S. El Isleo, 308 U.S. 378 (1940). Cf. Keefe, Administrative Rule Making and the Courts (1939) 8 Fordham L. Rev. 303.

72. See Marvel, supra note 64, at 57.

73. Id. at 55.
Such appeals have been fairly successful and we have, finally, to consider whether, assuming that such authorization was necessary, the law of evidence is included therein. In some instances the inclusion is express and in practically all of the "delegating" statutes, thus far enacted the terms "procedure" or "practice" or both are specified as proper subjects for exercise of the rule-making authority. We have seen that "procedure" is treated, practically everywhere, as including

74. Professor Harris (supra note 67) has compiled a useful chart showing 14 states with "full rule-making power". A later article in the same periodical (at 65) lists 17 state Supreme Courts enjoying such power, with Missouri and North Dakota "on the way". In South Dakota it is reported that the framers of the new Code are segregating the sections relating to procedure for promulgation by the Supreme Court as rules.

Certain additions to the list given by Professor Harris must now be made, viz., Maryland. Under Code of General Laws, Art. 26, trial court rules governing continuances were upheld in Laurel Canning Co. v. R. Co., 115 Md. 638, 81 Atl. 126 (1911). Nebraska. The statute of 1939, June 5, "directs" the Supreme Court "to promulgate rules of practice and procedure . . . for admission and exclusion of evidence, the taking of depositions", etc. Mr. Gertner, supra note 67, classes Nebraska as a state without a rule-making act and Professor Harris writes of it, "there has been no exercise of the power granted by the constitutional amendment of 1920." On the contrary, not only have there been several instances of such exercise, but they are such as to form the most instructive examples of the practical identity of rule-making by decision and that by formal promulagation. Thus in deciding Penhansky v. Drake Realty, etc., Co., 109 Neb. 120, 190 N. W. 265 (1922), the Supreme Court changed the rule precluding the contradiction of one's own witness and in the same opinion formally announced the new doctrine as a rule of the court. In Jessup v. Davis, 115 Neb. 1, 211 N. W. 190 (1926) the court reaffirmed the doctrine of an earlier decision (Miller v. Taxi Co., 110 Neb. 305, 193 N. W. 19 (1923)). But for the constitutional amendment, nothing further would have been done; but the court then felt called upon to "promulgate" the rule. This, however, amounted to nothing more than it would have without the amendment; the sole change was in the form of expression. But the process did not stop there. After another decade, during which a new judge, with an exploring mind, appeared on the scene the question again came before the court, the "promulgated rule", announced before the amendment, was restored, (Fielding v. Public Cars, Inc., 130 Neb. 576, 265 N. W. 725 (1936)) permitting a plaintiff to sue an insured for reimbursement for medical expenses in a personal injury case to interrogate defendant as to whether he was to receive indemnity from an insurance company. See also Heineman v. Wilson, 132 Neb. 159, 271 N. W. 346 (1937), holding the rule not to be retroactive. All of these decisions were rendered before the enactment of the 1939 statute and their sole authority, other than inherent power, was the amendment, using the terms "procedure" and "practice". North Dakota—"The Supreme Court has power to make all rules of pleading, practice and procedure." Laws, 1941, Ch. 238, sec. 1. Philippines—Constitution VIII, 13, renders all procedural statutes "rules of court subject to the Supreme Court's power to alter and modify them." Tennessee—Act of 1939, see Wicker and Anderson, Regulation of Procedure by Rules of Court (1939) 15 TENN. L. REV. 758, 768. Washington—Act of 1925, construed in State ex rel. v. Superior Court, 148 Wash. 1, 267 Pac. 770 (1928); but see State v. Pavelich, 150 Wash. 411, 273 Pac. 182 (1928) ; 153 Wash. 379, 701; 279 Pac. 1151 (1930), which contains puzzling passages characterizing rules of evidence as parts of the substantive law and thus not subject to control by court rules. Morgan, 59 HARV. L. REV. 934, note 65. Wisconsin—Act of 1937, upheld in Rules of Court Case, 264 Wis. 501, 236 N. W. 717. Pursuant to this the Supreme Court has promulgated rules (270.025, 325.14 (1)) as to cross-examination, impeachment and admissibility of account books.

75. Nebraska. The Act of 1939 (supra note 74) specifies "admission and exclusion of evidence, the taking of depositions," etc. Washington. The Act of 1925 authorizes the Supreme Court to prescribe the mode and manner "of taking and obtaining evidence". The Committee on Judicial Administration expressed the opinion that this was sanctioned "by the more general provisions".

76. Supra note 55 et seq.
evidence. “Practice” is a more popular term which, while not so broad as “procedure,” is held sufficient likewise to include evidence.77

2. So-called “Substantive” Rules of Evidence. As we have seen,78 all positive law was once procedural (“adjective”) and some that was such has now come to be regarded as substantive. Examples are the “parol evidence rule”, now regarded as part of the law of contracts,79 and the “conclusive presumption”.80 Indeed, there is high authority 81 for the view that all presumptions belong to the substantive branch; but that is disputed.82 These are but illustrations of a problem which is likely to confront the rule-maker as to various terms and subjects. But it must constantly be kept in view that his task is to frame rules of evidence and any branches of the law which belong to some other subject are not within his province. His initial task therefore would seem to be to identify and exclude all rules which are not evidential in character and it should not be confused with the attempt sometimes made to classify the rules of evidence themselves into “substantive” and “procedural” categories. A rule is either evidential or it is not; if the latter, it cannot be a class of the former and if the former, it belongs, as we have seen, to the field of procedure. But the
rule-maker should not permit his course to be deflected by speculating over theoretical classifications of other branches.

3. Legislative Restrictions Upon the Rule-Making Power. Certain delegating statutes assume to prohibit rules effecting change of "the substantive rights of any litigant" and in such jurisdictions it becomes necessary to inquire what, if any, rules of proof might effect such change. But first we must ascertain what is meant by "substantive rights". One writer answers that "primary rights are substantive" and a well-known jurist informs us that "primary" or "antecedent" rights are those "which exist before any wrongful act or omission". But the late Justice Cardozo pointed out the impracticability of any hard and fast distinction or separation of substantive rights from procedural; and this brings us very close to the conclusion reached by Chamberlayne that: "The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a brutum fulmen; i.e., no law at all."

It is evident that those who seek to separate substantive from procedural rights in the same connection encounter one of the most confused and complicated subjects in the law. Indeed, expressions of

85. Holland, Jurisprudence (13th ed. 1924) 1478. Cf. Pomeroy, Remedies and Remedial Rights (3d ed. 1894), who calls all private rights "primary".
86. "The primary or antecedent right may be distinguished in analysis from the right of action for its infringement, but the normal exercise of the state's power is through the agency of the courts, and hence a right which, when violated, does not create a right of action, is shorn of most of the incidents that make a legal right of value." Jacobus v. Colgate, 217 N. Y. 235, 241, 111 N. E. 837, 839 (1916).
Similar appear to have been the views of the late Justice Holmes: "But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space." Collected Legal Papers (1921) 310, 313 et seq.; reprinted in Wu & Liang's Essays in Jurisprudence and Legal Philosophy.
88. "It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure . . . . there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. In such cases, the difference between these two branches of the law is one of form rather than of substance." Salmond, Jurisprudence (Parker's ed. 1937) 647, 649.
more recent writers leave the impression that there is really little or no fixed meaning for either of these phrases.

In the Federal Courts, the subject is now further complicated by a revolutionary decision followed shortly afterwards by the promulgation of the new Civil Procedure Rules which, however sound and justifiable, unfortunately upsets nearly a century's trend toward uniformity. overrules a long line of prior decisions promises a snarl of conflicting rulings by the lower federal courts which will require years to unravel, and raises new and serious questions as to the effect of the said Rules.

89. "Even if we find a precedent for holding a certain rule of one jurisdiction to be either of substance or of procedure, we must generally guard against the fallacy of assuming that such precedent is authority for a determination that the rule does not also affect procedure or substance." McClintock, supra note 84, at 942.

"Nor does it follow that because 'evidence' may be classified as 'procedure' for some purposes, an item of evidence is to be accorded 'procedural' consequences for conflict-of-laws, constitutional law, or any other purpose." Tunks, Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins (1937) 34 Ill. L. Rev. 271, 277. "... the courts have given diverse meanings to the concepts of 'procedure' and 'substantive rights' in the various situations." Note [1938] Wis. L. Rev. 325.

90. "When flexibility, modernity and justice can be promoted thereby, courts should feel free to pry apart an artificial dichotomy of 'substance' and 'procedure.'" Tunks, supra note 89, at 301. But how can the courts 'pry apart' elements which are but complements of each other (see supra notes 86, 87) and hence inseparable?


92. Effective Sept. 1, 1938, supra note 71.

93. Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939) per McReynolds, J., who quotes at 212 from the opinion in Cent. Vt. R. Co. v. White, 238 U. S. 507, 512 (1915), the statement that "the local rule" is "part of the very substance" of the litigant's case. But there the court refused to apply the state rule. The "revolutionary decision" was not discussed in this most recent opinion nor was Civil Procedure Rule 8(c) cited. See also Schopp v. Muller Dairies, Inc. (declaring that since the said decision "there is no federal common law") 25 F. Supp. 50 (1938).

94. "... the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff." Schopp v. Muller Dairies, Inc., 25 F. Supp. 50, 51 (1938) and cases cited there. See also N. O. and Northeastern Ry. Co. v. Harris, 247 U. S. 367 (1918).

"Matters respecting the remedy—such as the bringing of suits, admissibility of evidence, statutes of limitation—depend upon the law of the place where the suit is brought." Hunt, J., in Scudder v. Union National Bank, 91 U. S. 406, 413 (1875).

95. Thus in Coca-Cola v. Munn, 99 F. (2d) 190 (C. C. A. 4th, 1938) the state doctrine as to applicability of res ipso loquitur was held to control the federal court. But in Moore v. Chicago, etc., R. Co., 28 F. Supp. 804 (W. D. Mo. 1938) the court declined to heed "the judicial voice of a state ... as to physical laws or the laws of logic or as to what are facts of universal knowledge." See note on this case in (1939) 88 U. of Pa. L. Rev. 220.

96. In Francis v. Humphrey, 25 F. Supp. 1 (E. D. Ill. 1938) it was held "that the absence of contributory negligence is made an essential part of plaintiff's cause of action by the substantive law of Illinois and ... The Supreme Court, by a procedural rule, cannot take this burden from plaintiff and impose it upon defendant." Similar decisions in the future may seriously restrict the scope of Rule 8(c) which, however, the court distinguished as applicable to defenses only. But see Tunks, supra note 89, at 279, 283.
Some state courts, indeed, treat as "substantive" a foreign rule requiring a party to prove freedom from contributory negligence and where a Federal Court sits in such a jurisdiction it must now apply that rule. But there is an impressive array of authority for the contrary doctrine and diversity is thus perpetuated. Contributors to our legal periodicals have recognized the unfortunate situation thereby created and have sought a way out by resorting to decisions in the field of the conflict of laws. But the results there seem to offer little hope for a satisfactory solution of our problem. For we are con-


98. England—Yates v. Thomson, 3 Ch. & Fin. (H. L. Cas.) 544 (1835). "... the lex fori is to govern trials respecting real property and ... whatever relates to a remedy to be enforced or to evidence, must ... be governed by that law." Bain v. Whitehaven R. Co., 3 H. L. Cas., 19 (1850). Connecticut—Downer v. Chesebrough, 36 Conn. 39, 47 (1859). Iowa—"... the claim that the courts of this state must ... adopt rules of practice of another state which pertain merely to the weight of evidence ... is unsound." Johnson v. The Chi. and Northwestern R. Co., 97 Iowa 248, 252, 59 N. W. 66, 68 (1894). But see Cahill v. Ill. Cent. R. Co., 137 Iowa 577, 115 N. W. 216 (1908). Massachusetts—Levy v. Steiger, 233 Mass. 600, 124 N. E. 477 (1919). Cf. Holland v. Boston and Me. R. Co., 270 Mass. 342, 181 N. E. 217 (1932). Minnesota—"The law of evidence is the lex fori. Whether a witness is competent, whether certain matters require to be proven by writing ... whether certain evidence proves a certain fact ... are to be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the court sits to enforce it." Jones v. Chi., St. P., M. and O. Ry. Co., 80 Minn. 488, 491, 83 N. W. 445, 447 (1906). Cf. Jenkins v. Minn. and St. Louis Ry. Co., 124 Minn. 373, 145 N. W. 40 (1914). Missouri—"The rules of evidence are part of the law of the remedy and the law of the forum controls. ... As to the burden of proof, the competency of witnesses and the weight of the evidence." Menard v. Goltra, 328 Mo. 368, 369, 40 S. W. (2d) 1053, 1058 (1931). In Jackson v. St. Louis-San Francisco Ry. Co., 224 Mo. App. 60, 31 S. W. (2d) 250 (1930), the court applied an Oklahoma constitutional requirement that contributory negligence must be left to the jury, thus undertaking "to designate the tribunal which should determine essential issues." Note, Conflict of Laws as to Presumptions and Burden of Proof (1939) 4 Mo. L. Rev. 299, 304.


100. "In any drive toward flexibility of treatment, the conflict of laws cases present a parallel." Tunks, supra note 89, at 302. "... the distinction between 'substance' and 'procedure' was first attempted in cases interpreting ... the Statute of Frauds—i. e., was the obligation void or merely unenforceable ... it is not surprising that concepts already developed should have been utilized in solving the new questions, despite the great differences to be performed." Note (1939) 4 Mo. L. Rev. 299.

101. Not only is there a wide variance between Civil Law and Anglo-American jurisdictions, but the latter are themselves divided as to what rules are "procedural" (and hence lex fori) and what "substantive". In England where Leroux v. Brown, 12 C. B. 801 (1852) is generally followed, the question is said to be "one of extreme simplicity." Lorenzen, supra note 99, at 313; but that decision has not been generally followed in the United States; on the contrary American cases on the subject form no less than four distinct classes, leaving the law of the subject, as Lorenzen points out, "in an unsettled condition." Id. at 314.
cerned neither with artificial classifications nor with attempts to harmonize decisions in some other branch of the law; but with a practical plan to reform the rules of evidence and render them more adaptable to present-day conditions. We should never allow ourselves to be deflected from the direct path to that objective.\(^{102}\)

4. Possible Need for Exercising Inherent Power. Professor Harris\(^ {103}\) deprecates the "attempt to find justification for the movement (toward court rule-making) in concepts of 'inherent judicial power';" but that concept may prove indispensable in finding our way out of the maze resulting from the effort to separate completely "substance" from "procedure" and to limit the courts to an arbitrary definition of the latter. If the writer understands the conceptions of Chamberlayne, Holmes and Cardozo, quoted above, they may well be condensed into the time-honored maxim, \textit{ubi jus, ibi remedium}. If every remedial (procedural) right is the complement and counterpart of a substantive right, it is difficult, if not impossible, to change one without affecting the other.\(^ {104}\) Hence, when a legislative body authorizes a court to "prescribe rules for practice and procedure" and at the same time forbids it to change "substantive rights", the former is merely making a futile gesture, if the restriction is to be applied literally. For two reasons the writer believes that it cannot be so applied: (1) a statute must always be so construed as to give it effect if possible;\(^ {105}\) and (2) an attempted legislative prohibition of judicial "change" in a procedural rule (whatever the consequences) relating to the conduct of the court's business would be an unwarranted invasion of a time-honored judicial prerogative.\(^ {106}\)

\(^{102}\) "The purpose of the present (1934) grant of rule-making power should . . . constitute an important guide for determining what should be deemed procedure and what . . . matter of substantive right." Sunderland, \textit{Character and Extent of Rule-Making Power} (1935) 21 A. B. A. J. 116. " . . . no intelligent conclusion can be reached in any particular case until the fundamental purpose for which the classification is being made, is taken into consideration." Cook, supra note 60, at 356. "Diverse purposes of the various restrictions and enactments necessitated the diverse meanings in order that the purposes of the law be complied with." Note [1938] Wis. L. Rev. 324, 325.

\(^{103}\) Harris, supra note 67, at 27.

\(^{104}\) Thus Federal Civil Procedure Rule 43 (a) broadens considerably both admissibility and competency and to that extent is almost certain to affect "substantive" rights.

\(^{105}\) 59 C. J. 563: " . . . it must be given one which will best effect its purpose . . . even though that construction is not within the literal interpretation."

\(^{106}\) See supra notes 49, 61, 67. The court which declined to recognize the power of Congress to require it to "examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States" (See its letter to President Washington, 2 Dall. 411, 413 (1792)), may well ignore an attempt of the same body to restrict an established prerogative in the field of evidence. Marvel, supra note 64, at 56, was ready to "concede the right of the legislative branch . . . to say what courts may do"; but objected "when they attempt to say how the courts shall do it." But courts generally have not left it to legislative bodies to say what the former "may do".
And here we may find encouragement in the observation of Mr. Justice Reed that "the line between procedural and substantive law is hazy but no one doubts federal power over procedure." Exercise of that power at any time, as it has not infrequently been exercised in the past, would suffice to meet the present crisis and save from slow attrition the new Civil Procedure Rules, promulgated after such a prolonged effort and hailed with such profound satisfaction by the Bar. It would be tragic indeed to see that long-sought achievement frittered away by a fruitless controversy over words and abstractions.

And it would seem equally tragic if this opportunity to secure an uniform law of evidence for all courts in United States were to be lost because of technical doubts of the existence of powers which courts have exercised for centuries, or because the "Code" itself may not be a perfect instrument. As the Director said in his report already quoted: "That any body of educated men, dealing with a subject which for the most part relates to matters concerning which they have had practical experience, should all agree not only with the general scope, arrangement, and treatment, but also with each of the 112 rules proposed, is neither possible nor desirable. That the proposed draft is a great improvement on the existing law, I personally do not have the slightest doubt."

He may have had in mind the late Dean Wigmore's "Dissent"; but that great jurist recognized in the "Code", "a worthy enterprise upon which so much skilled labor has been bestowed by a distinguished group in an eminently useful organization."

V. CONCLUSION

As a result of the foregoing survey I conclude:

(I) That in those jurisdictions where courts are empowered to formulate rules of "procedure" or "practice", they may prescribe rules governing any branch of evidence, (although it might save some future quibbling if the word "evidence" were inserted in the statute); but rules pertaining to another branch of the law, even though disguised as evidence rules, would not be included.

108. See notes 68 and 71 supra.
109. "In view of the re-labelling many doctrines undergo, as they are considered with reference to one division or another, that recipes for distinguishing a matter of 'substance' from one of 'procedure', regardless of the setting, should have been formulated seems surprising." Tunks, supra note 89, at 277. "... the application of the rule is not as clear as might be desired and too often it is obscured by simple faith in the effectiveness of statement in the terms of 'substance' and 'procedure'." Note (1939) 4 Mo. L. Rev. 299.
110. 28 A. B. A. J. 23.
That even in those jurisdictions where no such statute has been enacted, courts, at least of last resort, would probably be justified in prescribing such rules, as an exercise of their inherent power, fortified by nearly five centuries of English legal tradition and inspired by sources and achievements of an earlier age.

That courts are not precluded from exercising such power, either inherent or acquired, because rules thus formulated may possibly affect so-called "substantive" rights since otherwise the power itself might often be futile.

That such power would not extend to rules the effect of which would be to change constitutional provisions, but would repeal conflicting statutes.

112. "Many enabling statutes specifically provide that the rules which may be made must be consistent with the statutory law. And where not specifically stated, that has been held to be the reasonable inference. In those jurisdictions where rule-making power has been predicated upon the inherent power of the courts to make rules, a conflict between the provisions of a rule and those of a procedural enactment may reasonably and logically be resolved in favor of the rule. ... A legislature cannot destroy the inherent power of a court by passing an act regulating a matter with which a court has dealt by rule." Gertner, supra note 49, at 47, 48. In A. T. & S. F. Ry. Co. v. Long, 122 Okla. 86, 251 Pac. 486 (1926), the court set aside a popularly adopted act which, it was held, infringed the judicial prerogative.