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The Principles of Criminal Evidence

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Twining's terminology, the 'anti-nomian thesis'.[63] It holds that rules of law that attempt to direct how evidence should be used in reaching a conclusion are more liable to lead the trier of fact astray than to a correct determination of the issue.[64] Legal rules that require the judge to tell the jury that this or that evidential use of a piece of evidence is forbidden are ineffectual because they often conflict with the jury's function of deciding according to their common sense. At present a jury may be told to convict if they believe the accused's guilt beyond reasonable doubt; the same jury may be told also not to give credence to such and such evidence. One can order a person to act but one cannot order (or even force) a person to believe and hence an instruction not to believe the believable is as ineffective as an instruction to believe the unbelievable.[65] Bentham understood well that mandatory instructions can be effectively addressed to the will ('Do this or that') but not to the understanding ('Believe this or that').[66]

In dealing with the law of criminal evidence we shall have numerous opportunities to notice how the two misconceptions just discussed have affected judicial control over the jury. Many attempts to confine the non-factual judgment of the jury have foundered as a result of a persistent reluctance to acknowledge the intricate ways in which our system of criminal justice allows non-factual and extra-legal judgment to permeate into the ascertainment of the facts. Juries should certainly be helped to reason correctly, but various judicial dictates have proved inadequate help because of their failure to engage the jury's understanding.

[63] Twining, *Theories of Evidence: Bentham and Wigmore* (1985), 66.
[64] *Rationale of Judicial Evidence*, (1827), vol. 3, pp. 219 ff.
[65] One can instruct the jury to proceed as if they held a certain belief, but the effectiveness of such instruction is very doubtful.
[66] See Bowring edn, vol. 6, pp. 151–2, and Twining, *Theories of Evidence: Bentham and Wigmore* (1985), 67.

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Relevance, Admissibility, and Judicial Control

As we have seen, judicial control over the fact-finding process in jury-trials is exercised to a large extent through the filtering of the evidence to be presented before the jury and by withholding cases from jury adjudication. This chapter outlines the concepts involved in this exercise, of which the most important are relevance and admissibility.

RELEVANCE AND ADMISSIBILITY

Inferences from evidence are drawn according to ordinary logic so that only data which in ordinary reasoning count as evidence for a disputed proposition should be allowed to be presented at the trial. This is the rule of relevance. In Stephen's phraseology, relevance denotes that

> any two facts . . . are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.[1]

Neither the need for relevance nor its definition is a peculiarly legal matter, as Thayer pointed out:

> There is a principle—not so much a rule of evidence as a proposition involved in the very conception of a rational system of evidence, as contrasted with the old formal mechanical systems—which forbids receiving anything irrelevant, not logically probative.[2]

[1] Digest, 12th edn. art. 1.
[2] *Preliminary Treatise on Evidence* (1898), 264. See also Montrose, 'Basic concepts of the law of evidence', (1954) 70 LQR 527. For a comprehensive survey see *Wigmore on Evidence*, Tillers Rev., vol. 1A, 37.

However, it does not follow from the fact that relevance is determined by the logic of inductive reasoning that considerations peculiar to the legal process do not impinge on the acceptability of evidence in the courts. On the contrary, most of the law of evidence consists of principles which alter the course of free proof. The most basic of these devices is the test of admissibility, by which evidence is tested for its qualification to be admitted in a court of law.

A distinction is commonly drawn between relevance and admissibility. Relevance is said to be entirely governed by logic whereas admissibility is thought to be a matter of law.[3] Both of these assumptions are liable to mislead if left unqualified.

The test of relevance operated by the courts is more complex than is usually assumed due to institutional constraints. The ascertainment of facts under any system of inquiry, be it legal or otherwise, is bound to be affected by the conditions under which the inquiry is conducted, by the character of its functionaries, by the methods employed, and, not least, by the purpose for which it is carried out. One of the most obvious constraints is that of resources. Criminal cases of a serious nature are tried before a judge and a jury consisting of twelve lay members of the community. This composition of the court may not be the most conducive to the ascertainment of truth. Truth may be more readily discovered by twenty-four jurors instead of twelve or two or three professional judges instead of one. But accuracy is not the only concern of the legal system.[4] In deploying the inevitably limited resources allocated to the Lord Chancellor's office accuracy is only one amongst several considerations; others include the speed of adjudication and the availability of persons for jury service.

Institutional constraints do not end with the organization of the courts but continue to exert their influence throughout the process of trying an issue of fact. The constraints of cost and time have several consequences in the context of judicial proceedings. Litigants cannot be allowed to take disproportionate amounts of the court's time, because this will deny the same facility to others. The rich litigant must not be allowed to waste time and augment cost so as to exhaust the poorer litigant or the coffers of the state. Lastly, the purpose of adjudication is not only to ascertain the facts but also to resolve the charge as promptly as possible so as to put to rest public concern about criminal activity. Promptness is necessary if wrongs are to be effectively remedied, if social tensions are to be relieved, and if crime is to be effectively combated.[5]

A constraint of a different kind is imposed by the limitation of the human mind. There is an inevitable limit to the amount of evidence that a person, however experienced and talented, can digest. In piling up evidence, albeit relevant, a point will come where any further piece of evidence may detract from, rather than increase, the correctness of the final assessment.

The risk of overburdening the trier of fact is not only a function of the number of witnesses called but also of the extent to which their reliability may be tested. Suppose that the witness for the prosecution testifies that the accused struck the first blow. The credibility of the witness is clearly important and the accused proposes to challenge the witness's record for accuracy by showing that a month earlier the witness made a mistake in observing some other event from a similar distance. However, this course gives rise to a new dispute over what happened on the previous occasion, which is otherwise unrelated to the present issue. Clearly, the more such side-issues are allowed, the more likely it becomes that the trier of fact will be distracted and reach a mistaken conclusion on the main issue.[6]

It follows that in determining whether a certain piece of evidence should be admitted into the trial the judge has, first, to consider whether the evidence bears a logical relationship to the issue and, if it does, whether it makes a sufficient contribution to what is already known to justify the loss of time and the

[3] *Phipson on Evidence*, 12th edn. para. 153. 'Admissibility' is sometimes used as denoting that a piece of evidence is both relevant and that it does not infringe any legal rule of exclusion. Thus while no irrelevant evidence can never be admissible, relevant evidence may still be inadmissible.

[4] Dworkin, *A Matter of Principle* (1985), 72.

[5] For discussion see Fuller, 'The forms and limits of adjudication', 92 Harv L Rev 353 (1978); Eisenberg, 'Participation, Responsiveness, and the Consultative Process, etc'. 92 Harv L Rev 410 (1978); Scott, 'Two models of the civil process', 27 Stan L Rev 937 (1974–5).

[6] *Agassiz* v. *London Tramway Co* (1872) 21 WR 199.

trouble that its reception might cause.[7] Thus the question of relevance in legal proceedings does not only involve a determination of whether the evidence affects the probability that the event at issue occurred but also whether it affects it sufficiently to be worthy of admission. 'The degree of relevance needed to qualify for admissibility is not', as Hoffmann put it:

> a fixed standard, like a point on some mathematical scale of persuasiveness. It is a *variable* standard, the probative value of the evidence being balanced against the disadvantages of receiving it such as taking up a lot of time or causing confusion.[8]

If the judge is to decide whether a piece of evidence is likely to make a sufficient probative contribution, he has to assess its potential probative weight.[9] The difference between assessment

[7] Bentham was the first to explore the relationship between the admissibility of evidence and its utility; Bentham, *Rationale of Judicial Evidence* (1827), vol. 4, bk. IX, p. 477. In *A–G* v. *Hitchcock* (1847) 1 Exch 91, 105, Rolfe B remarked that '[i]f we lived for a thousand years instead of about sixty or seventy, and every case was of sufficient importance, it might be possible and perhaps proper... to raise every possible inquiry as to the truth of statements made... In fact mankind finds it to be impossible.' See also *Hollington* v. *Head* (1858) 4 CB (NS) 388, 391 per Willes J. For discussion of relevance see Michael and Adler, 'The trial of an issue of fact', 34 Col L Rev 1224, 1462 (1934), and Hoffmann, 'Similar facts after *Boardman*', (1975) 91 LQR 193, 204–5. The conjunction of a test of utility with a test of relevance is of course not a peculiarly legal necessity. It arises in all practical inquiries.

[8] Op. cit. 205. See also, USA, Uniform Rules, Rule 45, which lays down: 'the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury; or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.' See also Federal Rules of Evidence (R. D. 1971) 403, which makes exclusion mandatory when probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, but discretionary in the case of other dangers. Cf *Wigmore on Evidence*, Tillers Rev, vol. 1A, ss. 28, 37.4. This is essentially a Benthamic view. It is Bentham's philosophy that the ascertainment of truth must take into account not only rectitude of decision but also its timely utility; *Rationale of Judicial Evidence* (1827), vol. 1, pp. 31 ff.; Twining, *Theories of Evidence: Bentham and Wigmore* (1985), 91.

[9] Weight consideration is inevitable in determining relevance. Suppose that the issue is whether the accused was in a certain town at a certain time. The prosecution offers to show that a spent train ticket to that town was later found in the accused's coat. This evidence is relevant because we are able to appeal to the generalization that people in possession of spent train tickets have usually used them for the nominal destination. The evidence is relevant because it is capable of producing a probability regarding the issue. Its probability is its weight. We may say, therefore, that it is relevant because it has a weight.

by the judge and assessment by the jury lies in the purpose and method of the assessment. The judge is not concerned to estimate the final weight of any piece of evidence, let alone the probative outcome of the whole of the evidence. At the admissibility stage he is only concerned to make a rough and ready estimate of the potential contribution that the evidence in question might make and whether it is substantial enough to justify admission. The admissibility test is therefore a composite test made of a mesh of considerations of logical probabilities and of practical utility. By contrast the jury's primary duty is to examine the entire body of evidence in order to decide whether or not the charge against the accused has been proved.

On some occasions the potential contribution of the evidence adduced will be immediately apparent to the judge; for example, the testimony of an eyewitness to the disputed event. At other times its potential will only emerge from a juxtaposition of the evidence in question and other pieces of evidence or known facts. If, upon the presentation of an individual piece of evidence, the judge is in doubt about its relevance, he will ask the party offering it how it relates to the rest of the evidence he plans to adduce. If a publican claims that the brewer supplied him with bad beer, then the fact that the same brewer supplied another pub with bad beer might not be of sufficient weight to be admissible. But it would become sufficiently weighty if it is also shown that it was one of five incidents of supply of bad beer by the same brewer in the same neighbourhood within the space of a day.[10]

The law does not provide rules by which to determine whether a piece of evidence has sufficient probative potential to justify its reception.[11] The self-same piece of evidence in support of the self-same proposition may be sufficient in one set of circumstances but not in another. To quote Thayer:

[10] Cf. *Holcombe* v. *Hewson* (1810) 2 Camp. 391.

[11] It is possible to translate the constraints of time and confusion into fixed rules of law. We may, for example, make a rule that no trial should last more than two days or that no party should call more than four witnesses. Although such rules will save time they will be insensitive to the additional function of the court, that of reaching a correct conclusion. For the view that the law does lay down rules in this regard see *Wigmore on Evidence*, 3rd edn. (1940), vol. 1, s. 12, p. 298. For commentary see: Twining, *Theories of Evidence: Bentham and Wigmore* (1985), 154; *Wigmore on Evidence*, Tillers Rev, vol. 1, sec. 12 nn.

[The evidence] must not barely afford a basis for conjecture, but for real belief; it must not merely be remotely relevant, but proximately so. Again, it must not unnecessarily complicate the case, or too much tend to confuse, mislead or tire ... the jury, or to withdraw their attention too much from the real issues of the case. Now in the application of such standards as these, the chief appeal is made to sound judgment; to what our lawyers have called, for six or seven centuries at least, the discretion of the judge. Decisions on such subjects are not readily open to revision; and, when revised, they have to be judged of in a large way; this is expressed by saying that the question is whether the discretion has been unreasonably exercised, has been abused.[12]

Although precedent cannot obviate a case-by-case assessment of sufficiency of relevance, past decisions can help to identify goals or policies which need be pursued in the reception of evidence. They inform us of the importance of factors such as the avoidance of confusion, of proliferation of issues, and of the saving of cost.

There is, however, one aspect of admissibility that is a matter of law in the sense of being governed by rules. To be admitted evidence must not only be of sufficient probative potential, it must also not be specifically excluded by a rule of law.[13] As we shall see, some rules exclude certain types of evidence irrespective of weight while others require the judge to strike a balance between weight and prejudicial effect.

Some writers have suggested that the concepts of relevance and of admissibility do not comprehend all the basic concepts in this field. It is said that there is a further concept to be reckoned: materiality.[14] 'Materiality' is supposed to denote that the fact in support of which evidence has been adduced is of legal consequence in the proceeding. A question of materiality in this sense is not really a question about evidence. As we have seen, the trial of fact is concerned solely with ascertaining those facts

[12] *Treatise*, 516.

[13] These are commonly referred to as 'exclusionary rules'. Strictly speaking, these are not rules of admissibility because they only ordain exclusion not inclusion; if a piece of evidence is not so excluded its admissibility would depend on it being sufficiently relevant.

[14] See James, 'Relevance, probability and the Law', 29 Calif L Rev 689 (1941); Montrose, (1954) 70 LQR 527. Cf. *Wigmore on Evidence*, 3rd edn. (1940), vol. 1, s. 12, p. 296.

which the substantive law fixes as giving rise to legal results, and about the existence of which there is a dispute between the parties. No other facts may be the subject of a trial of fact.[15] Since 'relevance' is a relative term, it can only be relative to facts in issue. If evidence is not relevant to one of these facts, it will be excluded and we do not need a concept of materiality to tell us this.[16]

'NO CASE TO ANSWER'

Between the admissibility stage and the verdict there is an intermediary stage at which a decision about the evidence has to be taken.[17] At the end of the case for the prosecution, before the accused is required to present his defence, the judge may be required to consider whether the prosecution has submitted sufficient evidence to justify putting the issue to the jury.[18] If the judge concludes that the prosecution has not done so, he will stop the trial and direct the jury to acquit.[19] The test formulated by Professor Cross is that the judge must

inquire whether there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue.[20]

[15] As a matter of general principle the courts will not entertain hypothetical questions: *Re Barnato* [1949] ch. 258.

[16] If the concept of materiality is put forward as a test for ascertaining which factual elements are required by the substantive law for any legal result, then the question is one of interpretation of the substantive law and not about the evidence in the case.

[17] For a discussion of a further stage see next section.

[18] The prosecution's duty to produce sufficient evidence is sometimes referred to as a duty to make out a 'prima-facie case'.

[19] The need for a decision on this matter usually arises on a plea of 'no case to answer' put forward by the accused at the close of the prosecution's case. But even in the absence of such submission the judge must consider whether the prosecution has made out a prima-facie case, for otherwise the accused has a right not to be put to his defence: *Abbott* [1955] 2 All ER 899, 903. See Glanville Williams]1965] Crim L R 343 and 410. On the duty of the judge to ensure that justice is done according to the law, irrespective of submissions from accused see: *Stirland* v. *DPP* [1944] AC 315, 327–8 per Viscount Simon LC; P. M. North, '*Rondel* v. *Worsley* and criminal proceedings', [1968] Crim L R 183.

[20] *Cross on Evidence*, 5th edn. (1979), 77. See also Edwards, (1970) 9 Western Australia L Rev 169.

Accordingly, the prosecution must adduce evidence capable of producing in the mind of an ordinary person conviction beyond reasonable doubt. Where the prosecution fails to adduce evidence in support of one of the elements of the offence or where the prosecution adduces evidence which is incapable of leading to the conclusion of guilt there will clearly be no case to answer.

It has been said that in determining whether there is a case to answer the judge does not weigh the evidence and does not assess the credibility of witnesses but only determines whether the required minimum of evidence has been adduced.[21] This statement is misleading. A certain amount of weighing is unavoidable at this stage because the trial judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt.[22] Suppose that the case for the prosecution rests on one witness who alternately affirms and denies that he saw the witness commit the offence. The judge is likely to hold that no reasonable jury could possibly convict on such evidence precisely because its probative weight is negligible.

The courts are uncertain how to treat mistaken rejection of a plea of 'no case to answer'. The difficulty concerns the situation where the judge wrongly rejects the accused's submission at the end of the prosecution's case, and in the course of his defence (or as part of a co-accused's case) other incriminating evidence is revealed which fills the gap in the prosecution's case. The question inevitably arises: Should the Court of Appeal quash the conviction?[23]

There are two schools of thought. The first is that on appeal the court must consider the evidence as a whole and that a

[21] *Barker*, unreported, per Lord Widgery CJ quoted in *Mansfield* [1978] 1 All ER 134, 140.

[22] See J. C. Wood, 'The submission of non case to answer in criminal trials: the quantum of proof', (1961) 77 LQR 491.

[23] Section 2(1) of the Criminal Appeal Act 1968, which deals with curable mistakes by the trial judge, has no application in this situation. It lays down 'that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.' Had the accused's submission of 'no case' been accepted, there would have been a directed acquittal. See *Abbott* [1955] 2 All ER 899, 902, construing the predecessor of the present provision.

conviction will be quashed only if it is unsafe or unsatisfactory on the totality of the evidence, including that which was adduced by the defence.[24] A second school of thought is supported by cases holding that as the accused had a right to be acquitted at the end of the prosecution's case, his conviction must therefore be quashed.[25]

Two competing factors are involved here. On the one hand, there is the principle that the accused has a right to say: 'If the prosecution can prove my guilt let it do so. I need do nothing to help it'. Consequently, once the prosecution's case has collapsed, the accused has a right to be acquitted without being put to his defence.[26] On the other hand the accused was, in fact, convicted on perfectly admissible evidence, and to acquit him now is to set free a person about whose guilt there is no doubt. Our courts seem to have given prominence to the latter factor and have upheld convictions where guilt appeared evident but not otherwise.[27] This approach is to be preferred because it gives due weight to the public interest in the conviction and

[24] *George* (1908) 1 Cr App R 168; *Pearson (No. 1)* 1 Cr App R 77, quoted in *Payne* v. *Harrison* [1961] 2 All ER 873; *Jackson* (1910) 5 Cr App R 22; *Fraser* (1911) 7 Cr App R 99; *Power* [1919] 1 KB 572.

[25] *Joiner* (1910) 4 Cr App R 64; *Abbott* [1955] 2 All ER 899. The former case was explained away in *Power* [1919] 1 KB 572. It has been suggested that the distinction between the two groups of decisions is that in the former the accused himself supplied incriminating evidence after the prosecution's case while in the latter the additional evidence was given by a co-accused who threw the blame on the accused; the authority is *Payne* v. *Harrison* [1961] 2 All ER 873 which was, however, a civil case and involved different considerations from those applicable in a criminal case; see *ibid.* 877. The neatness of the distinction is somewhat spoiled by *Power*, a case belonging to the first group, where the incriminating evidence was also supplied by a co-accused, albeit called as witness for the accused. It is difficult to see how this distinction can justify a different reaction to a mistaken rejections of 'no case' submissions.

[26] In *Abbott* [1955] 2 All ER 899, 903; Similarly, if the accused has pointed to sufficient evidence in the prosecution's case indicating the possibility of self-defence and the prosecution has failed to adduce evidence to rebut it, the judge must withdraw the case from the jury and not deny the accused the choice of whether or not to defend himself: *Hamand* (1986) 82 Cr App R 65 (see also Ch. 9). Unlike the position in criminal cases, in civil cases the judge need not rule on a defendant's submission of 'no case to answer' unless the latter elects not to give evidence. See also Wood, 'The submission of no case to answer in criminal trials . . .' (1961) 77 LQR 491.

[27] *Joiner* (1910) 4 Cr App R 64, does not fit into this explanation. Perhaps it was for this reason that it was not followed in *Power* [1919]1 KB 572.

punishment of offenders, and avoids the unedifying spectacle of acquitting an accused whose guilt has been in fact proved.[28]

It is to be noted that the trial judge may withdraw not only the entire charge from the jury but he may also withdraw a specific issue. The accused, for example, bears the burden of establishing the defence of insanity. If he fails to adduce *prima facie* evidence to sustain his plea, the judge will instruct the jury to dismiss the plea without considering it.

THE TEST OF 'UNSAFE OR UNSATISFACTORY'

There is a further stage at which the trial judge may be asked to decide whether the case should be withdrawn from the jury: after both the prosecution and the defence have presented their respective cases. Section 2(1)(a) of the Criminal Appeal Act 1968 provides that the Court of Appeal 'shall allow an appeal against conviction if they think . . . that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory'.[29] At one stage it was thought that an analogous test had to be applied by the trial judge in deciding whether to let the case go to the jury because a conviction based on evidence that cannot safely support a guilty verdict is bound to be quashed on appeal. A trial judge, it may be said, should not allow the jury to return a verdict of guilty which is bound to be quashed later.[30]

In *Galbraith*[31] the Court of Appeal has rejected this view, explaining that if the trial judge were allowed to consider whether a conviction would be unsafe or unsatisfactory he would inevitably be applying his views to the weight of the

[28] Different considerations may obtain where the trial judge rejected the accused's submission of 'no case' not in the mistaken belief that the prosecution has made out a *prima facie* case but because he felt that the accused should be made to answer the accusation all the same.

[29] This provision was first enacted by s.4(1) of the Criminal Appeal Act 1966. This provision replaced s.4(1) of the Criminal Appeal Act 1907 which empowered the court to quash a conviction if it thought it to be unreasonable or incapable of being supported by the evidence.

[30] *Mansfield* [1978] 1 All ER 134. For commentary see Devlin Committee on Evidence of Identification, para. 4.67.

[31] [1981] 2 All ER 1060.

evidence, which he must not do.[32] This explanation is unsatisfactory for, as we have just seen, a certain amount of weighing is inevitable. Indeed, some weighing of evidence is sanctioned by the very tests formulated in *Galbraith* itself:

> (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.[33]

The Court of Appeal's approach in *Galbraith* may be supported on the grounds that since an acquittal is not subject to appeal, a mistake by the trial judge in withdrawing the case from the jury is irredeemable. Thus, it could be said, except in extreme cases of insufficient evidence (falling under head (a) above) it is prudent to leave the final assessment of whether the evidence is safe and satisfactory to the Court of Appeal.[34]

The *Galbraith* policy of reserving the 'safe and satisfactory' test to the appellate instance suffers, however, from an almost fatal flaw: appellate judges are very reluctant to review factual decisions. Their reluctance is understandable in view of the fact that our procedure is essentially oral, making it difficult for a judge who sits on appeal to pass judgment on the basis of the written record. Even when the evidence is wanting on paper, appellate judges tend, understandably, to assume that if the jury was prepared to rely on it, there must have been something in the appearance of the witness or the way in which the

[32] [1981] 2 All ER 1061.

[33] [1981] 2 All ER 1062. For review of the authorities see Pattenden, 'The submission of no case to answer . . . ', [1982] Crim L Rev 558.

[34] It should be noted that the Court of Appeal has further powers of review, such as the power to hear fresh evidence in exceptional circumstances; Criminal Appeal Act 1968, s.23; *Parks* (1960) 45 Cr App R 1. Having heard fresh evidence it may quash the conviction or order a new trial; s.7 of the 1968 Act.

evidence was given to provide added weight.[35] Given that the trial judge has heard the evidence and is better placed to assess its strength, it would be better to allow him to apply the test under consideration leaving the appellate court with an opportunity for a second opinion.

[35] This point is illustrated by the reluctance of appellate courts to quash convictions based on visual identification notwithstanding the notorious unreliability of such evidence. See Twining, 'Identification and misidentification . . .', in Lloyd-Bostock (ed.), *Evaluating Witness Evidence* (1983), 255; Gross, 'Loss of innocence: eyewitness identification and proof of guilt', 16 Journal of Legal Studies 395 (1987).

5

Opinion: Probative Utility and Lay Standards

THE 'OPINION' RULE

Witnesses, according to legal tradition, are allowed to testify to facts but not to their opinions. The jury must draw its own inferences from the facts stated by the witness; the witness has to confine himself to recounting what happened.

However, 'opinion' is an ambiguous term. Most factual reports of witnesses involve opinion. I observe the back of a person with a stoop walking across the road and decide that it is my friend *X*. When I testify that I saw *X* across the road, I do not just report what I saw but also the opinion I formed about what I saw. As Thayer observed, '[i]n a sense all testimony to matter of fact is opinion evidence; i.e. it is a conclusion formed from phenomena and mental impressions'.[1] Yet clearly the law does not mean to exclude my testimony. Although most lawyers would accept that in the absence of a legal definition of 'opinion' the distinction between statements of fact and of opinion cannot govern admissibility, the rule excluding opinion evidence continues to be described in terms of this distinction. The highest claim that seems to be made for it is that it appears to work because it is 'laxly applied'.[2] But what is important is to know what lies behind this uneven application of the rule or, in other words, what are the considerations that govern admissibility or inadmissibility.

On examination, hardly any decision will be found to turn

[1] Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898), 524. See also *Wigmore on Evidence*, Chad Rev, vol. 7, s. 1978. '[T]he testimony of any witness', Weinstein observed, 'describes the combination of himself and the event'. Weinstein, 'Some difficulties in devising rules for determining truth in judicial proceedings', 66 Col L Rev 223, 231.

[2] Cowen and Carter, *Essays on the Law of Evidence* (1956) 164. See also Heydon, *Evidence, Cases and Materials*, 2nd edn. (1984) 367.