Party Disability to Testify as to the Facts under Continental Code and Anglo-American Systems

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I. PRELIMINARY

A German appellate court judge, who spent six months in the United States of America came to the following conclusion:

"The gap between American and German jurisdictions can be said to be as large and boundless as the ocean separating American from the European continent......."

Indeed, it is very true that there are many legal phenomena which invite puzzling ideas to the lawyers from non-English speaking countries in the United States.

Legal education in the United States, conducted by the case method, tends to emphasize the importance of policy and factual considerations in the decision-making process. In so doing it directs attention towards the functional nature of the judicial process, since the notions of common law are conceived in a concrete practical manner within the frame of an actual case, for which the most appropriate and just solution must be found. A writer summarized it thus:

"...... The rules and principles of case-law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment......... The principles themselves are continually tested: for if the rules derived from a principle do not work well, the principle itself must ultimately be reexamined." 1

On the other hand, legal education under civil law system pays relatively less attention to the importance of policy and factual considerations in the decision-

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making process. This is due in part to the importance in continental legal education of the lecture method which inclines towards an exposition of general principles from which the results in concrete cases are derived from a process of deductive reasoning and which gives little opportunity for a full exploration of the factual background of individual decisions, for civil law jurisprudence follows, and has followed for centuries, abstract logical categories; it strives for arriving at broad, general, clearly defined and logically interrelated concepts and homogeneous institutions, to be applied to as many similar factual situations as possible by way of interpretation and subsumption.

Apart from the entity of legal education itself, there are a number of diversities with respect to the adjective law with which this paper should closely associate with. As an old German said,

"Man muss nicht das Kind mit dem Bade ausschütten—You mustn't empty out the baby with the bath water", procedural and substantive elements in law are intimately intermingled.

II. COMPARATIVE CHARACTERISTICS OF ANGLO-AMERICAN AND CONTINENTAL RULES OF EVIDENCE

Let us examine some striking procedural structures of civil law system in the light of Anglo-American practice to furnish an aid for further analysis of the original subject of this article. In most civil law countries, the jurisdiction of the ordinary civil courts is essentially limited to controversies involving private rights and the application of private law as distinguished from public law. To the extent that public law controversies, that is controversies regarding the validity and propriety of administrative and other official acts, have been made justiciable by an administrative code or other statute, they are determined by administrative courts. In fact, it has been generally conceded that the Civil Law

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2. This is generally true in France, but some of civil law countries discarding this kind of form. For instance, in the case of Japan, after the enforcement of new Constitution, the administrative actions, such as the action for cancellation of the purchase of the agricultural land by the government, the action for modification of levy of tax and the action for making an illegal election invalid, ect., are tried according to the Code of Civil Procedure together with special legislation called Administrative Procedure Act.
is dualistic law. The distinction, dating back to the very beginning of Roman
history and clearly laid down at the outset of the Digest in the famous quotation
from Ulpian. Its consistency with the prevailing trends in the political and
historical development towards the authoritarian state was one of the reasons for
the reception and it was unknown to Germanic law which had been dominant
in some of the European countries prior to the reception of Roman law. Ulpian
based the distinction upon the double status of the human being as an individual
and member of organized society which is endowed with sovereign power. This
dualistic nature of law brings about a more authoritarian form of procedural
device in the criminal procedure, as compared with the civil proceedings, since
the criminal law is known as public law in the civil law countries.

A further peculiar instance of procedure in the civil law countries can be found
in the countless cases in which one and the same wrongful act entails both criminal
and civil liability, many civil law jurisdictions give the injured party a right of
election: he may bring an independent civil action, or he may intervene in the
criminal action and become a co-plaintiff together with the public prosecutor. If
he chooses the latter method, which in the most instances will be speedier and
less expensive, the criminal court has jurisdiction to include in the sentence
provision for damages to be paid by the defendant to the injured plaintiff.

Most of all, virtually incomprehensible to the civilian the term refers to a
lawyer trained under the civil law system, are the inherent powers of the court
which in bygone days the courts possessed by virtue of their own pronounce-
ments at law and in equity and quite independent of any statute. 3 For him, the

3. As to the nature of inherent powers of court, In re Steinway, 159 N.Y. 250, 63
N.E. 1103 (1899), is noteworthy to give a comparative idea of code-governed
courts of civil law country. A main issue was raised in that case that has the
Supreme Court of New York the power, upon the petition of a stockholder, to
compel by mandamus the corporation to exhibit its books for his inspection? The
court answered, very strangely to civilians, that "the general jurisdiction in law
and equity which the supreme court of the state possesses under the provisions of
the constitution includes all the jurisdiction which was possessed and exercised by
the supreme court of the colony of New York at any time, and by the court of
chancery in England on the 4th day of July 1776...... We have the powers of the
court of kings bench and the court of chancery as they existed when the first
court is a creature of the statute and he may find that under the applicable provisions of the codes there is often no remedy corresponding to the writs of habeas corpus, certiorari and mandamus, and that the code-governed courts of a civil law country have no inherent power to grant any of these remedies.\footnote{In most of civil law countries, writ of habeas corpus provision usually appears in the Constitution or legislation. In Germany, for instance, The Basic Law for the Federal Republic of Germany (1949) provides in (2) of Art. 104: “Only judges may decide on the admissibility or extension of a deprivation of liberty. Where such deprivation is not based on the order of a judge, a judicial decision must be obtained without delay. The police may hold no one on their own authority in their own custody longer than the end of the day after the arrest. Details shall be regulated by legislation”. In view of the nature of writ of habeas corpus under American jurisdiction, it is doubtful whether the legislature can regulate the free exercise of inherent powers of the court especially with respect to the recent legislative proposal to limit the habeas corpus proceedings.}

Another interesting instance is in the Continental procedure of the interlocutory order directing the taking of evidence. It has been reported that such an order is appealable in France.\footnote{See Wright, French and English Civil Procedure, 42 L. Q. Rev. 327, 502 (1926). R. Schlesinger, Comparative Law, Brooklyn, Found, Press, 201-204 (1950).} In this respect, the French system may lead to delay by encouraging appeals from interlocutory orders. In other civil law countries, for instance in Germany, where such an order is not directly appealable, the court of first instance can delay the proceeding for a long time by directing, in several successive interlocutory orders, the taking of irrelevant evidence.

A. THE SCOPE OF APPLICABILITY

To begin with, the Anglo-American rule of evidence is applicable equally to criminal and civil proceedings since both proceedings are based on the same principle of party disposition. On the other hand, it has been generally considered that different rules of evidence may apply in criminal and civil proceedings under civil law systems.
B. THE JURY SYSTEM

In the development of the jury system as a characteristic of alleged administration of justice, we may trace a very long existence, unbroken in England but subject to many vicissitudes in the civil law countries. The introduction of the jury system into French criminal procedure at the Revolution was itself the result of a revolt against what was judged to be the cruelty and the insufficiency of the criminal trial at that time. Following a series of shifts, it has been settled that the trial by jury in criminal cases was established in 1939 in France. Germany abolished jury trials in the 1924 revision of its Code of Criminal Procedure, but it has been reported that in American-occupied Bavaria trial by jury in certain felony cases was re-introduced, but was eliminated again in September 1950, by law on the Restoration of Uniformity of Law (Gesetz zur Wiederherstellung der Rechtseinheit). In Japan, the sole advocate of the jury system in the Far East, the jury system has been in force since 1928 and it was suspended during World War II. There is no immediate sign of resumption.

An English critic commented as follows on the French jury system:

"The jury is in France an exotic innovation. It is scarcely matter for wonder that there it functions imperfectly. But the English observer should not conclude that the obvious remedy is therefore to introduce into France the circumstance of an English trial. I suspect that it would be repugnant to the French sense of justice and propriety to propose that the inquiry by the juge d'instruction should be jettisoned and that the guilt or innocence of the accused should be allowed finally to depend on what may seem to the French to be, and what in France might well be, the extremely fortuitous outcome of that markedly gladiatorial, and in any event highly peculiar, enterprise which in England we call a trial."

the contrary, the most promising line of reform in France...... a line which is indeed proposed by the more perspicacious there... may well lie in the attempt to make more careful, more exact and effective that very inquiry by the juge d'instruction which to us seems the obstacle and the anomaly”.

The operation of that jury system itself provides peculiar proceedings which contrast quite a bit with what goes on in the Anglo-American courts. There is no charge to the jury upon the law of the case and after experience with verdicts by three-fourths and five-sixths of the panel of twelve, the French Legislature many years ago adopted the principle of a majority verdict. Following the speeches by the lawyers, the president reads a series of brief questions to which the jurors, by a majority vote, return categorical answers. For instance, the president may read thus: (1) Did the accused kill the deceased? (2) Did he act in self-defence? (3) Did he kill with pre-meditation? (4) Did he rob the deceased? Upon the basis of the answers returned the president, after consulting his associates, pronounces sentence. French jurists declined long ago to incorporate in their procedure the Anglo-American custom of summing up.†

Apart from the peculiar nature of French proceedings of jury trial, the dossier produces some confusion at the trial. The dossier is the whole of the material of the preliminary hearing which goes forward with the prisoner to the court of trial and which stands as an enormous weight against the accused. The oral evidence is orally adduced; but the evidence so adduced is not self-....

7. It is forbidden to the presiding judge to sum up by the law of 19th June, 1881; Code Inst. Crim., Art. 336. He merely directs the jury as to their duties, and puts to them the prescribed questions which considered to be procedural rather than evidential. Also it will be remembered that Napoleon I took the view that the jury (borrowed from England) was an institution of purely political origin. As Mr. Justice Brewer said: “damned as faint praise,” there are many French criticsim to the maintenance of the jury system. Quickest way to produce twelve lawyers. Following articles dealt with jury system: Hammelmann, the Evidence of the Prisoner at his Trial, 37 Can. Bar Rev. 652 (1949); Jackson, Some Problems in Developing an International Legal System, 22 Temple L. Q. 147 (1948); Ploscowe, Jury Trial in France, 29 Minn. L. Rev. 376 (1945); Woods, The Efficiency of French Justice, 15 A.B.A.J. 162 (1929); Garner, Criminal Procedure in France, 25 Yale L. J. 225 (1916).
Contained and complete in the Anglo-American sense, since it is not rehearsed anew. It shows the fragmentary and imperfect nature of the oral evidence. It gives an impression of an experted story from the dossier which is at the disposal of the president but not, in court at least, of the jury.

C. PRINCIPAL FEATURES

It has been considered that Anglo-American rule of evidence has achieved its development in conjunction with the jury system and Professor Wigmore strongly argues that the hearsay rule, as a most important rule of evidence in Anglo-American proceedings is a product of the jury system which constantly required special precautionary device so as not to create factual confusion on the part of lay jurors. To this opinion, Professor Morgan expresses a strong challenging opinion to the effect that the hearsay rule is a result of the traditional Anglo-American principle of party disposition rather than the result of the jury system. 8 Whatever the source of present Anglo-American rules of evidence, and whatever the origin of the hearsay rule may be, at least nobody would deny that the Anglo-American rules of evidence had a close tie with the jury system. To support this contention, recent developments in the rules of evidence in England should be mentioned. The British Evidence Act of 1938 has relaxed the traditional hearsay rule and granted so-called “document in lieu of testimony before the the court” since principally there is no jury trial in civil cases in England. 9

One point should, nevertheless, be mentioned at this time, because of its practical importance to the Anglo-American rules of evidence. History shows that between the 18th and 19th centuries, equity courts started to adopt the same rules of evidence that were in use in the common law courts in the Anglo-America system. This process of adoption has shown no defects in being applied to the non-jury trial even providing the gracious proposition of humanity.

1. Principle of Party Disposition

As professor Morgan insists, the Anglo-American rules of evidence spring from the principle of party disposition. This principle prevails in the civil as well as in the criminal proceedings, as previously mentioned. Indeed, Anglo-American trial proceedings give an impression of playing a sport or a game as of jury or judge assumes the role of an impartial and passive third observer. This offers a contrast to the Continental hearing proceedings where judge assumes the role of leading actor and both parties merely furnish assistance to solve disputed fact or facts.

The basis of the principle of party disposition is the oral proceedings so that it can be called the principle of orality. In the Anglo-American court, every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. On the other hand, in France, oral evidence is only admissible exceptionally and by the preliminary hearing where it is in the discretion of the examining judge. The French proceeding is a typical example of the principle of documentation which is essentially a survival of the medieval system, and is the antithesis of the principle of party disposition.

In the Code of Civil Procedure, some civil law countries have the provision which announces: "The decision of the court is based on the evidence introduced by the parties..." 10 According to the prevailing opinion in civil law countries, the rights and duties in disputes in civil proceedings are generally rights and duties of which the parties are free to dispose, not only in the framing of their pleadings, but also in the conduct of the hearing and even in the introduction of evidence. Even assuming this principle of party disposition governs in some civil law countries, the alleged concept under the civil law system is still far removed from that of Anglo-American system because the Continental system has no rules

equivalent to the Anglo-American rules of evidence. The Anglo-American system, in general, admits or requires oral evidence of the parties, subject always to cross-examination: but nevertheless has extremely strict rules of evidence which govern what the admitted witness may say and how he shall say it.

2. Exclusionary Rules of Evidence

The same evidence that would be admissible in most civil law countries must face the exclusionary rules of evidence in Anglo-American courts because of the nature of its provative value. Whether the striking difference in the law of evidence which exist between Anglo-American and civil law, belong to the “fundamental” or the “technical” category, is a more difficult question since to civilians it is a cause of pride that they have essentially freed their courts from the artificial restrictions on the admission of relevant evidence. On the contrary, to the commoners (the word refers a lawyer trained under the common law system) it is a cause of pride that they have maintained the exclusionary rules of evidence to secure better administration of justice.

a) Hearsay Rule

Apart from the question of possibility to adopt hearsay rule in criminal procedure in the Continental court, let us examine the role of hearsay evidence in the Continental courts especially in civil cases. On this point, Art. 257 of new Italian Code of Civil Procedure should be noted. It says:

“If a witness refers to another person from whom he has learned the facts to which his evidence relates, the examining judge may ex officio order that this person be called as a witness to give testimonial evidence.”

As to the general restrictions placed on the admissibility of testimonial evidence to prove mutual agreements and contracts, there is no uniform legislation due to the fact that a general restriction on oral proof of contracts involving more than a certain amount usually prevails in Italy and France. However,
the restriction does not exist in Germany, Switzerland and Austria nor in the other civil law countries where the French form of civil code is not predominant. With respect to this question, an interesting trend of legislation in Italy is in line with English decisions which admit parol evidence of a subsequent agreement between the parties varying the terms of the original contract. These English decisions are explained in terms of "corroboration rule." At any rate, the new Italian Civil Code has granted the court discretionary power to admit testimonial evidence even in excess of the legal limit and Art. 2723 of its Civil Code also expressly admits oral evidence of subsequent agreements.

b) Question of Relevancy

Regarding civil or common law systems, the fundamental principle of the rules of evidence is that "fact must be determined by the evidence." However, no one can expect that disputed fact in litigation can always be determined by

11. Art. 2734 Civil Code, maintains a general restriction on witness evidence which is excluded for proof of contracts exceeding 5,000 lire in value.
12. Art. 1343, Civil Code, reads: "A person who has brought an action for more than five hundred francs is not allowed to produce oral evidence, even by reducing his original claim." By law of Feb. 21, 1940, the amount has been raised to 5000 francs.
13. For instance, J.M. Mackay says: "Probably the principal difference between the rules of parol testimony in England and Scotland is the rule that in Scotland, in common with most other European countries, except England, the uncorroborated testimony of one witness is not sufficient legal proof, whereas in England it may be. This is said to be a relic of the effort made during the Middle Ages in Europe, to weigh evidence by mechanical means—a effort which led to many stupidities from which, no doubt, Scotland suffered as well as other European countries (although there is no evidence of this, apart from the survival of the corroboration rule). In any event, the corroboration rule, although at times decried and at times leading to mere mechanical repetition has still got its uses if applied with discretion." 14 Modern L. Rev., 171 (1951).
14. Par. II, Art. 2721 reads: "The judge may consent to admit testimonial evidence beyond the aforesaid limit, having regard to the position of the parties, the nature of the contract and any other circumstances."
15. It reads in part: "......having regard to the position of the parties, the nature of the contract and other circumstances, it seems likely that such additions or modifications have in fact been made by word of mouth."
the direct evidence. In most instances, at least in civil law countries, the practice has been prevailed to the effect that litigated fact or facts very often prooed by the analogy of already determined indirect fact. Of course, if that determined indirect fact seems to have no effect of analogy at all, it should be considered as an immaterial factor in determining the disputed fact in litigation and subject to the exclusionary order of the court. This gives a strange impression to commoners in view of the Anglo-American rule of relevancy. Undoubtedly, Anglo-American rules of evidence would not allow such a proceeding in toto, but civilians would be shocked if Anglo-American courts precluded the fact which substantially contains logical force in proving litigated fact or facts.

Indeed, the civil law system has long been based on the fundamental proposition that, in principle, all evidence which has probative value should be admitted in court and open to free evaluation by the tribunal. It has not given such prominence to the study of questions of admissibility and relevance as English law, and does not contain a systematic enumeration of inadmissible evidence. It is true that there are, however, conditions which limit the admissibility of evidence. The Italian Code of Civil Procedure, for instance, imposes the duty upon the examining judge to admit instruments of proof proposed by the parties only "if they are relevant and admissible". 16 Apparently, relevance in this connection is presumably a question of fact and admissibility one of law, but it is a mere nominal provision since the Code gives no clue to the actual solution.

3. Witnesses and Introductive Proceedings

The function of the court under the civil law system is considered to fall into two parts: to receive the evidence brought forward by the parties, and to render judgment. Perhaps, this is a simplified statement, but it will invite numerous variations in judicial process when it has been put in its proper perspective of comparative study with the common law system.

a) Witnesses

Continental lawyers make a careful distinction between the expert witness and

the lay witness as used in the Anglo-American legal system, to the effect that an expert should not be regarded as an instrument of proof at all. Continental systems define an expert as a person who conveys to the court scientific information on abstract questions of fact. It is generally recognized that most of the countries under the civil law system uniformly insert rules of evidence concerning the expertise in their codes of civil and criminal procedures. A typical example is the French Code of Civil Procedure which contains a detailed set of rules governing the position and evidence of experts in civil actions. The number of experts is usually three, but, in any case, an odd number, in order to facilitate the formation of a majority. The parties are, in principle, free to delegate the task of preparing the "expertise" to anyone they wish without restriction, but in practice they select eminent persons who possess special qualifications to deal with the question at hand. In Italy, the right of the court to appoint its own expert witnesses has been retained in the new code of civil procedure, and the concept has been extended to include a "technical consultant," appointed by the court from official rosters containing the names of experts in

17. A writer summarizes thus: "Dominant French opinion holds the view that experts as defined in the French Code of Civil Procedure cannot...... as in England they must...... be regarded as witnesses, and some writers go as far as to deny that they can be considered as instruments of proof at all. Glasson (Traité de Procedure Civile, Vol. I, 617 ff.) argues that the experts exercise "une partie de la jurisdiction" and regards them as assistants of the tribunal, carrying out a truly public function. Glasson's view is based in the first place on the fact that, even though the parties may choose the persons of the experts, it is the court which appoints them and invests them with their function. But there are a number of other points which speak in favour of his argument. Experts can refuse to accept the office (art. 316), while witnesses are, of course, obliged to testify (art. 316), whether they like it or not. When carrying out their investigation, for example, when undertaking an inspection or an experiment, experts are entitled to put questions to the parties or their counsel present, and can even, according to some authorities, call in their person who, though not as witnesses, may provide them with information......" Expert Evidence, H.A. Hammelmann, 10 Modern Law Review, 38 (1947).

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such fields as medicine, industry, commerce, agriculture, banking and insurance. These experts have investigative powers. The court is not bound to act upon it but if the Continental judges are more ready to rely on expert evidence than Anglo-American courts, the main reason lies in the fact that experts nominated by the court are far better calculated to assist the court in arriving at a conclusion on difficult technical matters than experts hired by the parties, who usually turn partisan and endeavour to destroy the case of their opposite number. At least one case in the Federal courts favors the idea of court appointed expert so far. 20

In criminal proceedings, the picture is little different. For instance, in French criminal proceedings, the appointment of the expert or experts rests exclusively within the discretion of the court. As the nature of continental criminal proceedings shows, in the inquisitorial criminal procedure the expert witness appears fundamentally as an auxiliary to the investigating magistrate or to the trial judge in getting at the truth. 21 In most of the cases it is completely within the discretion of the investigating magistrate or trial judge as to whether or not he will in any particular instance order the employment of an expert. It is only at the trial level, in most of the Continental courts, that the defense has any very effective chance to impugn the findings of the official expert. Because of the decisive influence of the report of the official expert and in view of the fact that even the best experts may make a mistake, the battle of experts is not avoided by most of criminal procedure on the Continental Europe. The official expert must testify orally. The written report he made in the preliminary stage serves as a basis for his examination. He may therefore be cross-examined by defense counsel who may also call his own experts to contradict the official expert. The lines, however, are somewhat differently drawn than in America. Both experts are examined originally by the presiding judge and not by the

21. So far this is true in Germany that when the judge chooses a certain expert for specific operations, his participation in the procedure may be challenged by the parties on the same grounds as a judge may be challenged, e.g., interest, enmity, relationship, etc.
prosecutor or defence counsel. Moreover, these experts are not confined by any restrictive rules of evidence in giving their opinions. French and German evidentiary rules are much more liberal than the Anglo-American. An effort has been made in France to provide the necessary controls by the defendant over the work of the official expert. 22

Experts in most civil law countries enjoy considerable credit and reputation in courts because of the elaborate provisions of the codes of civil and criminal procedures. Some French practitioners commented that French Courts are inclined to accept expert evidence at its face value, and assert that the courts have fallen into the bad habit of throwing their responsibility too often, and unnecessarily, upon experts.

Apart from the question of experts, the majority of countries under the civil law system provide qualifications for withnesses. Soviet Russia 23 and Yugoslavia 24

22. The investigating magistrate would be required to appoint two experts, an official and a defense expert. All the operations prior to the formation of the opinion would be performed by both men. If the two experts come to different conclusions then a third expert will be appointed by the magistrate. This procedure is already used in France in special cases, such as adulteration of food, frauds in merchandise, and unlawful speculation. French reformers wish to generalize this system and make it the ordinary procedure.

23. Zelitch, Soviet Administration of Criminal Law, Univ. of Penn. Press, 172, and Hazard & Weisberg, Cases and Reading on Soviet Law, Parker School of Foreign and Comp. Law, Columbia Univ., 15-16 (1950), give following informations: Code of Criminal Procedure of 1927 provides that the following persons may not be called or examined as withnesses: (1) The advocate of the accused; (2) persons who by reason of physical or mental deficiencies are incapable of realizing the import of the case and of giving correct testimony. (Art. 61) To determine the ability of a person to be a witness expert may be consulted. Code further provides that “The inquisitor shall not have the right to refuse the request of the accused or of the complainant to summon additional witnesses or examine experts if the facts or circumstances sought to be established may have any bearing on the case.” (Art. 112) Most of all, the main feature of Soviet rule of evidence specified in Art. 57. It reads: “The court shall not bound by any formality of the testimony, and it shall be utterly within the discretion of the court to decide, under the circumstances of the case, whether it should admit any given testimony, or demand such from third persons (not parties to the action), which demand shall be complied with.”

24. Articles 219-230. Code of Criminal Procedure, provide the process of hearing of
follow the same line of legislation. Since the value of testimony, which is an
assertion offered in court as proof, depends entirely upon the triple supposition
that the witness has not erred in perceiving, correctly remembers what he
perceived and will not deceive the court because of interest in giving his testi-
mony, most of the civil law countries following the Romano-Canonical tradition
maintain the code provision that all persons can be witnesses unless they are
explicitly rejected by the law, either absolutely or partly. However, in specifying
exactly when the above essential qualities are lacking, the traditional line of the

witnesses. These articles prescribe, inter alia: any individual summoned as a
witness shall be bound to answer the summons; such individual shall be bound
to give evidence so long as the Code does not provide that he may not be heard
as a witness or that he shall be exempted from the duty of giving evidence; until
he is released from the duty by the authorized organ, the individual was might
violate the duty of preserving an official and military secret with his evidence
may not be heard as a witness, nor may the defense council of the defendant
give evidence on what the defendant had entrusted to him as his defense counsel;
exempted from the duty of giving evidence are the spouse of the defendant, the
next of kin up to a definite degree, the adopter and adoptee of the defendant and
the religious confessor with regard to anything the defendant had confessed to
him; witnesses may be required to take the oath; the witness who fails to answer
the summons for giving evidence may be fined, and if witness refuses to give
evidence, he will be subject to imprisonment. Articles 231—247, supra, deal with
“on the spot investigation and experts.” These articles provide, inter alia, that
the person who is summoned as expert shall be bound, under the pain of a fine,
to answer the summons and give his expert findings and opinion; persons who
may be heard as witnesses or who are exempted from the duty of giving evidence,
as well as persons against whom the criminal offense was committed may not
be engaged as experts: experts may be required to take the oath prior to giving
evidence. In addition, the Code contains provisions for certain cases of expert
evidence (the examination and autopsy of the corpse; the examination and of the
human embryo and of the newborn’s corpse, homicide by poisoning, assessment
of body injuries, assessment in regard to a defendant suspected of suffering from
a mental disease which eliminates or reduces his sanity, the physical examination
of the defendant and of other blood test and so on). Art. 247, supra, explicitly
prohibits the use of medical means on the defendant or witness and the admin-
istering of anything to them which would influences their will making statements.
These informations are obtained from “The New Yugoslav Law”, Bulletin on
Law and Legislation in the Federal People’s Republic of Yugoslavia, Belgrade,
code provision usually sets forth, under roughly three headings, those who are to be rejected as witnesses: (1) Those unfit to give testimony. In this category are listed persons who have not attained maturity or the weak-minded adult. (2) Those who are to be considered as suspect. Here are included: (a) perjurers; (b) persons branded as infamous after a declaratory or condemnatory sentence; (c) Persons who are not considered trustworthy because of bad morals; (d) public and bitter enemies of the contesting parties. (3) Those who are disqualified. (a) Those who are parties to the case or those who take the place of the parties. e.g., guardian in the case of a minor, a superior or administrator in the case of his community the judge and his assistants, the advocate and others who assist or have assisted the parties in the same case. (b) Husbands in the case of their wives and vice-versa; blood relations and relations by marriage in the case of persons related to them in any degree of the direct line and in the first degree of the collateral line, except in cases which deal with their civil or religious state, the knowledge of which cannot be had from other sources, and when the public welfare demands that the truth be ascertained. By way of exception, however, blood relations and relations by marriage in any degree of the direct line and in the first degree of the collateral line are permitted to be witnesses in marriage cases. Despite the above general principle of rejection of persons established by the the Romano-Canonical tradition, this basic principle has been modified to the various degrees in each individual nation which follows the civil law system. However, it should be borne in mind that traditionally an exceptional rule has been established so as to give a great deal of discretion to a judge who may admit them as witnesses and examine them, if he feels that it is advisable and will help in eliciting complete truth or in discovering sources of proof or evidence of which the tribunal was hitherto unaware. 25

It is interesting to notice that the traditional Romano-Canonical rule has been changed in the course of history. For this purpose, at least to have a bird's eye view of the evolution, let us take the case of Sweden. It's Code of Civil Procedure

of 1948 is illustrative. Everyone has a duty to give evidence except: (a) persons closely related to a party need not give evidence at all; (b) civil servant may not be heard as facts covered by their duty of secrecy; (c) confidential communications to lawyers, physicians, and clergymen are privileged, but the client may waive; (d) trade sece.ries are privileged unless there is a particular reason to disclose; and (e) the witness need not say anything that would disclose that he or someone close to him has committed a crime. In addition, children under fifteen and persons of unsound mind may be heard as witnesses only by leave of court. Parties are heard, but not as witnesses. Hence their testimony is estimated like anything else occurring before the court. 26

b) Introductory Proceedings

Generally speaking, in civil matters, the French and Italian line of civil law countries puts emphasis on the preliminary hearing. On the other hand, the German, Swiss and Austrian line of civil law countries places less emphasis on the preliminary hearing. For the purpose of discussion, it might be convenient to consider under two separate headings, namely, in criminal proceedings and in civil proceedings.

i) In Criminal Proceedings

In France, Germany and Italy, an investigating magistrate conducts an impartial judicial inquiry into the most important criminal cases as a preliminary proceeding, and prepares them for formal trial. He is known as the "juge d'instruction" in France, the "Untersuchungsrichter" in Germany, and the "giudice inquisitore" in Italy. His mission is to get at the truth of each criminal charge and he therefore gathers evidence both for the prosecution for the defense. Since he is a judicial officer, he has wide powers of arrest, preventive detention, search and seizure, etc., to aid him in his investigations. The result of his investigations appears in written documents, called dossiers, already referred to in its function in the criminal trial. The suspect is brought into the process at a point much

earlier than that at which he is brought into the Anglo-American process. In Continental process the function of the investigation magistrate starts after the suspect has been brought in. But in Anglo-American process, the inquiry is concluded before the appearance of the prisoner in front of the magistrates. In fact, the Anglo-American magistrates do not conduct an inquiry. They hear the results of an inquiry which has been conducted. The preliminary examination in Continental process does not result in a finding of guilty. In the case of a committal for trial the investigating magistrate concludes only that a case sufficient to warrant the trial of the suspect has been made out and as a matter of principle the prisoner continues to be presumed innocent until proven guilty. Because the inquiry in Continental process is one in which the suspect has officially participated and has been heard and during which he may have actually admitted the offense, the committal by itself is there a good deal more probative of his guilt than is the Anglo-American preliminary hearing, where the magistrate normally takes cognizance only of the ex parte evidence collected by the police by its own process and for its own purposes and where the prisoner often enters only a formal plea of not guilty and reserves his defense.

At the trial, the prosecutor and accused are granted the same measure of procedural rights, but they do not dominate the trial as they do in England and America. A continental trial is actually conducted by the presiding judge. He does most of the questioning. His duty is similar to that of the investigating magistrate. He must get at real facts in every case. As does the investigating magistrate, he examines the accused, the experts and witnesses. He does his best to clear up the criminal charge.

As for the practice in Soviet Russia, Zelitch gives this description: 27

"The testimony of the witnesses or the defendant during the preliminary inquiry or investigation is usually not to be read at the trial, for the accusatory conclusion, directly or indirectly, had already incorporated the testimony of all the witnesses. But when a witness at the trial contradicts the testimony previously given by him at the

pre-trial proceedings, or fails to appear at the trial, though summoned, his testimony at the preliminary hearing may be read at the trial, on the motion of the court, or at the request of one of the parties. When one of the defendants dies before the trial his testimony may be read in favor of or against the other defendants (sections 294, 295, 296, 297). The reading of the pre-trial testimony of a witness who has not been summoned to the trial is permissible only upon a special decision of the court (section 297). The testimony of the defendant obtained during the preliminary inquiry must be read at the trial if he refuses to testify at the trial (note to section 294), which he may do.”

ii) In Civil Proceedings

Introductory proceedings in civil cases can be divided into three groups according to prevailing practices. The first group is the French and Italian line

28. Hazard & Weisberg, Cases and Reading on Soviet Law, supra, 117-118, gives interesting proceeding in Soviet Russia. The accused, sixty-six years of age, was found guilty by the provincial court of forcing his feeble-minded daughter who was materially dependent upon him to have sexual relations with him. He was sentenced to deprivation of freedom for two years under Criminal Code. Supreme Court of RSFSR declared: “The conviction is based upon the testimony of a feeble-minded woman, who in the opinion of medical expert testimony was capable of lying and exaggerating. Moreover, there was noted in the case on the part of close relatives of the accused who testified for conviction an effort to get free of the accused and to separate him from the use of the property. Further, the close and distant relatives gave completely conflicting testimony and estimates not only of the character of the accused but also of all of the material circumstances. Further, the court, who did not agree with the expert testimony, failed to give its reasons in the opinion. All of the material in the case indicates that the case arose out of a family quarrel concerning the division of property and that the feeble-minded victim was used for the purpose. For these reasons the conviction must be set aside and the case demanded for retrial in the same court with a different bench of judges. Retrial must begin with the preliminary investigation with attention to the opinion of authoritative medical experts and psychiatric experts since the testimony of the feeble-minded Tatyana Roganova (victim) is of value as evidence. There must also be more careful investigation of the physical condition of the accused who is in his declining years and the opinion of the experts on that score is as yet unknown⋯⋯”
of civil law countries where the preliminary hearing is considered as important: and the second is the German, Swiss and Austrian line of civil law countries where less importance is given to the preliminary proceedings. The third group is the Swedish and Japanese line of countries where the Anglo-American form of proceeding has been adopted. In addition, the Soviet Russian line of practice, as touched on before, is worthwhile to exploring to see to what extent it is cutting across the civil and common law lines, but it will not be dealt with here.

A French court of the first instance can exercise a greater control, because there is no jury in civil cases, over the factual side of a case before it than does an American court of first instance. In spite of this, the French court of first instance tends to insulate itself from the fact-finding process, and, thus, to a certain extent from the facts of the case, by the practice of hearing testimony is a separate proceeding, the "enquete", rather than as a part of the proceeding before the full bench. The enquete is conducted by a "juge commissaire" who is usually, though not always, one of the judges of the bench before which the case is being argued. As a result, only one judge of the three who will decide the case has had an opportunity to hear the witnesses and evaluate their testimonial capacity. The other judges will consider the facts from the written record. 29 In order to explore further the French and Italian line of practice, the new Italian Code of civil procedure should be read. The first task of the Tribunal, when entrusted with a case, is the appointment of Giudice Instruttore—examining judge—whose powers are extremely wide 30 so as that the trial proceeding degenerates into a mere formality. The proceedings before the examining judge, during which all evidence is introduced by the parties, follow the principle of orality. 31 As men-

29. A.V. Mehren. The Judicial Process in the United States and in France, 22 Revista Juridica de la Universidad de Puerto Rico 254, (1952-53), reports: All testimony is taken by the full court in proceedings before the commercial courts and in summary proceedings before the civil courts. Proposal has been made, so far without success, which would tend this practice to ordinary civil proceedings. 30. Book II, Title I, ch. 2; art. 175 ff, Code of Civil Procedure. 31. Art. 180, supra.
tioned before, the examining judge is, under certain circumstances, entitled to
delegate his duties further to a technical consultant. The hearing before
the examining judge is open to the parties and their counsel only, and not public.
The result of these preliminary proceedings, especially of the reception of the
evidence, is embodied in a written report which is transmitted to the tribunal
when the case is ripe for decision in the view of the examining judge. The
Code of Civil Procedure regulates the introduction before the examining judge
of the various instruments of proof and in addition, the Civil Code provides
other rules concerning evidence. 32 The examination of the witnesses is conducted
by the judge, and the parties have no right of cross-examination. 33

So much for French and Italian procedures, let us further proceed to see the
prevailing practices in the German, Swiss and Austrian line of civil law countries.
The process of preliminary hearing is prescribed under the German Code of Civil
Procedure, 1877, as amended 1950. 34 Trial proceedings are conducted by one
judge in the Summary Court, by the presiding judge of a collegiate body con-
sisting of, as a rule, three judge in the District Court. In the case where the
court handles a case through a collegiate body, it may conduct the preparatory
procedure prior to the formal trial proceedings if it deems the case complicated
and troublesome. This procedure aims at arrangement of the assertions and
tender of evidences of both parties by one commissioned judge. In case the
preparatory procedure is conducted, the trial proceedings are to be held upon
completion of the arrangement of the assertions and tender of evidences according
to the procedure. Usually, parties are not allowed to make new assertions and

32. Parties can be ordered, on the opponent's application, to produce any specified,
reliable documents in their possession. Witnesses are questioned orally by the
examining judge, but their answers are incorporated in the latter's written report
which is submitted to the tribunal. Since the tribunal has no opportunity to judge
the credibility of the witnesses, the examining judge may describe their demeanor
in his report.

33. In connection with this statement, Judge L. Hand's remark, in Becker v. Web-
ter, 171 F. 2d 762, 765 (C.A.2d 1949), invited question whether it is considered
unethical for an attorney to discuss the facts of a case with a prospective witness
in a number of civil law countries.

34. Articles 348-350.
tender new evidences which they have not made or tendered in the preliminary proceedings. The presiding judge examines the complaint and, when it is perfect in its form, he summons both parties, fixing the date for actual trial. After the points at issue between both parties have become clear in trial proceedings, the court takes the evidence to decide these points. At the stage of this taking of evidence comes the examination of witnesses, of documentary evidences and the inspection to be conducted. The presiding judge decides the order calling witnesses and conducts the principal examination. The examination of the witnesses or of the parties themselves is conducted by the presiding judge and during or after the examination of each witness by the presiding judge he will permit the respective attorneys to ask questions of the witness to bring out matters which were not covered in the principal examination. In other words it lies within the reasonable discretion of the presiding judge to refuse to examine witnesses whose testimony he considers irrelevant, unreliable or cumulative. 35

As to the third group, that is, Swedish and Japanese line of civil law countries, the process of examining witnesses and preliminary hearing are generally in accord with that of Germany, but new development was started on January 1, 1948 in Sweden, and, on January 1, 1949, in Japan. Following the Anglo-American system, the Japanese Code of Civil Procedure has introduced the process in which the examination of the witnesses or of the parties themselves, formerly conducted by the presiding judge in person, has come to be done by means of cross-examination by both parties or their representatives. 36 In Sweden, there has been a drastic transfer of witness-examination to the hands of the parties through the means of cross-examination. 37

35. Art. 398 supra. In criminal cases, where the prosecutor and defense counsel jointly apply for the privilege, the presiding judge is required to permit examination of witnesses by them. Art. 239, Code of Criminal Procedure.
III. RULE OF PARTY DISABILITY TO TESTIFY UNDER THE CIVIL LAW SYSTEM

Under the civil law system, the personal nature of evidence consists of three kinds, namely, witness, expert and statement of either party in civil proceedings or explanation of his own story by the accused in criminal proceedings. However, this categorical approach is not true under the common law system. It is generally recognized that the personal nature of evidence is solely produced by a witness' testimony since there is no substantial distinction between expert witness, lay witness and statement of either party in civil proceedings or an explanation of his own story by the accused in criminal proceedings.

Since the parties to civil litigation in Anglo-American courts have testimonial capacity as well as a testimonial duty, a party himself can be for his own witness or be forced to testify for the adversary. Taking the witness stand, the defendant and plaintiff both are eager to proceed to occupy a witness chair since the party himself knows fact or facts so well that most probative value of evidence comes to him first. This picture of Anglo-American court proceedings gives a most dichotomous idea when someone recites the German Code of Civil Procedure: In the event the court is unable to prove by the process of examination of evidence, it can inquire of the party upon a motion by either party, an agreement between parties, or on its own discretion. 38

A. THE PREVAIING RULE

The circumstances that have caused such a fundamental divergence in the process of party disability to testify as to fact are to be found in history. Under the Anglo-American system subsequent to the Lord Denman's Act of 1843 that made any defendant examinable as a witness on behalf of the plaintiff or any co-defendant, the importance of fact discovery before trial has been distinctly lessened by the mid-century revolution in the law of evidence by which the parties were made competent witness for and against each other in all civil pro-

38. See Articles 445-448, supra.
ceeding. Where, as under this rule, now of universal prevalence in the Anglo American jurisdictions, either party may examine the order as a witness at the trial, it is apparent that the need for a distinct method of fact-discovery, vital when the opposite party could not be called as a witness, has to a considerable degree disappeared. Briefly touched in connection with the qualification of witness under Romano-Canonical tradition, the basic rule of party disability to testify shows historical significance. The present question should be answered under different two headings, in civil proceedings and in criminal proceedings, for the sake of discussion.

1. In Civil Proceedings

Since all civil law countries refuse to recognize parties as witnesses either for or against themselves, there is no full provision for the reception of their evidence. Apart from the type of provision of German Code of Civil Procedure mentioned above, the new Italian Code of Civil Procedure provides that the judge has the right to invite the parties to attend for an informal examination. 39 It shows substantially strengthened discretionary powers of the judge in the new Code. Under Code of Civil Procedure, 1948, Sweden does not make a party a competent and compellable witness, showing the faith of its adherence to the traditional principle. However, an oral examination of the party in open court is an independent means of proof. The provision specifically emphasizes that the examination shall be held before the hearing of witness-proof touching its subject-matter in the absence of special reason to the contrary. 40 It must be borne in mind that once the oral statement by the party is admitted there are no artificial barriers to its reception in the civil law countries.

2. In Criminal Proceedings

As we have seen the basic rule of party disability to testify in civil cases, the same rule applies in criminal cases. It has been a uniform practice that the defendant himself is always asked by the court at the completion of the

39. Art. 117.
examination whether he desires to present his own story. It has been reported that Soviet Russia follows this pattern. At least a number of civil law countries, through legislation, have moved in the direction of the accusatorial rather than the inquisitorial principle. In Sweden, under the Code of Criminal Procedure, 1948, at the trial proceedings the prosecutor is to state his case. The accused is then requested to state whether he admits or denies. The prosecutor is then to substantiate the charge prior to the testimony by the injured party. The accused is then to give a coherent account of the case and to state what he wishes to say as to the statements of the prosecutor and the complainant. The prosecutor and the complainant may then question the accused after obtaining permission of the court; and that usually follows by counsel for the accused putting questing. When the examination of the complainant or the accused is carried on, the dossier or preliminary investigatory record may not be read unless his statement during the examination differs from his previous statements or unless he remains silent during examination. In Japan, under the new Code of Criminal Procedure, 1948, the status of superiority of the public prosecutor as the representative of the state to the accused has been wiped out, and in the course of trial the public prosecutor is put on the almost equal status to the accused as a result of adoption of Anglo-American form of cross-examination. A symbol of authoritarian ex-officialism and inquisitorial prosecution ceased to exist. Also a new development can be seen in Germany too. The Code of Criminal Procedure, 1950, permits associate judges, prosecutor, defence counsel, to question the accused. It has been reported that some of the critics fear that this could amount to a kind of cross-examination, which in most cases under distrust of civilians is apt to confuse and trap a person, but rarely brings out the truth. An accused is under an obligation to tell nothing but the truth; but he is under no obligation to tell the whole truth. This gives

41. Zelitch, Soviet Administration of Criminal Law, supra, 217.
42. Orfield, supra, at p. 283.
43. Art. 304.
44. Art. 240.
quite contrasting ideas if one thinks of well-developed discovery devices under Anglo-American jurisdictions.

As to the question of confession, it should be pointed out that the "arraign-
ment" in criminal cases under the Anglo-American system begins to be viewed in a new light in the sense of better administration of justice. Undoubtedly, there is no "arraignmant" under civil law system as the result of logical conclu-
sion that the accused is not a witness in the sense of Anglo-American system, but is a mere narrator. The German Code of Criminal Procedure, 1877, as amended 1950, gives a material provision. 46 A typical example is the new Japanese Code of Criminal Procedure which provides that even if the accused makes a confession before the court, a judgment shall not be entered if it is a sole incriminatory evidence. 47 Along this line, it is interesting to read that Thailand had a peculiar provision. Its Code of Criminal Procedure provides:

"In the trial of a case if the accused pleads guilty to the charge, the court may give judgment accordingly, provided that in a case punishable with a maximum term of imprisonment of ten years or upwards, the court must hear the evidence for the prosecution until it is satisfied that the accused is guilty. 48

In this respect, the civil law system, as the result of adherence to the traditional rule of party disability to testify furnishes a device of protection of innoce-
tnce. Even if there is confession made or pleaded guilty by the accused, the court must consider further evidence to determine whether the admission of crime by the accused came out from his own volition upon full comprehension of alleged committal process of crime. At least it is conceivable that the confession made or pleaded guilty will certainly bring a triumph to the prosecutor and will release him from a sense of responsibility to carry out further proceedings, or at least will save writing a long opinion on the part of judge. Nevertheless, it is

46. It says that that judge should decide the case according to the all evidence taken. It is generally considered that the German court gives extensive interpre-
tation of this provision.
47. Art. 11, 319.
submitted that the judge, as an administrator of justice, should do some sophisticated exploration to wit: what is the story behind of this testimony. This is the very reason why the judges in civil law countries eagerly seek auxiliary evidences whenever the accused made a confession or pleaded guilty to the charge.

Speaking of confession, how far confessions made by co-defendants or by co-criminals prevails in the prosecution of the accused is a worthwhile subject to be examined on the basis of comparative study between Anglo-American and Continental legal systems, especially in the light of rule of party disability to testify. Another interesting question will also lie with respect to the problem of how the disability rule would work in a civil law country, where the accused is not considered as witness, and which has adopted a self-incrimination provision in its Constitution along the line of Fifth Amendment to the United States Constitution.

B. RAISON D'ÊTRE OF THE RULE

The reason for the existence of this rule under the civil law system apparently rests upon the theory under which reliance is placed upon the judge to ferret the truth from any available source and confidence is placed in the ability of the members of the court to give proper probative value to the evidence, or, alternatively stated, are there difficulties in maintaining this rule in view of the actual practices? Generally speaking, the fact-finding processes in civil law countries are conducted by the initiative powers of judges that is in turn accelerated by the "dental clinic form of trial" under which there is no time limitation on the carrying out of the processes.

1. Dental Clinic Form of Trial

To begin with, the basic difference of court proceedings under the civil law system and the common law system should be mentioned. It can be characterized

as of the “day in court” in Anglo-American court “and dental clinic form of
trial” in the courts of civil law countries. In the Anglo-American courts, contin-
uous trial proceeding is performed as if there is a final battle that requires
well-prepared actions based on the principle of orality and the principle of
thorough party disposition. Let us look at the practical operation of typical
court proceedings in the civil law countries. Sir Maurice Amos gives a very vivid
picture on this issue: \(^5\)

“How differently are civil trial conducted in countries where the
ideal of the day in Court’ is unknown, or is not faithfully adhered
to. Let us go into a civil court in the Palace of Justice at the
blessings of a learned, incorruptible, energetic and probably too
numerous judiciary, and of a bar to which the same adjectives are
applicable. It has a civil procedure code based upon that of France;
...... We have arrived in good time to hear the beginning of the
day’s proceedings. The first hour is spent in a discussion of the list
for the day, which contains thirty cases. Nobody expects or intends
that more than twelve cases shall be heard. Finally the court, having
caued the thirty cases to be called, and having heard summary
argument for and against adjournments, sends eighteen cases over,
and settles down to hear the remaining twelve...... An hour is
given to the arguments on an interesting right of way case
which raises an unfamiliar point of law and where the facts are not
in dispute; half an hour is given to each of two other cases, a
quarter of an hour each to six more, one case is again adjourned,
and in two very dull cases, which turn exclusively upon the details
of reports by referees on tangled true accounts, the President success-
fully beguiles counsel into admitting that oral argument may well
be dispensed with, and that they are prepared to rely upon the
written briefs which are already in the possession of the court.

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50. Sir Maurice Amos, A Day in Court at Home and Abroad, 2 Cambridge Law J.
340, at pp 343-344 (1926).
When we come out at four o'clock we shall certainly have some idea of the points in issue in nine of the cases. With the right of way case we shall feel thoroughly au fait. But as to the others we shall only have the haziest notion as to the facts or as to which may the decision of the court should or will go. We may have discovered from the speeches of counsel that in one dossier are to be found the minutes of evidence taken some weeks ago before referee, in another the minutes recording a descente sur les lieux—an official view of the premises in litigation by a judge who is or was at the time a member of the court......

"One thing that we shall have observed is that all the cases mentioned during the day, both those which were adjourned at the beginning of the morning and those which were argued, seem to have been at different stages. The adjournments have shown us that the cases are gradually being matured by successive appearances in court. In one, time was asked for to cite fresh parties; in another, time was asked for to obtain evidence from abroad; in a third, which gave rise to some argument, a motion was granted for a joinder of suits. Then on the reserved list we noticed that in several cases final judgment was not asked for; the question under discussion was as to the manner in which proof should be furnished by witnesses, experts, or interrogatories, as the case might be; in each of these cases the court was asked to make an interlocutory order, and, if the motion was granted, to adjourn the case until the order had been discharged."

There is a recent development on the Continent towards a realization of that Sir Maurice Amos termed the "Day in Court" 51 (It has been reported that Sweden started to adopt this Anglo-American principle, but it is interesting to see how it will work). More or less abnormal development can be seen in the case

51. It has been reported that Sweden started to adopt the Anglo-American principle of this idea, but it is interesting to see how it will work. See Orfield, supra, 287.
of Italy where the trial proceedings become mere formality, as the broad powers are delegated to the examining judge. To do this, the Italian Legislature made strenuous efforts to the effect that the trial is concentrated in the final hearing with possible freedom from interlocutory proceedings and based upon VIVA VOCE evidence given in open Court. Whether these proceedings should be regarded as the Anglo-American "Day in Court" is doubtful especially in view of the function of examining judges which is very similar to that of a hearing officer of NLRB in the United States of America.

The rule of party disability to testify in civil law countries has historical significance, as already has been pointed out. But it goes further than that since it has been rooted on the traditional process of hearing proceedings, namely, the "dental form of trial". As a matter of practice, no inconvenience was revealed in maintaining this rule since the almighty judge always exercised his discretion in determining facts through his free proof process. If this is a prevailing practice, is there any institution under the civil law system equivalent to that of fact-discovery device under the Anglo-American court?

2. Discovery and Conclusive Oath

The traditional method of fact-discovery by bill and answer in the federal courts took a radical change by the Equity Rule of 1912 that installed written interrogatories separate from the bill and called for written responses separate from the answer, Historically the device of detached interrogatory as a means of enabling a party to elicit facts from his adversary was originated and developed as a part of organized system of discovery, namely, the Romano-Canonical some seven centuries before. When that system had attained its flourishing period especially in the positional, the English Chancery made the borrowings which enabled it to construct its own system of discovery that appeared as a form of the English Rules under the Judicature Acts later. It is true that the Chancery Practice Amendment Act of 1852 affected a decided improvement of the old system by separating the interrogatories from the bill (though not the answers to the interrogatories from the answer to the bill) and by according to the defendant
who hitherto could have had no discovery from the plaintiff except by means of a crossbill—the right directly to address interrogatories to the plaintiff. In 1854, by the Common Law Procedure Act of that year, discovery was introduced in the common law system, the method provided being that of written interrogatories. Under the Judicature Acts of 1873 and 1875 the same method—that of written interrogatories and answers wholly dissevered from the pleadings—was adopted for the unified procedure and remains the method of the present day.

In 1939, modern discovery and deposition procedure as exemplified by Rules 26 et seq. of the Federal Rules of Civil Procedure under American federal jurisdiction has modified the Equity Rule of 1912, but the same principle is maintained throughout the intended reform. It is generally conceded under the common law system that the term “discovery” implies the eliciting of facts or documents from the adversary, by designated means in advance of trial or at the trial itself, for use as media of proof. As to the term “discovery”, there is no precisely equivalent word in the procedural vocabularies under civil law systems. As compared to discovery and deposition procedure under existing Federal Rules of Civil Procedure, it is true that civil law devices for eliciting facts from an adversary are relatively weak.

Discovery device itself is not new in civil law countries, since one can find code provisions such as:

adversary shall be given a period of time during which he can examine the names of witnesses, their addresses, documentary evidence or evidentiary articles.”

As to the actual proceedings, generally it takes the following form. A party may, in any cause, and at any stage of it, request that his opponent may be interrogated on facts relating to the matter in dispute; these interrogatories are ordered upon a motion setting forth the facts, after judgment on the point has been delivered at a public hearing of the court. The interrogatories are administered either by the presiding judge of the Court, or by a judge appointed for

52. For example, see Par. 1 Art. 299, Japanese Code of Civil Procedure.
that purpose. The party interrogated must answer in person, and is not permitted to read any reply in writing, and must answer without the assistance of counsel upon the facts contained in the motion, and also upon those the judge may himself put to him; the answer must be precise and relevant on each fact and must contain nothing libellous or injurious. The party who has demanded the interrogatories is not entitled to be present. The party answering the interrogatories must sign his answers.

As to the German practice, it was reported that:

"attorneys are under limitation in preparation for trial which are scarcely understandable to American lawyers. German attorneys may consult only with their clients. Ordinarily they may not interview witnesses at all. Even clients are expected to avoid contacting witnesses and may not take written statements from them. Depositions of witnesses who will be unable to appear in court may be taken before the Amtsgericht having jurisdiction over the place of residence of the witness. The judge of the Amtsgericht will conduct the examination, but the parties or their attorneys may be present and may be permitted to submit questions. The duty of an Amtsgericht to conduct depositions for other courts is known as Rechtshilfe, or legal assistance."

In determining the crucial fact, conclusive party oath device is in existence under the civil law system. A party was entitled to request his adversary to deny under oath a determinative fact of the case. The opponent then had to take the oath or tender it back to the proponent. The taking of the oath or its refusal was decisive of the case. The oath, as a religious sanction of the truthfulness of the testimony, has in recent years fallen into some discredit on the Continent. This tendency appeared in abolishing the conclusive oath device in Germany and Sweden. Historically, it was the ancient civil law institution, namely, the Roman iusurandum necessarium. In Germany, Eideszuschiebung (conclusive oath) has been replaced by the more flexible practice of discretionary judicial

examination of the parties. However, the French and Italian line of civil law countries maintains this institution. If the demand was properly made, the court would rule to the effect that the proponent of the oath should win if the opponent refused or failed within a specified period to swear the oath which was formulated in the judgment, but that the opponent should win if he so swore. After the rendition of the conditional final judgment the outcome of the litigation was automatically determined by the opponent’s swearing or failure to swear, and the subsequent entry of the (unconditional) final judgment was a mere ministerial act.

IV. RULE OF PARTY DISABILITY TO TESTIFY UNDER THE COMMON LAW

A. ORIGINS

The total disqualification of the party from testifying as to the facts in either civil or criminal proceedings is a relatively recent development in the common law of England. Indeed, the disqualification was unknown under the ancient modes of trial and did not appear in England until the early 1600's.

The disqualification of the party from testifying is a logical outgrowth of the common law rule disqualifying any person from testifying who had an interest in the outcome of the case. The rationale expressed by the legal writers when this innovation was introduced was that a party or a witness with such an interest might be prone to falsify in order to obtain a desired decision. Prior to this time, one could say generally that interest (that which was to later disqualify persons) was an essential prerequisite for any witness—even for jurors—at a trial. Witnesses in the early days of the common law were definitely partisan.

It has been suggested that the growth of the jury system as we know it today

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54. For example, French Civil Code provides this institution, under the heading "of decisive oaths", articles 1358-1369.
was, in large part, responsible for the sudden preoccupation with a witness interest in the outcome of the case. 58 When the Norman judges in England first organized the jury, it served an important investigatory function. Originally, jurors were rather well-informed members of the community who went around the neighborhood where the trouble giving rise to litigation arose gathering first-hand information and forming their first-hand opinions. Later when witnesses became the exclusive source of the jurors' information, very stringent exclusionary rules were created in order to protect the jurors from being misled by falsification, irrelevancies, biases and other influences which might inhibit the doing of justice. One of these exclusionary rules was the rule which prohibited the testimony of witnesses who had an interest—pecuniary or otherwise—in the outcome of the case. 59

The notion that interest warranted disqualification from testifying appears all the more conspicuously when you consider that at the same time that this exclusionary rule was in effect, common law civil procedure did admit the testimony of a mere titular or nominal party, or a party against whom judgment had already gone by default. The feeling was that the testimony of such parties would not so likely be tainted with interest. 60

The upshot of all this was that the proper safeguard against a false decision was deemed to be the total exclusion of interested persons—particularly parties to the action—from the witness stand. However, the inflexibility of the rule excluding such testimony proved too great and it soon gave way to numerous exceptions so that the conduct of trials would not be completely hampered. Among the more common exceptions to the party disqualification rule were the following: 61 (a) the parties could be heard in court by way of the various writs and pleadings which were filed; (b) the parties' testimony was admitted to obtain a continuance; 62 (c) the

59. It should be noted that in its original form, the exclusionary rule was not limited to a party's testimony; it applied to the testimony of any interested person.
60. Wigmore on Evidence, supra, 693.
61. The Rules of Evidence, Stated and Discussed, Appleton, supra. 74-88.
62. A continuance is only sought because it benefits the party asking for it and might prejudice the opposing party. The effect is essentially no different than that which would result if the party's full testimony on the issues at stake were received.
testimony of the party was admitted to prove the loss of a deed or other paper where the fact of loss is within the exclusive knowledge of the party in whose possession the deed or paper formerly was; 63 (d) the party's testimony was admitted to establish the facts by which he intended to sustain a motion; (e) in some jurisdictions the exclusionary rule was so far whittled away as to allow the testimony of the party from "necessity", allowing in such testimony whenever it was impossible to adduce better proof. 64

Then too, there were several statutory exceptions, in English practice, to the party disability rule. In causes arising under the Usury laws, parties were allowed to testify as to the rate of interest charged. And in causes arising under the Bastardy Act, the testimony of the mother was admitted as to facts peculiarly within her knowledge which facts were only contradicted by the reputed father.

Akin to the party and interest disqualification at common law was the testimonial disqualification based on the marital relationship. It is often said that the interests of husband and wife were too closely identifiable to guarantee that either one would not falsify in order to protect the other. This is, of course, only one of several reasons advanced for the husband-wife testimonial disqualification. 65

But party disability to testify was not limited only to civil proceedings. There were exclusionary rules in criminal proceedings as well. As a matter of fact, until rather late in the nineteenth century the accused in a criminal proceeding was not allowed to testify for himself. However, it was the practice in England and in some American jurisdictions to allow the criminally accused to make an unsworn statement to the jury, but not as a witness. These exclusionary rules in criminal proceedings were followed for a much longer time than the comparable rules in civil proceedings. The rule was first changed in Maine in 1864 and then in England in 1898. 66 It has been abolished in all of the American states except Georgia. 67

63. n.b., The testimony in such a case could touch only on the fact of loss and not on the contents of the paper; *Taylor v. Riggs*, 1 Peters, 591.
65. Wigmore on Evidence, supra. 731.
66. Ibid. 701.
67. See 63-65, infra.

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In the general area of criminal proceedings, there was another exclusionary rule which provided that a person who had been previously convicted of a crime should be disqualified from testifying at a subsequent trial. This was known as disqualification by "infamy". The theory behind it was that a person who has been guilty of committing a criminal act cannot be trusted in any respect and, therefore, should not be trusted in his testimony. This rule applied to parties as well as to other witnesses. 68

In passing, it might be interesting to note the situation where there were co-defendants or two or more persons being tried on the same charge. The general rule was that each and all were disqualified unless one such party could lose his status as a party to the suit. This might be accomplished by having the charge dropped against him or by having the original co-defendants tried separately. 69

Coming now to the party disability rule in Equity proceedings, it would seem that the Courts of Chancery accepted the common law rules as to the admissibility of evidence. This was inharmony with the general Equity maxim that "Equity follows the law". 70 But in jurisdictions where the procedure, both at law and in Equity, is governed by code provisions this maxim is only applied where the code has failed to provide for the special case coming under the jurisdiction of Equity. 71 In other jurisdictions the exceptions to this maxim are so numerous that one cannot but wonder whether the maxim can be applied to the party-disqualification situation at all. For instance, the rules of evidence in Equity departed from those at common law as follows: (a) in Equity testimony was taken in writing rather than orally; (b) Equity required two witnesses to every material allegation or to overcome the defendant’s oath; (c) Equity granted discovery before and during trial, in effect, denying the common law privilege of a party opponent to refuse to testify personally to disclose any of his evidence at any time. 72

68. The Rules of Evidence, Stated and Discussed, Appleton, supra. Ch. III.
Judge Appleton in his book on the rules of evidence indicates that the party disability rule in Equity was much more complex than at common law. Evidently, the testimony of the defendant was compelled and received, whether favorable or unfavorable. On the other hand, the plaintiff's testimony which was favorable to him was not admissible unless the defendant gave his consent. With respect to other testimony, the plaintiff, as in the situation at law, could not be compelled to testify.

Where the same judge and same court acted in both Equity and Law capacities, the divergence in the rules of admissibility of a party's testimony seems all the more ridiculous.

B. THE ABOLITION OF PARTY DISABILITY IN ANGLO-AMERICAN PROCEDURE

Legislation in the United States did not begin to do away with the rule disqualifying a witness for interest until after 1846. Michigan in 1846 and New York in 1848 were in the vanguard. Prior to this, in 1843, the reform had been accomplished in England; but it was not until that the disqualification of the party was abolished in England. The writings of Jeremy Bentham were, in large part, responsible for these reforms.

With a few rather conspicuous and anachronistic exceptions, which will be dealt with later, interest disqualification and party-disqualification have been

72. Wigmore on Evidence, supra, 14–16.
73. *Phillips v. Thompson*, Johnson's Ch. R. 140 (1814) ruled precisely on this point that "the plaintiff cannot testify for himself, unless at the instance, and on the call of the defendants..."
74. The Rules of Evidence, Stated and Discussed, Appleton, supra. 99.
75. Ibid. 105: "At common law perjury is presumed to be the necessary and inevitable consequence of receiving the testimony of a party; in equity the same judge eschews his own words, says the party is more entitled to confidence than any witness however upright and honorable he may be. This rule is applicable, too, not to one party merely or to one suit, but is uniform in its application to all defendants, past, present, and to come", Phillips v. Thompson, (N.Y.) Johnson's Ch. R. 139 (1814).
abolished in all American jurisdictions. The Connecticut statutory provision provides a typical example; it reads as follows:

“No person shall be disqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise, or of his disbelief in the existence of a supreme being, or of his conviction of crime; but such interest or conviction may be shown for the purpose of affecting his credit.” 77

The criticisms of the exclusionary rules fall into two general categories. First of all, it was felt that the rule failed in the accomplishment of its aim, i.e., to prevent falsification. Although the parties themselves had no chance to falsify, the false testimony of their respective witness could be equally effective in accomplishing the same result. The second type of criticism centered around the fact that the rule often operated to exclude significant and essential evidence.

Unfortunately, there are still some anachronistic vestiges of party disqualification remaining in some present-day American jurisdictions. Most wide-spread and conspicuous of these is the so-called “Dead Man’s Statute” found in most of the states’ statutes. Such statutes provide that in actions against a decedents estate, the testimony of the survivor of a transaction is not admissible. 78 The most common justification for this rule is that it prevents the surviving party from giving unchallengable false testimony with reference to the transaction. In short, the statute is designed to discourage fraud and perjury on the part of the surviving. 79 The theory is that it places the parties to such a suit upon terms of equality in

77. Sec. 7868 The General Statutes of Conn.. Revision of 1949.
78. The following are pertinent excerpts from the Iowa “Dead Man’s Statute”, §§ 622.4 and 622.5, Iowa Code Annotated (1949): “No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased,...... against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person......”
regard to opportunity to give testimony. Hence, the prevailing American view is that an objection based on the "Dead Man's Statute" should be directed to the competency of the witness and not to the testimony itself.

There is growing dissatisfaction with the "Dead Man's Statutes" and there are numerous instances where it has been circumvented or construed by the courts so narrowly as to be largely ineffective. For example, Oregon, New Mexico and Canada admit the survivor's sole testimony, if it is somehow corroborated. Connecticut, Virginia and, again, Oregon allow the surviving party to testify, but admit as well any writing or declarations of the deceased party on the subject in issue. Arizona excludes the survivor's testimony except when it appears to the court that injustice may be done without the testimony of the party.

Connecticut has abolished the "Dead Man's Statute" and in the survey of Connecticut lawyers made in 1921 by the Legal Research Committee of the Commonwealth Fund of New York, the great majority of practising Connecticut judges and lawyers felt that this reform was an aid in the ascertainment of truth.

Another vestige of the disqualification rules is to be found in Alabama where the courts have manufactured a rule disqualifying a person—particularly a party—from testifying as to his own intent or motive, even where intent or motive are material to the case. Once again, the theory is that a party's interest in the outcome of the case would lead him to falsify his testimony as to his state of mind.

83. Wigmore on Evidence, supra. 697.
84. Ibid., 698-701.
85. Ibid., 714; Brooks v. State, 185 Ala. 1, 64 So. 295 (1914); Patton v. State, 197 Ala. 180, 72 So. 401 (1916); Low v. Low, 255 Ala. 536, 52 So. 2d 218 (1951); Peinhardt v. State, 76 So. 2d 176 (1954).
A vestigial form of the disqualification rule exists in the state of Georgia where the courts still follow the old England common law rule to the effect that the accused in a criminal proceeding is not competent or compellable to testify. However, as at common law, Georgia courts do allow the criminally accused to make an unsworn statement to the court. The pertinent Georgia statutory provisions read as follows:


“No person who shall be charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction, shall be competent or compellable to give evidence for or against himself.”


“In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.”

Supporters of the Georgia rule argue that it actually benefits the accused because if he were allowed to take the stand and then declined to do so, jurors might infer that he has something to conceal and was, therefore, guilty. In effect, then, the abolition of the exclusionary rule would tend to force the accused to testify. This has raised the objection that abolition would violate the privilege against self-incrimination guaranteed by the Fifth Amendment to the federal constitution and found in most of the state constitutions. The wording of the privilege follows substantially this form: “No person shall be compelled in any criminal case to be a witness against himself”. It is felt that by abolishing the exclusionary rule, the party would feel compelled to testify.

However, as early as 1874 the Georgia rule was held up to criticism on the grounds that it was particularly damaging to the innocent accused; he never has a chance to testify as to his innocence. In effect, the Georgia rule hinders the innocent and helps the guilty. 87

As for the unsworn statement which the accused in Georgia is allowed to make, this is of little or no help as it is a one-shot chance and may not be subsequently added to or clarified. Furthermore, the fact that it is unsworn weakens its probative value before the jury. 88

V. CONCLUSION

If the aim of the courts is to arrive at truth, it would seem clear that exclusionary rules such as those discussed above are entirely inappropriate.

In justifying the exclusionary rules, much has been made of the argument that they prevent falsification. However, the opportunity for interested persons to falsify under the present rules of evidence (where most of the exclusionary rules discussed here have been abolished) exists only to a very limited extent. For example, the variety of influences which act upon a judge and jury when they hear testimony are so many that it is virtually impossible for the average witness to be assured of the success of any lies which he might tell. 89 Then too, those who might hear

87. See criticism of the exclusionary rule in Bird v. The State, 50 Ga. 585, 589 (1874).
88. The following is a list of some significant rulings of Georgia state courts with reference to that states criminal exclusionary rule:
(a) The defendant may not make more than one statement without permission of the court, but it may be made at any time before the close of evidence, Dixon v. the State, 12 Ga. App. 17, 76 S. E. 794 (1912);
(b) The state may rebut the defendant’s unsworn statement, McCallum v. The State, 70 Ga. App. 535, 28 S. E. 2d 323 (1944);
(c) The defendant has the right to submit himself to cross-examination, Porch v. The State, 207 Ga.645, 63 S. E. 2d 902 (1951);
(d) It is not an abuse of discretion to refuse defense counsel the right to examine the defendant, even though the accused has submitted to examination by the state’s counsel, Lindsey v. The State, 138 Ga. 818, 76 S. E. 369 (1912).
the perjured testimony are alerted on their own or by opposing counsel to inconsistencies, the witness' reputation, the witness' demeanor, etc.

The rules of evidence and powers of the court also contribute to a large extent to reducing the likelihood of perjury. For instance, the deterrent effect, however small, of the courts' power to punish for perjury should not be overlooked. Also, the practices of examination and cross-examination of a witness lessen the probability of falsification. Examination and cross-examination pick testimony apart, subjecting the various elements of a witness "story" to jealous scrutiny. A similar effect can be claimed for the counter-testimony of the opposing party or witness. Such persons' very interest in the outcome of the case or in having the veracity of their testimony upheld leads them to do their utmost to discredit any adverse testimony. This works both ways and tends to inhibit the effect of false testimony.

Looked at from another point of view, insofar as interested parties do testify truthfully, the exclusionary rules work a considerable injustice. If you exclude the party as a witness in his own favor, then he is placed at the mercy of any witness introduced by the opposition, whether that witness misstates the facts as a result of carelessness or deliberate intent. When that excluded party is the defendant, his helplessness is all the more apparent, for it is a simple matter for the unscrupulous plaintiff to destroy a person's integrity and effectively silence him merely by choosing to make him a defendant to a suit. 90

As has already been shown, the party—and interest—disqualification rules are subject to several significant exceptions. This only serves to highlight the difficulties involved in making any such rules rational, consistent and workable. If we look at the interest-disqualification rule realistically, we find that if it is carried to its logical conclusion, no witnesses at all would be allowed to testify because it

90. The law of Scotland dealt with this problem by providing, in essence, that if a person should make another a party to any suit, without reasonable cause and for the purpose of excluding his testimony, the law would forbid such an object; and one who has been included in the list of defendants for this purpose, whether in a civil or criminal action, should, upon discovery of the circumstance be a good witness notwithstanding. The Rules of Evidence, Stated and Discussed, Appleton supra., 92.
is impossible to conceive of a witness who is not in some way partisan. A witness
cannot help but be prejudiced in favor of one party or the other, usually in
favor of the party for whom he is testifying. Indeed, a completely disinterested
witness would have to be an automaton; certainly he could not be anything as
impressionable as a human being.

As a device to prevent falsification, the party-disqualification rule is totally in-
effective. After all, every non-party witness, influenced by bias in favor of one
party or the other, has an equal chance to falsify. What's more, no exclusionary
rule can effectively cope with the problem of inadvertent falsification on the part
of a witness. It is possible even for the so-called disinterested witness (assuming
arguendo that such a person exists) to freely falsify unintentionally from a defect of
observation or memory. 91 Finally, on this issue of falsification, it would seem
obvious that falsification is most dangerous in the situations where it is least ex-
pected. The testimonial situation in a trial is one where falsification is anticipated.
It is because of just such an anticipation that we have rules of evidence. In
short, the exclusionary rules attempt to protect against falsification where no
protection is really needed.

Insofar as the exclusionary rules prohibit the testimony of the party, it does
not require much imagination to visualize the situation where the testimony of the
interested parties themselves might be the most reliable. For instance, the parties
to a contract should certainly know more about the contractual transaction than
a casual witness whose interest in it was not so immediate. It seems almost too
obvious to point out that if you want reliable information, you go to those who know.

The disqualification of the criminally accused deserves especially critical examina-
tion because, as we have seen, it still exists intact in at least one American
jurisdiction.

Under the Anglo-American legal system, the accused in a criminal action is
presumed to be innocent until he is proven guilty. However, the rule excluding
the testimony of the accused is not in harmony with this presumption. It, in effect,

91. Courts on Trial, Myth and Reality in American Justice, J. Frank, supra., 16-
21.

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presumes before trial that the accused is guilty and will lie in order to avoid conviction. Therefore, his testimony is not heard. This seems all the more unfair when you consider that the accuser in the same proceeding is free to testify. If the jury can evaluate the credibility of one, then why not the other? It would also seem more important that the testimony of the accused in a criminal proceeding should be heard because in this realm a life is often at stake, not merely civil rights. Imagine the injustice of condemning an innocent accused to death when the admission of his testimony might have substantially altered the court’s decision.

It may be said, in view of the foregoing discussion, that the old rule of party disability to testify as to facts is more closely related to and much more in harmony with the civil law trial procedure, typified by the intervention of judges, than it is with the principle of party disposition which is so characteristic of the Anglo-American trial procedure.

We all agree that the basis of judicial action is proof. Since judicial action can materially affect a person’s whole pattern of living, even his life, it would seem that the proof which stimulates this action should be sought from every available source, subject only to rules bearing on relevancy, materialness and opportunity to observe. If our purpose is truth-seeking or fact-finding, calls it what we wish, then the exclusionary rules of evidence discussed herein have no place in our trial procedure.

Jeremy Bentham sums up the problem well in his flamboyant, but eloquent style.: 92

“In principle there is but one mode of searching out the truth: and . . . . this mode, insofar as truth has been searched out and brought to light, is, and ever has been, and ever will be, the same, in all times, and in all places, in all cottages and in all palaces—in every family, and in every court of justice: Be the dispute what it may, see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most

attentively of all, and first of all, those who are likely to know most about it—the parties.”

93. This article was originally read as a paper, in substantially the same form in which it is now printed, at the seminar course called “Fact-Finding” conducted with such a pioneering zeal by the late Judge Jerome Frank, at Yale Law School while the author was a graduate fellow in 1956. The author is happy to note that since then there have been published works which are partially relevant to this article. These are: Kaplan & Others, Phases of German Civil Procedure, 71 Harvard L. Rev., 1193-1268, 1443-1472, 1958; Helen Silving, Oaths, 68 Yale L. J., 1329-1390, 1527-1577, 1959.