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COMMENTS ON THE PROPOSED CODE OF EVIDENCE OF THE AMERICAN LAW INSTITUTE

[It is a rather curious fact that the work of the American Law Institute in restating the law is so little known to the profession, and referred to so little, if at all, by the Canadian courts. Largely through the efforts of Lord Wright the work of the Restatement is rapidly obtaining recognition in England and has been, in the last few years, cited more than once in judgments in the House of Lords. To a Canadian who wishes to obtain the American view on common law topics, it would seem that the Restatement is by far the best instrument for this purpose, since it contains the essence of the American case law, examined, re-examined, and stated in succinct form by specialists, drawn from the academic field, from practicioners and the bench. It is not unusual to find American cases cited in our courts, although in Ontario, at least, there are some judges who manifest a violent dislike, to put it mildly, to such citations. So far as this is merely prejudice against the discussion of American experience in the common law generally, it is, in the editor's opinion, totally incapable of support. On the other hand, one can understand the reluctance to hear one or two isolated cases which may be drawn from any of at least forty-eight states, to say nothing of the federal jurisdiction. The Restatement, on the other hand, is not open to this objection. Merely because the Restatement does not carry the individual signature of a judge should certainly not lessen its value for persuasive authority in Canadian courts.

While the various Restatements have been concerned with restating existing law, the latest project of the American Law Institute should have a wide appeal to the Canadian profession, particularly at a time when there is much talk of reform in the air. For the last two years the Institute has been concerned with formulating a new Code of Evidence, which will supplant all provisions of the common law and all statutes inconsistent with the Code itself. This ambitious project was begun in 1940 under the directorship of Professor Morgan of the Harvard Law School as reporter, and Professor Wigmore (whose name is practically synonymous with the word "evidence" in all common law jurisdictions) as chief consultant. Morgan's staff of advisers included outstanding law school men as well as two judges from the Federal Circuit Court of Appeals whose reputation for scholarship and masterly craftsmanship is well known throughout the United States and, indeed, to any person who has had occasion to read American decisions. The two judges in question are Augustus N. Hand and Learned Hand. In addition, in this case, the list of general consultants includes many other judges as well as the names of leading proctitioners from various jurisdictions. The same

care adopted by the Institute in all its work was taken in this case, the modus operandi being the preparation of a draft by the reporter; submitting of a draft to an assistant reporter and Professor Wigmore; a redraft then being mimeographed and sent to the various advisers; after the amendments suggested by the advisers, a redraft submitted to the Council of the American Law Institute; again redrafting for the purpose of submitting to the general meeting of the Institute which is held annually in Washington every May. As a result of the discussion at the general meeting further amendments are drafted and resubmitted at the meeting the following year, following the course of procedure outlined above. At the present time there have been two tentative drafts drawn and submitted to the general meeting and a final draft is now being drawn for submission to the gneral meeting of the Institute in May. Such painstaking and scholarly work cannot, or at least should not, be overlooked by any common law jurisdiction in contemplating changes in the law of evidence.

Professor Morgan, who has had the difficult task of steering the various drafts through the intermediate stages, has written the following article, outlining some of the highlights of the changes suggested by the Code. Some of the provisions which the Code incorporates are unnecessary in Canada, such as providing for a judge to comment on evidence. Other provisions will no doubt strike many practitioners as wildly heretical, as indeed they have struck many of the practitioners in the United States. Perhaps the most important single topic is the manner in which the Code has dealt with the whole topic of hearsay. Professor Morgan indicates the substance of the method by which the Institute has dealt with this problem and it is to be hoped that the profession will be sufficiently interested to pursue the subject in more detail.

As the possibility of obtaining material from the American Law Institute is practically unknown in this country, we take this opportunity of pointing out that drafts of the Code, or at least tentative drafts, can be obtained at the executive office of the American Law Institute, 3400 Chestnut Street, Philadelphia.—ED.]

"It may seem strange to the uninitiated, but the elders of the bar find no inconsistency whatever between their complete confidence in the adequacy of the judicial process for the trial of issues of fact and their open admiration for those members of the profession who are most adept at the manipulation of court room procedure for the obfuscation of issues and the confusion of juries." This is the final sentence of a review of a recent book about success in court. Books about trials written for popular consumption by lawyers in their anecdotage, or by laymen about lawyers who have achieved notoriety in spectacular cases, ought not to be taken too seriously. They do serve to disclose abuses which our adversary system of litigation makes possible; abuses which occur and are exposed frequently enough to cause many intelligent men hastily to condemn the whole system. This reviewer's generalization, however, is startlingly inaccurate, unless by elders of the bar he means the elderly trial lawyers

whose biographies or autobiographies he has read. If by elders of the bar he means the present leaders of the profession, he is entirely in error in both specifications. These men are not completely confident of the adequacy of the present process and they have no real admiration, open or otherwise, for a practitioner who substitutes intellectual legerdemain for honest preparation and presentation. They realize that the rules of procedure and practice are defective, and they are engaged in efforts to make them sensible and workable. They have within the past few years produced a code of rules governing procedure which makes it practicable for the litigants to define the issues to be tried with such accuracy and in such detail that the element of surprise at the trial may be entirely eliminated. These rules are in force in the United States Courts and have already been adopted in many states. Through the American Law Institute these leaders of the American Bar are now considering a code of evidence which, if applied in conjunction with these rules of procedure, will prevent the clouding of issues and confusion of the jury and make the trial a rational proceeding for the settlement of a dispute between litigants.

In so far as a trial involves the determination of a past event or condition, it cannot be made a scientific investigation for the discovery of truth. Since the issue is framed by the adversaries and since the court has no machinery for independent investigation to discover sources of information unknown to the adversaries or undisclosed by them, the evidence upon which the decision must be made has to be furnished by interested parties. The event or condition may have been observed by only a few. The capacities and stimuli for accurately observing and remembering relevant material of each of these few will vary. The ability and desire to narrate truly may be slight or great. The trier of fact can get no more than the adversaries are able to present, and at times not even so much. No scientist would think of redering a decision upon such data. But in a lawsuit, a decision is imperative. The dispute must be settled. Often a wrong decision promptly made is better than a right decision after undue delay. "Some concession must be made to the shortness of human life." The trier of fact must determine where the preponderance of probability lies, and assume that the data presented are complete. If the data leave the mind of the trier in equilibrium, the decision must be against the party having the burden of persuasion. No proposal for reform in procedure can ignore these truths.

The proposed Code of Evidence recognizes the existence of these obstacles to the presentation of adequate data, but its underlying assumption is that no available relevant evidence should be withheld except for the most weighty reasons. In particular, it rejects the notion that perjury or subornation of perjury can be prevented by a rule rendering an intelligent witness incompetent or making material testimony inadmissible. Ancient judges and modern legislators have labored under the curious delusion that the dishonest litigant can be thwarted by rules of procedure. Even slight experience at the Bar or on the Bench is enough to demonstrate that the crooked case never fails to get to the jury or other trier of fact for lack of evidence from competent sources. It is quite as easy to invent admissible evidence as to invent inadmissible evidence; to suborn a person competent to testify as to suborn one incompetent. Given a litigant and counsel willing to present perjured evidence, no exclusionary rule will be effective.

The keystone of our system of administering justice is the trial judge. With an incompetent trial judge the applicable rule of substantive law may be overlooked or misapplied, the rules of procedure may be disregarded, and contending counsel may mistreat witnesses and impose upon the jury. With a competent trial judge the questions of substantive law are intelligently handled, the procedure is orderly, counsel are properly regardful of witness, court and jury, and the jury are understandingly instructed and guided. It would be foolish and futile to frame a code of evidence to be administered by an incompetent or dishonest judge. There is no substitute for intelligence and honesty on the trial bench.

Even the best trial judge cannot function satisfactorily with a stupid or corrupt jury. Such a jury may misunderstand the plainest directions or wilfully disregard what it does understand. No rules of evidence can cure ignorance or corruption. The charge is seldom made that modern juries are corrupt, but complaints of stupid and capricious action are frequent. The low intellectual capacity of the jury is commonly put forward to justify some, if not all, of our exclusionary rules. That is in great part a mere rationalization of rules which originated without reference to the jury system and which cannot persist if they must rest on a basis so largely contrary to fact. Much of the abuse of the jury is due to the unwillingness of jurors to apply anachronistic rules of substantive law and the insistence of legislators and lawyers upon prohibiting the trial judge from

commenting upon the weight of evidence and credibility of witnesses.

The attitude of the bar and bench toward the jury, as reflected in judicial decisions and in some legislation, is past comprehension. In some aspects jurors are treated as if they were low grade morons. In most American states they are thought to be so undiscerning that they may not be permitted to hear testimony from an interested survivor in an action against the estate of a decedent or incompetent. They are assumed to have insufficient intellectual capacity to evaluate ordinary hearsay evidence even with the help of counsel who can point out the dangers of uncross-examined material. They are believed so prone to subordinate themselves to the judge that they must not be permitted to know what he thinks about any fact in issue. On the other hand, they are deemed to have extraordinary intellectual capacity and superlative emotional control. They can refrain from drawing any inference against an accused because of his failure to testify in his own behalf or against a party who claims a privilege preventing disclosure of material facts. Where the admissibility of evidence depends upon a fact the existence of which is in dispute and the judge admits the evidence, the jurors have no difficulty in reviewing the judge's finding as to the preliminary fact, and if they disagree with him, in casting the objectionable evidence out and remembering it no more forever. In an action against a master and his servant for damage done by the negligent conduct of the servant, the jurors must first determine whether the servant was negligent.; if so, he is personally liable and perhaps the master also; if not, neither is liable. Evidence of admissions by the servant is admitted, and both bench and bar purport to be confident that the jury will use these admissions for what they are worth in seeking to determine the servant's negligence when considering his personal liability but will proceed as if they had never heard any such evidence when considering the master's liability for the servant's negligence. If a witness testifies that an event did occur, his former statement that the event did not occur is admissible; but the jury is directed, and with the greatest of ease obeys the direction, that this evidenc can be used not as tending to show that the event did not occur but only to show that the witness is mistaken or lying in testifying that it did occur. And finally the untrammeled judgment of a jury concerning disputed facts is so to be desired and trusted that the judge must not so much as intimate to them his opinion thereon. Of course, the truth is that the jurors are neither so foolish as some of the rules they are supposed to follow, nor so wise or able as other

rules assume them to be. When they enter the jury-box, they do not lose their common sense, nor do they acquire new capacities or new wisdom. They cannot cast aside all the previous experiences of their lives; they endeavor to solve the problems put to them as they would do in like situations out of court; and they succeed in doing so with reasonable efficiency except when hindered by artificial rules of procedure and evidence.

The proposed Code of Evidence therefore proceeds upon the theory that it is to be administered by an honest and intelligent judge; and that the trier of fact, whether or not a jury, has the capacity and desire to hear, consider and fairly evaluate all data which reasonable men would use if confronted with the necessity of solving a problem of like importance in their everyday life.

Discretion of Trial Judge

The first requisite of this theory is that the trial judge be made the master of the trial, as he has always been in England. By Rule 105 he is to see to it that the evidence is presented honestly, expeditiously and in such form as to be readily understood. To this end he determines the order in which evidence shall be offered and witnesses called, the number of counsel who may examine a single witness, the number of witnesses that may be called upon a single matter. He protects witnesses from being misled or intimidated; he controls the use of leading questions, of memoranda to refresh recollection, of plans, maps, summaries and similar means of conveying information to the trier of fact. He may call witnesses of his own motion or examine witnesses called by either party; on the other hand, he may exclude inadmissible evidence or protect the privilege of an absent person, whether requested to do so or not. He decides whether and upon what condition a party must submit at the trial to another party documents in the former's control and readily accessible. To prevent unfair surprise he may exclude certain documentary evidence unless the adversary has been furnished copies in advance. Under Rule 702 he may admit secondary evidence of the content of a writing if he deems it unfair or inexpedient to require the production of the original.

Under Rule 9 it is the trial judge who decides disputed questions of fact upon the decision of which depends the existence of a privilege, the competency of a witness or the admissibility of evidence. Rule 3 authorizes him to ascertain whether a matter concerning which questioned evidence is offered is bona fide in dispute, and directs him not to apply exclusionary rules

to evidence of matters which are not the subject of honest controversy. He has the power to appoint expert witnesses and to require them to perform their functions efficiently. He has much discretion in the application of the doctrine of judicial notice.

Generally speaking, he is not tied down by rules of thumb. Rule 702, for example, does not prescribe the situations of fact which shall constitute reasonable grounds for the non-production of an original writing, but allows him to determine whether the facts are such as to show that it is unavailable for any reason other than the culpable negligence or wrongdoing of the proponent. Rule 403 enables him to prevent delay or confusion of issues or unfair surprise, for it authorizes him to exclude otherwise admissible evidence if its legitimate probative value is outweighed by the risk that its reception will cause undue consumption of time or create real danger of undue prejudice or of confusing the issues or misleading the jury. And finally the judge may comment upon the weight of evidence and credibility of witnesses. His conduct of the trial in all these respects is reviewable only for abuse of discretion.

Competency and Credibility of Witnesses

The misconceptions of the common law concerning the effect of race, color, relationship, age, interest and mental abnormality upon the ability or desire of a person to testify truly have almost all been swept away either by judicial decision or legislation. In most of the United States, however, a remnant of the idea is preserved in statutes which prevent a financially interested person from testifying in actions against the estate of an incompetent or decedent. The Code abolishes this remnant, and is supported by the experience of Connecticut for nearly a century. The sole qualifications for a witness are his capacity to communicate to the trier of fact relevant data concerning any material matter of which he has personal knowledge, and to understand the duty of a witness to tell the truth.

The value of a person's testimony may depend upon many factors; he may in the past have shown a high or low regard for the truth; he may be weak or corrupt; he may have peculiar or prejudiced views with reference to the subject-matter of the dispute or the parties to the action. His testimony may be of prime importance or comparatively trivial. The probable effect of revealing to the jury or other trier of fact relevant data concerning his credibility, therefore, varies from case to case.

The common law has evolved numerous rules of thumb governing the admissibility of evidence impairing or supporting the credit of a witness, most of which are the subject of inharmonious decisions in many jurisdictions of the United States. There is general agreement that a party may not impeach his own witness. The rule which forbids a cross-examiner to question a witness about a prior contradictory statement in writing without first showing him the writing or reading it to him prevails in most states. The proposed Code cuts away all these artificial restrictions. It makes admissible all relevant data affecting the honesty or veracity of a witness by whomever called, and relies upon the trial judge's application of Rule 403 to prevent waste of time or confusion of issues or undue prejudice. The judge can prevent unfairness to witness or party in the use of evidence of prior contradictory statements by Rule 106 (2).

Privileges

Under our adversary system of litigation rules of admissibility and privilege are usually enforced only at the demand of an adverse litigant except where a witness claims a privilege. Where, however, the creation of a privilege is for the protection of the interests of the government as opposed to those of the litigant or witness, the court should refuse to permit the privileged matter to be revealed. Thus the Code Rules which cover secrets of state, official information, communications to a grand jury and identity of an informer are framed in terms of both inadmissibility and privilege. These are recognized at common law. Under the Rules, the judge determines whether or not the desired information constitutes a secret of state or whether the disclosure of the other official information will be harmful to the interests of the government: under the authorities there is much uncertainty as to whether this decision lies with the judge or with an executive or administrative officer.

The personal privilieges embodied in the Code are privilege against self-crimination; privilege against disclosure of confidential communications between lawyer and client, between husband and wife and between priest and penitent; privilege to refuse to disclose religious beliefs and political votes, and privilege against disclosure of trade secrets. They do not include any privilege for communications to physicians, bankers, accountants or newspaper reporters. The common law recognized no privilege for any of these last mentioned communications. In only a very few states is there any statutory privilege for communications

to bankers, accountants or newspaper reporters. In many states statutes with varying limitations and qualifications create a privilege for communications between patient and physician. Experience shows that these statutes result in suppression of valuable testimony for flagrantly improper purposes. There is not a shred of evidence that they tend to improve the public health. The evidence is overwhelming that they foster fraud in litigation over insurance and personal injuries. In this connection it is to be noted that neither the common law nor this Code sanctions the disclosure of confidential communications between professional advisers and their clients or customers. Such a disclosure may constitute a tort or a breach of contract. What the common law and this Code do is to refuse to prevent disclosure of such communications when they are demanded for a proper purpose in a court of justice.

The general theory of the Code is that all relevant evidence should be admissible. It is universally conceded that relevant confidential communications are likely to be most trustworthy and are usually capable of reasonably accurate valuation even by an untrained trier. Therefore they should be made the subject of privilege only to the extent that sound social policy demands, and should not be buttressed by provisions which will encourage claims of privilege to be made. Generally speaking the Code preserves the personal privileges which the common law created, and contains few, if any, limitations upon them which are not supported by respectable authority. The following provisions, however, should be noted.

(1) Paragraph (3) of Rule 201 permits comment by court and counsel upon the failure of the accused to take the stand. Rule 106(3) forbids the introduction, by cross-examination or otherwise, for the purpose of affecting the credibility of an accused who takes the stand, of any evidence tending to show that he had committed or been convicted of another crime. Good policy as well as fairness to the accused requires 106(3) if comment is to be allowed on the failure of an accused to testify.

(2) Rule 225 provides that if any privilege other than that of an accused to refrain from testifying is claimed and allowed, the judge and counsel may comment thereon, and the jury may draw reasonable inferences therefrom. Where such a privilege is claimed, the judge may ascertain why it is claimed; and then determine whether it would be fair to permit comment.

(3) By Rule 223 a previous voluntary disclosure or consent to a disclosure by another of privileged matter, or a contract

not to claim a privilege, destroys the privilege. A party should not be permitted to use his privilege as a vendible commodity, or to use it solely for the purpose of preventing disclosure in an official investigation. If he discloses it to others, he should be required to disclose it in court.

Relevancy

In handling the vast multitude of cases in which courts and writers have attempted impossible distinctions between logically relevant and legally relevant evidence, the Code gets back to first principles. It defines relevant evidence as evidence having any tendency in reason to prove any matter the existence or non-existence of which is provable in the action. It then makes all relevant evidence admissible except as otherwise specifically provided; and entrusts to the trial judge the power, as heretofore stated, under Rule 403 to exclude relevant evidence the probative value of which is outweighed by the risks which its reception would carry. It treats the myriads of cases dealing with physical capacity, skill, means, opportunity, motive, intent, design, knowledge, and conduct tending to show their presence or absence, as mere examples of this general principle. It proposes specific rules concerning character and habit and for the few situations in which the courts have evolved positive exclusionary rules that seem supported by social policy.

As to character, the Rules proposed are more liberal than those now generally accepted—when character is a fact necessary to establish a liability or defence, it may be proved by evidence of opinion, or of reputation or of specific instances of relevant conduct. Where character is to be used as a basis for inference to conduct, evidence of specific instances are generally inadmissable. The common law rules as to evidence of accused's character in criminal actions are preserved; and evidence of character as to a person's care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

The rule as to the exclusion of evidence of other crimes and wrongs when offered to prove the commission of a specified crime or wrong is by Rule 411 put on a sound sensible basis which has support in innumerable cases though rarely clearly articulated. Such evidence is made inadmissible only where it is relevant solely as tending to prove a disposition to commit such a crime or wrong or to commit crimes or wrongs generally. If it is relevant for any other purpose, it is admissible. The courts at common law will not admit evidence of a person's criminal or tortious character as tending to prove his conduct on a specified

occasion; *a fortiori* they will not admit specific instances of his conduct on other occasions as tending to prove such character. Rule 406 does, with certain exceptions, admit evidence of relevant traits of character in civil actions as tending to prove conduct, but it does not permit such character to be proved by evidence of specific instances. This might well be enough without a specific rule. But out of abundance of caution in this instance the Code specifically excludes evidence of a person's commission of other crimes or torts as tending to prove the commission of the crime or tort charged, when the only series of inferences by which the commission of the crime or tort has any probative value is from that commission to a disposition to commit such acts, and from that disposition to the commission of the act charged. In all other situations, it is admissible if relevant, subject, of course, to Rule 403.

Opinion

The Code attempts to make the use of opinion evidence, lay and expert, cease to violate the canons of common sense and decency. It allows the lay witness to testify in language which includes inferences or conclusions unless he is likely thereby to mislead the jury and he is able to present the data adequately and satisfactorily without the use of such language.

The necessity for expert testimony has been recognized at least since the fourteenth century, when the precedents show experts being called in to aid the judges. Two outstanding abuses have developed since experts have become witnesses for the parties. First, they are in most instances merely expert advocates. The shocking exhibitions in criminal prosecutions and in personal injury actions need no detailed description. Second, when an expert has not observed the data which are to serve as the foundation of his opinion, his opinion must be hypothetical, for he cannot be permitted to decide whether its foundation in fact exists in the particular case. This has led to the invention of the hypothetical question, which, as Mr. Wigmore says, "is one of the truly scientific features of the rules of Evidence," but has been so "misused by the clumsy and abused by the clever" that it "has in practice led to an intolerable obstruction of truth."

Rules 503-510 embody substantially the same provisions as the Uniform Expert Evidence Act, which has been approved by the Committee of the American Bar Association on Improvement of the Law of Evidence. Its chief features are:

(1) The judge may appoint expert witnesses where he finds that they will be of substantial assistance.

(2) The parties have an opportunity to be heard on the propriety of appointing experts and the choice of experts. If the parties agree as to the experts, the judge must appoint the experts agreed upon.

(3) The parties may call other experts but must give reasonable notice of intent to do so.

(4) The judge may order appropriate examinations and inspections by the experts, and the filing of written reports under oath by the experts, whether or not they be appointed by the judge. Each such report is to be open to inspection a reasonable time before the expert or experts making it are called to testify.

(5) The jury is to be told of the appointment of the experts by the judge. Each expert so appointed may be cross-examined by either party.

(6) The expert may read his report; he may state his relevant inferences, whether or not embracing an issue to be ultimately decided by the jury; he need not first state, as an hypothesis or otherwise, the data on which he bases his inference unless the judge so orders. This does away with the necessity of the hypothetical question.

(7) Provision is suggested for the payment of part or all the expert's fees by public authority.

HEARSAY

The hearsay rule, like the rest of the law of evidence, has been said to be the child of the jury system. As to much of the law of evidence the entire lack of influence of the jury can be clearly demonstrated; as to the hearsay rule also the statement, unless qualified, will not bear close investigation. It would more nearly approximate the truth to say that the hearsay rule is the child of the adversary system, and that the jury is a foster parent foisted upon it by the judges and textwriters of the nineteenth century. The Anglo-Saxon trial by ordeal, the Anglo-Norman trial by battle, and trial by compurgation both before and after the Norman Conquest were essentially adversary proceedings. Though they were conducted under the supervision of the court, the adversaries furnished the actors through whom they appealed to the Deity for a decision. The institution of the Norman inquest, from which the jury evolved, was revolutionary. It not only substituted a rational investigation for a more or less

superstitious ceremony, but it removed the proceeding for the determination of the facts completely from the control of the litigants. To use Mr. Thayer's phrase, it made the decision depend upon "what a set of strangers might say, witnesses selected by a public officer." And these strangers gave their answers without the assistance of the court and without evidentiary help or hindrance from the litigants. The parties were permitted to state their respective contentions. Later they secured the privilege of furnishing additional information to the jury. Of this privilege they took greater and greater advantage, so that by the opening of the 1600s juries ordinarily depended for the information chiefly upon evidence given in open court. And and before the middle of the 1700s, jurors were obliged to rely upon what was thus presented in determining the facts of the particular case. This evidence was furnished almost, if not quite, exclusively by the parties. The purely investigative system of the Norman inquest had become our modern adversary system.

During the first few centuries of the jury system, the jury based its decision upon what the jurors themselves knew of the matter in dispute and what they learned "through the words of their fathers and through such words of other persons whom they are bound to trust as worthy." Until the end of the sixteenth century hearsay was received without question. Some objections were made shortly before the opening of the 1600s, but these had to do with weight rather than admissibility. By the middle of that century they grew in number and strength, so that by the beginning of the 1700s hearsay was excluded when offered in corroboration of non-hearsay. By the end of the third decade of the eighteenth century, it was generally rejected.

The earliest reason for the rejection was lack of oath. As Chief Baron Gilbert put it: "Besides,. . . the person who spake it was not upon oath; and if a man had been in court and said the same thing and had not sworn it, he had not been believed in a court of justice." As long as the jurors were regarded principally as witnesses rather than as finders of fact, their oaths sufficed to give the requisite religious sanction common to all other forms of solemn investigation. When it was perceived that the author of the hearsay statement is the real witness, and the witness on the stand merely a conduit for the conveyance of the author's testimony, it was to be expected that the lack of oath would be urged and accepted as a ground for excluding the statement. However much it may be regretted, the sanction

of the oath has lost most of its effectiveness. If lack of oath alone were the basis for the rejection of hearsay, it could not suffice as an excuse for the exclusion of any helpful evidence. Nor does the presence or absence of a jury in any wise affect the necessity for the oath.

As early as 1668, sworn hearsay was excluded, because "the other party could not cross-examine the party sworn, which is the common course," and in 1696 sworn depositions were rejected for the same reason. Nothing is said about the jury or about its supposed credulity. Cross-examination is not required, but opportunity for cross-examination. The adversary not the jury is to be protected.

As our system changed in character from investigative to adversary the rule rejecting hearsay and the rule making opportunity for cross-examination a requisite of admissibility developed side by side. This was no mere historical accident. The civil law, like the common law, requires witnesses to speak under oath with its accompanying sanctions. It requires confrontation in some cases; but it remains an inquisitional rather than an adversary system. It does not know anything like the Anglo-American cross-examination. Bentham says: "The peculiarity of the practice called in England cross-examination—the complete absence of it in every system of procedure grounded on the Roman, with the single exception of the partial and narrow use made of it in the case of confrontation, is a fact unnoticed till now in any printed book, but which will be as conclusively as concisely ascertained at any time, by the impossibility of finding a word to render it by, in any other language." And the civil law does not reject hearsay. To be sure, it has no jury; but the opportunity for cross-examination is not a necessary element of a jury system, while it is the very heart of an adversary theory of litigation.

Consequently, not the jury system, but rather the adversary theory of litigation, coupled with then currently accepted notions as to the value of the oath, accounts for the hearsay rule as it was at the opening of the nineteenth century.

Soon thereafter the judges began to attempt to give reasons for rules which they had theretofore been applying in reliance on precedent alone. The exclusion of rationally probative evidence in a proceeding assumed to be a rational investigation required an explanation. The frailties, real and supposed of the jury, presented a plausible reason. The judges accepted the plausible, and by constant repetition gave it such seeming validity that the superlative nonsense uttered by Lord Coleridge in *Wright v.*

Doe d. Tatham, 5 Clark & Finelly 670 (1838), was accepted by the bar without indignant dissent. In that case he rejected an argument for the admission of evidence of a person's conduct indicating belief in the competence of the testator, as involving hearsay and as based "on the fallacy, that, whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury".

Let us look at the situation which a partial recognition of this judicial attitude has brought about in the law of evidence. Suppose that a car driven by Anderson with Blake as his guest collided with a car owned by defendant and driven by Carlson, a friend to whom defendant had loaned or rented the car for an afternoon. Suppose also that there is a statute making defendant responsible for Carlson's operation of the car. An investigation shows the following facts:

1. One Watson saw the accident as he was on his way to take a train. In great excitement he immediately called a policeman, and thereafter went to a notary public and dictated an account of what he saw. The notary reduced the matter to writing in the form of an affidavit; Watson executed the affidavit and mailed it to Anderson.

2. The policeman called by Watson came to the scene within a minute or two, and Watson immediately told him how the accident occurred.

3. Anderson was taken home and later told his wife how the accident occurred.

4. A few days later Anderson, realizing that he was about to die, made a full statement.

5. Blake likewise was fatally injured, and he made a dying declaration.

6. Carlson was indicted for the manslaughter of Anderson and in his trial testified that he had taken several drinks of whiskey before the accident.

7. Watson testified fully at Carlson's trial.

8. When Carlson was on his way to defendant's garage, he met one Wilson to whom he said that he was going to have defendant's car for the afternoon but first he was going to Zuber's saloon and get plenty of whiskey to put him in good spirits.

9. Carlson was convicted of manslaughter of Anderson.

10. At the criminal trial Carlson told Wilson privately that he knew he was liable to Anderson's widow and that he was going to sell his home and pay her. Carlson died in prison.

11. Defendant, who was out of the city at the time of the accident, called on the Andersons a week after the accident and told Mrs. Anderson that he was sorry about it, that Carlson was drunk at the time, that he wouldn't have let Carlson have the car if he had known that Carlson drank.

Anderson's administrator brought action against defendant for wrongful death under a statute like that in Massachusetts, which allowed recovery of not less than $500 nor more than $10,000 according to the degree of fault of the defendant, and in addition damages for the pain and suffering of the decedent. At the trial the following occurred:

1. Watson was called as a witness and testified fully on direct examination. He wanted to read the affidavit but the court would not permit it because he had a present recollection of the matter. There was a recess at the end of Watson's direct examination, and Watson was accidentally killed. Defendant moved to strike his direct examination. Motion granted.

2. Plaintiff thereupon offered in evidence Watson's affidavit. Rejected.

3. Plaintiff threupon offered in evidence, through the court reporter, the testimony given by Watson in the criminal prosecution of Carlson. Rejected.

4. Plaintiff then called the policeman who offered to testify to what Watson told him at the scene of the accident. Admitted.

Up to this point testimony given by Watson in open court at the present trial in the presence of the jury while confronting the defendant and expecting to be cross-examined by him has been rejected. His testimony given in the criminal trial while he was under oath, confronting Carlson against whom he was testifying and subject to cross-examination by Carlson has been rejected. A sworn statement in writing made by him a short time after the accident, but not on the scene nor while he was laboring under nervous excitement caused by the accident has been rejected. An unsworn oral statement, reported by the person who heard it, made by this same Watson whose sworn testimony and sworn statement has been rejected, has been received. Why? Watson's statements may carry strong guaranties of trustworthiness. There can be no question that his testimony in the criminal trial was given under conditions calculated to induce him to tell the truth and to enable a court and jury to put a fair value upon his statement. His direct examination at the present trial has the added merit of being

in the presence of the court and jury who are to consider it against this defendant. The affidavit is of less value but was given under sanction of an oath. In all three, however, there is the fatal lack of opportunity by defendant to cross-examine Watson. The adversary theory of litigation requires opportunity to cross-examine by the party against whom the evidence is offered. In these rejections, no deviation from that theory is permitted. In dealing with Watson's spontaneous statement, however, no consideration whatever is given to the adversary system. Attention is directed to Watson's mental condition. His statement is unreflective—made before he had a motive to contrive a falsehood. To use the metaphor of some courts, the event speaks through Watson. (Some courts, indeed, let this metaphor run away with them, and hold that a deliberate statement inconsistent with the spontaneous statement is not admissible to impeach Watson; for it was not Watson but the event that was speaking and the event made no contradictory statement.) The short of it is that Watson spoke under such circumstances that he probably desired to tell the truth. The nervous excitement under which Watson was laboring may take the place of an oath as a guaranty of sincerity; but it can in no measure be a substitute for cross-examination as to observation and narration. Indeed, psychologists assure us that a person laboring under a nervous excitement is likely to observe and to narrate with more than normal inaccuracy.

[Now suppose for a moment that Watson had been cross-examined and that there had been a mistrial. At a second trial Watson has so far forgotten the relevant data as to be unable to testify from memory. He still has his affidavit, and the court reporter has a verbatim transcript of Watson's testimony at the first trial. The affidavit or its content is admissible as a record of past recollection, although any effective cross-examination of Watson is impossible. His former testimony is inadmissible although it contains a complete cross-examination. However, if Watson had died after the first trial, his former testimony would be admissible but his affidavit would be inadmissible. Resort to the adversary system will help explain these results, but can anything justify them?

A further supposition may be indulged, that after the Anderson action is over, Blake's administrator sues defendant for Blake's wrongful death, and at the trial offers in evidence Watson's testimony at the Anderson trial. By the orthodox view, it will be excluded, although it would be admitted at the second trial

of the Anderson action. It is true that the issue is the same, and that defendant cross-examined Watson at the Anderson trial; but since Blake's administrator had no opportunity to cross-examine Watson, the evidence would be inadmissable against Blake's administrator; and if inadmissible against him, it is inadmissible in his favor. Why? Both adversaries must be treated alike; one shall have no handicap which the other does not bear. But what has this to do with an investigation of fact?]

Let us go on with the Anderson trial.

5. The plaintiff now offered both of Anderson's statements —that to his wife and his dying declaration. Rejected.

Incidentally, Anderson's dying declaration was offered and received in the criminal prosecution of Carlson for Anderson's death. Blake's dying declaration was there offered and rejected. Here both of them are clearly inadmissible. Why? Certainly the adversary theory would cut them out in all three trials. The guaranty of the desire of the speaker to tell the truth is equally operative in all three. The awfulness of the situation, or a dying man's fear of going to his Maker with a lie on his lips, is as effective in one as in another; the circumstances in which the statement is made, not those of the litigation in which it is offered in evidence, control the motivation of the declarant. Consequently some other sort of consideration must be operating. Some judges have frankly said that the policy of facilitating the criminal prosecution of manslayers induces the courts to accept this evidence despite its frailties; hearsay is better than nothing, and it is needed because the chief witness in this class of case has always been put out of the way. But why should that policy operate against the reception of Blake's declaration in the prosecution for Anderson's death in the same accident? And why receive frail evidence against a man whose life or liberty is at stake and reject it when only his property is involved? The answer seems to be that the rule took on these qualification at a time when the courts were rejecting all hearsay except that for the reception of which a precedent was found.

6. Plaintiff next offers evidence of Carlson's testimony at Carlson's trial in which he admitted that he had had several drinks of whiskey just before the accident. Rejected.

7. Then plaintiff offers through Wilson evidence of Carlson's statement that Carlson was going to get defendant's car but was first going to get plenty of whiskey, etc. Admitted.

Here the court rejects evidence of a sworn statement by Carlson which he must have known would be most damaging to him, which would tend to make the very jury in whose presence it was uttered more willing to find him guilty of a serious offense. The next instant the court receives evidence of an unsworn statement by this same Carlson. The fact to be proved by each item is the same, namely that Carlson drank whiskey shortly before the accident. His sworn statement that he actually drank the whiskey is rejected, his unsworn statement of intention to drink it is received. Certainly Carlson's stimulus for telling the truth was greater as to the first than as to the second. To the first item, the court applies the adversary theory; to the second, it seeks only for a so-called guaranty of trustworthiness.

8. Next plaintiff offers a duly authenticated copy of the judgment of conviction of Carlson for the manslaughter of Anderson and Wilson's testimony that Carlson told him that he knew he was liable to Anderson's widow and would sell his home and pay her. The court rejects the former and admits the latter. The reason for the rejection is that the judgment is hearsay opinion, a mere conclusion of the jury based on hearsay, that is, on the testimony offered in the Carlson prosectuion. To be sure the conclusion was reached as the result of a trial at which Carlson had every opportunity to present evidence and argument; it represented the considered judgment of twelve men, approved by the judge, that there was no reasonable doubt of Carlson's criminal negligence causing Anderson's death; but the adversary theory requires an opportunity to cross-examine, and defendant had no opportunity to cross-examine either the witnesses at Carlson's trial or the jury which rendered the verdict on which the judgment was entered. The reason for receiving Wilson's testimony is that Carlson's statement was of a fact against his pecuniary interest and Carlson was not likely to make such a statement unless he believed it to be true.

Finally plaintiff offers evidence of defendant's statement to Mrs. Anderson that Carlson was drunk. If defendant were called to the stand and asked about Carlon's condition at the time of the accident, he would not be permitted to answer though under oath and subject to cross-examination, because he has no first-hand personal knowledge about Carlson's condition either at the time of the accident or at any other relevant time. Yet the offered evidence is admitted.

Anderson's statement to his wife is unadulterated hearsay and evidence of it, when offered for plaintiff, falls within no

exception. But suppose that the statement had been favourable to defendant and he desired to offer it in evidence. If Mrs. Anderson, for whose benefit the administrator is prosecuting this action, had, in making proof of Anderson's death to a life insurance company, either attached Anderson's statement or repeated its content in answer to the question as to cause of death, this answer would have been admissible in evidence for defendant for its full value. But if she had not in some way adopted its content as an accurate account of the accident, it would not be admissible as tending to show the cause of Anderson's death upon the issue of plaintiff's right to recover the penalty, but would be admissible to show the cause of Anderson's death upon the issue of plaintiff's right to recover damages for Anderson's pain and suffering. Why these rulings? As to the statements of defendant and Mrs. Anderson, defendant cannot object that he had no opportunity to cross-examine himself, and Mrs. Anderson is treated as if she were the party to the action because she is the sole beneficiary. Every relevant item of conduct of one adversary may be given in evidence against him by the other. As to Anderson's statement, the administrator is in privity with Anderson as to the claim for Anderson's pain and suffering, but is not in privity with Anderson as to the claim for the penalty. The adversary theory of litigation here identifies the party with his predecessor in interest for procedural purposes because the party is claiming the identical substantive interest which the predecessor would have had. Obviously there is no greater guaranty of trustworthiness in the one instance than in the other; and just as obviously the party against whom the evidence is offered never had an opportunity to cross-examine the declarant. Why should he be prevented from objecting to lack of opportunity to cross-examine merely because he is the successor in interest of the declarant?

These examples of what might happen in an ordinary case are sufficient to indicate that the present law as to hearsay is a conglomeration of inconsistencies due to the application of competing theories haphazardly applied. Historical accidents play their part also. In the orthodox treatment of former testimony there is the most rigorous adherence to the adversary theory. Former testimony given under oath and subject to cross-examination by the very party against whom it is now offered is inadmissible merely because it would not be receivable if offered against the proponent. In admissions, personal or authorized, even the testimonal qualifications of the declarant are disregarded. In most of the other exceptions there is not a

semblance of a subtitute for cross-examination. What is found is a set of circumstances of the utterance which indicate that a reasonable man in making such an utterance would have no motive to falsify or would probably desire to tell the truth. In other situations where the guaranties of trustworthiness are much more substantial, the hearsay is rejected.

Any system of rules which produces such absurd results is ripe for reform. Consequently it is in the chapter on hearsay that the code does most violence to common law rules. It limits hearsay by definition to conduct intended to operate as an assertion or offered for a purpose which assumes that it was so intended, evidence of which is tendered in proof of the matter intended to be asserted. Rule 603 makes evidence of hearsay by a declarant admissible if the judge finds that the declarant is unavailable or if the declarant is present at the trial and subject to cross-examination. It rejects hearsay only where the declarant is available and not presented for cross-examination. In considering the advisability of receiving declarations of unavailable persons, it must be remembered that the judge under Rule 403 may exclude hearsay of comparatively slight weight and under Rule 8 may comment on the weight of the evidence and the credibility of the witness. If the declarant is present for cross-examination, the proponent will rarely present the hearsay statement in lieu of oral testimony. He will do so chiefly when the hearsay constitutes a prior contradictory or a prior corroborative statement.

The judicial decisions admit many classes of hearsay from declarants who are available as witnesses but who are not present and subject to cross-examination. These the Code preserves. It also puts evidence of declarations against interest in this class, and permits the judge in his discretion to dispense with the requisite of unavailability as to former testimony, declarations of family history, and recitals in dispositive or constitutive documents. It otherwise expands the generally accepted doctrines in a few instances. The following should be noted:

1. Rule 608 makes admissible a declaration by an agent concerning a matter within the scope of his agency made before the termination of the agency, even though the agent was not authorized to make the declaration.

It also makes declarations of one co-conspirator concerning the conspiracy admissible against his fellow conspirators if made while the conspiracy was on, even though not made in furtherance of the conspiracy.

It further adopts the doctrine of some cases and statutes making admissible evidence of a declaration of a declarant tending to show declarant's liability for conduct for which the party against whom the evidence is offered is vicariously responsible.

2. Declarations against interest include declarations of matters contrary to pecuniary or proprietary interest, of matters which would subject the declarant to civil or criminal liability, and of matters which create a risk of subjecting him to the hatred, ridicule or social disapproval of the community.

3. Vicarious admissions by joint-owners, joint-obligors, and predecessors in interest are admissible only in so far as they are declarations against interest. This provision puts this whole subject on a rational basis.

4. Entries in the regular course of business are treated as in the more modern statutes, but a preliminary finding by the judge that the offered entries were made in such regular course is required. Furthermore, an express provision makes absence of a regular entry evidence of the non-occurrence of the matter which, had it happened, would have been noted in such an entry.

5. Written statements by public officials and entries in public records by *ad hoc* officials are made generally admissible in the manner now commonly provided for by statute in the case of entries in records of vital statistics. The method of proving the content of an official record provided in Federal Rule 44 is adopted.

6. Judgments of conviction are made admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment.

7. Reputation offered to prove a person's character includes reputation in a group with which he habitually associates in his work or business or otherwise.

8. Statements in learned treatises are admissible to prove the truth of the matter stated, where the writer is recognized in his profession or calling as an expert in the subject.

Authentication and Content of Writings

As to authentication, the Code accepts the common law. As to proof of content, as heretofore stated, Rule 702 disregards the numerous rules of thumb with reference to excuses for failure to produce an original writing and as to their applicability to so-called collateral documents. It substitutes a general rule to be applied to the circumstances of each case by the judge.

It also makes clear what is obscurely implied in the cases, namely, that if what the judge finds to be the original writing is produced, there is nothing to prevent a party from introducing secondary evidence of what he claims to have been the original. The only showing he must make is that the paper which he claims to have been the original has become unavailable without his culpable neglect or wrongdoing. In considering this question the judge must assume that there was such an original and that it has not been produced at the trial, unless there is no evidence to that effect.

Rule 703 makes clear the distinction between the procedural and the substantive requirements for the proof of an attested document. It puts all attested documents in the same class for procedural purposes, and provides that the execution of such a document may be proved in the same way as the execution of an unattested document, unless a statute requires attestation and in addition expressly requires that the attesting witnesses be called. This is a practicable, workable rule. If the purpose of the legislature in requiring attestation is not only to insist upon formalities to ensure solemnity in execution and to disclose the identity of the solemnizing witnesses but also to insist upon the witnesses as media of proof wherever practicable, the statute can be so drawn.

Presumptions

The American cases dealing with the effect of a presumption are in such hopeless confusion that a volume would be required to expound the existing law. The confusion is due in part to the use of inaccurate terminology, in part to divergent views as to procedural policy, in part to negligent presentation by counsel and faulty analyis by courts, including the Supreme Court of the United States, and in part to the generally accepted assumption that all presumptions should be given the same procedural effect. To bring order out of this chaos, a simple, easily administered rule must be enacted. All courts put the presumption of legitimacy of a child born in wedlock in a class by itself. The Code does likewise, and provides that when the fact of birth in wedlock is established in an action, the party asserting illegitimacy has the burden of proving it beyond a reasonable doubt. As to every other presumption, the sole effect of establishing its basic fact, that is the fact which gives rise to the presumption, is to put on the party against whom the presumption operates the burden of seeing that evidence is or has been introduced which

would support a finding of non-existence of the presumed fact. No presumption operates to decrease the value as evidence of the basic fact; nor does a presumption increase that value; its only effect is the purely procedural one of fixing the burden of coming forward with evidence. Thus, if the basic fact, A, is established, the trier of fact must assume the existence of the presumed fact B unless and until evidence has been introduced which would support a finding that B does not exist. As soon as this evidence is introduced, all effect of the presumption as such is gone. If A has no value as evidence of B or insufficient value to support a finding of B, and there is no other evidence of B, the trier must be directed to find that B does not exist; if A by itself or in combination with other admitted evidence is sufficient to support a finding of B, the trier of fact will determine whether or not B exists exactly as if no presumption had ever been operative in the case; as if, indeed, there had never been any rule of law declaring that the establishemnt of A raises a presumption of the existence of B. The Code Rule is supported by decisions of the Supreme Court of the United States, by those of some other State courts of last resort and by innumerable dicta. It was first expounded by Professor James Bradley Thayer. It is simple to state and easy to apply. It may be lacking desirable elements of rationality; but if once adopted, it may lead courts to use the term presumption only in situations where the result required by the Rule is the result desired.

Judicial Notice

The Code makes no radical changes in the accepted law as to judicial notice, other than requiring the courts of the several states of the United States to notice judicially the statutes and common law of sister states of the United States, and authorizing courts to notice private acts and resolves of the Congress of the United States and of legislative bodies in the several States. In other respects it is much like a restatement of law in other fields as approved by the American Law Institute.

Conclusions

The simplification of the law of evidence in the United States is probably essential if the courts are to continue to function; it is certainly necessary if they are to function efficiently. With complicated rules of procedure and evidence the courts cannot

compete with administrative tribunals or with tribunals set up by private agencies for the arbitration of disputes. Whether this proposed Code is a proper or wise provision for such simplification is a question which the Bench and Bar should seriously consider.

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