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The Future of the Model Code of Evidence

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been protected against oppressive majority discrimination. Freedom and justice have become inseparable. If our form of government is to continue, some abuses in our nation must be corrected; otherwise our pledges to true democracy recently proclaimed by our delegates to the United Nations, will be considered to be echoes of our own hyprocrisy. Because the conflicts will be great in a section of our nation which has deemed it advisable to deny equality and justice to a minority race is no reason to read into our Constitution a judicial interpretation that is foreign to the purpose for which it was adopted. As Mr. Justice Harlan protested in 1896: "There is no caste system here. Our Constitution is color-blind and neither knows nor tolerates classes among its citizens. In respect to civil rights, all citizens are equal before the law." [22] Neither true equality nor substantial equality will come under a system based upon racial segregation.

Leonard Boykin, Jr.

THE FUTURE OF THE MODEL CODE OF EVIDENCE.—Referring to the trial of Socrates, Plato, in his Apology, stated that the accusers of Socrates said he had the faculty for making the worse cause appear the better. This same criticism has been leveled at some of the modern day trial attorneys when they achieve the same result by the aid of outmoded and unrealistic exclusionary rules of evidence. To remedy this obvious injustice, the American Law Institute, with the aid of experienced judges, lawyers, and educators, formulated a model code of evidence in 1942. Professor Edmund Morgan of the Harvard Law School was chosen as Reporter and John Wigmore was selected as Chief Consultant.[1] The purpose of the Code is stated by Professor Morgan in his forward to the Code:

> The law of evidence is in such a confused and confusing condition that it is almost impossible to draft a rule which is universally accepted without qualification. On the other hand, many of the rules, if adopted, will make important changes

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[22] Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 1317 (1946).

[1] Assisting as members of the Evidence Editorial group in compiling the Model Code were Wilbur H. Cherry, University of Minnesota Law School; William G. Hale, University of Southern California Law School; Augustus N. Hand, United States Circuit Court of Appeals, Second Circuit; Mason Ladd, University of Iowa, College of Law; Learned Hand, United States Circuit Court of Appeals, Second Circuit; Henry T. Lummus, Supreme Judicial Court of Massachusetts; John M. Maguire, Harvard Law School; Charles T. McCormick, University of Texas Law School; Robert P. Patterson, United States Circuit Court of Appeals, Second Circuit; and Charles E. Wyzanski, Jr., Boston, Massachusetts. Mr. Maguire also acted as an Assistant Reporter.

> in the common law. They call for serious consideration by the Bench and Bar; and in considering them the members of the profession should have constantly in mind the disturbing truth that more and more of the problems which are traditionally solved by lawyers and judges are being taken from the courts and handed over to private arbitrators or to official administrative tribunals. To what extent this phenomenon is due to the obstructions to the prompt and efficient investigation and determination of disputes which have been interposed by antique rules of procedure and the exclusionary rules of evidence is a question which deserves more than passing attention. Unless Bench and Bar institute a procedure for quickly disclosing the matters really in dispute between litigants and for a speedy, inexpensive, and sensible trial and final determination of those matters, potential litigants will justifiably resort to other tribunals, official and unofficial. To say that the courts have not and cannot get personnel competent to use such a procedure is to confess that our system of administration of justice has completely broken down.[2]

It is important to emphasize that the Code is not a restatement of the law of evidence. The counsel of the American Law Institute, believing as they did that the present law of evidence needed clarification to make it workable and produce certainty in its application, decided to eliminate the numerous anachronistic rules. They admitted that a large part of the law of evidence should be preserved, since it is basically sound, but nevertheless they realized that outmoded rules suppressed rather than developed the truth, and they felt that a thorough revision of existing law, rather than a restatement, would accomplish their purposes. It was the view of Professor Morgan that many of the evils of the present rules are the result of too great particularization and that more flexibility would not only promote but also expedite justice for the litigants.

With the advent of the trial by jury, rules of evidence were evolved to regulate the conduct of the trial. The trial by jury supplanted outmoded methods of trial which had proven to be unsatisfactory as instruments of justice. These included trial by battle, ordeal, and compurgation, also known as wager of law. Although classified as trials, they were actually tests the parties were compelled to undergo to prove their claims. The wager of law often afforded a dishonest defendant a means of evading a just obligation and, as a result, it became obsolete in the royal courts, being supplanted by trial by jury.[3] These earlier

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2 MODEL CODE OF EVIDENCE, Forward (1942). See also STASON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS, 419, Note 12 (1937) where it is said, "One wonders if the advent of administrative tribunals with their simplified procedure and their relaxation of technical rules of the common law will

forms of trial became obsolete because the litigants felt that they were being deprived of substantial justice because of the farcical nature of the proceedings which became increasingly irrational and which failed to keep abreast of changing times and conditions, and thus they turned to the trial by jury. This fact is of prime importance to us today when we observe the growing use of administrative tribunals in the settlement of legal controversies. There is a possibility, not too remote, that just as the trial by jury as we know it today supplanted the earlier methods of trial, it too, may be supplanted and its functions usurped by administrative tribunals.

The Code, representing, as it does, about three years of concerted, conscientious effort by the country's leading legal minds, purports to forestall such a possibility by shearing off the evidentiary barnacles that hinder rather than aid the true administration of expeditious justice.

The rules of evidence are greatly relaxed and, in some cases, entirely discarded by statutory provisions creating administrative tribunals themselves. This is typified by a provision of the National Labor Relations Act which states, "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." [4]

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in the course of time have a liberalizing effect upon conventional judicial processes. Such a result is not out of the question, and at least a few observers have pronounced it a likelihood."

[3] "The most common and popular medieval form of trial by oath was where the party swore with oath-helpers, and was called compurgation. It consisted in the producing, by the party adjudged to make the proof, of a specific number of persons to make oath in his favor; the requisite number varied with the rank of the parties and of the compurgators, the value of the property in dispute, and the nature of the suit. These persons were not witnesses, and they swore, not as to the facts, but as to the truthfulness of the party who produced them in his behalf. In small matters the oath taken was an informal one, but in serious criminal cases it was made so intricate that its words could only with great difficulty be repeated, and if the wrong word was used the oath burst and the adversary won. . . . From being a favored mode of trial, this 'law,' or, as it was commonly called 'wager of law' steadily tended to become a thing exceptional; not going beyond the line of the precedents, and within that line being a mere privilege alongside the growing . . . trial by jury. In the newer forms of action it was allowed and finally it survived mainly in *Detinue ad Debt*. In 1833 it was abolished in England by Act of Parliament." PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 108-111, 325 (2nd Ed., 1936). In the ordeal a hot iron was placed in the hand of the accused or he was compelled to plunge his hand into boiling water, then the hand was sealed and kept under seal for three nights. The bandages were removed, and if the hand was uninjured, he was deemed innocent. In trial by battle the suitors or their champions engaged in physical contests. There was a professional band of champions who undertook business all over the country; courts would arrange the dates of battle so that the champions could fit in their engagements conveniently. Since very great landowners were so constantly involved in ligitation, they maintained their own fulltime champions. Naturally this method, which favored the rich, was never popular among the poor.

[4] 49 Stat. 449, 29 U. S. C. A. § 116 (1935).

The popular appeal of the administrative tribunal is well illustrated by the following statement of Robert H. Jackson, Associate Justice of the Supreme Court of the United States:

> Most lawyers like court procedure, which is somewhat ceremonial and moves according to a prescribed ritual. Administrative bodies on the other hand, generally sit informally. Their procedure is not rigid, and many of them admit laymen to practice. The court receives evidence only according to technical rules of presentation, competence and relevance. None but the lawyers understand these rules, and they are generally in disagreement about their application, which makes a trial something of a drama of objections and exceptions, with lawyers playing all speaking roles. The administrative tribunal is non-technical about the receipt of evidence, its procedure is flexible, and even mistakes are easily amended. A layman may actually understand what one of these administrative tribunals is doing. Such a tribunal may have a better knowledge of the problems at issue than the lawyer who presents the case. It may have its own corps of experts to advise and assist it. Such a tribunal is not as dependent as the ordinary court upon the arguments of partisan counsel to get at the truth. Skilled advocacy is neither so necessary to keep such a body informed nor is stupid or cute advocacy so apt to blur the merits of a controversy.[5]

Professor Maguire concurs with Mr. Jackson's opinion that there is a real danger that administrative tribunals may usurp the functions of the courts unless constructive changes are instituted. He believes the easier administrative practice is pleasing to the litigant.[6]

In our discussion thus far of the Model Code of Evidence, we have attempted to present the obvious need for an improvement of the

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Illinois Commerce Commission Law, Acts, Sec. 702. par. 702 (1921). California Administrative Procedure Act, Sec. 11, 512, ch. 867 (1945). The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

See also, *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 61 S. Ct. 524, 85 L. Ed. 624 (1941), where Mr. Justice Stone says "It has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed." New York Workmen's Compensation Act, Sec. 68, ch. 41, Acts of 1914.

[5] JACKSON, *The Administrative Process*, 5 JOURNAL OF SOCIAL PHILOSOPHY, 143, 146-149 (1940).

[6] GOODRICH, GARDNER, MCCORMICK, PARKER, and MORGAN, *Spotlight on Evidence*, 27 J. AM. JUD. SOC., 113-117 (1943).

present day system of trial by jury, and we have pointed out that it was the intention of the compilers of the Code, in part at least, to satisfy this need. The prime question then is: Does the Code improve the everyday jury trial? If not yet, then will it in the future improve practical methods of obtaining justice for the litigants? Unless the Code does actually aid the judge, jury, counsel and litigants to arrive at truth, its contribution to legal knowledge is purely academic. It would be well, then, to consider the recognition the Code has received among its prospective users, the bench and bar.

It is rather obvious that the greatest part of the Model Code conforms to the universally necessary and accepted regulations now in effect as rules of evidence. These standards are not questioned in any jurisdiction and are admittedly productive of justice in jury trials. It is the practices prevalent in many jurisdictions which the makers of the Code feel do not expedite justice, that form the vortex of discussion.

Because the Model Code does not conform, in certain instances to the existing rules of evidence, it has been branded as too radical. It is questionable that this is a legitimate objection. If worthless rules exist, to reject their change is illogical. It would seem that a more advantageous evaluation of the Model Code would be found in an examination of the existing situation under the old rule and then the performance of a theoretical investigation under the Code regulation. From a comparison of the two results, the practice most likely to bring justice to the parties should be chosen. This, of course, would entail a thorough familiarization by each jurisdiction with the tenets of the Model Code. This has been undertaken in many jurisdictions.[7]

To date, the Model Code has not been extensively cited as authority by courts. Indeed, it would be amazing, if it had been since the Code has been in existence for only five years.

Courts' mention of the Code has generally been restricted to little more than comment. In the cases in which it has been cited as author-

[7] MAGUIRE, EVIDENCE, 164-165 (1947, says "Men who sound like good prophets warn us that if the judiciary continues to carry only outmoded stock of procedural goods, it may find itself without customers. Once change over the fashion from judicial litigation to administrative litigation, and it will be cold comfort for the legal profession to speculate upon the likelihood that the inherent vices of administrative procedure may grow with the debilitating ease of firm establishment and the fading of early crusading fervor. Destruction of business or professional good-will, the habit of coming back to the old stand for more, is a matter of long-term regret. If before popular revulsion comes, the courts as we now know them have lost their hold, resuscitation of their fine qualities and influence will be a slow, hard job. Wisdom demands timely renovation of features like the hearsay rule which impair the competitive position of judges as against administrators, arbitrators, and their kin. Any extensive triumph at this time of calculated obstructionism, mentioned in our second chapter as the essence of the law of evidence, will indeed be a Pyrrhic Victory."

ity, the holding was in accord with the pre-existing general rule of the jurisdiction. And usually, in addition, cases were cited to substantiate the general rule. The Code under these conditions, is no more than declaratory of the accepted general rule.[8]

The Model Code represents a practical guidepost for the future, but whether it will be utilized depends upon a number of factors. Times change, popular thinking changes, and unless the laws and rules adapt themselves to meet present day conditions, they will be relegated to the oblivion that they justly deserve. Many feel the Code is too radical. If their contention is correct then it will be read, discussed, and filed away in the library as a fine theoretical dissertation to be cited and referred to by students and educators. The law is a changing force and it is always in a continual process of growth. A study of the growth of the law reveals that any new change or development contrary to solidified precedents has been labeled "radical." If, however, the Code is to have a practical application, it is necessary that it be used in the determination of litigation by the courts and be adopted by the legislatures of the various states.

Codes are not new. From the most ancient Codes of Hammurabi, King of Babylon, promulgated about 2100 B. C., through the Justinian Code, the New York Field Act Code, to the present Federal Administrative Act of 1946, codification has attempted to introduce certainty and rationality into the law. The Model Code of Evidence, possessing, as it does, certainty and rationality, represents, it would seem, the best available touchstone by which the courts can extricate themselves from slavish obedience to rigid formalism which has no place in our fast-moving, high-tempo, modern society. It is a complete coverage of the entire subject of evidence formulated on the theory that, since ascertainment of truth is the prime requisite of the court, all relevant evidence should be admitted and exclusionary rules curtailed.

Although the Code fulfills a long felt need in the law of evidence, nevertheless, at the present time, we see only faint glimmerings of its

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8 Very great weight was accorded a Model Code of Evidence rule in The C.G.R.-180, 70 F. Supp. 975 (1946).

Other cases which do little more than acknowledge that the Model Code of Evidence presents a rule similar to that always in existence in their jurisdictions are: Pennsylvania R. R. Co. v. Rochinski, 158 F. (2d) 325 (1946); Wright v. Wilson. 154 F. (2) 616 (1946); United States v. Angelo, 153 F. (2d) 247 (1945); People v. One Mercury Sedan, 74 Cal. App. (2d) 304, 168 P. (2d) 443 (1946); Knox v. Knox, 22 Minn. 477, 25 N. W. (2d) 225 (1946); In re Forsythe's Estate, 221 Minn. 318, 22 N. W. (2d) 19 (1946); Stella Cheese Co. v. Chicago St. P., M. & O. Ry. Co., 248 Wis. 202, 21 N. W. (2d) 655 (1946); Meeks Motor Freight v. Ham's Adm'r., 302 Ky. 71, 193 S. W. (2d) 745 (1945); State v. Scott *et al.*, ... Utah ....., 175 P. (2d) 1016 (1947); Vanadium Corporation of America v. Fidelity & Deposit Co. of Maryland *et al.*, 159 F. (2d) 105 (1947); Brasher v. State, ... Ala. ....., 30 So. (2d) 26 (1946), 30 So. (2d) 31 (1947); and Bloch v. Brown, ... Miss. ....., 29 So. (2d) 665 (1947).

recognition by the courts. But it is our opinion that when the true worth of this monumental effort is realized generally by the members of the bench and bar, it will be accepted and integrated into the American system of jurisprudence and exert a tremendous influence on the courts of the future.[9]

*John J. Broderick, Jr.**
Thomas F. Broden

BLACKFORD'S REPORTS.—The broad highway of adequate present day legal reporting often narrows to a backwoods trail or a frontier path for those who make the journey to our legal yester-years. Such would be the case for the State of Indiana were it not for the life and work of one of her adopted sons, Isaac Blackford.

He was born in Bound Brook, New Jersey, November 6, 1786, the same year of Shay's Rebellion in Massachusetts. During his pre-school years, a constitution for the United States was written and a government was set in operation. Before his high school years, a westward movement was active; Vermont, Kentucky, and Tennessee had been admitted to the Union; St. Clair had been defeated by the Indians; and Wayne had regained control of a portion of the Northwest Territory from the Indians. President Washington's terms had given place to the term of John Adams. During Blackford's high school years, President Washington had died at Mount Vernon, the federal capital had been moved to Washington, D. C., and Jefferson had been inaugurated president.

Blackford's early love for books and learning was evident, and his scholastic ability was soon proved after he enrolled in Princeton in 1802 at the age of sixteen years. He was at the same time one of the youngest and strongest of a class containing many men who were later to be governors and judges of their respective states.[1] His studies led him in his junior year into Civil Law, and in his senior year into

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9 In the 1947 revised edition of the Federal Rules of Civil Procedure there appears a note to Rule 43, Evidence, on p. 44, which infers very strongly that the Model Code of Evidence will definitely influence future rules. "While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the committee so far to undertake this important task. *Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute.*" (Italics ours.)

See also Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 F. R. D. 124, 137-8 (1945).

1 Alexander, *Life and Character of Judge Blackford*, 6 So. L. REV. (N. S.) 907 (1881).