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THE FEDERAL RULES OF EVIDENCE

Symposium

FOREWORD

*George W. Pugh**

This student symposium, written in consultation with Professors Frank L. Maraist, Cheney C. Joseph, Jr., and me, seeks to isolate and discuss the highlights of the Federal Rules of Evidence and to contrast its provisions with counterparts in the law and jurisprudence of Louisiana. It is designed for the Louisiana judge and lawyer as an introduction to the Federal Rules—to provide a contrasting overview, not to spell out or explore the details of either the federal or Louisiana system.

Enacted into law by Congress on January 2, 1975, the Rules went into effect on July 1, 1975.¹ Since they govern the overwhelming majority of proceedings in federal courts throughout the country,² their importance to lawyers practicing in federal court is obvious. Their significance, however, goes beyond their area of immediate application in federal court; like the 1938 Federal Rules of Civil Procedure, it is unquestionably to be anticipated that they will have an important radiating influence on state law. Determining what state law is or should be as to a given evidentiary point is often difficult and time consuming, for evidence law is at times obscure, hard to find, and unsettled. Presumably lawyers and judges will frequently consult and refer to the provisions of the readily accessible Federal Rules of Evidence reflecting, as they do, the end product of extensive study and thought by some of the nation's most eminent judges, lawyers, professors and legislators. There is danger, even, that the handy accessibility of the Federal Rules will cause some judges and lawyers to commit reversible error by failing adequately to plumb the esoteric depths of their own states' evidentiary rules.

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1. Pub. L. No. 93-595, 88 Stat. 1926 (Jan. 2, 1975).

2. For a detailed statement of the Rules' applicability, see FED R. EVID.

Also of great significance, the adoption of the Federal Rules of Evidence will further stimulate states' efforts to reform and codify their own law.³ The Federal Rules will, it is believed, serve as a model (or at least *point de depart*) for such reform state codes, for not only are the Federal Rules a rather concise, relatively consecutive, non-revolutionary formulation of evidentiary rules for the nation's federal courts, they also represent the culmination of long standing historic efforts towards reform and codification.

In England, Jeremy Bentham was, of course, the first great and effective modern advocate for evidentiary reform, with his persuasive writings of the early nineteenth century.⁴ Wigmore says of Bentham, "Beginning with the first publication, in French, of his Theory of Judicial Evidence, in 1818, the influence of his thought upon the law of evidence gradually became supreme. While Time has but tardily vindicated and accepted most of his ideas (then but chimeras) for other practical reform, and though some still remain untried, the results of his proposals in this department began almost immediately to be achieved. . . . No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings."⁵ In this country, Bentham's contemporary, Edward Livingston⁶ (who has been characterized—again by Wigmore⁷—as the "American Bentham"), prepared and proposed a Code of Evidence for Louisiana.⁸ Although presented

3. Pending the adoption of the Federal Rules of Evidence by Congress, they were adopted with relatively minor changes by Nevada, New Mexico and Wisconsin. See 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE COMMENTARIES ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS & MAGISTRATES xi (1975).

4. See J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1824).

5. 1 J. WIGMORE, EVIDENCE 239 (3d ed. 1940) [hereinafter cited as 1 WIGMORE].

6. In his Report to the Senate and House of Representatives of the State of Louisiana on The Plan of a Penal Code, Livingston pays tribute to the writings of Jeremy Bentham. E. LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA 6 (1833). See C. HUNT, LIFE OF EDWARD LIVINGSTON 96, 351 (1864).

7. 1 WIGMORE at 240.

8. By Act of March 21, 1822, the Louisiana Legislature commissioned Edward Livingston to prepare a penal code. Livingston, *Report Made to the General Assembly of the State of Louisiana on the Plan of a Penal Code for the Said State*. 708 (1822). As part of the project he undertook to do an evidentiary code embracing both civil and criminal law. However, on November 14,

as a part of his "System for Penal Law in Louisiana," by its terms it would have governed evidentiary matters in both civil and criminal trials. Had Louisiana adopted Livingston's proposals in this regard, the history of Anglo-American evidence law might have been quite different, but she did not.⁹

By the end of the first quarter of this century, as a result of the influential treatises of Greenleaf,¹⁰ Thayer,¹¹ and Wigmore,¹² American evidence law had been thoroughly and critically analyzed and evaluated.¹³ Then, in 1927, after an extensive study by a distinguished committee selected by the

1824, according to Dr. W. B. Hatcher, the entire work, except for sixty pages, burned in his library. W. HATCHER, EDWARD LIVINGSTON 263 (1940). By 1826 the work had been rewritten and was the subject of debate both within and without the Legislature. See HATCHER, *supra*, at 283; NEW ORLEANS LOUISIANA COURIER, January 26-30, February 6, 1826; Moore, *The Livingston Code*, 19 J. CRIM. L. 344, 354 (1928). In 1822 he was elected to the United States House of Representatives and took his seat in December of 1823 and according to Professor Moore did not thereafter return to Louisiana. Moore, *supra*, at 353.

9. It is not altogether clear exactly why the Legislature did not act on the System of Penal Law. Charles H. Hunt suggests that it was Livingston's absence from Louisiana which chiefly accounted for the Legislature's inaction. HUNT, *supra*, note 6 at 274. Professor Moore elaborates that great opposition to the whole System of Penal Law had arisen in both judicial and legal circles. Moore, *supra*, note 8 at 354. Dr. W. B. Hatcher was of the opinion that this opposition was so strong that even if Livingston had remained in Louisiana his System of Penal Law would not have been adopted. HATCHER, *supra*, note 8 at 284.

10. See generally S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (1st ed. 1842; 16th ed. 1897).

11. See J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898); J. THAYER, A SELECTION OF CASES ON EVIDENCE AT THE COMMON LAW (1st ed. 1892; 2d ed. 1900).

12. See J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1st ed. 1904, 2d ed. 1923, 3d ed. 1940).

13. Speaking of Thayer's and Wigmore's work, Professors Morgan and Maguire in 1937 stated: "During the following half century [from the publication of the first Harvard Law Review in 1887] these two, James Bradley Thayer and John Henry Wigmore, bestrode the narrow world of evidence like a colossus. Thayer's Preliminary Treatise and his collection of cases and materials laid the groundwork. They demonstrated the insufficiency of all previous studies in this field, and pointed the way for all future scholars. Wigmore gave to America a critique resembling that of Bentham in England, but in far superior and more comprehensive fashion. He adopted and supplemented the results of Thayer's historical studies, and made them known to the profession. He made a penetrating analysis of modern decisions. The law reports of the past quarter century reveal the influence of these great scholars to an amazing degree." Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1937).

Commonwealth Fund,¹⁴ broad legislative reforms were proposed. Although important, their impact was not as great as hoped.¹⁵

Principally because the then prevailing rules of evidence were seen as being "so defective that instead of being the means of developing truth, they operate[d] to suppress it,"¹⁶ the prestigious American Law Institute decided against a restatement of the law of evidence and instead in 1938 asked the Carnegie Corporation to underwrite a model evidentiary code. The project was commenced in 1939 and the Model Code of Evidence was adopted by the Institute in 1942. The great evidence law men of the day were represented in its formulation.¹⁷ Although it stimulated much discussion and debate, no state adopted the Model Code, apparently because it was deemed too radical and its style too complex and involved.¹⁸

In 1953 the Uniform Rules of Evidence were adopted by the National Conference of Commissioners on Uniform Laws,¹⁹ and approved by the American Bar Association. Although more palatable than the Model Code, the Uniform Rules were not widely adopted. However, the Model Code and the Uniform Rules, together with their intellectual offspring, the very important New Jersey Rules of Evidence²⁰ and

14. E. MORGAN, *THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM* (1927). The Committee to Propose Specific Reforms in the Law of Evidence was composed of Edmund M. Morgan (Chairman), Zechariah Chafee, Jr., Ralph W. Gifford, Edward W. Hinton, Charles M. Hough, William A. Johnston, Edson R. Sunderland and John H. Wigmore.

15. See Morgan & Maguire, *supra*, note 13 at 926.

16. AMERICAN LAW INSTITUTE, *MODEL CODE OF EVIDENCE, Introduction*, viii (1942).

17. Professor Edmund M. Morgan served as Reporter and his colleague at Harvard Law School, Professor John M. Maguire, as Assistant Reporter. In addition, the Committee on Evidence was composed of Wilbur H. Cherry, Laurence H. Eldredge, William G. Hale, Augustus N. Hand, Learned Hand, Mason Ladd, Henry T. Lummus, Charles E. Wyzanski, Jr., and the Chief Consultant was John H. Wigmore.

18. See Report of the New Jersey Supreme Court Committee on Evidence 1 (March, 1963); *Report of the Committee on Administration of Justice on the Model Code of Evidence*, 19 CAL. ST. B. J. 262 (1944).

19. Work on the Uniform Rules of Evidence was begun by the National Conference of Commissioners on Uniform Laws in 1949. The Special Committee on Uniform Rules of Evidence as of 1953 was composed of Spencer A. Gard, Mason Ladd, Charles T. McCormick, Lucian E. Morehead, Maynard E. Pirsig, John Carlisle Pryor and Robert E. Woodside. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1953*.

20. Order Supreme Court of New Jersey, June 6, 1967.

California Evidence Code,²¹ were invaluable precursors to the Federal Rules of Evidence.²²

Despite the firm scholarly foundation available for reformulation of the rules of evidence on the federal level, the evolution of the Federal Rules was slow and tedious.²³ For an in-depth understanding and interpretation of a particular provision of the Rules, its antecedents in earlier codes must be considered, as well as its successive formulation through the Rules' elaborate legislative history.

In 1961 the Judicial Conference of the United States appointed a Special Committee chaired by Professor James William Moore "to study the advisability and feasibility of developing uniform rules of evidence for the federal courts."²⁴ Following a favorable report of the Committee, Chief Justice Warren, on March 8, 1965, appointed an Advisory Committee on Rules of Evidence, chaired by Albert E. Jenner, "to formulate uniform rules."²⁵

After two preliminary drafts (1969²⁶ and 1971²⁷), an amended Final Draft was promulgated by the Supreme Court on November 20, 1972 as the Federal Rules of Evidence, to take effect July 1, 1973.²⁸ Pursuant to law,²⁹ the Rules were thereafter transmitted to Congress by the Chief Justice. Considerable Congressional opposition developed and by Act

21. CAL. EVID. CODE, Ch. 299 § 2 (January 1, 1967).

22. See the Report of Mr. Albert E. Jenner, Chairman of the Advisory Committee of the Judicial Conference of the United States on Rules of Evidence, accompanying the Preliminary Draft of the Federal Rules of Evidence, March 1969.

23. For helpful summaries of the Rules' history, see J. MOORE, MOORE'S FEDERAL PRACTICE RULES PAMPHLET, Part 2 § 1.1-3.2 at 1-7 (2d ed. 1975); WEINSTEIN *supra*, note 3, *passim*.

24. MOORE, *supra*, note 23, part 2 at 3.

25. *Id.* at 4. The other members of the Committee were Simon E. Sobeloff, Joe Ewing Estes, Robert Van Pelt, Thomas F. Green, Charles W. Joiner, Jack B. Weinstein, David Berger, Hicks Epton, Robert S. Erdahl, Egbert L. Haywood, Frank G. Raichle, Herman F. Selvin, Craig Spangenberg, Edward Bennett Williams, and Edward W. Cleary (Reporter).

26. Fed. R. Evid. (Prelim. Draft 1969).

27. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (March 1971), 51 F.R.D. 315.

28. 93 S. Ct. 3073 (1973). In promulgating the Federal Rules of Evidence, the Court cited as its authority 18 U.S.C. §§ 3402, 3771-72 and 28 U.S.C. §§ 2072, 2075. Justice Douglas, with written reasons, dissented from the promulgation of the Rules. 93 S. Ct. 3074 (1973).

29. 18 U.S.C. § 3771; 28 U.S.C. §§ 2072, 2075.

of March 30, 1973,³⁰ Congress determined that the Rules should not go into effect until expressly approved by Congress.

The Rules were then considered in depth and extensive amendments adopted by the House Judiciary Committee's Subcommittee on Criminal Justice.³¹ An initial Committee Print was published June 28, 1973, and after circulation and consultation, another on October 10, 1973, which after a few floor amendments was adopted by the House on February 6, 1974. Reconsidered by the Senate Judiciary Committee, the proposed Rules were again amended in a number of respects.³² The Conference Report of December 14, 1974 reconciled the differences between the two versions and the bill was finally signed into law on January 2, 1975, to take effect July 1, 1975.

The Louisiana legislature in 1956³³ authorized a second attempt to prepare a Code of Evidence for Louisiana.³⁴ Pursuant to this legislation, the Louisiana State Law Institute undertook to prepare a project for such a code,³⁵ but in light of the difficulties encountered and the fact that the Federal Rules of Evidence were in the process of formulation, the project was terminated some ten years later.³⁶ Now that the Federal Rules have been enacted, the task may well once again be undertaken. Such is desirable, for as the great Livingston said in his Introductory Report to the Code of Evidence, "No branch of jurisprudence requires greater certainty and more simplicity in its provisions, than that of judi-

30. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

31. See H.R. 5463, 93rd Cong., 2d Sess. 1 (1974).

32. Pub. L. No. 93-1277 (Oct. 11, 1974).

33. La. Acts 1956, No. 87.

34. By this act the Louisiana State Law Institute was instructed to prepare a comprehensive project for a Code of Evidence covering both civil and criminal cases. For a discussion of the history of Louisiana evidence law and of the applicability to civil cases of evidentiary rules contained in the 1928 Louisiana Code of Criminal Procedure (which rules are now generally embodied in Title 15 of the Louisiana Revised Statutes), see Lilly, *Were the Louisiana Rules of Civil Evidence Affected by the Adoption of the Louisiana Code of Criminal Procedure?*, 14 LA. L. REV. 568 (1954), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 1 (1974).

35. See Papale, *Editorial: Reflections on the Proposed Louisiana Code of Evidence*, 12 LOYOLA L. REV. 51 (1966).

36. See Fifteenth Biennial Report of the Louisiana Law Institute to the Legislature of Louisiana, May 1, 1968; Sponsler, *Evidence: Louisiana Style*, 21 LOYOLA L. REV. 273 (1975).

cial evidence." Livingston hastened to add, however, "But there is none in which so little of either is to be found."³⁷ In any event, it is hoped that this symposium will be of benefit in highlighting and contrasting the two systems.

37. LIVINGSTON, *supra*, note 6 at 247.