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FOREWORD

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The Editors of the *Rutgers Law Review* are to be congratulated upon their planning and execution of this symposium on the Uniform Rules of Evidence. Here we have a topic of the utmost timeliness, which is discussed authoritatively by authors of deep acquaintance with the subject matter. So the symposium not only fulfills its immediate purpose of enlightenment as to the pending reforms in New Jersey, but also produces discussions of substantive significance in the law generally. My task as introducer is even less compelling than that of a toastmaster at a banquet, limited though that ought desirably to be; for the authors here, in historic banquet phrase, need no introduction to this learned audience. Hence I shall confine myself to some consideration of the banquet fare itself, with particular reference to the background against which this reform in the administration of justice has taken shape and become vital and important.

As Justice Jacobs so well shows in his informing article which leads off this discussion, the need for revision of the law of evidence has long been recognized and scholars have worked on this reform for a very considerable period. Even though some of these projects have been completed, notably the American Law Institute's Model Code of Evidence, adopted in 1942, yet none have been enacted into law. Now it does appear that greater success is imminent; for those two forward-looking communities in the realm of law administration, New Jersey and Puerto Rico, are vying for the palm of first adoption, with the odds apparently a tossup between them, since in each jurisdiction a complete draft based on the Uniform Rules is ready for adoption by the rule-making authorities.¹ But that there has been a definite lag between

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1. The status of the New Jersey reform is given in Justice Jacobs' article *infra*. In Puerto Rico a committee appointed by the Supreme Court of the Commonwealth, with Professor Edmund M. Morgan as reporter, completed a draft in 1954, which has been under consideration by the bench and bar and should be passed

conception and execution seems clear, particularly when we consider the corresponding history as to rules of civil pleading. The Federal Rules of Civil Procedure, as recommended by the Advisory Committee of the Supreme Court of the United States, were in process of preparation from 1935 to 1937 and went into effect in the federal courts in September, 1938. Since then they have been adopted almost in toto in some thirteen jurisdictions, and in very substantial and definite parts in fifteen or so more; in addition, they have had substantial effect in various separated areas, with the pre-trial rule the most widespread. And the thinking which has gone into them has affected the activities for reform in a considerable number of additional states. Indeed, it is not too much to say that probably no state remains entirely unaffected by the movement.²

It is interesting, therefore, to speculate somewhat upon the comparative slowness with which reform in the law of evidence has so far been attended. There have been peculiar problems, as Justice Jacobs' article points out, involving the elimination of ancient regard for exclusionary rules in themselves or notable divergencies of view in the profession, so that the considerable unanimity of opinion now apparent has been a matter of rather laborious development and patient achievement. Up until the present time the adoption of rules of evidence—we may say with all reluctance—would have been premature because of this lack of general agreement and the doubtful, if not unfortunate, results attendant upon the adoption of a restrictive or confused or conflicting code. There is, I suspect, another reason: in my experience, the actual practice in the courts has tended to outstrip the theoretical argumentation. While scholars and appellate courts have struggled with the weight of restrictive precedents from the past, trial courts in the main seem to have gone ahead with rather sensible reactions. I remember my dear and distinguished former colleague Augustus N. Hand saying that in his years as a trial judge he always took pains to admit all evidence presented if at all useful or admissible and, in so doing, was never reversed by the appellate court.

Of course one can run across cases of arbitrary rulings, made all the worse, it seems, because there has certainly been no uniformity in such strictness. Such uncertainty of application is naturally one of the strong arguments for the adoption of uniform rules. But having in mind the well-known fact that restrictive procedural precedents are the ones that hit the professional headlines and call forth the black-letter decisions, while the permissive ones either are never written up or else make no

upon shortly by the Court for reporting to the Legislature of the Commonwealth. The rule-making authority there is discussed in Clark & Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 YALE L.J. 1147, 1165 (1952).

2. Clark, *A Modern Procedure for New York*, 30 N.Y.U.L. REV. 1194, 1200 (1955), and references there given.

splash,³ and recalling my own observations, I am convinced that judges generally have tended toward a pragmatic and common-sense attitude in the admission of evidence. They thus have already, with the exceptions noted, established the common-sense principle of Uniform Rule 7, which makes all relevant evidence admissible unless otherwise expressly forbidden in the rules themselves.⁴

Naturally the failure of the Federal Rules of Civil Procedure to cover this field has had its effect; and some commentators have been critical, undoubtedly thinking of the wide spread of the civil rules which potentially might have been extended to rules of evidence.⁵ But I am quite sure that this would not have been the immediate result—that, indeed, the federal interim development has been a necessary one. At the time the civil rules were prepared there was no settled view as to the proper development of the fields of evidence, and indeed there had been some question as to whether rules of evidence could be considered rules of procedure and within the Supreme Court's rule-making authority.⁶ The attempt to resolve some of these problems would have seriously prejudiced the peculiarly appropriate timing of the Advisory Committee's original report and the swift adoption of the rules. We owe this timing to the fine sense of values of the chairman of the Committee, the late William D. Mitchell, whose driving force was largely responsible for the early success of the federal movement. He it was who conceived and carried into execution the wide submission of the rules to the bench and bar before their adoption by the Court.⁷ But after a period of such consideration and discussion he was wholly convinced that there must be no delay for what might be considered side developments, even of important nature, and that the times were propitious for adoption of the main body of the rules. As events proved, he was

3. I have ventured to term this a Gresham's Law of Procedural Precedents, whereby the technical and strict in due course drives out the liberal and flexible interpretation. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 505 (1950); Clark, "Clarifying" Amendments to the Federal Rules? 14 OHIO ST. L.J. 241, 245 (1953).

4. Set forth in Justice Jacobs' article *infra*.

5. See authorities cited note 9 *infra*.

6. For discussion see Sunderland, *Character and Extent of the Rule-Making Power Granted U. S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404, 406, 407 (1935); FOREWORD, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES xvii (May 1936); Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622 (1936), 47 YALE L.J. 194 (1937); and see also *Lopinsky v. Hertz Drive-Ur-Self Systems*, 194 F.2d 422, 424-27 (2d Cir. 1951).

7. The worth of this practice is attested to in the latest report of the Committee, citing one of the last statements penned by Mr. Mitchell. REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 2 (October 1955), quoting PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS iii (May 1954). See Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 73-82 (1949).

clearly right. Attempt then to draft a whole set of uniform rules of evidence was sure to delay the remainder of the project and might well have jeopardized it entirely.

Hence the basic rule of evidence then adopted, Federal Rule 43(a), was essentially of a holding nature, as it was so designed. I think the critics have not realized this background of utility of the rule and the objectives against which it was framed. Nor, in my judgment, have they given it sufficient credit for preserving all gains theretofore accomplished in the rules of evidence while yielding at least some opportunity for development. Essentially, the rule provides that evidence admissible either under state procedure or under former federal principles in either law or equity should be admissible under the presently revised procedure; in other words, that the rule of fullest admissibility should everywhere prevail.⁸

The criticisms in effect have been that even the opportunities for advance thus indicated have rarely been seized by the judiciary.⁹ This, I think, neglects the principle above noted that the technical judicial precedent seems to drive out the liberal one,¹⁰ and overlooks a considerable flexible working of the rule which is not reflected in upper court decisions. The rule, I am quite sure, has worked much more in the direction sought by the critics than is indicated by the few appellate cases they cite.¹¹ Nevertheless, the very situation described does point to the need, now that uniform rules of a desirable and acceptable nature are at hand, that further steps be taken; for rules of procedure, if soundly prepared, are a liberating, rather than a restrictive, influence. It might be thought theoretically that a grant of full discretion to a trial judge, without specification of details, would be the most effective

8. Federal Rule 43(a), providing that "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made." And the competency of a witness to testify is determined in like manner.

See, in general, *Pfotzer v. Aqua Systems*, 162 F.2d 779, 785 (2d Cir. 1947); *Wright v. Wilson*, 154 F.2d 616 (3d Cir. 1946), cert. denied, 329 U.S. 743 (1946).

9. See Thompson, *Federal Rule 43(a)—A Decadent Decade*, 34 CORN. L.Q. 238 (1948); Note, *The Admissibility of Evidence in Federal Courts under Rule 43(a)*, 46 COLUM. L. REV. 267 (1946); Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197 (1941); Green, *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560 (1952); 1 WIGMORE, EVIDENCE 197-204 (3d ed. 1940), also *id.* 1955 Supplement at 38, 41, 42.

10. Note 3 *supra*.

11. Conrad, *Let's Weigh Rule 43(a)*, 38 VA. L. REV. 985 (1952); Comment, *History and Application of Rule 43(a) of the Federal Rules of Civil Procedure*, 30 TEXAS L. REV. 350 (1952); PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 52 (May 1944); 5 MOORE, FEDERAL PRACTICE 1313, 1316, 1317 (2d ed. 1951).

form of rule. Experience, however, shows that without some signposts the tribunals inevitably drop back into past practices. The detail of the rules is necessary to point the way to what is really authorized and permitted. Perhaps an outstanding example is in the development of discovery. This is perhaps the most striking original development of the Federal Rules. Had it been set forth in a single general rule covering all details, it is doubtful if the courts would have realized the veritable arsenal of different forms and devices of discovery now set forth with illuminating detail in Federal Rules 26 to 37 and the adopting state rules based upon them.¹²

Thus the development which is the topic of this symposium is most welcome. One can hope and perhaps expect that the adoption of these rules in a notable jurisdiction such as New Jersey will lead to their considerable exploitation in other states, and particularly in the federal system. It would seem that these rules afford an excellent basis for future expansion, whatever question as to individual details may occur. For my part, I am especially pleased at the basic plan as exemplified in the initial approach of admissibility set forth in Uniform Rule 7 noted above.¹³ Further, I like particularly the treatment of presumptions,¹⁴ giving a greater flexibility to a worth-while procedural device than was permitted under the original American Law Institute's Model Code, which pursued the rather rigid Thayer-Wigmore formula. As Professor Morgan shows in the article on the subject below,¹⁵ this was attempting to confine and restrict operation of common-sense principles beyond what courts by and large found feasible and practical. So on the whole the rules seem to me a good embodiment of practical approach to the subject and, especially since they present a fine concurrence of informed professional opinion, deserve general acceptance.

I shall not comment upon the individual articles herein; for here are the views of experts, and my comments could add nothing to the force of what they say. I do venture, however, to refer to one article which I think can be singled out without invidious comparison, because it touches on a matter of wide and present interest, beyond matters of evidence or court procedure. If I may permit myself to comment, I find it heart-warming to see the fine explanation and rehabilitation, as it were, of the *Privilege Against Self-Incrimination*, by Judge Clapp, former dean of the Rutgers University School of Law.¹⁶ Sometimes of late it has seemed that this glorious privilege of the Bill of Rights is by way of becoming only a derogatory epithet or adjective. Judge Clapp makes a careful analysis of the differing situations when its use becomes

12. See the articles cited in note 3 *supra*.

13. Note 4 *supra*.

14. UNIFORM RULES OF EVIDENCE, Rules 13-16 (1953).

15. Morgan, *Presumptions*, page 512 *infra*.

16. Clapp, *Privilege Against Self-Incrimination*, page 541 *infra*.

of importance, and thus performs a highly useful task of balance. But more than that, he goes on to demonstrate how the privilege is useful to us all, not merely, or perhaps primarily, to the poor individual often forced under stress to resort to it, and how our civilized approach to the enforcement of law requires that the representatives of the people prove their case affirmatively, rather than rely upon the forced confession or admission wrung from those whom they accuse. Our administration of the law, criminal and civil, does not require the use of methods which we so greatly abhor as we read about their excesses in other countries. We need to keep our administration of justice of the kind we can admire and cherish. To that end these rules and these fine articles play their worthy part.