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Edmund M. Morgan

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SYMPOSIUM
MINNESOTA AND THE UNIFORM RULES OF EVIDENCE

Introduction
EDMUND M. MORGAN*

Many years of experience in endeavoring to convince future and contemporary members of the profession that they should do something to make the rules of procedure the means of adjusting the real disputes of litigants in an orderly manner as speedily and inexpensively as possible, has generated a pessimism which this symposium does little or nothing to dissipate. It is easy enough to demonstrate (a) that the orthodox rules of pleading, evidence and practice erect needless obstructions to rational investigation and decision on the merits, (b) that the asserted justification for many of them is largely the accepted but inexplicable judicial misconception of the capacities of jurors, which attributes to them, on the one hand, a childlike credulity and naïveté and, on the other a God-like control of their mental and emotional processes combined with an intellectual power to understand and apply instructions phrased in language unintelligible to most laymen and to many lawyers, and (c) that the exclusionary rules, as a whole, are a conglomeration of inconsistencies which prevent jurors from hearing highly relevant, credible evidence while permitting them to hear and consider evidence of slight weight and doubtful credibility. But it is quite another thing to stir lawyers to effective action. In their practice the procedural questions arise one at a time. Frequently neither side insists upon the observance of the rules. The application of a particular rule works sometimes to the advantage of one side, sometimes to the advantage of the other. And when a body representing the more progressive members of the profession propose a code or set of rules, the majority in effect condemn it by ignoring it, and a smaller group will register individual opposition to provisions contrary to those current rules which are usually applied in their favor in litigation.

*Frank C. Rand, Professor of Law, Vanderbilt University; Royall Professor of Law Emeritus, Harvard University.
Consequently I fear that when the Uniform Rules are submitted for adoption or when it is proposed that they be so submitted, the reaction of the profession will be a composite of the views of our authors who are in active practice or whose academic careers were preceded by much experience at the trial table. If so, there will be general agreement that a codification of the rules in simple language would be highly desirable. But the average member of the Bar will want to leave unchanged those rules with which he has long been familiar and will read with hostile eye any proposed amendment. He will voice no objection to what appears to be a rational restatement or return of the rules which he has had little or no occasion to use. For example, our plaintiff author apparently has had little or no occasion to consider carefully the subject of judicial notice, and so the provisions of the Model Code and the Uniform Rules seemed satisfactory to him. Then he discovered the article by Professor Davis and was quickly convinced that not just one provision but the whole section would not do. So far as he discloses, he made no attempt to discover why two groups of judges, lawyers and legal scholars, after mature consideration, had reached conclusions so easily demolished by an attractively written article by a professor whose specialty is administrative law, or to question the analysis and interpretation of the opinions upon which the author relied, and the probable judicial interpretation of the language of the rules which he condemned. Without taking serious objection to Rule 41, he notes that the application of a "contrary doctrine" enabled him to get a new trial at which he secured a verdict in twice the amount of that at the former trial. Rule 41 excludes evidence "to show the effect of any statement, condition or event upon the mind of a juror as influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." The evidence in question consisted of statements made by the foreman of the earlier jury to his fellow jurors in the jury room of events which would have been inadmissible if offered in evidence at the trial, including an assertion of the result of a trial in another jurisdiction and of a "good and fair" offer of settlement rejected by plaintiff. Obviously this evidence had nothing to do with the effect of these assertions on the mind of any juror, but showed objective misconduct in the jury room, and would have been clearly admissible under the Rules. If our plaintiff author had not viewed the rule with a jaundiced eye, how could he have so misinterpreted it? Both he and the defendant author would reject

the rules on presumptions, but for different reasons. And both are opposed to the proposal for judge-appointed expert witnesses.

Plaintiff has no objection to the abolition of the rule in the *Queen's case*, but defendant would prefer to keep it. Plaintiff is opposed to all privileges, but if any is to be preserved, it must be the statutorily-created physician-patient privilege. Defendant notes objection to that privilege alone, and Professor Louisell, who has had much experience at the Bar, thinks that they all should be preserved since they express the judicial or legislative conviction that the relationship involved in each is fostered by the privilege and is one which society desires to have protected and encouraged.

And so it goes. The one near miracle is the approval of or lack of objection to Rule 45, which is in substance a copy of Rule 303 of the Model Code; no provision of that Code has been more savagely attacked by the Bar than Rule 303. And no commentator has opposed the abolition of the so-called dead-man statute.

The topics of relevancy of evidence, competency of witnesses and impeachment of witnesses are given comparatively little attention by our practitioner authors although some of the rules seem to defendant more objectionable than they seem to plaintiff. The other subjects are treated in five separate articles by law teachers, two of whom had assistance. Their approval or disapproval, whether express or implied, unless history fails to repeat itself, will have little effect in changing the opinion of the Bar. However, the objective of the symposium is not propaganda but education. Its purpose is the exposition of the content of the rules as compared with those now in force in Minnesota, and these five articles amply fulfill that purpose. The extent to which reasons are given supporting the existing rules as contrasted with those supporting the proposed rules varies, but each author furnishes sufficient material to enable the reader to come to a fair conclusion as to the advisability of adopting the several rules in substance whether or not the phrasing is satisfactory. The article on Rules 13-17 not only makes the requisite comparison between their provisions and the existing Minnesota law but constitutes a much needed clarifying treatment of the entire subject of presumptions—a subject which heretofore produced a plethora of conflicting judicial opinions and of confused and confusing discussions by judges, lawyers and law-teachers, many, if not most, of which merely increased the density of the surrounding fog. The article dealing with Opinion is both informative and persuasive that for the greater part the rules will not reverse the trend of modern judicial decisions. As to the appoint-
ment of expert witnesses by the judge, it shows how the adversaries are amply protected against abuse and prejudice. But the objection that a judge may play favorites and that his favorites may not be of really superior skill and learning and may not be really impartial may still have some force. The Uniform Commissioners did not have the benefit of knowing the result of the experiment in New York and Bronx Counties conducted with the approval and aid of the Appellate Division of the Supreme Court in securing impartial medical testimony. The report of that experiment should be thoroughly considered whenever a proposal for court-appointed experts is submitted for adoption. See Impartial Medical Testimony; A Report by a Special Committee of the Association of the Bar of the City of New York on the Medical Expert Testimony Project.