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EVIDENCE REFORM: THE ADMINISTRATIVE PROCESS LEADS THE WAY

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HARBINGER of the coming judicial imitation of the administrative system of evidence is the reasoning of a federal district court in a recent decision: "It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the Federal Trade Commission is inadmissible before a judge sitting without a jury in a civil anti-trust case brought by the Government."¹

The fact is, despite the seeming custom of lawyers to make the opposite assumption, that far more adjudications are now conducted in the United States without the exclusionary rules of evidence than with them.² Administrative experience is proving the

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1. Wyzanski, J., in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 349, 356 (D. Mass. 1950). The court also reasoned that many controversies are being removed from courts to agencies and that "To preserve their own jurisdiction the courts must in this type of controversy relax the rigidity of the hearsay rule." The court accordingly admitted a large amount of documentary evidence although substantial portions of it were hearsay. The court required, however, that the evidence must be "of the kind that usually affects fair-minded men in the conduct of their more important affairs."

2. Probably the comparison should be between jury cases in court and administrative adjudications, counting nonjury court cases on neither side.

In the federal courts during the year ending June 30, 1949, the total number of civil cases was 37,991. Only 3,632 were contested, of which 3,231 were nonjury cases, and 172 were either directed verdicts or other dispositions without verdicts. In only 1,155 did judgments rest on jury verdicts.

The total number of criminal defendants in the federal courts during the year was 36,264. Pleas of guilty or nolo contendere were entered by 30,447. 615 were acquitted by juries and 295 by courts; 998 were convicted by juries and 629 by courts.

In criminal and civil cases combined, dispositions of contested cases by jury verdicts were 2,768; by courts without juries, 4,255.

The figures are from Ann. Rep., Director of Admin. Office of U. S. Courts 136, 164 (1949).

During the same year the section of complaints of the Bureau of Motor Carriers of the ICC held 2,564 hearings. 62 ICC Ann. Rep. 105 (1949).

soundness of dispensing with the exclusionary rules. Simplicity and common sense take the place of intricacy and artificiality. The fundamental tendencies are (1) to replace rules with discretion, (2) to admit all evidence that seems relevant and useful, and (3) to rely in making findings upon "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."³ In the federal administrative process and in that of many states the exclusionary rules are discarded not only in determining what evidence shall be admitted but also in determining what evidence may support a finding.⁴ The welcome consequence of the system's success is that, apart from official notice,⁵ problems of evidence in the administrative process are of steadily diminishing importance; attention is directed to probative weight of evidence and not to issues of admission or exclusion.

DISSATISFACTION WITH EXCLUSIONARY RULES EVEN FOR JURY CASES

Morgan and Maguire, looking backward and forward at evidence, proclaim:

In short there is scarcely a segment of the subject which does not call for re-examination and revision. What is needed is a well-designed and well-constructed code built upon the two leading principles, enunciated by Thayer more than forty years ago, "(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."⁶

Wigmore discusses open-mindedly the "Faults and Needs of the Rules of Evidence" and, among his pros and cons, asserts that "in the United States and today, justice *can* be done without the orthodox rules of Evidence . . .," and that ". . . the rules to a large extent fail of their professed purpose. They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict."⁷ The Commonwealth Fund Committee observes that "Reformers from Bentham to Wigmore have

3. Quoted from Judge Learned Hand in *NLRB v. Remington Rand*, 94 F. 2d 862, 873 (2d Cir.), *cert. denied*, 304 U. S. 576, 585 (1938).

4. An exception is the NLRB under a special provision of the Taft-Hartley Act.

5. The difficult problems of the administrative counterpart of judicial notice are of increasing importance. The writer has discussed these problems comprehensively in *Official Notice*, 62 Harv. L. Rev. 537 (1949).

6. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 922-23 (1937).

7. 1 Wigmore, *Evidence* § 8c (3d ed. 1940).

exposed the illogicalities and inconsistencies . . . [of the exclusionary rules] in language of biting sarcasm, stinging ridicule and blistering denunciation . . .,"⁸ discusses seriously "the suggestion of a single reform, namely, to abolish all rules which forbid the reception of any relevant evidence . . .,"⁹ and brings in recommendations for basic changes. McCormick thoughtfully predicts "that the hard rules of exclusion will soften into standards of discretion to exclude. But evolution will not halt there. Manifestly, the next stage is to abandon the system of exclusion. Ordinarily it would be more economical of time and energy, in a judge-tryed case, for the judge to receive all the relevant data offered and to consider its reliability, not upon an artificial issue of admission or exclusion, but only at the later stage of weighing all the evidence as a prelude to final decision."¹⁰ The American Bar Association's Committee on Improvements in the Law of Evidence, with its sixty-six advisers, recommends sweeping changes.¹¹

Most significant of all, the American Law Institute, instead of restating the law of evidence, has adopted a Model Code which is proposed for legislative enactment. In the Foreword of that Code the observation is made that "the law of evidence is now where the law of forms of action and common law pleading was in the early part of the nineteenth century,"¹² and that "the present law as to hearsay is a conglomeration of inconsistencies due to the application of competing theories haphazardly applied . . . and no amount of discourse about the frailties of jurors or the virtues of cross-examination can give them the appearance of rationality."¹³ Professor Morgan, the Institute's reporter for drafting the Code, has elsewhere explained that "the Institute did not attempt a restatement of the law of evidence because its members were convinced that no restatement could eliminate the obstructions to intelligent investigation which currently accepted doctrines have erected."¹⁴

The courts themselves have often expressed dissatisfaction with the exclusionary rules, not merely for administrative proceedings and for nonjury cases, but for jury cases as well. For instance,

8. Commonwealth Fund Committee, Evidence xiv (1927).

9. *Id.* at xi.

10. McCormick, *Tomorrow's Law of Evidence*, 24 A. B. A. J. 507, 580-81 (1938).

11. 63 A. B. A. Rep. 570 (1938).

12. A. L. I., Model Code of Evidence 5 (1942). The Foreword was written by Professor E. M. Morgan.

13. *Id.* at 46-47.

14. Practising Law Institute, Significant Developments in the Law During the War Years, Evidence 1 (1946).

after an examiner for the FTC had excluded certain evidence, the Court of Appeals for the Second Circuit said in 1945:

If the case was to be tried with strictness, the examiner was right. . . . Why either he or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. *Even in criminal trials to a jury* it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chanced that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.¹⁵ (*Italics supplied.*)

This judicial pronouncement takes on additional significance in view of the court's acknowledgment that "this testimony was not relevant to the issue."¹⁶

JUDICIAL PRACTICES IN NONJURY CASES

To the extent that the administrative process should draw from judicial experience in working out evidence practices, it should look to nonjury cases, not to jury cases. The dominant influence of the jury upon the content of many of the exclusionary rules seems abundantly clear.¹⁷ Basic in many rules is the idea that untrained jurors should not be exposed to relevant but possibly misleading evidence. To protect the judge or the trained specialist to the same extent as the untrained juror is palpably unsound.

Leading commentators have recognized this. Thayer, for example, called the law of evidence "a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system

15. *Samuel H. Moss, Inc. v. FTC*, 148 F. 2d 378, 380 (2d Cir.), *cert. denied*, 326 U. S. 734 (1945).

16. *Ibid.*

17. Among evidence scholars, Professor Morgan is a lone dissenter from the above observation: "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 text-writers of the nineteenth century." Morgan, *Some Observations Concerning a Model Code of Evidence*, 89 U. of Pa. L. Rev. 145, 157 (1940). But even if the view of Professor Morgan is fully accepted, the origins of centuries ago are of little consequence as compared with the reasons of the nineteenth and twentieth centuries for keeping the hearsay rule and other exclusionary rules. The modern differentiation between jury and nonjury cases is overwhelming, as Professor Morgan agrees.

..."¹⁸ Wigmore, after quoting some comments of Sir Henry Maine to the effect that the "system of technical rules . . . fails . . . whenever the arbiter of facts . . . has special qualifications for deciding on them," declares: "These sagacious observations of Sir Henry Maine may serve to warn us that any attempt to apply strictly the jury-trial rules of Evidence to an administrative tribunal acting without a jury is an historical anomaly, predestined to probable futility and failure."¹⁹ Even more emphatic is Dean McCormick's observation: "As rules they are absurdly inappropriate to any tribunal or proceeding where there is no jury."²⁰

Of course, practitioners are generally aware of the relaxation or rejection of the exclusionary rules in equity cases and in law cases in which a jury is waived.²¹ Appellate courts not only presume that the trial judge who admits incompetent evidence considers only what is competent, but appellate courts often do all they can to encourage trial judges to admit all relevant evidence

18. Thayer, *Evidence* 509 (1898).

19. 1 Wigmore, *Evidence* § 4b (3d ed. 1940).

20. 5 *Encyc. Soc. Sci.* 637, 644 (1931). See also Report of the Committee on Improvements in the Law of Evidence, 63 A. B. A. Rep. 570, 594 (1938); Commonwealth Fund Committee, *Evidence* xi. (1927). Of course, not all the rules of evidence stem from the jury system, and these broad statements have principally in view such exclusionary rules as the hearsay rule, the opinion rule, and the best evidence rule. Privileges, oaths, cross-examination, presumptions, judicial notice, and many other concepts have no necessary relation to juries.

21. See, e.g., McCormick, *Tomorrow's Law of Evidence*, 24 A. B. A. J. 507, 508 (1938). "In trials without a jury the tendency is to disregard them [the evidence rules] altogether except as the traditional rules have influenced the habitual forms of questioning, and except for rare instances where the admission or exclusion of some indispensable item of proof will be decisive of the entire case as for example, the testimony of a surviving party who alone knows the facts, in an action involving the estate of a decedent. Even if objections are made the trial judge will usually admit the evidence, and may rely upon the gracious presumption obtaining in the appellate court that if there was competent evidence to sustain his conclusions, he acted upon this and discarded the incompetent. [Citing authorities.]"

Rule 43(a) of the Federal Rules of Civil Procedure provides 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." Since the authorities concerning equity practice were sparse and unclear, opportunity was given to the courts to reject the exclusionary rules. But when issues of evidence have become drawn so that opinions have been written, the exclusionary rules have generally been held applicable. *Majestic v. Louisville & N. R. R.*, 147 F. 2d 621 (6th Cir. 1945); *Roth v. Swanson*, 145 F. 2d 262 (8th Cir. 1944). See the collection of authorities in Note, 46 Col. L. Rev. 267, 271 (1946). An exception is *Peoples Loan & Investment Co. v. Travelers Ins. Co.*, 151 F. 2d 437 (8th Cir. 1945). But formal opinions of appellate courts do not control the practice of trial judges, who often admit evidence, reserving judgment on the question whether it should be considered or given weight.

and even all evidence of doubtful relevancy. A good example is a 1950 opinion of the Court of Appeals for the Eighth Circuit in a case coming up from the Tax Court:

In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. [Citing cases.] On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed . . . The instant case is almost a perfect example of how technical rulings on evidence will frequently frustrate the trial of a nonjury case and put the litigants to the trouble and expense of a new trial.²²

The court quoted with approval from an earlier opinion:

One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider competent or material. . . . If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.²³

THE BACKGROUND OF OPINION SUPPORTING ADMINISTRATIVE PRACTICES

As early as 1904 the Supreme Court clearly saw the need for allowing the ICC to avoid the use of the exclusionary rules:

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by tech-

22. *Builders Steel Co. v. Commissioner*, 179 F. 2d 377, 379 (8th Cir. 1950).

23. *Donnelly Garment Co. v. NLRB*, 123 F. 2d 215, 224 (8th Cir. 1942). The court also expressed its views on the question of convenience: "We think that experience has demonstrated that in a trial or hearing where no jury is present, more time is ordinarily lost in listening to arguments as to the admissibility of evidence and in considering offers of proof than would be consumed in taking the evidence proffered, and that, even if the trier of facts, by making close rulings upon the admissibility of evidence, does save himself some time, that saving will be more than offset by the time consumed by the reviewing court in considering the propriety of his rulings and by the consequent delay in the final determination of the controversy." *Ibid.*

nical rules as to admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law . . .²⁴

In 1920 an order of the ICC was challenged because it was based partly on hearsay, but the Court pointed out that "Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect. . . ."²⁵ By 1941 the Court in upholding an order resting partly on hearsay had ample support for its observation that "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."²⁶

The Attorney General's Committee on Administrative Procedure, using mild words, aimed a devastating blow at the exclusionary rules: "An administrative agency must serve a dual purpose in each case: It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second important factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result."²⁷ The attitude seems to be that when only the immediate parties are affected the exclusionary rules can't do much harm, but when the public interest is at stake the irrationalities of those rules cannot be allowed to hamper the process of getting needed information! The minority of the Committee took a much more conservative position on some other issues but minced no words in saying that "there is no place in administrative justice for the 'archaic and technical' rules of evidence."²⁸ One of the members of the minority has said elsewhere that the exclusionary rules "are the product of trial by jury" and that they "should

24. *ICC v. Baird*, 194 U. S. 25, 44 (1904).

25. *Spiller v. Atchison, T. & S. F. Ry.*, 253 U. S. 117, 130 (1920). Compare Morgan, *The Law of Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 541 (1946): "The exclusion of hearsay evidence is not grounded upon its lack of probative value, for if inadmissible hearsay is received without objection, it is to be weighed by the trier of fact, and may be of sufficient value to support a finding or verdict."

26. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 155 (1941). The court not only approved admission of the hearsay but also approved the Administrator's reliance on it.

27. Rep. Att'y Gen. Comm. Ad. Proc. 70 (1941).

28. *Id.* at 241.

have no application before permanent administrative tribunals."²⁹ Another member of the minority, speaking not merely of admissibility but of basing findings upon incompetent evidence, has expressed doubts about a provision of the Model State Administrative Procedure Act that findings must be supported by competent evidence.³⁰ To the extent that some division of opinion may still be found, the split seems not to be along the usual liberal-conservative lines but is between special students of the subject, who uniformly tend toward abandonment or drastic modification of the exclusionary rules, and the general practitioners, who often prefer the system they find familiar.

Of course, the key to the present administrative practice is section 7(c) of the Administrative Procedure Act:

. . . Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . .

This provision rejects the exclusionary rules with respect to both admissibility and support for findings.³¹ The provision for exclusion reaches "irrelevant, immaterial, or unduly repetitious evidence" and does not reach incompetent evidence. Orders and rules need not be based upon competent evidence but must be based on "reliable, probative and substantial evidence." The Senate Committee cited cases to show that the provision was merely a codification of previous law,³² and said that "the standards and principles of probity and reliability" are those "which people engaged in the conduct of responsible affairs instinctively understand and act upon."³³

29. Vanderbilt, *The Technique of Proof Before Administrative Bodies*, 24 Iowa L. Rev. 464, 467 (1939).

30. Stason, *The Model State Administrative Procedure Act*, 33 Iowa L. Rev. 196, 208 (1948). Referring to the requirement that an order be supported by "competent" evidence, Dean Stason says: "The wisdom and utility of the requirement are questionable."

31. 60 Stat. 237, 5 U. S. C. § 1001 (1946) (Fed. Administrative Procedure Act § 7(c)).

32. Sen. Doc. No. 248, 79th Cong., 2d Sess. 30 (1946). The committee may have been guilty of overstatement when it said that the exclusionary rules "are no longer applicable in judicial trials, at least in trials in equity or before a court sitting without a jury." *Ibid.*

33. *Id.* at 208. The House committee made a similar statement. *Id.* at 270. The House committee added: "These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and sum-

QUESTIONS OF ADMISSIBILITY

The APA provides that "Any oral or documentary evidence may be received . . ." The only explicit qualification is that "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . ." Does this leave an agency free to exclude incompetent evidence if it chooses to do so?

A typical rule pursuant to the Act's provision is that of the FPC:

In any proceeding before the Commission or a presiding officer relevant and material evidence shall be admissible, but there shall be excluded such evidence as is unduly repetitious or cumulative, or such evidence as is not of the kind which would affect reasonable and fair-minded men in the conduct of their daily affairs.³⁴

This rule seems to be entirely in accord with the spirit of the Act and with the previous case law. But not all agencies have adopted comparable rules. For instance, the FTC provides by rule: "The trial examiner . . . shall admit relevant, material and competent evidence, but shall exclude irrelevant, immaterial and unduly repetitious evidence."³⁵ The rule seems deliberately to dodge the crucial question, for it fails to provide either for admission or for exclusion of incompetent evidence. Similarly, the ICC rule is more restricted than the Act's provision:

Any evidence which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.³⁶

maries where appropriate to the subject matter." *Ibid.*

In view of the clarity of the Act's words and of the committee reports, Senator McCarran may have been mistaken in the following colloquy:

"Mr. GEORGE. Take the labor-relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, 'We are powerless to interfere with it.' Would this bill change that rule, if the court were of the opinion that there was no probative evidence?"

"Mr. McCARRAN. Yes; it would change that rule.

"Mr. GEORGE. I am pleased to hear it." *Id.* at 322.

34. 18 Code Fed. Regs. § 1.26 (1949) (FPC Rules of Practice).

35. 16 Code Fed. Regs. § 2.18 (1949) (FTC Rules of Practice). Of course the NLRB rules follow the special provision of the Taft-Hartley Act on evidence, 29 Code Fed. Regs. § 102.39 (1949) (NLRB Rules of Practice).

36. ICC Rules of Prac., Rule 75 (1942). Why the ICC did not adopt a provision like that of the FPC is unexplained, except for the fact that the ICC rule was adopted in 1942 and has not been changed.

Theoretically the exclusion of incompetent evidence, if it is the kind of evidence on which "responsible persons are accustomed to rely in serious affairs," might be reversible error. Of course, the agencies seldom exclude such evidence and even when they do a court is unlikely to set aside an order on this ground. A close approach to such a result nevertheless appears in *NLRB v. Cities Service Oil Co.*³⁷ The examiner excluded testimony of a witness who had made no personal investigation but who "talked with other persons, some of whom he could not name, and accepted their reports."³⁸ The court said: "Respondent's counsel admits that the evidence is hearsay, and, while the Board is entirely free to accept such evidence, we cannot say that it commits reversible error in excluding it. As the Board's able counsel admitted at the oral argument, it probably should have been admitted, but we agree with him that its exclusion was not fatal. . . . The testimony would probably have added little. . . . It should be noted that the respondent made no effort to put on the stand as witnesses any of the persons who made the investigations. . . ." ³⁹ In *NLRB v. Ohio Calcium Co.*,⁴⁰ hearsay was admitted but not relied upon and the court seems to hold that the hearsay should have been relied upon. The company had refused reinstatement of forty employees after a strike, and the NLRB ordered thirty-nine reinstated. The question was whether they had engaged in violence. The evidence showed that ten had rocks in their hands and that ten others were in the picket line while rocks were being thrown. The Board had disregarded the testimony of the company's president that he had personal knowledge of violence on the part of some strikers "and also the reliable information he said he had received as to the conduct of all the others except one."⁴¹ The court gave great weight to the failure of the Board to call sixteen of the strikers as witnesses, and said: "There being nothing improbable about the testimony of [the president] and it being substantially supported by other evidence, there is no legal justification for its rejection. . . . It will thus be seen from the uncontradicted evidence in the record that with the exception of one employee ordered reinstated with pay, all others engaged in acts of violence or aided and abetted others in such conduct."⁴² Apparently the court thought it was error to

37. 129 F. 2d 933 (2d Cir. 1942).

38. *Id.* at 936.

39. *Ibid.*

40. 133 F. 2d 721 (6th Cir. 1943).

41. *Id.* at 727.

42. *Ibid.*

refuse to rely upon the president's testimony as to "the reliable information he said he had received," because his personal knowledge apparently did not extend to all the employees but one.

Evidence is sometimes erroneously excluded as irrelevant.⁴³ Frequently a reviewing court's reversal of an agency's exclusion of evidence for irrelevancy results from the reviewing court's different view on a question of substantive law on which relevancy depends.⁴⁴

Despite the APA, some exclusions of relevant and probative evidence may be necessary and desirable. To the extent that the privilege against self-incrimination has a constitutional base, it is applicable to an administrative proceeding as much as to a judicial proceeding. Similarly, the attorney-client privilege⁴⁵ and perhaps other such privileges, theoretically founded on special considerations of social policy, may deserve as much respect from a court as from an agency. For instance, if an offer in compromise enjoys a privilege in court, it probably should enjoy an equal privilege in the administrative process. Yet to the extent that privileges of this kind may be regarded as unsound,⁴⁶ the APA offers opportunity for the administrative process to experiment with a system which differs from that followed by courts.

43. *NLRB v. Fairchild E. & A. Corp.*, 145 F. 2d 214 (4th Cir. 1944); *Fresh Grown Preserve Corp. v. FTC*, 125 F. 2d 917 (2d Cir. 1942).

In *Associated Laboratories v. FTC*, 150 F. 2d 629, 630 (2d Cir. 1945), the court said "it is perfectly plain that the evidence was in fact irrelevant" but nevertheless cautioned examiners and agencies against exclusion of evidence of doubtful relevance.

44. An especially good example of this is *American Trucking Associations v. United States*, 326 U. S. 77 (1945).

45. In *SEC v. Harrison*, 80 F. Supp. 226 (D.C. 1948), the court assumed that the attorney-client privilege was the same for a proceeding before the SEC as for a proceeding in court.

46. See McCormick, *Tomorrow's Law of Evidence*, 24 A. B. A. J. 507, 512 (1938), for the view that such privileges as that of husband and wife, and attorney and client are supposed to rest on public interest in keeping such secrets inviolate, that "the fostering effect must be slight," and that the privileges have survived because revealing of confidences is regarded as dishonorable but that "it would not be dishonorable if the law required it." Maguire, *Evidence—Common Sense and Common Law* 164 (1947): "Enforcement of patient-physician privilege in an industrial accident tribunal is nonsense, obvious and complete." Morgan, *Some Observations Concerning a Model Code of Evidence*, 89 U. of Pa. L. Rev. 145, 153 (1940): "A scientific code of evidence would, therefore, erect no privilege for communications between client and attorney . . . But there is no hope of securing the adoption of such a provision." McCormick, *Privilege in the Law of Evidence*, 16 Tex. L. Rev. 447, 469 (1938): "The manifest destiny of evidence law is a progressive lowering of the barriers to truth. Seeing this tendency, the commentators who take a wide view, whether from the bench, the bar, or the schools, seem generally to advocate a narrowing of the field of privilege."

WHEN IS INCOMPETENT EVIDENCE RELIABLE, PROBATIVE,
AND SUBSTANTIAL?

More than nine-tenths of the problems of exclusionary rules that come to reviewing courts from the agencies involve administrative reliance on hearsay in making findings. The case law on the meaning of the APA's words "reliable, probative, and substantial" is slow to develop, but since the legislative history shows clear intent to codify previous law,⁴⁷ presumably the question is governed by pre-APA case law.

Following the lead of the New York Court of Appeals in *Matter of Carroll v. Knickerbocker Ice Co.*,⁴⁸ some of the state courts⁴⁹ have developed the "residuum" rule—that even when a statute provides that an agency is not bound by the rules of evidence, and even though the agency "may in its discretion accept any evidence that is offered; still in the end there must be a residuum of legal evidence to support the claim before an award can be made."⁵⁰ The New York Court of Appeals more recently has retreated to some extent from the rule,⁵¹ but it apparently persists in other states, and recently the Commissioners on Uniform State Laws have

47. See note 32 *supra*.

48. 218 N. Y. 435, 113 N. E. 507 (1916).

49. *E.g.*, *Consumers Co. v. Industrial Commission*, 364 Ill. 145, 4 N. E. 2d 34 (1936); *Gacesa v. Consumers Power Co.*, 220 Mich. 338, 190 N. W. 675 (1922); *Lloyd-McAlpine Logging Co. v. Whitefish*, 188 Wis. 642, 206 N. W. 914 (1926).

50. *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 440, 113 N. E. 507, 509 (1916).

Wigmore rejects the residuum rule because (1) "it still virtually requires the tribunal to test its proceedings by the jury-trial rules, and thus holds out the temptation to practitioners to employ the whole arsenal of technical weapons and secure a record full of 'errors,'" and (2) it rests logically on the fallacy that the residuum of legal evidence will have some necessary relation to the truth, whereas "the 'legal' rules have no such necessary relation." 1 Wigmore, *Evidence* 40-41 (3d ed. 1940). Commissioner Benjamin likewise rejected the residuum rule. *Administrative Adjudication in the State of New York* 192 (1942).

51. *Altschuller v. Bressler*, 289 N. Y. 463, 46 N. E. 2d 886 (1943). The legislature changed the statute after the *Carroll* case so as to permit reliance on hearsay statements of a deceased employee. The court in the *Altschuller* case upheld an award based on hearsay statements of an employee who was mentally dead but physically alive. The principal basis for the decision was that "there is no substantial testimony to show that an accident did not occur as narrated by the injured employee, and established 'facts and circumstances' leave little reasonable doubt that the narration is substantially true." *Id.* at 470, 46 N. E. 2d at 889.

Some state cases hold that hearsay may support a finding. *American Furniture Co. v. Graves*, 141 Va. 1, 15-16, 126 S. E. 213, 216-17 (1925); *London Guarantee & A. Co. v. Industrial Accident Commission*, 203 Cal. 12, 14-15, 263 Pac. 196, 197 (1927).

adopted the residuum rule in the proposed Model State Administrative Procedure Act.⁵²

The extent to which, if at all, the residuum rule is the law of the federal courts is not easy to determine. Congress in the APA clearly avoided the requirement of competent evidence to support a finding.⁵³ Judge Hough in 1924 laid down the basic proposition that has been followed in the federal courts ever since: "We are of opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done."⁵⁴ Judge Learned Hand authoritatively stated in 1938 that the examiner "did indeed admit much that would have been excluded at common law, but the act specifically so provides; . . . no doubt, that does not mean that mere rumor will serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs."⁵⁵ And Mr. Justice Rutledge declared in behalf of a court of appeals: "It is only convincing, not lawyers' evidence which is required."⁵⁶

But these various statements, much quoted and requoted and followed, do not necessarily answer the main question. For it is still arguable, as the Court of Appeals for the Seventh Circuit has said, that "responsible persons are not accustomed to rely on hearsay in serious affairs."⁵⁷ Of a statutory provision that "the rules of evidence . . . shall not be controlling," the same court had earlier said: "We think Congress presupposed that the trier of facts would weigh and apply the evidence as before and use only that which was competent and material, and disregard that which was not."⁵⁸ And the Fifth Circuit has held: "Hearsay and non-expert opinion evidence may not be used in this court as a basis to sup-

52. Under section 12(7)(e) the reviewing court may reverse if the administrative findings are "unsupported by competent, material, and substantial evidence in view of the entire record as submitted."

53. See text at notes 31-33 *supra*.

54. *John Bene & Sons, Inc. v. FTC*, 299 F. 468, 471 (2d Cir. 1924).

55. *NLRB v. Remington Rand*, 94 F. 2d 862, 873 (2d Cir. 1938).

56. *International Ass'n v. NLRB*, 110 F. 2d 29, 35 (D.C. Cir. 1939).

57. *Tyne Co. v. NLRB*, 125 F. 2d 832, 835 (7th Cir. 1942). Compare *Reck v. Whittlesberger*, 181 Mich. 463, 469, 148 N. W. 247, 249 (1914): "The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common knowledge, and common conduct of mankind. Its principles are generally understood and acted upon in any important business transaction or serious affair in life."

58. *NLRB v. Illinois Tool Works*, 119 F. 2d 356, 364 (7th Cir. 1941).

port the findings of the Board upon which rests an order sought to be enforced."⁵⁹

Most significant is the Supreme Court's pronouncement in the *Consolidated Edison* case: "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."⁶⁰ This statement has been neither overruled nor specifically discredited by the Supreme Court. Is that not a sufficient basis for a conclusion that the residuum rule is at least to some extent the law of the federal courts?

The answer is probably no. The statements of Judges Hough and Hand have survived the *Consolidated Edison* case, the remark in that case is a mere dictum,⁶¹ and even in the face of the remark, federal courts in their holdings have often upheld findings resting on hearsay.

In the *Opp* case,⁶² the Supreme Court upheld a wage order resting on statistical studies which were largely hearsay, and the Court said that the studies "were evidence to be considered by the Administrator,"⁶³ but the authority of the case is weakened by lack of objection to admission of the evidence.⁶⁴ In *Ellers v. Railroad Retirement Board*,⁶⁵ a denial of an award was based on reports,

59. *NLRB v. Bell Oil & Gas Co.*, 98 F. 2d 406, 409 (5th Cir. 1938). One of the most extreme federal decisions is *Tri-State Broadcasting Co. v. FCC*, 96 F. 2d 564, 566 (D.C. Cir. 1938), in which the FCC had allowed an applicant for a broadcasting license to testify: "Those I talked to were unanimously of the opinion that another station would be very beneficial, and the majority of them promised financial support to it." The court said: "The testimony admitted was clearly hearsay. It was a statement in effect of what others had told [the witness]. Its admission deprived the appellant of the right to cross-examine . . ." Of the case Wigmore said: "No wonder the administrative agencies chafe under such unpractical control." 1 Wigmore, *Evidence* 33-34 (3d ed. 1940). The case is altogether different from one like *Powhatan Mining Co. v. Ickes*, 118 F. 2d 105 (D.C. Cir. 1941), in which the right to cross-examine was of great consequence and the court held that the statistical data could not be relied upon unless underlying facts about its compilation were revealed.

60. *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 230 (1938). The case was decided in December, 1938. *NLRB v. Remington Rand*, 94 F. 2d 862 (2d Cir. 1938), in which Judge Learned Hand said that hearsay may support a finding, was February, 1938.

61. Just as strong a dictum is that of Mr. Justice Brandeis for a unanimous Court in *Tisi v. Tod*, 264 U. S. 131, 133 (1924), that the correctness of the judgment of the lower court concerning the administrative finding "is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found."

62. *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1941).

63. *Id.* at 155.

64. The Court cited previous holdings that if such evidence is admitted without objection "it is to be considered and must be accorded 'its natural probative effect as if it were in law admissible.'" *Ibid.*

65. 132 F. 2d 636 (2d Cir. 1943).

answers to questionnaires, and letters not under oath; the court upheld the order after reciting that "if it is of the kind on which fair-minded men are accustomed to rely in serious matters, it can support an administrative finding."⁶⁶ In *NLRB v. Southern Wood P. Co.*,⁶⁷ the question was whether an employee was discharged for union activities. The employee testified that a week after his discharge, a representative of the company offered him a new job, but when he went to take the job he found the representative talking to the superintendent who had discharged him; the representative then told him he had not known earlier that the employee "had been messed up in labor trouble" and that the company could not employ him. The superintendent testified that the discharge was "solely for general inefficiency in his work." The court upheld a finding that the discharge was for union activity. But the finding rested on evidence of efficiency as well as on the hearsay. Another such discharge case is *Union Drawn Steel Co. v. NLRB*.⁶⁸ The discharged employee testified that the foreman told him, after the refusal to rehire at the end of a strike, that the mistake he made was going on the picket line. The foreman testified that he said only that the employee was too old for the picket line and that he could have his job back when there was work for him to do. The court said the employee's testimony was hearsay but "not remote" and that the testimony was corroborated by the company's hostility to the union and by the fact that the employee's place was filled by other men. But the support for this last point was weak; the employee was unskilled; whether three new men taken on were skilled or unskilled did not appear in the record; and the foreman testified that the employee's work had been done by himself and other members of the force. The case seems to hold either that the uncorroborated hearsay supports the finding, or that the hearsay corroborated by the company's hostility and the other inconclusive evidence does so; nothing hinges on which form of statement is used, for other circumstances of a case can always be called corroboration.

The kind of weak corroboration that is sometimes held sufficient is well illustrated by a workmen's compensation case, *Associated General Contractors v. Cardillo*.⁶⁹ The deceased employee's relatives testified he told them he had struck his head against a filing cabinet. The statute provided that "declarations of a deceased em-

66. *Id.* at 639.

67. 135 F. 2d 606 (5th Cir. 1943).

68. 109 F. 2d 587 (3d Cir. 1940).

69. 106 F. 2d 327 (D.C. Cir. 1939).

ployee concerning the injury . . . shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury." The court held: "His story of how and where the injury happened is corroborated by the facts that (1) he came home from the office 'at his usual time,' with a visible wound and manifestations of suffering which he had not exhibited when he left home to go to the office, and (2) there was, in his office, a filing case on which he could have injured himself as he said he did."⁷⁰ A somewhat similar holding is *NLRB v. Service Wood Heel Co.*⁷¹ The question was whether a majority of employees had chosen the union. The only evidence that they had was 33 signed slips, but Hutchins, who collected the slips, could testify to the genuineness of only 12 or 14. The court accepted all 33 as evidence, declaring: "We think there was sufficient corroboration in the testimony of Hutchins, in a careful inspection of the slips themselves, and in the surrounding circumstances." The court specifically rejected the residuum rule: "If . . . the Board . . . must sift out the various items of evidence before it and reserve for special treatment those items which would have been inadmissible in a court of law under the technical and often debatable rules of evidence, we think there would be put upon the Board the very burden of which the Congress intended to relieve it."⁷²

The cases are legion in which courts uphold both the exclusion and the deportation of aliens on the basis of hearsay.⁷³ The outstanding case rejecting such evidence is

70. *Id.* at 329.

71. 124 F. 2d 470 (1st Cir. 1941).

72. *Id.* at 472. Another weak-corroboration case is *Meinwald v. Doran*, 60 F. 2d 261 (S.D. N.Y. 1932), involving revocation of a druggist's permit. See also *Alabama v. United States*, 46 F. Supp. 478 (W.D. Ky. 1944). Of course hearsay is sometimes not substantial evidence. *E.g.*, *Martel Mills Corp. v. NLRB*, 114 F. 2d 624 (4th Cir. 1940); *Automobile Sales Co. v. Bowles*, 58 F. Supp. 469 (N.D. Ohio 1944).

73. In *Yong Yung See v. United States*, 92 F. 2d 700 (9th Cir. 1937) the sole evidence against the alien was testimony in another case. The court recognized that this was hearsay but justified the finding by saying "it is not shown that the three witnesses . . . were available for this inquiry." In *Singh v. District Director*, 96 F. 2d 969 (9th Cir. 1938), the evidence against the alien was a letter from the Seattle immigration office and sworn statements by Mexican officers identifying the alien's photograph. When the alien asked for a chance to cross-examine, he was told he could do so by deposition, but he did not have the money to pay for that. The deportation order was upheld. In *The Washington*, 19 F. Supp. 719 (S.D. N.Y. 1937) the evidence against the alien was a letter from an American consul.

In *Vatjauer v. Commissioner*, 273 U. S. 103, 106 (1927), the Court said of a deportation order that "a want of due process is not established by showing . . . that incompetent evidence was received and considered." Despite the Supreme Court's recognition in *Ng Fung Ho v. White*, 255 U. S. 276 (1922) that deportation, as distinguished from exclusion, ma

Bridges v. Wixon,⁷⁴ which, however, may rest on such unique considerations and may involve such flagrantly unsound analysis as to be of little value as authority for future cases. Bridges challenged a deportation order by habeas corpus. The inspector had found that he had been a member of the Communist Party, the Board of Appeals found that he had not, and the Attorney General had agreed with the inspector. The court of appeals, three to two, upheld the Attorney General, and the Supreme Court, five to three, reversed. The evidence, in addition to independent testimony of Lundeberg identifying Bridges as a Communist, consisted of unsigned and unsworn statements O'Neil allegedly had made to investigating officers some months earlier that O'Neil had walked into Bridges' office in 1937 and saw Bridges pasting assessment stamps in a Communist party book, and that Bridges reminded O'Neil that he had not been attending party meetings. The statements were verified by the stenographer who took them down and by an officer who testified that O'Neil had later repeated the statements to him and to other witnesses. O'Neil was a witness at the deportation proceeding but denied making the alleged statements. The Court quoted Regulations of the Immigration and Naturalization Service:

All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding.⁷⁵ A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation.⁷⁶

The Court held that Bridges, having properly objected, was en-

result in loss of "all that makes life worth living," and therefore calls for greater procedural safeguards than those permitted for exclusion in *United States v. Ju Toy*, 198 U. S. 253 (1905), the alien cases in reviewing courts involving questions of evidence do not seem to recognize any such line between deportation and exclusion, with the exception of *Bridges v. Wixon*, 326 U. S. 135, 154 (1945), where the Court said: "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."

74. 326 U. S. 135 (1945).

75. 8 Code Fed. Regs. § 150.1 (c) (1949) (Reg. of the Immigration and Naturalization Serv.).

76. *Id.*, at § 150.6 (i).

titled to insist upon observance of these rules: "A written statement at the earlier interviews under oath and signed by O'Neil would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription. Statements made under those conditions would have an important safeguard—the fear of prosecution for perjury."⁷⁷ The Court thus interpreted the Regulations as requiring exclusion of O'Neil's unsigned and unsworn statements, although nothing in the Regulations specifically so required. Indeed, the Court's quotation stopped immediately short of what may be the most significant sentence of the Regulations:

An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person.⁷⁸

Since O'Neil did give testimony contradicting the earlier statements, this provision clearly permitted reception of the inspector's affidavit, and yet the Court seemed to hold that even superior evidence should be excluded—the testimony instead of the affidavit of the inspector, and the stenographer's transcription supported by the testimony of the stenographer. The Court did not attempt to answer the observation of the three dissenting justices that the Regulations provided "neither explicitly nor by implication that statements other than recorded statements are inadmissible."⁷⁹

The majority, however, rested its decision not only on the Regulations but also on the hearsay character of the O'Neil statements. The Court reasoned that those statements would not be admissible in a criminal case as substantive evidence, that the hearsay rule has been relaxed in exclusion cases but that here deportation was involved, and that "deportation is a penalty—at times a most serious one."⁸⁰ The astounding implication from this part of the opinion seems to be that the same rules of evidence apply in a deportation case as in a criminal case. But the majority of the Court made no attempt to answer the point made in the dissenting opinion, and also made by the presiding inspector in reliance on Wigmore,⁸¹ that the principal reason for excluding hearsay is lack

77. *Bridges v. Wixon*, 326 U. S. 135, 153 (1945).

78. 8 Code Fed. Regs. § 150.6 (i) (1949).

79. 326 U. S. 135, 175 (1945).

80. *Id.* at 154.

81. 3 Wigmore, Evidence § 1018(b) (3d ed. 1940): "It does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be

of opportunity for cross-examination and that O'Neil was present for cross-examination.

In a third respect the majority opinion takes a position that seems untenable. The Court said: "Whether the finding would have been made on this record from the testimony of Lundeberg alone is wholly conjectural and highly speculative."⁸² This statement was unsupported by specific analysis. The dissenting justices asserted precisely the opposite, and supported their conclusion with quotations from the findings of the inspector, adopted by the Attorney General, including the statement: "I reach the conclusion, therefore, that the conversation did take place substantially as testified by Lundeberg and that Bridges did then and there admit to Lundeberg that he was a member of the Communist party."⁸³

A fourth element of the majority opinion may alone be enough to render the decision unsound. The Lundeberg testimony, although hearsay, was probably within the admission exception to the hearsay rule and would probably be admissible even in a criminal case.⁸⁴ Even if the Court had been right in its view that it was conjectural whether the finding would have been made on the Lundeberg testimony alone, still that would be reason merely for remanding the case to the finders of fact. The Court's judgment had the effect of releasing Bridges and ending the case. Although the courts commonly remand deportation cases, the Court made no mention of that possibility.⁸⁵

strictly denied them in the mind of the tribunal. The only ground for so doing would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. . . . Here, however, by hypothesis the witness is present and subject to cross-examination. . . . The whole purpose of the Hearsay rule has been already satisfied."

Compare Maguire, *Evidence—Common Sense and Common Law* 59 (1947): "Since the witness is by hypothesis the author of the inconsistent statement, and is instantly available for full cross-examination as to its verity, the statement is not hearsay at all and should be admissible at full value."

82. 326 U. S. 135, 155-56 (1945).

83. *Id.* at 172.

84. The court below passed upon the question whether the statement was admissible as an admission and held that it was. *Bridges v. Wixon*, 144 F. 2d 927 (9th Cir. 1944).

85. The Court did call O'Neil's statements "highly prejudicial." *Bridges v. Wixon*, 326 U. S. 135, 154 (1945). And of those statements it said: "We are unable to say that the order of deportation may be sustained without them."

Lundeberg testified that he had dined at Bridges' home in 1935, that Bridges urged him to join the Communist Party, and that two members of Bridges' family and a secretary were present. The Lundeberg testimony should be discounted by Lundeberg's admitted hostility to Bridges. But that testimony takes on added weight from Bridges' failure to call as witnesses the members of the family and the secretary.

The combined effect of the various weaknesses of the majority opinion is overwhelming. The infirmities seem serious enough to weaken or destroy the authority of the case as a guide for future cases.⁸⁶

OPINION EVIDENCE AND EXPERT TESTIMONY

The technical rule known as "the opinion rule" obviously does not apply to the administrative process. A view even more liberal than that of Wigmore⁸⁷ and of the Model Code⁸⁸ prevails.⁸⁹ The dominant spirit, even in reviewing courts, is typified by *Keller v. FTC.*⁹⁰ A witness whose qualifications as an expert were doubtful had been allowed to give substantial opinion testimony. The court disposed of the question with a simple remark: "In this situation we think the question was not properly whether the witness was qualified to testify but, rather, what weight was to be given to his testimony."

Questions of expert testimony often relate peculiarly to the administrative process. One of the most common arguments is that an agency cannot accept the expert testimony of its own staff members as against the testimony of outside experts; the federal courts consistently reject the argument.⁹¹ Sometimes the agency tries to follow the conventional rule and the reviewing court has to remind it that the administrative process should be free from such a rule; the Tax Court, for instance, rejected testimony of a corporate officer as to reasonableness of salaries, applying the rule often followed at common law that a witness may not give an opinion on the very question the tribunal must answer, but the reviewing court reversed.⁹²

86. Compare Maguire, *Evidence—Common Sense and Common Law* 163 (1947): "The view of the majority is either anomalous or strictly limited by peculiarities of the situation in the immediate case."

87. 7 Wigmore, *Evidence* §§ 1920-21 (3d ed. 1940).

88. Rule 401.

89. An especially helpful presentation of the judicial practices is McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 Tex. L. Rev. 109 (1945).

90. 132 F. 2d 59, 61 (7th Cir. 1942).

91. *NLRB v. Griswold Mfg. Co.*, 106 F. 2d 713 (3d Cir. 1939); *Pacific Power & L. Co. v. FPC*, 141 F. 2d 602 (9th Cir. 1944); *Rabkin v. Bowles*, 143 F. 2d 600 (Em. Ct. App. 1944).

92. *Express Pub. Co. v. Commissioner*, 143 F. 2d 386 (5th Cir. 1944). In *Carmichael v. Wong Choon Ock*, 119 F. 2d 173 (9th Cir. 1941) the court set aside a deportation order resting on medical expert testimony as to a boy's age, where direct testimony supported the opposite finding. A part of the basis for the court's view is revealed by Judge Denman denying petition for rehearing, 122 F. 2d 829 (9th Cir. 1941): "At ten years of age, because of my size, I was excluded from footraces for boys under fourteen." But in *Kong Din Quong v. Haff*, 112 F. 2d 96 (9th Cir.), *cert. denied*, 311 U. S. 706 (1940), medical expert testimony as to age was held enough.

In many cases the question recurs whether a supposedly expert tribunal may use its own judgment in the face of uncontradicted expert testimony to the contrary. The early federal cases sometimes required specific expert opinion to support the finding,⁹³ but in the 1940's the federal courts have generally permitted agencies to use their own judgment.⁹⁴ Typical of recent cases is a remark in a workmen's compensation case: "The Deputy Commissioner is not bound to accept the opinion or theory of any particular medical expert but he may rely upon his own observation and judgment in conjunction with all of the evidence before him."⁹⁵

Another recurring problem is whether misrepresentation of a product may be found on the basis of general expert testimony that no substance will do what is claimed for the product, when the expert witnesses so testifying have not analyzed the particular product, and when other expert witnesses have analyzed the product and testify that it does what is claimed; the cases generally permit a finding of misrepresentation in such circumstances.⁹⁶ The key case is now *Reilly v. Pinkus*.⁹⁷ The Postmaster General issued a fraud order concerning "Kelp-I-Dine," represented as permitting persons suffering from obesity to "eat plenty" and yet reduce "without tortuous diet" and without feeling hungry. Two doctors testified that iodine is valueless as an anti-fat, that kelp would not reduce hunger, and that the suggested diet was too drastic to be safe without medical supervision. The one doctor testifying for respondent expressed opinion that iodine did have value as a fat reducer and is so used by physicians, but even he conceded that the daily dosage to reduce weight would be fifty to sixty times as much as the recommended dosage, and that the recommended diet might

93. *Boggs & Buhl v. Commissioner*, 34 F. 2d 859 (3d Cir. 1929); *Bonwit Teller & Co. v. Commissioner*, 53 F. 2d 381 (2d Cir. 1931), *cert. denied*, 284 U. S. 690 (1932).

94. *Spitzer v. Commissioner*, 153 F. 2d 967 (8th Cir. 1946); *Kline v. Commissioner*, 130 F. 2d 742 (3d Cir. 1942), *cert. denied*, 317 U. S. 697 (1943); *In re Rae's Estate*, 147 F. 2d 204 (3d Cir. 1945).

95. *Contractors v. Pillsbury*, 150 F. 2d 310, 313 (9th Cir. 1945).

Of course, when background of experience is the basis for the finding, a fair procedure requires that that basis be revealed to the parties at the appropriate stage. In this respect *Moschogianis v. Concrete Material & Mfg. Co.*, 179 Minn. 177, 228 N. W. 607 (1930) may be sounder than *McCarthy v. Sawyer-Goodman Co.*, 194 Wis. 198, 215 N. W. 824 (1927). For the officer to refuse to take into account his special knowledge or experience would be unfortunate; equally unfortunate is his reliance on that knowledge without revealing it.

96. *John J. Fulton Co. v. FTC*, 130 F. 2d 85 (9th Cir.), *cert. denied*, 317 U. S. 679 (1942); *J. E. Todd, Inc. v. FTC*, 145 F. 2d 858 (D.C. Cir. 1944); *Charles of the Ritz Distributors Corp. v. FTC*, 143 F. 2d 676 (2d Cir. 1944).

97. 338 U. S. 269 (1949).

prove harmful. The district court and the court of appeals held that mere opinion evidence could not support a fraud order, relying on *American School v. McAnnulty*,⁹⁸ in which the Supreme Court had set aside a fraud order because of two widely held schools of opinion about the representation in question and because scientific knowledge was not yet sufficient to attribute intent to deceive to one who asserted either opinion. The contention of the *Pinkus* case was that "even the testimony of the most experienced medical experts can never rise above a mere 'opinion' unless the expert has made actual tests of the drug to determine its effects in relation to the particular representations alleged to be false." The Court rejected that contention but added a note of caution: "It would amount to condemnation of new ideas without a trial to give the Postmaster General power to condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity."⁹⁹

BURDEN OF PROOF

Section 7(c) of the APA provides: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." The Committee reports explained: "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a *prima facie* case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain."¹⁰⁰ An example of the way the provision can be applied, or misapplied, is *Philadelphia Co. v. SEC*.¹⁰¹ The Public Utility Holding Company Act empowers the SEC by rules and regulations to exempt classes of persons from obligations imposed by the Act upon subsidiary companies. A rule adopted prior to 1941 exempted all subsidiaries other than gas or electric utilities, investment companies, service companies, or holding companies thereof. Under the rule the Pittsburgh Railways Company, a subsidiary of Philadelphia Company, was exempt. When Pittsburgh filed a voluntary petition for reorganization in bankruptcy, the SEC inquired into the desirability of asserting jurisdiction over Pittsburgh under the Holding Company Act, issued a proposed amendment of

98. 187 U. S. 94 (1902). The Supreme Court had previously limited this case in *Leach v. Carlile*, 258 U. S. 138 (1922).

99. *Reilly v. Pinkus*, 338 U. S. 269, 274 (1949).

Another aspect of the decision, denial of cross-examination, is discussed in text at notes 106-108 *infra*.

100. Sen. Doc. No. 248, 79th Cong., 2d Sess. 208, 270 (1946).

101. 175 F. 2d 808 (D.C. Cir. 1948).

the rule, and invited written data, views, comments and oral arguments. Philadelphia requested a hearing at which evidence might be presented subject to cross-examination. The SEC denied such a hearing, and the court held that the denial was error. The court also held that "the Commission erroneously failed to assume the burden of proof in respect of the propriety of its proposed action."¹⁰² The court did not attempt to explain how the Commission can *prove* with evidence that such a rule should be amended in any particular respect. The APA provision may be entirely sound because by its terms it is limited to cases of adjudication and rule-making required by statute to be determined on the record after opportunity for agency hearing. If the court's decision is unsound, the fault may lie in the holding that the statute requires this kind of rule-making to be determined on the record.

CROSS-EXAMINATION ; WRITTEN PRESENTATIONS

Section 7(c) of the APA provides :

Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

The Senate committee said : "To the extent that cross-examination is necessary to bring out the truth, the party should have it."¹⁰³ The House committee said : "The provision on its face does not confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths . . . In many rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings."¹⁰⁴

Reliance upon hearsay, which as we have seen is usually clearly permissible, obviously prevents cross-examination of declarants who are unavailable. Then in what circumstances is cross-examination required for a full and true disclosure of the facts? *Pow-*

102. *Id.* at 818.

103. Sen. Doc. No. 248, 79th Cong., 2d Sess. 209 (1946).

104. *Id.* at 271.

*hatan Mining Co. v. Ickes*¹⁰⁵ is helpful on this question. In fixing coal prices, the director relied upon statistical data purporting to show prices on various grades of coal, but the identity of the particular producers was not disclosed to the petitioners, who demanded that knowledge in order that they might cross-examine. Late in the hearing the names of producers were disclosed but no basis was provided for linking any particular name with any particular transaction. The practical effect was to deny the petitioners an effective right of cross-examination with respect to the statistical data. The court held that this amounted to denial of fair hearing. In *Reilly v. Pinkus*,¹⁰⁶ discussed above in another connection,¹⁰⁷ the Post Office Department's expert witnesses testified that "Kelp-I-Dine" was valueless as an anti-fat and would not reduce hunger. The doctors' opinions rested on their general professional knowledge but to some extent was acquired from medical texts and publications. The seller of the product sought to cross-examine the doctors concerning statements in other medical books, some of which at least were shown to be respectable authorities. The books asserted the use of kelp as a fat-reducer. The examiner did not permit this cross-examination. The Supreme Court held: "We think this was an undue restriction on the right to cross-examine. It is certainly illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books." The Court set aside the order on this ground, attempting, however, to prevent misinterpretation of the holding by saying: "The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency."

Somewhere between the denials of cross-examination in such cases as *Powhatan* and *Pinkus* and the denial of cross-examination in an ordinary instance of reliance on hearsay, a line must be drawn to determine when cross-examination is required for a full and true disclosure of the facts.¹⁰⁸ That line has to be drawn in the first instance by hearing officers, subject to the check of agencies

105. 118 F. 2d 105 (6th Cir. 1941).

106. 338 U. S. 269 (1949).

107. Text at notes 97-99 *supra*.

108. See *Vatjauer v. Commissioner*, 273 U. S. 103, 106 (1927): "A want of due process is not established by showing . . . that incompetent evidence was received and considered."

and the further check of reviewing courts.

The Act recognizes the propriety of limiting some proceedings to written presentations, without cross-examination. The outstanding procedure of this kind is the ICC "shortened procedure,"¹⁰⁹ which has been used since 1923 in about a third of the railroad rate cases,¹¹⁰ with a great saving to the Commission and to the parties. In the ICC the use of the shortened procedure requires consent of all parties, although the Department of Agriculture makes it compulsory in some cases. The complainant submits a memorandum of facts, sworn to by the persons who would appear as witnesses if an oral hearing were conducted. An answering memorandum, similarly sworn to, is then filed by the defendant, followed by a reply memorandum of the complainant. Each memorandum may be accompanied by written argument. Interveners are permitted to file memoranda of fact with supporting arguments, and all memoranda are served on interveners as well as on other parties. The examiner prepares a proposed report which is served on the parties, and thereafter the procedure of briefs, exceptions, oral arguments, and decision-making is the same as in cases involving oral hearings. The key to the success of the shortened procedure is the rarity of questions of truth or falsity in rate cases. Most rate controversies revolve around questions of inference, interpretation, discretion, and law rather than around questions of primary or evidentiary facts. Some members of the ICC staff even believe that the shortened procedure results in better decisions than hearing procedures because the written memoranda are generally more precise than oral testimony.¹¹¹

Since an officer in behalf of the Commission recommends use of the shortened procedure in about twice as many cases as the number in which parties consent, the question is an important one whether the ICC should exercise discretion to make the shortened procedure compulsory in some cases. The compulsory system of the Department of Agriculture apparently has not been successfully challenged.

The OPA cases directly bear upon the problem of constitutionality of compelling the shortened procedure in appropriate cases. The Act provided that protests against price orders and regulations

109. Att'y Gen. Comm. Ad. Proc. 23-26 (ICC Monograph 1941); 3 Bull. Assoc. of Practitioners Before the ICC 9 (Aug. 1933).

110. During the years 1946-1948 the percentage of formal complaints handled by the shortened procedure with 31, 34, and 31. 61 ICC Ann. Rep. 79 (1948).

111. Rep. Att'y Gen. Comm. Ad. Proc. 405 (1941).

could be supported by affidavits and other written evidence and that the Administrator in his discretion might grant or deny the protest in whole or in part or give notice of oral hearing.¹¹² The regulations provided that opportunity for oral hearing and cross-examination would be allowed only upon a showing by a protestant that the filing of written evidence would not permit the fair and expeditious disposition of the protest. The Emergency Court of Appeals in 1943 rejected broadside contentions that this procedure violated due process,¹¹³ and the Supreme Court in the *Yakus* case¹¹⁴ held that "the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process. . . . In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process."¹¹⁵ Under this holding the denial of oral hearing might in some cases be constitutional and in others unconstitutional. The problem was thereafter presented to the Emergency Court of Appeals in at least seven cases, in all of which some means was contrived to avoid passing upon the crucial issue of what circumstances require oral hearing. The grounds for decision included failure to request an oral hearing,¹¹⁶ lack of showing that written evidence would not permit fair and expeditious disposition,¹¹⁷ failure to comply with the procedural regulation,¹¹⁸ allowance of opportunity for oral hearing at a later stage of the proceeding,¹¹⁹ and failure to show that refusal of an oral hearing was an abuse of discretion.¹²⁰

112. 56 Stat. 31 (1942), as amended, 58 Stat. 638 (1944), 50 U. S. C. § 923 (1946).

113. *Taylor v. Brown*, 137 F. 2d 654 (Em. Ct. App.), *cert. denied*, 320 U. S. 787 (1943).

114. *Yakus v. United States*, 321 U. S. 414 (1944).

115. *Id.* at 436.

116. *Veillette v. Bowles*, 150 F. 2d 862 (Em. Ct. App. 1945).

117. *Philips v. Porter*, 157 F. 2d 607 (Em. Ct. App. 1946); *Horns v. Bowles*, 151 F. 2d 191 (Em. Ct. App. 1945). In neither of these cases did the court in its opinion indicate what showing was made or what showing would be necessary.

118. *Direct Realty Co. v. Porter*, 157 F. 2d 434 (Em. Ct. App. 1946). This case was aggravated by the fact that the complainant was misled by the administrative officers as to his procedural rights. The court met this objection by saying merely that the complainant failed to consult the regulations, *Id.* at 438. The court acknowledged: "Procedural due process undoubtedly requires that a hearing be accorded at some stage of an administrative proceeding." *Id.* at 439. But that right was held to be forfeited.

119. *150 East 47th Street Corp. v. Creedon*, 162 F. 2d 206 (Em. Ct. App. 1947); *Polis v. Creedon*, 162 F. 2d 908 (Em. Ct. App. 1947).

120. *Mortgage Underwriting & R. Co. v. Bowles*, 150 F. 2d 411 (Em. Ct. App. 1945). The court said merely: "This Court will only interfere with a decision of the Administrator in the matter of granting or refusing an oral hearing where it plainly appears there has been an abuse of discretion. We find no such abuse in this case."

Despite the emergency element, the *Yakus* case and the various Emergency Court of Appeals decisions seem to afford a fairly secure foundation for the proposition that the ICC could constitutionally make its shortened procedure compulsory for cases in which a party cannot show a substantial dispute about a question of primary fact. The ICC rules of practice concerning the "modified procedure" seem to leave that question open. When parties refuse consent to use the shortened procedure, memoranda of fact may nevertheless be exchanged, and then any party desiring cross-examination may apply for it, stating the basis for the application. The rule then provides: "The order setting the complaint for oral hearing, if hearing is deemed necessary, will specify the matters upon which the parties are not in agreement and respecting which oral evidence is to be introduced."¹²¹

SUMMARY AND PERSPECTIVE

The administrative process is providing an effective leadership for reform of evidence practices. The American Law Institute's decision against restating the law of evidence and in favor of reforming it through the proposed Model Code rested upon virtual unanimity of evidence scholars in disapproving the exclusionary rules. The Model Code, even though it has failed to win legislative adoption, has nevertheless been a significant force for reform. But it is the administrative process that is demonstrating through extensive experience the practical success of receiving "any oral or documentary evidence" and of giving it such probative weight as the finder of fact thinks it deserves in the particular record. The achievements of the administrative process are sharpening the dissatisfaction with intricate rules that require exclusion of evidence having substantial probative effect. More and more, the exclusionary rules are attributed to the jury system. More and more, the courts are asserting the need for confining the exclusionary rules to jury cases. The Courts of Appeals of the Second and the Eighth Circuits¹²² have been especially aggressive in encouraging district judges to avoid the exclusion of evidence that might have substantial probative effect. A district court specifically imitates the Federal Trade Commission in a nonjury case. Scattered case law supports even the judicial reversal of administrative refusal to rely upon legally incompetent evidence.¹²³

121. ICC Rules of Prac., Rule 53(b) (1942).

122. See notes 15, 22, 23 *supra*.

123. See notes 37, 40 *supra*.

The technical rules are rejected not only as rules of exclusion but also as rules to guide the process of fact finding. The transition idea of "a residuum of legal evidence," including even the Supreme Court's generalization that "mere uncorroborated hearsay" is not substantial evidence, cannot survive, and is already rejected by many holdings. Of course, mere uncorroborated hearsay is often insubstantial. But technically incompetent evidence is often more reliable than technically competent evidence; several items of incompetent evidence sometimes corroborate each other. The problem is one for particular judgment in the light of a whole record, not for abstract dogmatism. The hearsay rule, as well as any generalization founded upon it, is deficient in leaving out of account what a court of appeals has called "persuasive hearsay."¹²⁴ Responsible persons often rely upon hearsay in serious affairs, just as responsible persons often refuse to rely upon hearsay in serious affairs. Appraising isolated bits of evidence apart from their record contexts has always been unsound; questions of reliability must be determined in the light of whole records and not in the abstract.

Whether or not evidence is "reliable, probative, and substantial" depends largely on factors having nothing to do with the reasons behind the rules of competence. The practical effect of the particular finding is often a major consideration. Revoking a license may require more reliable evidence than granting a license. Evidence which adequately supports an award of a benefit or even a cease and desist order may be insufficient to support a severe penalty. The Supreme Court emphasized in 1948 that "of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress."¹²⁵ Instead of making an invariable demand for the most reliable evidence, the administrative process must often match the importance or unimportance of the subject matter against considerations of economy. For determining small claims, the expense of travel and even of depositions may necessitate reliance on affidavits. But to base revocation of a valuable license solely on an affidavit, when expense is the only reason for not producing the witness, might even be a denial of due process if opportunity for cross-examina-

124. *Phelps Dodge R. Corp. v. FTC*, 139 F. 2d 393, 397 (2d Cir. 1943).

125. *FTC v. Cement Institute*, 333 U. S. 683, 705-06 (1948).

tion is crucial. Sometimes precision is required; sometimes approximations are enough. The Supreme Court has often upheld the ICC's "typical-evidence" practices: "To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief."¹²⁶

A most encouraging consequence of the system of receiving "any oral or documentary evidence" has been the sharp decline in litigation of evidence questions in the reviewing courts. The artificialities of the technical rules have long been fertile breeders of unnecessary litigation. Attention is at last focused on the significant problems—the problems of probative value. And those problems are solved and should be solved through exercise of discretion, not through detailed rules.

126. *New England Divisions Case*, 261 U. S. 184, 197-98 (1923). See also 2 Sharfman, *The ICC* 376-80 (1931); Att'y Gen. Comm. Ad. Proc. 19 (ICC Monograph 1941).