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MORGAN'S ROLE OF LEADERSHIP IN EVIDENCE LAW REFORM

There are two types of reformer—the meek and insinuating kind that wear down resistance like water falling on a rock, and the scrappy kind that carry the war into the enemy's country. Morgan is of the latter type.

Five years active trial practice in Duluth gave him the savor of evidence rules in action.

His first campaign for the betterment of evidence law was his work as chairman of a distinguished committee of lawyers, law teachers and judges set up by the Commonwealth Fund to propose reforms in the law of evidence. Under Morgan's leadership the committee "determined to develop a new method of approaching the problem. Instead of relying upon opinion and *a priori* argument, assistants were employed by the committee to compile factual material with regard to the actual status of the law and rules of evidence in the various states and, inasmuch as many of the questions were after all a matter of opinion, to collect the opinions of those who had had actual experience with the working of the law of evidence in their respective jurisdictions."[1] After five years of research, the committee drafted and published five proposed uniform statutes with supporting arguments which have been widely influential. These proposals would (1) give added discretion to the judge so that he need not apply the rules of evidence if he finds there is no bona fide dispute as to the facts which the offered evidence tends to prove; (2) empower the judge to comment on the weight of the evidence; (3) abolish the Dead Man's Statute disqualifying interested survivors; (4) admit in evidence the declarations of deceased persons; and (5) simplify and modernize the admission of business entries.[2] Three of these proposals, the first, third and fourth, were adopted as recommendations in 1936 by the American Bar Association.[3] The fifth proposal, embodying a Model Act on Business Records, has been the model for the Federal Business Records Act[4] and for statutes in six states, including New York.[5] The Model Act, moreover, was the starting point for the drafting of the Uniform Business Records as Evidence Act, which has been enacted in twenty-six jurisdictions.[6] In

1. MORGAN *et al.*, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM viii (1927).
2. *Id.* at xix.
3. See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 321-23 (1949).
4. 28 U.S.C. § 1732 (1958).
5. See MCCORMICK, EVIDENCE 607 n.8 (1954).
6. 1960 HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 259.

result, then, this pioneer enterprise of research and drafting bore good fruit.

Morgan's next important undertaking for the rebuilding of evidence law was the drafting of the Model Code of Evidence under the aegis of the American Law Institute.[7] At the inception of the work in 1939 Morgan was appointed Reporter, and shouldered the main responsibility for drafting the Code and presenting it to the Advisers (about a dozen lawyers, law teachers and judges), to the Council of the Institute and to the annual meetings of the more than one hundred able and tough-minded lawyers and judges who composed the membership of the Institute. In the drafting Morgan was ably assisted by Professor John M. Maguire. Professor John H. Wigmore was named as consultant.

Morgan presented three successive drafts of the Code at as many Annual Meetings, and his mettle is revealed by reading the transcript of the debates.[8] Senator Pepper, the Chairman, skilfully channeled the debate toward major issues, rather than details. At the meeting when the first tentative draft of the Code was presented, Morgan was faced with a cross-fire from two attackers upon the general form of the proposed Code. Professor Wigmore advocated a more detailed formulation of the rules after the manner of his own Code of Evidence, while on the other hand Judge Charles E. Clark, a member of the Institute, contended that the proposed draft was too detailed, and that it should be shorter, simpler and more flexible after the manner of the then new Federal Rules of Civil Procedure. Morgan rejected both of these opposite proposals for change in the style of the draft and he was sustained by the meeting.[9]

Morgan's conception of advocacy before a large group of lawyers includes a willingness to express his disagreement in forthright fashion, as is shown by this sample colloquy:

> MR. ROSENTHAL: If this relates only to an appellate court, then I would change the language to say "may have had substantial influence in producing the verdict or finding."
>
> MR. MORGAN: I should oppose that as long as I am able to oppose it. That is keeping a rule which the most backward courts now enforce. They say just what Mr. Rosenthal has said, that nobody can tell what influenced a jury; and, of course, we agree to that. Nobody can tell what influenced a jury. But when you have a rule to the effect that anything that may have influenced the jury is ground for reversible error, you mean that any error in the instruction or any error in the exclusion or admission of evidence is ground for reversal. That is what it means;

7. For a brief history of the Code see the *Introduction* to MODEL CODE OF EVIDENCE vii-xvi (1942).

8. These appear in vols. 17, 18 and 19 of the ALI PROCEEDINGS (1940, 1941, 1942).

9. For the debate and the outcome, see 17 ALI PROCEEDINGS 81-96 (1940).

> and if you take Mr. Rosenthal's amendment, you are not reforming anything. You are going back.[10]

Again, when the famous Rule 303—recognizing a discretion in the judge to exclude evidence otherwise admissible when he finds that its probative value is outweighed by factors of time, prejudice, confusion of issues, misleading the jury, or unfair surprise—was proposed and strong opposition was voiced from the floor, Morgan made an impassioned plea for the rule. Thereupon the Chairman appealed for a "temperate spirit" in the debate. Morgan's response was characteristic:

> Maybe you don't remember the first time the Reporter fulminated . . . and the Chairman came up to me and said "Eddie, please remember it is not a criminal offense to make a suggestion." I do not intend to be too warm about these things but you probably can tell from my name I am a Welshman and a Welshman never feels anything moderately.[11]

Rule 303 was approved.

Perhaps the most radical change in existing law proposed by the Reporter and his advisers is the provision embodied in rule 503 which admits evidence of a hearsay declaration wherever the declarant is found to be unavailable.[12] This stirred up a lively fusillade of dissent, as might be expected, but the meeting after a closing argument by Morgan voted its approval.[13]

Some other major issues were resolved in the meetings adversely to the Reporter's views. Thus, the Code as submitted to the meeting provided in respect to presumptions that if the basic fact of the presumption has any probative value as evidence of the presumed fact, but is met by countervailing evidence, the party opposing the presumption has the burden of persuasion to show the non-existence of the presumed fact.[14] The meeting, however, despite the body of tradition supporting this practice, refused to accept it[15] and decreed that the rule should be rewritten to conform to the Thayer view that the presumption "disappears" when met by counter evidence.[16]

Another important defeat was in the field of privilege. The Reporter's draft contained no provision for a privilege for communications between patient and doctor. This omission provoked what was perhaps the longest and liveliest debate in the whole series of meet-

10. 17 ALI PROCEEDINGS 110-11 (1940).
11. 19 ALI PROCEEDINGS 227 (1942).
12. MODEL CODE OF EVIDENCE rule 503 (1942): "Evidence of a hearsay declaration is admissible if the judge finds that the declarant
(a) is unavailable as a witness, or
(b) is present and subject to cross-examination."
13. 18 ALI PROCEEDINGS 86-136 (1941).
14. The proposed rule appears in 18 ALI PROCEEDINGS 199-200. A similar provision was adopted as UNIFORM RULE OF EVIDENCE 14(a).
15. 18 ALI PROCEEDINGS 226 (1941).
16. See MODEL CODE OF EVIDENCE rules 221, 222 (1942).

ings.[17] In the upshot there was incorporated in the Code a physician-patient privilege but with the danger of injustice minimized by including a provision that if the patient brings an action or interposes a defence in which the condition of the patient is an element or factor in the claim or defence, there is no privilege.[18]

Despite these significant changes in the Reporter's draft, the fact remains that the great body of the simplifying and clarifying provisions of the drafts were left unchanged in the cross-fire of debate, and the Code stands as a monument to the learning, courage, and clear thinking of the Reporter.

The Model Code was completed and published by the Institute in 1942. Though widely cited in judicial opinions, it has not been adopted in any state. Seemingly it was too advanced in its provisions to meet general acceptance by the profession. But it was destined to rise again. In 1949, seven years after the publication of the Code, the National Conference of Commissioners on Uniform State Laws accepted an offer of the Institute to make available to the Conference the Model Code as a basis for the drafting of a new formulation of rules of evidence.[19] A committee of the Conference, headed by Judge Spencer A. Gard, of Kansas, was named to prepare the draft of the new Uniform Rules, and the Institute appointed a committee, of which Morgan was Chairman, to consider the drafts of the Conference Committee in the hope that the new rules might be approved by the Institute.[20]

The close kinship of the new rules and the Model Code and the guiding influence of Morgan in shaping the new Uniform Rules are reflected in the following passages in the prefatory note to the Uniform Rules:

> The Conference has recognized its obligation to use The American Law Institute's Model Code of Evidence as a basis from which to work, and has proceeded accordingly. That thorough, candid work by the nation's best talent commands respect. But if its departures from traditional and generally prevailing common law and statutory rules of evidence are too far-reaching and drastic for present day acceptance, they should be modified in such respects as will express a common ground of acceptability in the jurisdictions and by the tribunals which the rules are expected to serve. So with the objects of acceptability and uniformity in mind, this effort is devoted to the policy of retaining such parts of the Model Code as appear to meet the requirements of such objectives, and to reject, revise or modify the rest.
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> . . .
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> Even before the appointment of the American Law Institute Committee,

17. 19 ALI PROCEEDINGS 183-217 (1942).
18. MODEL CODE OF EVIDENCE rule 223(3) (1942).
19. UNIFORM RULES OF EVIDENCE at 3.
20. *Id.* at 2, 4.

> the Committee of the Conference had established the practice of submitting its drafts of material to Professor Morgan for his comments and suggestions, in view of the fact that he had been chairman of the original committee of the Institute which drafted the Model Code of Evidence. After the appointment of the American Law Institute Committee it became the policy to submit our material to Professor Morgan, who in turn sent copies of it with his comments to the members of his committee. They in turn made comments, criticisms and suggestions of their own, and many of their suggestions have been adopted and are reflected in these Rules.[21]

The Uniform Rules of Evidence were approved by the Conference and by the American Bar Association in 1953. It is to be hoped that these rules, bearing as they do at one remove the imprint of Morgan's genius, may in the fullness of time have a wide acceptance in the statute books and the rules of courts.

In any event, from the foregoing record, it is clear that Morgan is entitled to a place beside Thayer and Wigmore as one of the master builders of evidence law.

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21. *Id.* at 3, 4.