Vanderbilt Law Review

Volume 14
Issue 3 *Issue 3 - June 1961*

Article 7

6-1961

Practical Difficulties Impeding Reform in the Law of Evidence

Edmund M. Morgan

PRACTICAL DIFFICULTIES IMPEDING REFORM IN THE LAW OF EVIDENCE

EDMUND M. MORGAN

[Editor's Note: It is perhaps unusual to find an article in a dedicatory issue written by the person to whom the dedication is made. There are two reasons which prompted us to invite Professor Morgan to compose this article. The first is that we felt that this was a means of preventing any suspicion on his part that the *Review* planned to make this a special issue in his honor. The second, and more important, is that no symposium on this subject matter could pretend to be complete without an article by this man. The subject matter of the essay reveals that the spirit of the author remains unchanged from what it was when he first began to champion the cause of reform in the law of evidence.]

"The World Do Move" was the subject of an address by Judge Joseph C. Hutcheson to members of the Association of American Law Schools shortly after the decision of the Supreme Court in *Funk v. United States*.[1] He used the opinion in that case as evidence that the courts do likewise even in matters of procedure when legislatures lag. With his usual finesse and subtle sense of humor, he did not specify the rate of motion or mention the magnitude of the movement. The time lapse was a mere 144 years and the memorable advance was from the position where a wife was incompetent to testify at the trial of a criminal prosecution in which her husband was an accused to the stage where she is competent to testify in his favor though still generally incompetent as a witness against him. This glacier-like rate of progress makes comparison heartening in terms of geologic periods, but it can hardly be a source of gratification in measuring the improvement in the administration of justice by courts in a time of rapidly changing physical and social conditions. And our adversary system makes entirely impracticable the process of comprehensive procedural reform by judicial decision in contested cases. Thoughtful judges and lawyers have long recognized the need for a careful re-examination of the whole body of rules governing witnesses and the admissibility of evidence. They have visualized a system where the trier of fact is furnished all relevant materials of appreciable value for decision insofar as available and consistent with the protection of individual and social interests deemed of transcending value. They have from time to time initiated proposals designed to make this vision approach reality. What has prevented them from succeeding? At least a partial answer may be found in the following narrative.[2]

1. 290 U.S. 371 (1933).
2. [Editor's note]: In order that the reader may be able (in Professor

The Commonwealth Fund Proposals

In 1920 the Commonwealth Fund appropriated funds for the encouragement of legal research and appointed a committee of distinguished judges, lawyers and legal scholars to determine the scope and means of the research to be undertaken. That committee in turn selected a committee of eight to study the subject of evidence and to propose specific reforms in the law of evidence. The Legal Research Committee and the Evidence Committee were agreed that numerous earlier proposals for improvement had been without substantial effect. After a survey of the field, the Evidence Committee selected five topics, each of which it believed to be a fertile subject of investigation, and the accepted pertinent rules thereof it felt to be in demonstrable need of radical modification. After nearly five years of study of the precedents and of professional opinion, the committee recommended the enactment of five uniform statutes. The histories of three of these are instructive in connection with our subject.

Entries made in the course of business.—The fifth proposed statute reads:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind.[3]

The investigation and report demonstrated that by using a combination of the rule governing entries in the course of business, the shop-

Morgan's words) "to evaluate this recital, with proper allowance for personal interest or bias," he should note that Professor Morgan was (1) Chairman of the Evidence Committee appointed by the Legal Research Committee of the Commonwealth Fund, (2) Reporter of the American Law Institute for its Model Code of Evidence, (3) Chairman of the Institute's Committee to cooperate with the Committee charged with the work of drafting the Uniform Rules of Evidence for the National Commissioners for Uniform Laws, and (4) Reporter for the Advisory Committee on Evidence of the Supreme Court of Puerto Rico. He was informally consulted only occasionally concerning the proposed New Jersey rules. He had no part in the Utah project but received information from time to time concerning the progress of the work of the Utah Supreme Court's Advisory Committee. He was a member of the United States Supreme Court's Advisory Committee on the Federal Rules of Civil Procedure from its inception under Chief Justice Huges until its dissolution under Chief Justice Warren.

3. MORGAN *et al.*, THE LAW OF EVIDENCE; SOME PROPOSALS FOR ITS REFORM 63 (1927).

book rule as modified by modern legislation, and the rules governing the admissibility of records of past recollection, almost all pertinent records of business transactions could be proved, but only by impractical expenditures of time and money.[4] The number of persons whose participation in a relevant transaction had to be shown and evidence of whose assertive conduct had to be qualified as admissible under one or more of the accepted doctrines varied with the business practices of the parties. The outstanding horrible example was furnished by a leading manufacturer of linoleums in its handling of a mixed order. As many as 102 employees might be involved; some of these could be identified specifically, but others could be placed only in a group consisting of as many as twelve. Professor Edward H. Hinton, who had practiced in Missouri, informed his fellow members of the Evidence Committee of a trial between two local banks in which counsel was uncertain concerning the applicable rules and endeavored to satisfy all of them, with the result that both banks practically suspended normal operations during the trial. The situation in New York is described in the opinion of the Court of Appeals in *Johnson v. Lutz*:[5]

> Prior to the decision in the well-known case of *Vosburgh v. Thayer*, 12 Johns. 461, decided in 1815, shop books could not be introduced in evidence to prove an account. The decision in that case established that they were admissible where preliminary proof could be made that there were regular dealings between the parties; that the plaintiff kept honest and fair books; that some of the articles charged had been delivered; and that the plaintiff kept no clerk. . . . Since the decision in that case, it has remained the substantial basis of all decisions upon the question in this jurisdiction prior to the enactment in 1928 of section 374-a, Civil Practice Act.

The report of the Evidence Committee was published in 1927. New York enacted the recommended statute in 1928 and in 1936 Congress did likewise. In 1936 the Uniform Commissioners approved a uniform act which accomplished the same purpose and was somewhat more flexible in terms. At least half the states have enacted the uniform act and a few others the Commonwealth proposal. And in almost all the other states there has been liberalizing legislation. The Uniform Rules of Evidence paraphrase the Uniform Act. Consequently it may be said that this recommendation for reform has accomplished substantial, desirable results beginning almost immediately and continuing for some thirty years. It had the support of the American Law Institute and the American Bar Association.

4. *Id.* at 51-57.
5. 253 N.Y. 124, 170 N.E. 517-18, (1930).

Repeal of the "dead man statute."—The third proposed statute follows:

> No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.
>
> In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge.[6]

If enacted in 1927 it would have changed the law in all but a few states. At common law a party to an action or a person interested in its outcome was incompetent as a witness. By the time the Commonwealth study was made, interest as a ground of disqualification had been abolished. But a remnant of the old doctrine was retained. A party or one interested in the outcome of an action by or against a representative of a deceased person was declared incompetent by statutes loosely designated as "dead man statutes." The extent of the disqualification varied, but the fundamental notion was that since the dead man could not testify in denial or explanation of the offered testimony and had had no opportunity to cross examine the witness, it would expose his estate to all sorts of false claims. The refutation of this argument by many commentators and some judges had had no appreciable effect. And the proposal to counteract this danger by making admissible evidence of the hearsay statements of the decedent whether self-serving or disserving had not been persuasive.

These disqualifying statutes had been breeders of litigation, and modifying amendments had done little or nothing to decrease the uncertainty.[7]

The Evidence Committee found that substantially the proposed provisions had long been in force in Connecticut, and it canvassed the opinion of judges and of members of the bar of Connecticut as to the practical operation of these provisions in (1) aiding the ascertainment of the facts and (2) in tending to encourage fraud or perjury. Of 288 lawyers and judges who expressed their opinions, 88 recorded no experience. The following excerpts from the Committee's report are submitted:

> Of twenty-one lawyers without experience, twenty thought greater safeguards necessary. Of one hundred and fifty-two lawyers having experience, sixty per cent were satisfied with the statutes as they are.

6. MORGAN *et al., op. cit. supra* note 3, at 35.
7. Maguire, *Witnesses—Suppression of Testimony by Reason of Death*, 6 AM. U.L. REV. 1 (1957).

> The Justices of the Supreme Court were unanimously of this opinion, and eighty-one per cent of the Superior Court Judges agreed. Of the four Common Pleas Judges, three believed additional safeguards advisable. Outside of these, the only class of lawyers opposed to these provisions were those who had little or no experience with them. And those of experience who suggested amendment usually advised only the requirement of preliminary findings by the judge [as in the proposed statute] or the requirement of corroboration.[8]

When South Dakota in 1939 abolished its dead man statute, it joined Connecticut, Massachusetts, Oregon and Rhode Island. New Hampshire in 1953 and New Jersey in 1960 made the interested survivor a qualified witness. The New Hampshire enactment came after several attempts by palliative legislation to liberalize the then current practice. The net result to date is that the Commonwealth investigation and recommendation have had only comparatively local or sectional influence. And this notwithstanding its approval by the American Law Institute and the American Bar Association.

Modification of the hearsay rule.—What of the second recommended enactment? Its terms are as follows:

> A declaration, whether written or oral, of a person deceased, insane, or otherwise unavailable, shall not be excluded as hearsay if the trial judge shall first find as a fact (1) either that the declarant is dead or insane or that after due diligence he cannot be produced in court and his deposition cannot be taken; (2) that the declaration was made; and (3) that it was made in good faith before the commencement of the action and upon personal knowledge of the declarant.[9]

This varies from the original Massachusetts statute of 1898 only by making unavailability from other causes than death a sufficient ground for the reception of the evidence. A minority of the Evidence Committee favored the terms of the original Massachusetts statute. The American Bar Association in July 1938 recommended the enactment of the 1898 statute with the addition of insanity as a ground of unavailability. But only Rhode Island has followed the example of Massachusetts. The report of the Evidence Committee gives the result of opinions of six hundred thirty-eight Massachusetts lawyers:

> The answers to the questionnaire came from attorneys whose respective practices were most varied. Of five hundred and eighty-eight having experience with the statute, only one hundred and twelve or about nineteen per cent favored a return to the common law rule and an additional twenty-nine or about five per cent desired restrictive amendments. Four hundred and sixteen were of opinion that the statute aids in the ascertainment of truth while only one hundred and nine believed that it encourages perjury. That is to say, about seventy-one per cent

8. MORGAN *et al., op. cit. supra* note 3, at 31-32.
9. *Id.* at 49.

> thought its effect beneficent while less than nineteen per cent considered it harmful. One third of the group without experience feared that the statute encourages fraud and perjury, while those who have used it or had it used against them in one hundred to five hundred cases were unanimous in the opinion that it does more good than harm. As in the case of the Connecticut enactment, it is most remarkable that the opposition to the statute is in almost inverse proportion to the experience with it.[10]

Later amendments to the statute have made the exception read "if the court finds that it [the statement] was made in good faith and upon the personal knowledge of the declarant."[11]

In a word, the investigation and report have produced no appreciable reform of the hearsay rule in the United States as a whole.

The reasons behind successful reform and failure.—Why, it may be asked, did the proposal for changing the rules governing evidence of business records become embodied in legislation without undue delay? The need for it in New York was made painfully apparent in numberless cases from day to day. Where the claims were asserted by reputable business men against other reputable defendants, the orthodox rules were constantly disregarded; but there was always the danger that counsel might insist upon them, and force compromise or loss where defendant's reliance was chiefly upon the expense and delay which application of the rules would make unavoidable.[12] The same sort of difficulty which made the exclusion of shopbooks an impossible impediment to doing business on credit in a simple society made the exceptions developed by judicial decisions totally impractical as means of regulating the enforcement of ordinary business obligations under modern conditions. The existing rules were totally unrealistic and contrary to generally accepted business practices; the courts were frequently refusing to apply them or imposing new conditions upon their applicability; and the situations in which their application would work intolerable delay and injustice were of everyday occurrence. With so large a segment of the community and so influential a portion of the bar recognizing the need of reform, a proposal for a carefully framed statute, backed by experience in a single state, would meet with little or no opposition by any organized interested group. And a later statute proposed by the Uniform Law Commissioners in such circumstances was likely to receive support rather than opposition by interested litigants.

The dead man statute, on the other hand, supported by specious reasoning and attractive rhetoric, comes into operation only occasion-

10. *Id.* at 41-42.
11. MASS. GEN. LAWS c. 233, § 65 (1943) (as amended).
12. Ehrich, *Unnecessary Difficulties of Proof*, 32 YALE L.J. 436 (1923).

ally in ordinary litigation. It is easily avoided by clients willing to commit perjury and subornation of perjury when represented by careless or crooked counsel. The proposed statute invites the substitution of less radical measures, and it runs counter to settled practice. As the late Judge John Parker said: "[W]e are trained to think that the practice with which we are familiar is the essence of human wisdom...."[13]

The New York State Advisory Committee on the Civil Practice Act has recommended the abolition of the complicated New York dead man statute as found in section 347 of the Civil Practice Act and the substitution of the following:

> In an action by or against the representatives of a deceased or insane person, including a proceeding for the probate of a will, evidence of any statement made on personal knowledge by the deceased or insane person, whether oral or written, shall not be excluded as hearsay. In weighing such evidence and testimony in such a case, the judge or jury shall take into account the inability of the deceased or insane person to contradict a witness and the fact that the deceased or insane person is not subject to cross examination.[14]

The New York State Bar Association referred consideration of this, among other parts of the Advisory Committee's report, to a Joint Committee whose report was discussed by a so-called panel at the 1960 summer meeting of the Association. Following are excerpts from the statement of the Chairman of the Joint Committee:

> As far as our Joint Committee was concerned, this, I think, was one of the subjects that divided us most deeply, and by a sharply divided vote our Committee disapproved. This is one of the few things on which we disagreed with the revisers. We disapproved this proposed change on the ground that, balancing all interests, the present C.P.A. § 347 is preferable.[15]

One supporter of the report regarded the antiquity of the existing provision as a recommendation for its retention, and was of opinion that it prevents "a great deal more injustice than the abolition of it will prevent." Another declared the revision utterly impractical and involving "a change in philosophical approach which is very undesirable . . . . and we should stick with the present system." Professor Weinstein presented an argument in favor of the revision in which he said:

> This is a proposal that has good New England roots. Connecticut has had it for many years; New Hampshire has it, Massachusetts has had it in broader form. More than 30 years ago the Commonwealth Fund financed

13. 17 ALI PROCEEDINGS 145 (1939-1940).
14. See N.Y.S.B. BULL., October 1960 at 315.
15. *Id.* at 315-16.

> a study to find out how it worked. The lawyers and judges who used the rule were asked, is there perjury because you permit this thing? The answers were no, the rule works fine. So that our proposal is thoroughly tested and has worked for many years; it is not a radical proposal at all.[16]

But his argument was ineffective. It is better to endure present injustices than to take a chance of inviting others that we fear even though experience elsewhere has shown the fear to be groundless. The statement of Judge Learned Hand during the discussion of some of the rules proposed for the Model Code of Evidence is pertinent: "We are all developing again and again as lawyers have done from the crack of doom [sic] an opposition to every reform, every change of law. . . . I protest against this continuous conjuring of disaster which seems to pervade every effort of this sort."[17]

The same sorts of considerations are applicable in double strength to the proposal to exclude from the condemnation of hearsay all statements made on the declarant's own knowledge in good faith. The Massachusetts experience is brushed aside, if perchance it is mentioned. Refusal of lawyers to learn from the experience of others in procedural matters is so common as to cause no condemnatory comment. A demonstration of the inconsistencies and complexities of the rules currently governing exceptions to the hearsay rule is shrugged off as purely hypothetical or as involving only imaginary situations. Neither the Bench nor the Bar takes time to consider the subject as a whole. Indeed, they may not have time or opportunity to do so; and when a study is undertaken by representatives of the profession, the conclusions reached are tested only by the personal experiences of each individual lawyer or judge. There is generally no organized group able or willing to spend the time or the money required to secure enactment of the recommended changes in the existing system.

But when organized groups representing special interests are engaged in promoting legislation creating privileges for their respective callings, they frequently succeed, even when opposed by lawyers and judges in general. For examples, accountants, newspaper men, social workers, psychologists measuring aptitudes, and members of similar professional callings have succeeded in securing in some states privileges to suppress the truth in proceedings in court on the ground that the transactions between them and their clients or patients are confidential. The harm done in preventing the trier of fact from

16. *Id.* at 317-18.

17. 18 ALI PROCEEDINGS 191 (1940-1941). It should be added that the several committees of the New York legislature rejected practically all the liberalizing provisions of the proposed code, and at its 1961 session the legislature adjourned without taking any action either adopting or rejecting the several bills embodying the provisions of the proposed code.

hearing or seeing relevant persuasive materials is disregarded or discounted, and in many cases there is no vigorous opposition by groups having a contrary interest.

The Problem of the Expert Witness

The abuse of expert opinion evidence in modern litigation in criminal prosecutions, in personal injury and wrongful death actions and in life insurance litigation has become in many states a scandal, for the expert witness has become in truth an advocate for the party who presents him, rather than a witness. The proposal for the appointment of an impartial medical witness has met violent opposition by members of the profession whose chief activity is in behalf of plaintiffs. In some instances defense counsel have joined the opposition. The New York experiment of using neutral experts selected by the court, which the judges have pronounced a great success in operation, is condemned on the ground that the jury will give undue weight to the opinion of the court-chosen expert, though it is hard to understand why such a witness is not likely to be more trustworthy than one who is in fact a partisan advocate. Such opposition will doubtless have a deterrent effect elsewhere and lead to palliative rather than really corrective legislation.

Increased Power in the Judge—A Key to Reform

Experience at the trial table has demonstrated that the judge holds the key to efficient administration of justice wherever there is a dispute as to the facts. This is the basis of Rule 303 of the Model Code and Uniform Rule 45.[18] They are identical in meaning though slightly different in phrasing. When Rule 303 was published, it met violent opposition from most members of the Bar and was roundly condemned by an influential association in Southern California. Uniform Rule 45 has not yet received such unqualified antagonism. The root of the adverse opinions is general distrust of the ability and character of the trial bench. But why there should be such confidence in the opportunity under our system of getting before a reviewing court a record which will reveal the trial judge's bias or incompetence in his rulings to the prejudice of the appellant is hard to understand. Yet it is a most effective method of preventing serious consideration

18. "The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered. All Rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated." Model Code of Evidence, Rule 303.

of a practicable and helpful reform by shifting the argument to the desirability of a more fundamental proposal which would meet with widespread resistance by interested groups. The usual opposition between the scholar and the doer is emphasized even by men who are on the whole dissatisfied with the prevailing rules. Witness the review[19] of the late Professor Millar's book, *Civil Procedure of the Trial Court in Historical Perspective,* by a writer who can hardly be classed a chronic conservative:

> Writing out of a scholarship so multifarious and rich as to be almost without peer in the procedural field, the author has erected on the foundation of his sure knowledge of legal history a structure that has in it room for almost every facet of modern civil procedure at the trial court level. . . .
>
> Rather than dwell on minor points of difference, it seems to me more important to note a somewhat disturbing factor in procedure again brought into focus at least implicitly by this book, namely, the difference in basic assumptions and in approach to problems of procedural reform of the teaching, as distinguished from the practicing profession. For Professor Millar, like most of the outstanding scholars in the field, thinks of further reform largely in terms of increasing the measure of discretion of the trial judge. Whether the matter be joinder of demands (p. 121), control of counterclaims (p. 136), selection of the jury (p. 296), commenting to the jury on factual matters (p. 310) or the use of special verdicts (p. 323), the author's predilections are invariably in the direction of more discretion and control for the trial judge. And it cannot be denied that from the logical and historical viewpoints, the author and other outstanding scholars such as Wigmore, make a convincing case.
>
> But to much of this the practicing lawyer nowadays will reply, in Grover Cleveland's words, that "It is a condition which confronts us, not a theory." To the practitioner, the serious question is whether, speaking generally of the United States, the procedural reform movement's confiding of more and more discretion to the trial judges, has not already outstripped the capacity of many judges to handle it.
>
> . . .
>
> But the practicing lawyer, especially the frequent litigator—and the informed layman, too—is going to insist that for some time to come the *real* reform must concern itself with the selection and security in service of good trial judges. Pay adequate to get them (but not so excessive as to make the judicial post a political sinecure), security in tenure of the good judges, some reasonable method of eliminating the misfits, and some sensible supervision, consistent with the tradition of judicial independence, to protect against undue imposition on the conscientious judges of judicial burdens that should be evenly shared—these are matters generally more vital and urgent than further refinements of such modern rules as the Federal ones. When these have been reasonably accomplished, it will be time enough to open the sluice gates for more discretion.

This is an excellent example of the technique noted above in

19. David W. Louisell, Book Review, 37 MINN. L. REV. 643 (1953).

opposing a proposal for a reform which lies in the sphere of present probability by shifting to a proposal for a more far-reaching change that is beyond the range of adoption in the foreseeable future.

The Federal Rules of Civil Procedure

The one shining example of substantial, not to say radical, reform in procedure is found in the Federal Rules of Civil Procedure. It took many long years to accomplish the enactment of Congressional legislation empowering the Supreme Court to make rules governing procedure in the trial courts of the United States. The final proposal was sponsored by the Roosevelt administration acting through Attorney General Cummings. Consider his statement to an Institute held in Washington, D. C., in October 1938:

> The next matter that seemed pressingly important was the one of civil procedure. I was, of course, aware of the long struggle that the American Bar Association had made to secure the rule-making power for the Supreme Court, and I was aware, too, that the struggle had been abandoned in a moment of discouragement at Grand Rapids in 1933, after twenty-five years of effort. It seemed to me well worth while to renew that struggle; and so the Bill was redrafted and introduced in Congress. If you will permit me to say so, one of the reasons that I was able to secure the passage of that Act was because I am something of a politician. I took stock of what had occurred before, and I found that the committees having the matter in charge had been approached by very dignified groups of lawyers, who, appearing before these committees, rather talked down as if from on high to those who were supposed to pass upon the wisdom of the passage of the law. So I thought I wouldn't have any committees at all. I went up there alone, unarmed, relatively innocent, and yet with some degree of experience in the matter of dealing with men. I used all the arguments I could think of, good arguments, bad arguments, threats and personal appeals. Eventually the opposition disappeared, and the Act reached a stage where it could be passed in the House if there were no objections. It had reached that critical stage where one voice raised against it would destroy the entire project.
>
> I recall one member of the Committee who was very obstinate and difficult. He told me that he had made speeches against the idea in his district; that it was a matter of principle with him, and that he would have to object. He assumed that it was something new and strange, and new things scare many people even if they are good things. I argued with that man for hours, and finally we compromised. I agreed to go on with the bill, and he agreed to abide by his principles but would absent himself from the House the day the matter came up.[20]

The bill as drawn made the rules effective unless disapproved by Congress. Everyone interested in observing the course of the rules through both branches of Congress is well aware that they escaped

20. Federal Rules of Civil Procedure, Proceedings of the Institute at Washington, D.C., October 6-8, 1938 (Chicago, 1939).

disapproval only because the calendars were so crowded that unanimous consent was necessary to have them acted upon. Had they required enactment by Congress, it is almost certain that they would never have become operative.

Recent Developments

New Jersey.—The most recent product of the influence of the Uniform Rules may give some, though little, hope that the usual professional inertia and opposition to change is weakening and that legislative distrust of judicial encroachment may be tentatively overcome. In October 1954 the New Jersey Supreme Court appointed a committee to consider a revision of the law of evidence; in May 1955 this committee's report recommended the adoption of rules in substantial agreement with the Uniform Rules. The court took no action upon the report, presumably because there arose a sharp divergence of opinion concerning the scope of the court's authority to promulgate rules of evidence.[21] The New Jersey legislature by joint resolution appointed a committee to study the report. It began work in January 1956. The result of its labors was the passage in June 1960, by unanimous vote of both houses, of an act which in article III authorizes the supreme court to adopt rules dealing with the admission or rejection of evidence subject to various specified conditions, which made clear that the subject matter lay in the province of the legislature. The act contains among other things in article IV the repeal of the dead man statute and a provision requiring that the interested survivor's testimony be corroborated. Article II strengthens the usual common law privileges and creates a liberal priest-penitent privilege and a very liberal newspaperman's privilege. The supreme court has appointed a new advisory committee. In all probability there will be considerable delay in framing and considering its report and in putting the court's final conclusions into effect as rules. In most respects the result will, on the whole, be an improvement of the existing system, and the court's original action can be properly regarded as the producing cause. The optimist can rejoice, the pessimist can utter an additional groan, the usual practitioner will probably do neither.

Puerto Rico.—The Supreme Court of Puerto Rico in 1953 appointed a Committee of distinguished lawyers to draft rules of evidence to be presented for adoption by the legislature. The Committee began its task promptly and with enthusiasm. It approved a draft in English in 1954; the pattern set by the United States Supreme Court Advisory

21. The supreme court had previously held that the New Jersey constitution put the sole power to promulgate rules of procedure in the court. It is interesting to note that Governor Meyner has twice advocated amendment of the Constitution so as to nullify this ruling. See 84 N.J.L.J. 86 (Feb. 16, 1961).

Committee was followed. The final draft, after translation into Spanish with pertinent explanation, was distributed to the bench and bar for comment, and in 1958 the court forwarded its final report to the legislature. On the hypothesis that more time was needed for consideration of the proposed rules by bench, bar and legislators, action was postponed. The latest information (February 1961) from San Juan is from a prominent Puerto Rico attorney[22] who reports that the proposed rules of evidence were sent again by the court to the legislature at the 1960-61 session and were being considered by a committee of the House. The present chairman of the Committee is Mr. Benjamin Ortiz, who was an Associate Justice and presided over the advisory committee on the rules in 1953 and 1954, so that there is hope for enactment of the Rules this year. However, opposition from various sections of the bar is still strong and vehement. The hearsay rules are the main target of their objections, and they feel that too much discretion is given to the trial court in the admission and exclusion of evidence. Some compromise may have to be worked out as to the hearsay reforms, at least as to criminal cases tried before a jury.

Utah.—In Utah the Supreme Court has express authorization to promulgate rules of evidence. A committee of 26 members appointed by the court to consider and report upon the advisability of adoption of rules of evidence began work in April 1955. From that time to the summer of 1957, it held meetings almost every week and succeeded in drafting a tentative set of rules. It then submitted the draft to members of the bar and called for criticism and suggestions. In March 1959, it submitted its report and final draft of proposed rules to the court. These rules are based upon the Uniform Rules and except in a few instances, are in substantial accord with them. Thus far the court has taken no action looking to their promulgation. Information recently received justifies the informant's conclusion: "The lot of law reformers in the procedure field in Utah has been hard lately."

Rules of Evidence for the Federal Courts

The original Advisory Committee on the Rules of Procedure for the United States District Courts recognized the need for including the subject of evidence, but postponed consideration because of the magnitude of the task. It was about to begin work on it when its existence was terminated. In the meeting of the Judicial Council with the Chief Justice to determine what, if anything, should be done to perform the functions theretofore in the field of the now defunct

22. Lino J. Saldana, until his recent resignation a justice of the Supreme Court of Puerto Rico.

committee, it was clearly indicated that the rules of evidence needed and should have early attention. Nothing further was done until the session of March 13-14, 1961, at which the Council authorized the creation of an Advisory Committee on Rules of Evidence to be appointed by the Chief Justice. It is to be hoped that the authorization will speedily result in the appointment of an able committee with a competent and vigorous Reporter. This Committee will not have the benefit of the experience of courts and counsel in the operation of the existing Federal Rules of Civil and Criminal Procedure. It may well use the American Law Institute Model Code and the Uniform Rules of Evidence as tentative drafts for examination and discussion.

The Techniques of Success

What is the conclusion of the whole matter? What has caused the lag and delay may be rather easily demonstrated. But what produced the attempts and partial success? In New Jersey, Arthur Vanderbilt, by his courageous, intelligent, ingenious and indefatigable exertions, brought about a revolution in court organization and procedure; and his efforts to reform the rules of evidence were cut off by his untimely death. In Puerto Rico, Chief Justice Snyder, an American by birth and education, rode on the crest of progressive public opinion and was the instigator of the accomplished reform in Court Organization and Procedure, and in the movement for modernizing the rules of evidence. Reaction began to appear in the legislature, became vocal in the Bar, the Chief Justice left the Bench and later died of a heart attack. In Utah, Mr. Justice Wade, a vigorous and forward-looking member of the supreme court, initiated the movement and gave it vigorous support. Only considerations affecting party politics, having no relation to the effective administration of justice, have blocked its progress.

In the Federal Courts, Chief Justice Taft had been constantly urging changes looking to simplicity; Chief Justice Hughes took advantage of the curious combination of circumstances which resulted in the enabling act and induced William D. Mitchell to take charge of the process of producing rules to govern civil procedure in the United States District Courts. Mr. Mitchell was recognized as a leader of the bar; he had had a distinguished career as Solicitor General and as Attorney General of the United States following an outstanding record at the bar. In all of these, his reputation for professional competence was matched only by his reputation for integrity, both moral and intellectual. He followed the pattern set by the American Law Institute, and selected a Reporter and an Advisory Committee. As Reporter he chose Charles E. Clark, then a member of the Yale Law

Faculty, now Judge of the Court of Appeals, Second Circuit, who had for years been foremost in advocating a thorough re-examination and reform of the rules governing civil procedure. Members of the Advisory Committee included law teachers, practitioners and judges, representative of their respective professions in different sections of this country, all of whom, including Mr. Mitchell as Chairman, gave their services without compensation.

When the need for change becomes imperative, the far-seeing leader appears and succeeds in making marked progress toward the goal before the force of reaction or inertia becomes dominant. The next champion begins where his predecessor was checked. Finally the goal is reached. "The world *do* move."