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EVIDENCE--RECENT DEVELOPMENTS (A SERVICE FOR RETURNING VETERANS)

John E. Tracy
University of Michigan Law School

COMMENTS

EVIDENCE—RECENT DEVELOPMENTS (A SERVICE FOR RETURNING VETERANS)*—The developments in the law of evidence in the war years have not been great. They have been mainly along the lines of tests for witnesses, the use of confessions in criminal cases, the inter-

* This comment is the first in the series of comments on Recent Developments in the Various Fields of Law, described in 44 MICH. L. REV. 149 (1945).

Within the last five years the *Law Review* has published other items, some of which have been cited by Professor Tracy in the present comment, dealing with developments in the law of evidence. They are as follows: Articles: Donaldson, "Medical Facts that Can and Cannot Be Proved by X-ray," vol. 41, p. 875 (1943); Schwartz, "Problems of Proof in Claims for Recovery for Dermatitis," vol. 41, p. 893 (1943); Hartwig, "Congressional Enactment of Uniform Judicial Notice Act," vol. 40, p. 174 (1941); Comments: Police regulations by rules of evidence, vol. 42, p. 679 (1944); Police regulations by rules of evidence—results of the McNabb case, vol. 42, p. 909 (1944); Decision Notes: Admissibility of hospital records as business entries, vol. 40, p. 1105 (1942); Admissibility of age in hospital records as business entry, vol. 43, p. 411 (1944); Admissibility of defendant's refusal to submit to blood test for intoxication, vol. 40, p. 907 (1942); Actions against shipowners for loss of cargo—burden of proof of seaworthiness, vol. 41, p. 693 (1943).—*Ed.*

pretation by the courts of the so-called "Business Entries" Act and the adoption by the American Law Institute of a proposed Code of Evidence.

Blood Tests to Determine Paternity

Since it has been thoroughly demonstrated by scientists that blood groupings and their inheritance may be conclusive to determine certain negative facts and the courts have shown their willingness to accept the established conclusions of the scientists, evidence as to blood tests has continued to be acceptable in cases involving paternity.[1] In certain jurisdictions, the courts, while not challenging the scientific conclusiveness of the tests, have refused to compel a party to submit to physical examination to procure the blood sample.[2] There has been, however, an increasing tendency to provide for such an examination either by statute[3] or by other rule.[4]

The remaining difficulty in demonstrating the conclusiveness of such tests has been the unwillingness of certain courts to decide that testimony of experts as to the results of the application of the tests raises anything more than a question of fact for the jury.[5] There is here involved again the old question of the power and the duty of the court to direct a verdict for the proponent of the evidence when such evidence was clear, positive, direct and undisputed, was given by an unimpeached witness and there were no facts or circumstances in the record which might throw doubt upon the truth of the testimony given.[6] In those jurisdictions that do not permit a judge to consider, as conclusive on the jury, testimony of uncontradicted and unimpeached experts that a certain person could not have been the father of a certain child,[7] apparently the only thing that a trial judge can do to avoid what he feels may be a miscarriage of justice, will be to submit the question of parentage to the jury and, if the jury returns a verdict

[1] Comment, Admissibility of blood-group test, by M. J. Miller, 32 MICH. L. REV. 987 (1934). Later cases admitting the evidence are: Matter of Swahn, 158 Misc. 17, 285 N.Y. Supp. 235 (1936); State v. Wright, 59 Ohio App. 191, 17 N.E. (2d) 428 (1938). Commonwealth v. Visocki, 23 Pa. D. & C. 103 (1935); State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936); Euclide v. State, 231 Wis. 616, 286 N.W. 3 (1939).

[2] See cases cited in note to WIGMORE ON EVIDENCE, 3d ed., § 2220 (1940).

[3] Examples of such statutes are Fla. Comp. Gen. Laws 1927, § 7035; N.Y. Consol. Laws (McKinney, 1941) tit. 14, § 126-a; Wis. Stat. (1943) § 166.105.

[4] E.g., Federal Court Rule No. 35.

[5] Arais v. Kalensnikoff, 10 Cal. (2d) 428, 74 P. (2d) 1043 (1937); State v. Wright, 59 Ohio App. 191, 17 N.E. (2d) 428 (1938).

[6] Olsen v. Hoffmann, 175 Minn. 287, 221 N.W. 10 (1928); Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585 (1929); WIGMORE ON EVIDENCE, 3d ed., § 2495 (1940).

[7] E.g., California (See note 5, supra).

contrary to the testmony believed by the trial judge to be conclusive, to set aside the verdict and order a new trial.[8]

Deception Tests

Continued pressure has been brought upon the courts to compel them to accept the results of certain "lie detector" tests as applied by experts to witnesses, usually in cases involving crime. The courts have continued to resist such pressure and have refused to admit the evidence, upon the ground that as yet the experts interested in that science have not been willing to assure the courts that they themselves consider such tests to be conclusive in their results.[9] While certain lower courts are said to have admitted evidence of the application of deception tests, introduced by stipulation of the parties,[10] in only one reported case has a court admitted the evidence against objection. That was a lower court ruling where the evidence was offered by the defendant of the application of the test to himself.[11] It should be noted, however, that the only witness who testified on that subject in that case, was the scientist who conducted the test and he was apparently willing to go the whole distance in its support, as he testified that it was his firm conviction that the test was 100 per cent efficient and accurate in the detection of deception. If and when scientists, as a whole, will go that far, the courts will doubtless be willing to receive such evidence, but until the scientists do so state, the courts can be expected to continue to adhere to the position that they have heretofore taken on this subject.

Tests to Determine Intoxication

Scientists are apparently agreed that a state of intoxication can be determined by the alcoholic content of the blood and that the concentration of alcohol in the blood can be ascertained, not only by blood samples but by a chemical analysis of such other bodily substances as urine, saliva, breath, and cerebral spinal fluid.[12] Therefore, there is little difficulty in convincing the courts of the admissibility of evidence of such tests and their results.[13] The principal difficulties in obtaining the substances for such tests and in offering in evidence the results of the tests have been the constitutional privilege against self incrimination, and, where the test was administered by a physician, the physician-patient privilege.

[8] That procedure was followed by the trial judge in State v. Wright, 59 Ohio App. 191, 17 N.E. (2d) 428 (1938), and his order granting the new trial was not disturbed by the Court of Appeals.

[9] 37 MICH. L. REV. 1141 (1939).

[10] See 53 HARV. L. REV. 285 at 293, note 57 (1939).

[11] People v. Kenny, 167 Misc. 51, 3 N.Y.S. (2d) 348 (1938).

[12] Ladd and Gibson, "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," 24 IOWA L. REV. 191 (1939).

[13] Ibid.

While, in certain jurisdictions, the courts have sustained the claim of privilege against self incrimination as to anything gained by an examination of the defendant's person,[14] yet two quite recent drunken driving cases have overruled such contention and have sustained the admissibility of the laboratory tests for intoxication.[15] The question of whether the physician-patient privilige will bar the admission of such evidence depends first, of course, upon whether there is such statutory privilege in the particular jurisdiction and, generally, whether the information was obtained during curative treatment.[16]

Confessions in Criminal Cases

This subject has become greatly complicated in recent years by the extraordinary decision of the Supreme Court of the United States in the *McNabb* case.[17] In that case the Court ruled that confessions or admissions of crime made by the accused in custody without having been brought before a magistrate as required by law, are inadmissible in evidence. The decision was not based upon the argument that the confession was made under compulsion, in fact it can be assumed from the fact stated, that the confession was made without compulsion, but its admission was barred simply because the officers of justice were themselves disregarding the law.

This decision, upon its publication, was severely criticized,[18] and the Attorney General declared it to be a serious blow against law enforcement.[19] Nevertheless, the lower federal courts and many state courts have felt themselves compelled to follow it.[20] However, certain subsequent decisions of the Supreme Court have cast doubt on just how far the Court really meant to go in the *McNabb* case, so that the state of the law on this question appears now to be in more or less confusion.

On the same day that the Court handed down its decision in the

[14] State v. Height, 117 Iowa 650, 91 N.W. 935 (1902); People v. Corder, 244 Mich. 274 ,221 N.W. 309 (1928); State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909). These were all rape cases and the examination of the defendant in each case was to ascertain whether he was suffering from a certain venereal disease found in the prosecuting witness.

[15] State v. Duguid, 50 Ariz. 276, 72 P. (2d) 435 (1937); State v. Gatton, 60 Ohio App. 192, 20 N.E. (2d) 265 (1938).

[16] For a thorough discussion of these two privileges see the article by Ladd and Gibson, "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," 24 IOWA L. REV. 191 (1939). Also, see note in 53 HARV. L. REV. 285 (1939).

[17] McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943).

[18] 56 HARV. L. REV. 1008 (1943); 42 MICH. L. REV. 679 (1944); id. 909.

[19] H. Hearings on H.R. 3690, 78th Cong. 1st sess., p. 46 ff. (1944) (Committee on Judiciary).

[20] See long list of cases cited in SHEPARD'S UNITED STATES CITATIONS, under 318 U.S. 332.

McNabb case, it decided the case of *Anderson v. United States.*[21] In that case, certain defendants were arrested by a state sheriff without a warrant, the prisoners being charged with dynamiting power lines during a strike. The prisoners were not arraigned before a magistrate as required by state law. While they were being held by the state sheriff, certain federal agents arrived to make an investigation of the crime (the power lines dynamited belonged to the Tennessee Valley Authority, a federal agency) and, in the course of their questioning of the prisoners, six of them confessed to having committed the crime. The men were indicted and convicted in the United States district court. On appeal, the conviction was reversed on the ground that error was made in admitting in evidence the confessions so made; that, although the conduct of the federal officers was not illegal, their collaboration with the state officers tainted the evidence and rendered the confessions inadmissible under the principle announced in the *McNabb* case.

A year later, the Court was confronted with a somewhat similar problem in the *Mitchell* case[22] but that time the court had had the benefit of the criticisms by law writers of its decision in the *McNabb* case and was apparently inclined to be more cautious, for it sustained the admission of a confession challenged under the theory of the *McNabb* case.

In the *Mitchell* case the prisoner was arrested charged with burglary in the District of Columbia. He was taken immediately to the police station where he made an apparently spontaneous confession, admitting the burglary and stating where the stolen property could be found. Thereafter a period of eight days elapsed before the prisoner was arraigned before a committing magistrate. The trial court admitted the confession; the court of appeals reversed under the doctrine of the *McNabb* case. On appeal by the government, the Supreme Court reversed the decision of the court of appeals and sustained the conviction. The Court stated that, although such lengthy detention without arraignment was illegal, the illegality of the detention did not retroactively change the circumstances under which the prisoner made the disclosures and that the use of such confession by the government would not be "use of the fruits of wrong-doing" by government officers; that the power of the court to refuse to admit evidence is not to be used as an indirect mode of disciplining misconduct by law enforcement officers. The Court also added, as an explanation of its position, that in these recent decisions, it had been dealing with the admissibility of evidence in criminal trials in the federal courts and suggested that review by the Supreme Court of state convictions pres-

[21] 318 U.S. 350, 63 S. Ct. 599 (1943).
[22] United States v. Mitchell, 322 U.S. 65, 64 S. Ct. 896 (1944).

ented a very different situation; that in those cases the sole authority of the court is to ascertain whether such a state court violated the basic safeguards of the Fourteenth Amendment.

A month after its decision in the *Mitchell* case, the court, in the case of *Ashcraft v. Tennessee*[23] faced the problem last suggested, viz., the legality of a conviction in the state court based on a confession which had been illegally obtained. In that case the defendant had been convicted in a state court of the crime of murder and the conviction had been affirmed by the supreme court of the state. The United States Supreme Court granted certiorari and reversed the conviction on the ground that the court had admitted in evidence an alleged confession by the defendant, which confession this Court found not to have been voluntary. Three justices dissented and it is interesting to note that among the dissenters was Justice Frankfurter, who had written the majority opinion in the *McNabb*, *Anderson* and *Mitchell* cases.

A month later came the decision of the Supreme Court in the case of *Lyons v. Oklahoma.*[24] There the defendant had been convicted in a state court of the crime of murder and the conviction had been affirmed by the court of appeals of the state. The Supreme Court granted certiorari. The ground urged for reversal was that there had been admitted in evidence a confession of the accused; that this confession followed by only about twelve hours an earlier confession that had been induced by third degree methods apparently so bad that such first confession was never offered in evidence; and that the fear instilled in the prisoner by the coercion that resulted in the first confession continued to result in the second confession. The court reviewed the record and found that there was evidence which, if believed, would justify a court in finding that the second confession was voluntary; that such finding had been made by the trial court and affirmed by the state court of appeals and the Supreme Court would not hold that there had been a lack of due process. Three justices dissented.

Admissibility of Business Entries

The two problems of admissibility of business entries that have apparently caused the courts the most difficulty in recent years, have been those of hospital records and reports of employees to their superiors.

In a comment in the *Michigan Law Review*[25] there appeared an exhaustive study of hospital records and their admissibility in evidence. It was there shown that only four states had definitely held hospital records to be inadmissible; that fourteen states, either by statute or

[23] 322 U.S. 143, 64 S. Ct. 928 (1944).
[24] 322 U.S. 596, 64 S.Ct. 1210 (1944).
[25] 38 MICH. L. REV. 219 (1939).

decision had admitted hospital records as business entries; that the highest courts in six other states had expressed a willingness to admit such records but, in the particular case brought before them, there had not been sufficient evidence of authentication; that in four other states there were statutes under which it would seem that the evidence should be admissible; and that in the remaining states there had been no decisions or statutes one way or the other. It was also discussed in the comment that, of the courts that had admitted hospital entries, not all had been willing to go the whole way and admit them for every purpose, some courts holding that they may be admitted to prove facts stated therein but not to prove opinions.

An attempt will be made here to discuss only those decisions that have been handed down since the above mentioned comment.

In *People v. Kohlmeyer*[26] defendant in a prosecution for robbery pleaded insanity. As bearing on that defense, he offered copies of a hospital record in Wisconsin relating to his paternal grandmother. These records showed that the grandmother suffered from insanity of the manic-depressive type which other evidence showed might be inherited. An objection to the admission of the evidence was sustained in the trial court. The court of appeals reversed this ruling as error, holding that the diagnoses of the grandmother's condition were "records of an act, transaction, occurrence or event" within the language and meaning of the Model Statute for the admission of business entries.

Meiselman v. Crown Heights Hospital[27] was an action for damages for malpractice. The trial judge excluded the records of the hospital on the ground that the physician who made the entries was in court. The court of appeals reversed, holding that such ruling was error.

In *Roberto v. Nielson*[28] a hospital record was offered in evidence reading as follows:

> "C. C. Auto accident. The patient is too limited in vocabulary, and too groggy from drink and paralydehide to give a very good story, *but evidently, after a day of beer and wine drinking, he was somehow involved in an auto accident.* The actuality of the coma was not elicited, but the patient was brought in by police.
>
> "Pt [patient] is very incooperative. Adequate determination of mental state is impossible (states that he has been drunk and says that he has had an injection in arm)."[29]

[26] 284 N.Y. 366, 31 N.E. (2d) 490 (1940).

[27] 285 N.Y. 389, 34 N.E. (2d) 367 (1941).

[28] 262 App. Div. 1035, 30 N.Y.S. (2d) 334 (1941), affirmed without opinion, 288 N.Y. 581, 42 N.E. (2d) 27 (1942).

[29] 288 N.Y. 581 at 582, 42 N.E. (2d) 27 (1942). (Italics the court's.)

The trial judge excluded the evidence and the appellate division reversed, holding that only the portion above italicized should have been rejected.

In an illuminating opinion in a lower court in the case of *Del Re v. City of New York,*[30] Justice Steinbrink laid down a very logical rule to apply in these cases. The infant plaintiff was injured while riding in a New York subway. He claimed that the train made an "unusual" stop; the defendant claimed that plaintiff was pushed by another boy while roughhousing. A hospital record was offered in evidence which stated *inter alia* "the patient was riding in subway when it came to a sudden stop at 25th Ave. and 86th." In holding that the admission of the record was error, the justice said "it was the business of the hospital to diagnose the patient's condition, not to record a statement learned from an unidentified source, describing the manner in which the plaintiff's injuries were sustained."

Reed v. Order of United Commercial Travellers[31] was an action on a fraternal benefit certificate. The defense was that death was from injuries received while insured was intoxicated, there being a clause in the certificate forbidding recovery in such a case. Defendant offered in evidence a portion of a hospital record stating that the patient "was reacting very well—still apparently under the influence of alcohol." It was held that the evidence was properly admitted.

The Supreme Court of Michigan has continued consistently to hold that, although hospital records are admissible under the Model Act concerning business entries, the portions of such records which do not refer to acts, transactions, occurrences or events incident to treatment are inadmissible.[32]

The other problem of the admissibility of entries under the Model Act that has occasioned much discussion in recent years, is that of an accident report made by an employee to the corporation by which he was employed. The leading case has been *Palmer v. Hoffman.*[33] Following a grade-crossing accident, the engineer of the train, who died before the trial, made a written statement in a freight office of the railroad, where he was interviewed by an assistant superintendant of the road and a representative of the state Public Utility Commission. The statement was offered in evidence by the railroad under the Model

[30] 180 Misc. 525, 42 N.Y.S. (2d) 825 (1943). Accord: Dickson v. Gastl, 64 Ohio App. 346, 28 N.E. (2d) 688 (1940).

[31] (C.C.A. 2d, 1941) 123 F. (2d) 252.

[32] Gile v. Hudnutt, 279 Mich. 358, 272 N.E. 706 (1937); Sadjak v. Parker-Wolverine Co., 281 Mich. 84, 274 N.W. 719 (1937); Valenti v. Mayer, 301 Mich. 551, 4 N.W. (2d) 5 (1942); Harrison v. Lorenz, 303 Mich. 382, 6 N.W. (2d) 554 (1942). Two recent law review articles dealing with this subject are 30 CORN. L. Q. 454 (1944) and 23 TEX. L. REV. 178 (1945).

[33] 318 U.S. 109, 63 S. Ct. 477 (1943).

Act. The trial judge refused to admit it and the circuit court of appeals affirmed, one judge vigorously dissenting. The Supreme Court granted certiorari and affirmed the ruling, saying:

"We may assume that if the statement was made 'in the regular course' of business, it would satisfy the other provisions of the Act. But we do not think that it was made 'in the regular course' of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule—restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous. . . . It was that problem which started the movement towards adoption of legislation embodying the principles of the present Act. . . . And the legislative history of the Act indicates the same purpose.

"The engineer's statement which was held inadmissible in this case falls into quite a different category. It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto

would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. . . . We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

"In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

"It is, of course, not for us to take these reports out of the Act if Congress has put them in. But there is nothing in the background of the law on which this Act was built or in its legislative history which suggests for a moment that the business of preparing cases for trial should be included."[34]

This decision has been both criticized[35] and defended[36] by law review writers and the courts have not agreed in their application of the principles there applied, as evidenced by two later decisions, both having to do with admissibility of hospital records.

New York Life Insurance Company v. Taylor[37] was an action on the double indemnity provision of a life insurance policy. The insured was killed by a fall from a stair well in Walter Reed Hospital and an issue in the case was whether his fall was accidental. To support its defense of suicide, the defendant offered the hospital record in the insured's case. It consisted of: (1) a history of the case; (2) reports on three operations performed on the patient; (3) reports of conversations indicating his intention to kill himself; (4) report of a conversation by the attending physician with a psychiatrist; (5)

[34] Id. at 111-114.
[35] 56 HARV. L. REV. 458 (1942).
[36] 43 COL. L. REV. 392 (1943).
[37] (C.C.A. D.C. 1945) 147 F. (2d) 297.

report of a psychiatrist; (6) transcript and findings of a hospital board of inquiry as to the cause of the insured's death. The Court of Appeals for the District of Columbia held that, although some parts of the record were unquestionably admissible, other parts, particularly the conversations with the insured and the reports of the psychiatrist, were clearly inadmissible, saying:

> ". . . Diagnosis of a psychoneurotic state involves conjecture and opinion. It must therefore be subjected to the safeguards of cross-examination of the physician who makes it. . . . Some diagnoses are a matter of observation, others are a matter of judgment, still others are a matter of pure conjecture."[38]

The court cited *Palmer v. Hoffman.*

A short time later, the Circuit Court of Appeals for the Second District in the case of *Buckminster v. Commissioner of Internal Revenue,*[39] a proceeding to review a decision of the Tax Court, holding that a certain gift was made in contemplation of death, had before it the question of admissibility of a hospital record. The report does not show the nature of the record, but it was claimed to be inadmissible under the decision of *New York Life Insurance Company v. Taylor.* The court held that the hospital record was properly admitted, saying "we do not agree with the way in which Palmer v. Hoffman was interpreted in the Taylor case."[40]

Parol Evidence Rule

A rather scathing attack was made upon the parol evidence rule in the opinion by Judge Frank of the Circuit Court of Appeals for the Second Circuit in the recent case of *Zell v. American Seating Company.*[41] It could pass as the opinion of one judge if it were not for the extraordinary history of the case in the Supreme Court.

The action was one brought by an individual against a corporation for a commission alleged to have been earned in obtaining war contracts for the defendant. The case came before the trial court on defendant's motion for a summary judgment. The complaint and bill of particulars showed that defendant, by letter addressed to plaintiff, the terms of which were accepted by plaintiff, employed plaintiff as its representative to obtain contracts for the manufacture of war supplies, the employment to be for a period of three months at a salary of $1000 per month, "such payment to be in full for your services and expenses and compensation for all work done on our behalf during such period." The contract was twice extended for

[38] Id. at 304, 306.
[39] (C.C.A. 2d, 1944) 147 F. (2d) 331.
[40] Id. at 334.
[41] (C.C.A. 2d, 1943) 138 F. (2d) 641.

additional periods of three months each and the agreed compensation was duly paid plaintiff. Plaintiff alleged, however, that the real contract between the parties was an oral one, under the terms of which plaintiff was to be paid for his services $1000 per month in any event and, if he were successful, plaintiff was to receive a further sum in an amount not to be less than 3 per cent nor more than 8 per cent of the "purchase price of said contracts," the exact amount to be later determined by the parties; that when the written contract was drafted, the provision for the extra compensation was purposely omitted, on the insistence of defendant's president, "to avoid any public stigma which might result from putting such provision in writing," there having been some public criticism of contingent fee war contracts; but that it was expressly agreed that the oral contract and not the written was the real contract between the parties. Plaintiff claimed to have procured for the defendant, war contracts aggregating $5,950,000 on which plaintiff claimed a commission of 3 per cent.

The trial judge granted the motion for summary judgment, holding that evidence as to the oral contract could not be received to contradict and vary the terms of the writing.

The Circuit Court of Appeals reversed the decision, holding that the contract having been made in Michigan and the parol evidence rule being a rule of substantive law, the law of Michigan must be applied, and the decisions of that state showed that evidence is admissible to prove that a written agreement executed as a mere sham lacks real efficacy and that extrinsic parol evidence will always be received on that issue.[42]

After so deciding, the opinion of the judge went on, however, for several pages in criticism of the parol evidence rule. The following quotation from the opinion shows the attitude of the court:

> "Candor compels the admission that, were we enthusiastic devotees of that rule, we might so construe the record as to bring this case within the rule's scope; we could dwell on the fact that plaintiff, in his complaint, states that the acceptance of his offer 'was partly oral and partly contained' in the October 31 writing, and could then hold that, as that writing unambiguously covers the item of commissions, the plaintiff is trying to use extrinsic evidence to 'contradict' the writing. But the plaintiff's affidavit, if accepted as true and liberally construed, makes it plain that the parties deliberately intended the October 31 writing to be a misleading, untrue, statement of their real agreement. . . . We thus construe the record because we do not share defendant's

[42] The opinion states that that is the rule "virtually everywhere." The writer is unwilling to concede the correctness of that statement. See 33 MICH. L. REV. 410 (1935).

belief that the rule is so beneficient, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application. The truth is that the rule does but little to achieve the ends it supposedly serves. . . . We see no good reason why we should strain to interpret the record facts here to bring them within such a rule."[43]

The Supreme Court granted certiorari and after argument the case was disposed of in a memorandum opinion which read as follows:

"*Per Curiam.* In this case two members of the court think that the judgment of the Circuit Court of Appeals should be affirmed. Seven are of opinion that the judgment should be reversed and the judgment of the District Court affirmed—four because proof of the contract alleged in respondent's affidavits on the motion for summary judgment is precluded by the applicable state parol evidence rule, and three because the contract is contrary to public policy and void . . . [citing cases]. The judgment of the United States Circuit Court of Appeals is reversed."[44]

Quaere: What will the Supreme Court do with the next cast that comes before it involving a clash between the parol evidence rule and the "written instrument executed as a sham" doctrine?

Model Code of Evidence

In 1942 the American Law Institute formally approved for publication its "Code of Evidence," its first avowed venture into the field of codification. It was the result of several years' work by a committee of experts appointed by the Institute to draft a Code that would supersede the present law of Evidence which has been judge-made and which has the imperfections with which all lawyers are familiar.

The theory of the Code and its detailed provisions have been widely discussed in legal literature since that time. Certain of its draftsmen have written vigorously in its support.[45] Dean Wigmore, who was originally named Chief Consultant in the drafting of the Code, shortly before his untimely death published an article which he called a "Dissent" in which article he vigorously criticized the plan of the code and certain of its provisions.[46] One writer, to avoid the

[43] (C.C.A. 2d, 1943) 138 F. (2d) 641 at 644-645, 649-650.

[44] American Seating Co. v. Zell, 322 U.S. 709, 64 S. Ct. 1053 (1944).

[45] Morgan, "The Code of Evidence Proposed by the American Law Institute," 27 A.B.A.J. 539, 587, 694, 742 (1941); Hale, 1941 CAL. S.B.J. 153. Ladd, "Modern Thinking Upon Evidence—A Modern Code," 17 TENN. L. REV. 10 (1941); McCormick, "The New Code of Evidence of the American Law Institute," 20 TEX. L. REV. 661 (1942).

[46] 28 A.B.A.J. 23-8 (1942); For another article in criticism see Challener, "The Proposed Code of Evidence," 13 Pa. B.A.Q. 162 (1942).

difficulty in attempting to have the Code adopted by forty-eight different legislatures has argued that the Code can and should be adopted by the courts, either in presence of rule-making power heretofore granted to them by the legislature, or as an exercise of their inherent power.[47]

While a large number of bar associations, either at bar meetings or through regular or special committees, have been engaged in studying the Code and the problems of whether it should be adopted in their particular state, the writer has not yet heard that it has been adopted *in toto* in any jurisdiction.

The feeling of the Bar, in general, so far as can be determined from reading the reports of bar meetings, is apparently that the Code contains much that is valuable and certain sections of it will doubtless be widely adopted, but that its adoption as a whole to supplant the existing law of Evidence would not be wise.[48]

John E. Tracy †

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[47] Lobingier, "Our 'Model Code of Evidence,'" 91 UNIV. PA. L. REV. 581 (1943).

[48] 18th Report of Judicial Council of Mass., Dec. 1942.