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Uniform Federal Rules of Evidence

UNIFORM FEDERAL RULES OF EVIDENCE*

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In 1961 the Judicial Conference of the United States resolved that the objective of developing federal rules of evidence is meritorious.[1] This resolution is amply supported by the facts and by the opinions of most writers.

In the first place the law of evidence in the federal courts, as in the states, has been and still is in very poor condition. In 1898 Professor Thayer of the Harvard Law School pointed out that the "chief defects" in our law of evidence are the

> motley and undiscriminated character of its contents . . . the ambiguity of its terminology; the multiplicity and rigor of its rules and exceptions to rules; the difficulty of grasping these and perceiving their true place and relation in the system, and of determining, in the decision of new questions, whether to give scope and extension to the rational principles that lie at the bottom of all modern theories of evidence, or to those checks and qualifications of these principles which have grown out of the machinery through which our system is applied, namely, the jury.[2]

Professor Thayer thought that a system of evidence should be "easily grasped," "easily applied," and aimed "straight at the substance of justice."[3] He also formulated the two leading principles to be applied to such a system: "(1) . . . nothing is to be received which is not logically probative of some matter required to be proved; and (2) . . . everything which is thus probative should come in unless a clear ground of policy or law excludes it."[4] He also pointed out that it is the "rejection on one or another practical ground, of what is really probative, which is the characteristic thing" in our law of evidence.[5]

Professor Cleary has characterized the law of evidence as "sagging to the point of collapse under its own weight."[6] He describes the two basic

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1. 1961 JUDICIAL CONF. ANN. REP. 31.
2. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 527-28 (1898).
3. *Id.* at 529-30.
4. *Id.* at 266.
5. *Ibid.*
6. Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277 (1952).

problems as the multiplicity of evidence rules and their unreality and suggests that "the unreality is what causes the multiplicity."[7] Professor McCormick stated in a law review article that rules of evidence should be uncomplicated so that they can be easily applied at any given moment by both judges and lawyers, but he lamented that such is not the case today.[8] In 1921 Mr. Justice Cardozo complained that portions of the law of evidence "are so unwieldy that many of the simplest things of life, transactions so common as the sale and delivery of merchandise, are often the most difficult to prove."[9]

In 1936 Professor Wigmore stated that "the law of Evidence in our Federal Courts is in a most deplorable condition. It is *inferior* to that of any of the fifty States and Territories—I say, inferior to *any* of them, and not only inferior but far inferior."[10] He then added: "I for one have long ago given up hope of being able to state what *is* the Federal law on *any* rule of evidence."[11] Professors Morgan and Maguire have likened the hearsay rule to "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists."[12] Other writers have more recently described the law of evidence in the federal courts as being "in a deplorable state,"[13] "in dreadful condition,"[14] and "grotesque."[15]

The reason why federal evidence law seems to operate satisfactorily in practice despite its complexities "is not that the complexity is mastered but that it has been ignored."[16] Another reason, suggested by Professor Thayer, is that many judges let the parties try their own cases and let them apply rules of evidence as loosely as they themselves may wish.[17] Judge Charles E. Clark recalled the approach of Augustus N. Hand who said that as a trial judge he would always admit all evidence which was at all useful or admissible, and in so doing he was never reversed on appeal.[18] Is it not

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7. *Ibid.*
8. McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEXAS L. REV. 661, 662 (1942).
9. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 121-22 (1921).
10. Wigmore, *A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Require Further Consideration*, 22 A.B.A.J. 811, 813 (1936).
11. *Ibid.*
12. Morgan & Maguire, *Looking Forward and Backward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).
13. Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341 (1960).
14. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275-76 (1962).
15. Michelson v. United States, 335 U.S. 469, 486 (1948).
16. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 276 (1962).
17. THAYER, *op. cit. supra* note 2, at 535.
18. Clark, *Foreword* to *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479, 480 (1956). For a similar view expressed by Judge Learned Hand see 19 ALI PROCEEDINGS 225 (1942).

time that strenuous efforts be made to conform the law in books to the law in action?[19] Must our policy always be that of muddling through?

RULE MAKING BY WHOM?

In 1943 the Supreme Court stated broadly that "Congress has power to prescribe what evidence is to be received in the courts of the United States."[20] When the federal courts apply state law in civil actions they do so because Congress by statute so directed. Where there are federal statutes providing rules of evidence they are applied even in diversity cases. Dean Joiner has concluded that the Supreme Court has inherent power to lay down rules of evidence.[21] It is preferable, however, to rest the power on the rule-making statutes inasmuch as the Court has never laid down rules in the absence of such statutes.[22] The various rule-making statutes use the word "procedure" which is broad enough to include evidence.[23] That is the view of most courts and writers.

Judge Alexander Holtzoff has stated:

> The law of evidence is in the field of adjective law and relates to procedure rather than substance. For this reason, a rounded system of rule-making should include evidence as well as pleading and practice. The Advisory Committee of the Supreme Court of the United States on the Federal Rules of Civil Procedure took this view, as it drafted a number of rules relating to evidence, which were adopted and promulgated by the Supreme Court. The same course was followed by the Advisory Committee on Federal Rules of Criminal Procedure.[24]

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19. Professor Schlesinger has indicated that the continental lawyers have made some progress in freeing their courts from the "fetters of artificial restrictions on the admission of relevant evidence." SCHLESINGER, COMPARATIVE LAW 251 (2d ed. 1959). "Except for matters of privilege and of personal incompetence to testify on account of age or kinship, the civilian codes contain no exclusionary rule of evidence, and particularly no hearsay or opinion rule." *Id.* at 26.

20. Tot v. United States, 319 U.S. 463, 467 (1943). Congress may change the rules of evidence in criminal cases "whenever they think proper, within the limits prescribed by the Constitution." United States v. Reid, 53 U.S. 361, 366 (1851).

21. Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 435 (1957).

22. See Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 342 (1960); Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 277 (1962).

23. Kring v. Missouri, 107 U.S. 221, 231-32 (1883).

> The word *procedure* itself, long stopped at the threshold of our legal vocabulary, before making its definite entrance. A transplant of the French *procédure*, it was good English at least as early as the seventeenth century, but not until the nineteenth did it enter into general use by the profession, which before had been content with the trichotomy, "pleading, practice and evidence."

Millar, *The Lineage of Some Procedural Words*, 25 A.B.A.J. 1023 (1939). See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 1 n.2 (1947).

24. Holtzoff, *Institute on Practical Evidence*, 18 F.R.D. 367, 378 (1956).

Professor Wigmore has also concluded that there is a region "where the rules of Evidence fade into the rules of procedure (for example, the procedure of taking depositions) . . . ."[25] In speaking of the topics of burden of proof, presumptions, to whom evidence must be presented, judicial notice, and judicial admissions, he stated that they "represent the border line of what is in strictness the law of Evidence."[26] The same is true as to procedure in preparation for trial such as taking depositions, as to the deliberations of the jury, and as to appeal because improper evidence has been considered. The only reasonable conclusion is that one cannot lay down rules of pleading and practice without to a considerable extent also laying down rules of evidence.

Perhaps there are those who would maintain that evidence law may be adequately developed by precedents handed down in the decisions of particular cases. But Professor Thayer was of the opinion that courts should not endeavor to improve the law of evidence by judicial precedents without having a full understanding of the history, nature, and scope of the present rules and without clearly seeing where they mean to come out.[27] Chief Justice Stone was of the view that a legal system created *ad hoc* lacks both form and symmetry, and the method itself lacks the scientific and philosophical generalizations that would establish the basis for an enduring system.[28] He also maintained that "a statutory enactment of the rules of evidence abolishing many of the existing rules altogether" is a proposal "worthy of serious consideration."[29]

Another item for consideration is whether reliance should be placed either on individual statutes or on a statutory code enacted by Congress rather than court rules. There are statutes on handwriting,[30] business records,[31] and official records.[32] A statute of 1878 permitted a criminal defendant to testify.[33] There is the Jencks Act regarding statements and reports of government witnesses.[34] These statutes, however, cover only a very small part of the law of evidence, and Congress has neither the time nor the training to develop a comprehensive code. Thus, some writers have rather convincingly concluded that in matters of practice and procedure court

25. 1 WIGMORE, EVIDENCE at xviii (3d ed. 1940).
26. *Id.* at 9. As to judicial notice, see THAYER, *op. cit. supra* note 2, at 279 and as to burden of proof, *id.* at 353.
27. *Id.* at 534.
28. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319, 321 (1923).
29. *Id.* at 329.
30. 28 U.S.C. § 1731 (1958).
31. Federal Business Records Act, 28 U.S.C. § 1732 (1958).
32. 28 U.S.C. § 1733 (1958).
33. 28 U.S.C. § 3481 (1958).
34. 18 U.S.C. § 3500 (1958).

rules have distinct advantages over statutory law: the former tend to be generally less complicated, can be changed more easily, can be tested and shaped by those persons more familiar with the requirements of litigation, and can be viewed in the proper perspective of being subsidiary to the substantive law.[35]

The demand for rules of court in this area is not merely a recent one. In 1898 Professor Thayer called not only for simplification of the rules of evidence but also for continuous control and shaping by the highest courts.[36] In 1938 the American Bar Association Committee on the Improvement of the Law of Evidence also reported that consideration should be given to proposals for improvement of rules of evidence by court rules in view of the then recent legislative developments making it clear that civil practice can best be governed in that manner rather than by legislation.[37]

PRESENT LAW OF EVIDENCE IN THE FEDERAL COURTS

Rule 43(a)[38] of the Federal Rules of Civil Procedure provides three sources for federal civil evidence: federal statutes, federal decisional law, and state law. Unhappily, though, all three of these need improvement. Rule 43(a) reveals that there is no separate body of federal civil evidence law, not to mention an up-to-date body of law. In contrast there is a separate body of law as to federal civil pleading and federal civil practice; furthermore, it is up to date and progressive.

The Federal Rules of Civil Procedure are lacking with regard to evidence in several respects. They do not modernize evidence as they do pleading and practice. They do not replace common law and statutes by rules of court but merely state unmodernized sources of evidence. They do not

35. See Vanderbilt, *Improving the Administration of Justice—Two Decades of Development*, 26 U. CINC. L. REV. 145, 250 (1957); Green, *To What Extent Courts Under the Rule-Making Power Prescribe Rules of Evidence*, 26 A.B.A.J. 482, 486 (1940).

36. THAYER, *op. cit. supra* note 2, at 530. Professor Thayer, however, opposes codification. *Id.* at 511.

37. 63 A.B.A. REP. 570, 571 (1938). See 1 WIGMORE, EVIDENCE § 8(b) (3d ed. 1940). "The final yield will be the acceptance by national and state courts of the task of embodying in rules of court a rational, simplified code of Evidence." McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 581 (1938).

38. *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. 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 the 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 and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

replace conformity to state law with uniformity throughout the nation. They do not furnish a model for state courts. Rules of evidence in civil cases in the federal courts are not uniform throughout the federal courts because of the need for application of state rules of evidence under Rule 43(a). This is true in federal question cases as well as in diversity cases. Thus it would be impossible to write a single book on federal civil evidence, but one would have to be written for each of the fifty states. In this respect the law of federal civil evidence is inferior to that of federal criminal evidence. As to the latter, state law has no application. Rules of evidence in civil cases also do not conform to state practice because a federal statute or a federal rule may control the admissibility of evidence. We have two systems of proving the truth in the courts of every state.

Our system of trial by jury has been mentioned as preventing the modernization of our rules of evidence. Historically our systems of pleading and practice were devised as they were because of trial by jury;[39] yet, that did not prevent their modernization. No more should it prevent the modernization of evidence.

Does *Erie R.R. Co. v. Tompkins*[40] stand in the way of federal rules of evidence? There are several answers. First, the problem of the *Erie* doctrine is already with us even without court rules of evidence. A second answer is that the same problem already arises as to rules of pleading and practice in the Federal Rules of Civil Procedure. In a minor way the *Erie* case has made the Federal Rules of Civil Procedure not uniformly applicable. It has been concluded that six of the rules may be invalidated by the *Erie* case: rule 3 on complaint, rule 15(c) on amendment of complaint, rule 13(a) on compulsory counterclaims, rule 17(b) on capacity to sue, rule 23(b) on derivative suits by a shareholder, and possibly rule 8(c) on pleading affirmative defenses.[41] However, no one has seriously contended that the Federal Rules of Civil Procedure or even the six rules just mentioned should be repealed. Indeed a writer has concluded that the *Erie* problem in federal evidence cases "has been minimal" in comparison with its impact elsewhere.[42] A third answer is that even though the *Erie* doctrine applies in federal civil actions and causes trouble there as to uniform rules of evidence, it does not apply in criminal cases or in admiralty cases.

The federal courts have now had thirty years in which they could have

39. THAYER, *op. cit. supra* note 2, at 3; Holdsworth, *The Development of Oral and Written Pleading*, 2 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 614, 619-20, 623-26 (1908).

40. 304 U.S. 64 (1938).

41. See Note, *Erie R.R. v. Tompkins and the Federal Rules*, 62 HARV. L. REV. 1030 (1949); Comment, 62 COLUM. L. REV. 1049, 1067 n.106 (1962) (citing cases sustaining *Erie* attacks on Rules 8(e)(2), 8(a), 13(g) and 4(d)(1).

42. *Id.* at 1069.

modernized the law of criminal evidence. The Preliminary Study for the Judicial Conference of the United States concludes: "The reluctance of the Supreme Court to improve evidence rules by decision, is matched by the inability of the lower courts to show progress toward a modern law of Federal criminal evidence."[43] I have read the decisions for that period, and I fully agree. The few liberal decisions are voices crying in the wilderness.

It may also be argued that a complete set of rules of evidence set forth in rules of court is too ambitious and without precedent. This is not so. Sir James Stephen states:

> Indeed, the whole scheme, and the fundamental propositions of my *Digest of the Law of Evidence*, are only a scheme of the law as it stands, devised by myself for the purposes of an Indian Evidence Act (Act 1 of 1872), which, with little if any alteration, has, since 1872, been the Act by which the law of evidence is regulated throughout the whole of the Indian Empire.[44]

It applies to this day in India, Pakistan, and Burma.[45] It has been adopted in Ceylon and by the African countries of Kenya, Nigeria, and Uganda. Several draft codes of evidence have also been presented in Israel.[46] In 1939 Lord Wright thought the English law of evidence ready for codification.[47] In 1953 the Evershed Committee proposed the codification of the statutory law of evidence from 1609 to 1938.[48] England does not now have rules of evidence laid down by the courts; however, that proves very little. In England trial by jury is used very seldom, and appeals on evidence points are rare. Lawyers who appear in court are highly trained barristers, and judges are usually former barristers who have practiced at the bar twenty-five years or more. English judges have discretion on many phases of evidence. In spite of this system English legal scholars are critical of the existing English law of evidence.[49]

A Canadian scholar has praised the Uniform Rules of Evidence and urged that a similar code be prepared in Canada.[50] Complete drafts of rules of evidence based on the Uniform Rules have been prepared in New Jersey

43. *Preliminary Report*, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF EVIDENCE (1962), found in 30 F.R.D. 73, 99 (1962) [hereinafter cited as PRELIMINARY STUDY].

44. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW 194 (2d ed. 1890).

45. Nokes, *Codification of the Law of Evidence in Common Law Jurisdictions*, 5 INTERNATIONAL & COMPARATIVE L.Q. 347, 350 (1956).

46. *Id.* at 352.

47. WRIGHT, LEGAL ESSAYS AND ADDRESSES 338, 339 (1939).

48. Nokes, *supra* note 45, at 349.

49. See, *e.g.*, Nokes, *The English Jury and the Law of Evidence*, 31 TUL. L. REV. 153 (1956).

50. Murray, *Evidence: A Fresh Approach, The American Uniform Rules of Evidence (1953)*, 37 CAN. B. REV. 576 (1959).

and Puerto Rico.[51] In the Virgin Islands the legislature in 1957 adopted the Uniform Rules of Evidence, and they seem to be working well.[52] The Canal Zone has adopted rules of evidence.

It may be argued that after the adoption of rules of evidence there will be a period of uncertainty while the rules are first being applied and construed.[53] The obvious answer to this contention is that the same was true as to the rules of pleading and practice.

Topics Covered

Certainly the hearsay rule should be included as one of the topics covered by rules of court. This area gives the courts a great deal with which to start. Possibly as much as one third of the law of evidence is concerned with the complications arising from the admission of hearsay.[54] The opinion rule should be incorporated as it deals with form.[55] Examination and impeachment of witnesses should be covered.[56] The rules as to relevance[57] and the rules as to writings should be covered.[58] Competency of witnesses should be included.[59] The procedure of admitting and excluding evidence should also be included[60] because rules 43(c) and 46 of the Federal Rules of Civil Procedure and rule 51 of the Federal Rules of Criminal Procedure only partially deal with the subject.[61] Demonstrative evidence should be covered. Judicial notice should be covered.

Some topics should not be incorporated into the rules of court. Parol evidence should not be included because it involves substantive law.[62] Dean Joiner concluded in 1957: "Only privileges, burden of proof, and conclusive presumptions may involve more or should be classified as substance and . . . may be beyond the rule-making power."[63] Thus, burden of proof and

51. Clark, *supra* note 18.
52. Preliminary Study, 30 F.R.D. 112.
53. 20 Pa. B.A.Q. 220, 221 (1949); Note, 98 U. Pa. L. Rev. 719, 732 (1950).
54. Nokes, *The English Jury and the Law of Evidence*, 31 Tul. L. Rev. 153, 167 (1956). In McCormick, Evidence (1954), 180 pages of a total of 712 are devoted to hearsay.
55. Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482, 489 (1940).
56. *Ibid.*
57. Degnan, *The Law of Federal Evidence Reform*, 76 Harv. L. Rev. 275, 301 (1962).
58. Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 345 (1960).
59. Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 Vand. L. Rev. 467, 483 (1957).
60. Degnan, *The Law of Federal Evidence Reform*, 76 Harv. L. Rev. 275, 293 (1962).
61. See McCormick, Evidence 113 n.4, 121 n.51 (1954).
62. Preliminary Study, 30 F.R.D. 107; Note, 62 Colum. L. Rev. 1049, 1069, 1073 (1962); Thayer, *op. cit. supra* note 2, at 390, 513.
63. Joiner, *supra* note 21, at 435.

presumptions should not be included even in federal question cases.[64] Non-conclusive presumptions are substantive for *Erie* purposes even though they may be within the rule-making power.[65]

The existence of too many privileges prevents getting all the facts before the court. A number of writers on evidence would exclude privileged communications from rules of court;[66] however, equally distinguished experts would include them.[67] One who would exclude this area concedes that "the law of privilege is at least half-procedure, for a truth-seeking interest is being weighed against a truth-obstructing interest to establish the lines we seek."[68] Certainly, in federal criminal cases federal standards are applied.[69] Likewise, in federal question cases federal standards perhaps should be applied,[70] but in diversity cases no rules should be laid down.[71]

CONCLUSION

The Uniform Rules of Evidence have the sponsorship of the Commissioners on Uniform State Laws, the American Bar Association, and the American Law Institute. Those rules are "simple, uniform, accessible and reasonably progressive."[72] The Model Code failed to win acceptance "chiefly because its form of expression was thought to be too academic and unfamiliar, because its widening of the admission of hearsay was believed to go too far, and because in one general rule it recognized a latitude of discretion in the trial judge to exclude which its critics regarded as excessive."[73] The Uniform Rules corrected the first two objections though they retained the third. Professor Morgan has stated that he believes a set of rules incorporating the best

64. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 283 (1962). But regulating management of presumptions in the course of trial is probably within the rule-making power for federal question cases.

65. *Id.* at 299.

66. Louisell & Crippin, *Evidentiary Privileges*, 40 MINN. L. REV. 413, 414 (1956).

67. Morgan, *supra* note 59, at 483-84; Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making*, 107 U. PA. L. REV. 1, 42 (1958).

68. Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 347 (1960).

69. Hawkins v. United States, 358 U.S. 74 (1958).

70. See Fraser v. United States, 145 F.2d 139, 144 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945).

71. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 299, 302 (1962).

72. McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 557, 573 (1955). The Uniform Rules of Evidence are brief. They are printed with commentary in a pamphlet of 57 pages, and printed alone without commentary they amount to 25 pages in a casebook. See MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 844-69 (4th ed. 1957). There are only 72 rules with 9 subdivisions: I. General provisions; II. Judicial notice; III. Presumptions; IV. Witnesses; V. Privileges; VI. Extrinsic policies affecting admissibility; VII. Expert and other opinion testimony; VIII. Hearsay evidence; and IX. Authentication and contents of writings.

73. McCormack, *supra* note 72, at 573.

features of the Uniform Rules of Evidence and the Model Code, drafted, for example, by the Advisory Committee of the United States Supreme Court, could not only improve both works but also would have a good chance of acceptance.[74]

After twenty-one years no state has adopted the American Law Institute Model Code of Evidence. After ten years no state except Kansas has adopted the Uniform Rules of Evidence. The Advisory Committee of the Supreme Court on Rules of Civil Procedure commenced its task of improving the law of pleading and practice twenty-eight years ago. The Advisory Committee on Rules of Criminal Procedure began its work twenty-two years ago. Is it not time to begin laying down rules of evidence so that the whole field of judicial procedure will be covered? The rules of procedure thus far developed have enjoyed the utmost admiration and support of the law schools. Our casebooks on pleading and practice are full of cases applying the federal rules. In 1957 the Judicial Conferences of the Third and Sixth Circuits recommended federal rules of evidence.[75] The American Bar Association by its House of Delegates in 1958 recommended that the Supreme Court lay down uniform rules of evidence.[76] In my judgment the greatest hope—possibly the only hope—for the improvement of the law of evidence both in the federal and state courts lies in promulgation by the Supreme Court of rules of evidence. Mr. Justice Cardozo once said:

> The time is ripe for betterment. "Le droit a ses époques," says Pascal in words which Professor Hazeltine has recently recalled to us. The law has its "epochs of ebb and flow." One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure.[77]

Ecclesiastes tells us that there is a time for every purpose—"a time to break down, and a time to build up."[78] This is a time to build up.

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74. Morgan, *The Uniform Rules and the Model Code*, 31 TUL. L. REV. 145, 152 (1956).
75. 1957 JUDICIAL CONF. SEPT. REP. 43.
76. 44 A.B.A.J. 1113 (1958).
77. Cardozo, *supra* note 9, at 126.
78. *Ecclesiastes* 3:3.