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Suggested Improvements in the Law of Evidence

The Washington Committee on Judicial Administration assigned a section of its membership to study the law of evidence in the state of Washington in the light of the Reports of the Section of Judicial Administration of the American Bar Association, published in July, 1938. The observations and recommendations of the Washington Section on the Law of Evidence appear in the following report.

As will hereafter appear, the Section recommends the adoption of a number of the A.B.A. proposals in their original form, and of two others in modified form. The considerations which have led us to make these recommendations will be briefly stated.

Those of the A. B. A. proposals which we do not recommend for local adoption we do not undertake to discuss separately. We think it sufficient to say that each of the proposals which we have not recommended appears to us to be either (1) inappropriate locally, or (2) already substantially covered by the existing practice, or (3) premature, until further discussion and educational effort among the bar. For obvious reasons, it seems to us that it is better at this time to confine our recommendations to a few of the more plainly desirable proposals and with respect to which there appears to be the least controversy, than to diffuse our efforts over too wide a front.

The Legal Institute which was held at the University of Washington Law School on March 31, 1939, and which was attended by approximately 400 judges and lawyers from all parts of the state, produced much valuable comment and discussion upon the more significant of the evidence proposals. While there was no formal effort made to take the sense of those present at the institute as to the recommendations presented for discussion, nevertheless, the trend of the discussion itself made it pretty plain what the general attitude of the bar was in respect to each of the proposals presented, and this reaction we have taken into account in arriving at our conclusions.

Running through the entire day's discussion was the often expressed objection to giving the trial judge more discretion in applying the rules of evidence. We note this not for the purpose of subscribing to such an attitude, but because we believe its existence should be made a matter of record. It is not in harmony with the views of the modern

day academicians and commentators, such as Wigmore and McCormick, who for many years have advocated in a forceful and persuasive way more flexibility in and more discretion in the application of the rules of evidence. That this attitude on the part of the bar is due in part to dissatisfaction with the present quality of judicial personnel was made reasonably plain by the discussion at the institute. As a matter of fact, Mr. George Boldt of Seattle undoubtedly articulated the feeling of a large number present when he stated that the granting of more discretion to the trial judge was, in his view, bound up with the question of judicial selection, tenure and salary, and that, until progress had been made in respect to the latter, we should be cautious in expanding discretion.

In respect to two or three of the proposals which we are recommending, rather than to attempt in this report a summary or abstract of the considerations actuating us, we are attaching to the report verbatim copies of the arguments advanced in support of the proposals at the Institute, these arguments appearing to us to represent reasonably complete and objective coverage of the subject matter.[1]

1. *Business Records*

We recommend the adoption of the Uniform Business Records as Evidence Act reading as follows:

> "Section 1. (Definition.) The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> Sec. 2. (Business Records.) A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission.
>
> Sec. 3. (Uniformity of Interpretation.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.
>
> Sec. 4. (Short Title). This act may be cited as the Uniform Business Records as Evidence Act.
>
> Sec. 5. (Repeal.) All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.
>
> Sec. 6. (Time of Taking Effect). This act shall take effect . . . "

We agree with the A.B.A. Committee that the "old common law rules for the admission, as a partial exception to the hearsay rule, of records of business transactions involving the participation of several persons in the transaction recorded, have long been recognized as out-of-date. Their details, complicated by historical relics, by early statutes and by judicial interpretation, now form a needless obstruc-

[1]Space limitations preclude publication of these arguments, which may be procured upon inquiry at the University of Washington Law Library.

tion in the investigation of facts." Varying proposals to remedy the existing state of affairs have been made by different agencies, but the Uniform Act seems to us preferable. We do not believe that there is or would be any substantial opposition to the adoption of this proposal.

2. *Certified Copies*

We recommend for adoption in this jurisdiction Rule 45 of the new Federal Rules for proof of records by certified copy. The rule reads as follows:

> "(a) (Authentication of Copy.) An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.
>
> (b) (Proof of Lack of Record.) A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.
>
> (c) (Other Proof.) This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute, or by the rules of evidence at common law."

Here also appears to be an opportunity to simplify and expedite proof of relevant records without substantial danger of any sort. The discussion of the A.B.A. Committee (page 77) is adequate, and we do not believe there is need to enlarge upon it.

3. *Oath*

It is, of course, doubtful just how much of a stimulus to truth-telling or a deterrent to perjury the oath represents. Yet, we should all be opposed to discarding it and, this being true, it certainly follows that it should be made as effective and therefore as impressive

as possible. The A. B. A. Committee recommended (page 78) that the following features of the oath should be restored:

1. It should be administered by the Judge, not the clerk.
2. It should be repeated, word for word, by the witness.
3. It should be administered anew to each witness on coming to the stand, not to a group and in advance.
4. The judge and all persons in the court room should stand while the oath is pronounced.

We recommend that the first three of these proposals be adopted. The fourth and last proposal we do not recommend. It seems to us that the cost in delay and inconvenience likely to result from the adoption of this proposal would exceed its value.

4. *Physician-Patient Privilege*

The A.B.A. Committee recommended that the present privilege be retained, qualified, however, by the "North Carolina proviso," reading as follows:

> "Provided that the presiding judge of a superior court may compel such a disclosure if, in his opinion, the same is necessary to the proper administration of justice."

The discussion of this recommendation before the institute by Dean Judson F. Falknor[2] was favorable to the adoption of the "North Carolina proviso." The majority of the section, however, do not feel it necessary or desirable at this time to go to this extent. Rather, the majority believe that the present California statute meets the requirements of the situation in a more practicable and desirable way. The California statute (§ 1881, subd. 4, Cal. Code of Civil Proc.) reads as follows:

> "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; provided, further, that after the death of the patient, the executor of his will, or the administrator of his estate, or the surviving spouse of the deceased, or, if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give such consent, in any action or proceeding brought to recover damages on account of the death of the patient; provided, further, that where any person brings an action to

[2]Available at University Law Library.

recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided, further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian, shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased."

It will be noted that this statute abrogates the privilege in the following situations: First, in will contests where the mental competency of the testator is in issue; second, in personal injury actions, and third, in wrongful death actions. In so far as will contests are concerned, the recommended change is of no great practical consequence, in view of the fact that our court now holds that a contesting heir may waive the privilege (In re Thomas Estate, 165 Wash. 42, 49).

In so far as personal injury and wrongful death actions are concerned, it is our belief that, where the plaintiff puts in issue, and this necessarily means publicly, his or her decedent's physical condition, no rational ground exists for longer suppressing what, by hypothesis, is the relevant truth and what, moreover, is likely to be the evidence of greatest probative value, namely, the testimony of the physician. Furthermore, we think the California statute has the advantage over the "North Carolina proviso" of making the rule definite and certain so that in preparing for trial counsel will know what he may and what he may not be able to show. Also, whatever abuses have resulted from the operation of the present privilege are, in our judgment, almost entirely confined to those situations wherein the California statute has relaxed the privilege.

5. *Proof of Foreign Law*

We recommend the adoption of the Uniform Act on Judicial Notice of Foreign Law reading as follows:

"Section 1. (Judicial Notice.) Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

Sec. 2. (Information of the Court.) The Court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

Sec. 3. (Ruling Reviewable.) The determination of such laws shall be made by the Court and not by the jury, and shall be reviewable.

Sec. 4. (Evidence as to Laws of Other Jurisdictions.) Any party may also present to the trial court any admissible evidence of such laws; but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

> Sec. 5. (Foreign Country.) The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.
>
> Sec. 6. (Interpretation.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.
>
> Sec. 7. (Short Title.) This act may be cited as the Uniform Judicial Notice of Foreign Law Act.
>
> Sec. 8. (Repeal.) All acts or parts of acts inconsistent with the provisions of this act, are hereby repealed.
>
> Sec. 9. (Time of Taking Effect.) This act shall take effect . . . . "

Reference is made to the report of the A.B.A. Committee (pages 85-86) on this proposal. Nothing need be added to what is there said. We do not believe there can be reasonable dispuite as to the advisability of undertaking what seems to us to be a necessary and sensible reform.

6. *Deceased Person's Statements*

The A.B.A. Committee recommended the adoption of a modification of the hearsay rule 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 the personal knowledge of the declarant."

While this proposal has come to be known as a recommendation for the adoption of the "Massachusetts Hearsay Statute," it should be noted that the proposal goes beyond the Massachusetts statute to a degree which is, in our view, inadvisable.

The Massachusetts statute (Massachusetts General Laws 1932, c. 233, § 65; original act 1898, c. 535; then revised laws 1902, c. 175, § 66) reads as follows:

> "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

It will thus be noticed that the A.B.A. recommendation draws within the operation of the principle of the Massachusetts statute not only statements of deceased persons, but those of insane persons and of persons that, after due diligence, cannot be produced in court and whose depositions cannot be taken.

For the reasons advanced in the report of the A.B.A. Committee (page 76) and in Judge Paul's exposition,[3] we recommend the adoption of the Massachusetts hearsay statute, modified only as follows:

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[3]Discussion by Judge Charles H. Paul, of the Seattle Bar, before the Institute of March 31, 1939, at the University of Washington Law School. Available at the Law Library.

1. By including within its operation statements of insane persons, as well as those of deceased persons. We see no objection to making this extension. But we are opposed to the recommendation of the A. B. A. Committee that there be included within the operation of the statute statements of persons who cannot be found or produced in court. It is our judgment that such an innovation would represent an opportunity for the introduction of fictitious and fabricated out-of-court statements, and that this danger more than offsets the advantages to be gained from the extension of the statute in this direction.

2. We think the Massachusetts statute should be further modified by requiring an express finding by the trial judge that the requirements of the statute have been met and that this preliminary finding should be entered in the record. (The North Carolina court has insisted on this wholesome requirement in respect to the relaxation of the physician-patient privilege under the "North Carolina proviso". See *Metropolitan Life Insurance Co. v. Boddie,* (1927) 139 S. E. 228.) If our recommendation on this point is to be carried into effect, it would seem necessary to specifically so provide, in view of the holding of the Massachusetts court (*O'Brien v. Bernoi,* 8 N. E. (2d) 780) that it is "not necessary for the judge, before admitting the statements, to express in words his finding that the conditions of admissibility * * * have been satisfied", the holding being that the admission of the statements imports such a finding.

Applicability of Rule Making Act to Foregoing Recommendations

We suggest the probability that all of the foregoing recommendations (save the recommendation in respect to the physician-patient privilege) may lawfully be carried into effect by rule of the supreme court under the provisions of Chapter 118 of the Laws of the Extraordinary Session of 1925. While this section has not been delegated to investigate the legal questions involved in the foregoing suggestion, and while consequently no such investigation has been undertaken, we nevertheless believe that our tentative conclusion is justified not only by the particular language of the act granting to the court the power to prescribe the mode and manner "of taking and obtaining evidence", but by the more general provisions as well. We believe that this feature of the matter should be carefully explored by the Judicial Council. The advantages of effecting changes of this sort by rule of court, rather than by attempting the difficult task of securing legislative enactment are obvious. This subject is dealt with in some detail in Judge Paul's paper.

Respectfully submitted,

ALFRED J. SCHWEPPE
EDWIN GRUBER
ROBERT M. JONES
CHARLES M. MORIARTY
JUDSON F. FALKNOR,
Chairman.

I concur in the foregoing report, save that in connection with the matter of the abrogation of the "physician-patient privilege", I express no opinion. Neither do I express any opinion upon the application of the rule-making power of the supreme court to the subject matter of the report.

WALTER B. BEALS.

The Bar Association has been informed that the following lawyers, recently admitted to the Bar, are in practice or business as listed below:

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