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On the Rules of Evidence

Comments and Casenotes

ON THE RULES OF EVIDENCE

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An ever present theme of controversy and debate, general in all the States, and current in Maryland in one form or another each time its Legislature assembles, is the extent, if any, to which the rules of evidence should be altered, or, according to the proponents, "modernized". Especially is this true as to the several Boards and Commissions to which, less perhaps than in most States, though some yet feel too generously, judicial or quasi-judicial powers have been recently assigned.

Much support for the movement is found among the most respectable and disinterested of authorities. Thus, in the preface to the first edition of his monumental study of the law of evidence, Professor Wigmore is found declaring: "The rules of evidence, over and above all others, have come to bear, even within the profession itself, the stigma of technical arbitrariness and obstructive unreason."[1] So staid and conservative a publication as the Encyclopedia Britannica (one reflecting, too, lay, rather than professional opinion) comments that in America "there is general distrust of the rules of judicial proof".[2] It concludes its discussion with the critical assertion: "The lay public is not sufficiently informed about defects and debatable points to express more than blanket condemnation".[3] To this Professor (now Mr. Justice) Frankfurter substantially joins with the statement that: "New conflicts and new types of controversies cannot be adjusted by the limited, litigious procedure, well enough adapted for (the) ancient common law action".[4]

It is of course, recognized as axiomatic that: "Historically, the distinction is fundamental, i. e., the common law rules of Evidence grew up exclusively in jury trial, *and do not apply 'ex stricti jure' in any tribunal but a jury*

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[1] This, from the preface to the First Edition, published in 1904, may also be found in the Second Edition (1922) xiii.

[2] 8 Encyclopedia Britannica (14th Ed.) 914.

[3] *Ibid.*

[4] Frankfurter, *Introduction to Symposium on Administrative Law* (1933) 18 Iowa L. Rev. 129, 130.

court."[5] This has been the rule of practice of the common law itself from early times. In proof, Professor Thayer, quoting from a treatise by Sir Henry Maine, observes: "And after pointing out that the law of evidence grew out of the jury system, he (Sir Henry Maine) adds truly that 'the English rules of evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure' ".[6]

More cautionary views upon the subject are not, however, lacking. It is Mr. Wigmore's final conclusion as to our Boards and Commissions: "On the whole, then, the popular view, viz. that the jury-trial system of Evidence can be generally dispensed with in administrative tribunals must be deemed to be unverified and premature."[7] In that opinion, he is fully sustained in the more recent expression by Professor Chafee of the Harvard Law School, who holds that more evidence is needed "before we decide that the experiment (of partially setting aside the common law rules of evidence) is a failure in these tribunals and should be abandoned, or that a similar policy . . . should . . . be adopted in the ordinary courts".[8] Mr. P. T. Sherman, after a study of the results before the New York Workmen's Compensation Commission of a "liberal" rule of evidence in practical operation, maintained that in its operation the abuses over-balanced the recorded gains.[9]

Maryland's best known departure from the rules of evidence is embodied in the Code section[10] providing that the State Industrial Accident Commission "shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this article". But unlimited experiment under that statute has been prevented by the Court of Appeals, which, it is conceived, wisely decided: ". . . the courts (should) adapt themselves somewhat to the increased latitude allowed to the commission, (but) this adaptation must at the same time, and as far as it can consistently be done,

[5] 1 Wigmore, Evidence (2nd Ed. 1922) Sec. 4B.
[6] Thayer, Preliminary Treatise on Evidence at the Common Law (1898) 508.
[7] Wigmore, *loc. cit. supra* n. 5.
[8] Chafee, *The Progress of the Law* (1922) 35 Harv. L. Rev. 302, 306.
[9] Sherman, *Evidence and Proof Under Workmen's Compensation Laws* (1920) 68 U. Pa. L. Rev. 203.
[10] Md. Code, Art. 101, Sec. 10.

avoid abandonment of cautions and safeguards which seem necessary, not only for constitutional due process of law, *but also for the assurance of reliability in the basis of adjudication*".[11]

The matter of the procedure before administrative tribunals has been the recent subject of an authoritative survey in Great Britain, culminating in the report made to the British Parliament in April, 1932 by the Lord Chancellor of England, styled "The Report of the Committee on Ministers' Powers". Mr. Arthur Suzman of London summarized that Report as follows:[12] "It is pointed out that although Ministers and ministerial tribunals, when exercising judicial and semi-judicial functions, are in no way bound to conform to the identical procedure of a court of law, there nevertheless are certain canons of judicial conduct which all persons and tribunals exercising such functions ought to observe". Those are stated to be: (1) that no man should be a judge in his own cause, hence no Minister should decide a controversy concerning his own conduct and power; (2) that no party ought to be condemned unheard; and (3) that the parties are entitled to know the reasons for the decision. Add to them a fourth and fifth requirement left without special specific emphasis in the Report that every case is entitled to be *fully* heard and on *reliable* proof, and the standards in the light of which it is herein urged the rules of evidence of fact finding Boards should be both framed and applied are succinctly stated.

The Constitutional minimum that all Boards must observe has been set by the Supreme Court of the United States as follows: "The due process clause does not control the mere forms of procedure, provided only the fundamental requirements of notice and opportunity to defend are afforded".[13] That Court, however, has not hesitated to reverse an order of the Interstate Commerce Commission for which it found *no legally sufficient evidence.*[14]

Some departure from common law rules of evidence has been had in Maryland, with most beneficial results. Our statutes for the admission of accounts, for the taking of the testimony of non-resident witnesses upon five days' notice, and requiring the Court to advise the jury as to the statute law of other States are examples that readily come to mind.

[11] Standard Oil Co. v. Mealey, 147 Md. 249, 254, 127 Atl. 850 (1925).

[12] Suzman, *Administrative Law in England* (1930) 18 Iowa L. Rev. 160, 176-7.

[13] Zayas v. Lothrop, Luce and Co., 231 U. S. 171, 58 L. Ed. 172, 34 S. Ct. 108 (1913).

[14] U. S. v. Abilene & S. R. Co., 265 U. S. 274, 288, 68 L. Ed. 1016, 44 S. Ct. 565 (1924).

No one could seriously claim that there is *no* room for further changes. But opposition is here sought to be voiced to the notion, too generally entertained, that drastic revision is in order and our whole system outmoded. Further opposition is registered to the theory that, before administrative tribunals, all the rules of evidence should give way to the Commission's conception of what will best promote justice in each given case.

The rules of evidence are largely of judicial origin.[15] That which is the handicraft of British and American Judges is usually found to have much to warrant its retention. This is true of the law of evidence. Modifications, following careful study and open debate, are from time to time in order, but not scrapping and discarding, nor unbridled discretion.

Once, heretofore, there was a movement in our law designed to correct all the alleged abuses of what was then unquestionably a too rigid system of procedure and a vastly cramped field of substantive law by ignoring, where it was thought necessary, that which had gone before. From that movement, our equity jurisprudence arose. In the successive British Chancellors it was nurtured by a sturdy stock. Yet, it was found, and is now the law, as has been well summarized by Lord Eldon:[16] "The doctrines of this (the Chancery) Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. *Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of the court varies like the Chancellor's foot.*"[17]

There is still a place in our law to side with the great Chief Justice Marshall who declared: "All questions upon the rules of evidence are of vast importance to all orders and degrees of man; our lives, our liberty, and our property

[15] "The English law of evidence as at present administered is of comparatively modern growth, having for the most part been built up by the judges in the last two centuries, with special reference to trials by jury, and it consists of this judge-made law as modified by various statutory enactments." Encyclopedia Britannica, (14th Ed.) V. 8, p. 905.

[16] Gee v. Pritchard, 2 Swans. 402, 36 Eng. Reprint 670 (1818).

[17] The reference to the Chancellor's foot is, of course, to the witty complaint of Seldon: "Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a Chancellor's foot." 1 Pomeroy, Eq. Juris., 62, N.

are all concerned in the support of these rules, *which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded*".[18] Or, as Pollack and Maitland so aptly phrased it: "Discretion is not of necessity 'the law of tyrants', . . . yet . . . formalism is the twin-born sister of Liberty".[19] In that spirit may the Maryland Bar ever be alert to maintain its rules of evidence as the most valued service it can render to keep the Free State truly "free"!

Of all such efforts, virtually complete approval is found in the Report of "The Committee on Improvements in the Law of Evidence" made to the Judicial Section of The American Bar Association at its July, 1938 Convention in Cleveland, wherein it is said:[20]

> "All will agree that the body of the rules of evidence, in their skeleton framework, are wise and wholesome—in short, they are a valuable and unique contribution to the world's expedients in the investigation of truth. What is lamented is their infinitesimal, meticulous, petty elaboration into a mass not capable of being perfectly mastered and used by everyday judges and practitioners."

The report went on to point out,[21] with disapproval, the tendency toward the so-called "legislative Star-Chamber alteration" of the rules of evidence. A recommendation was made that legislatures should not change the rules of evidence without giving due notice and opportunity of hearing to state and local bar associations. It asserted that too many changes in the rules had been made at the behest of interested members of the legislatures with personal notions of what would be desirable amendments, or through pressure brought to bear by individual attorneys who had suffered the loss of cases because of specific rules, or because of the influence of pressure groups which had been able to obtain changes beneficial to their interests.

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[18] Queen v. Hepburn, 7 Cranch 290, 295, 3 L. Ed. 348 (1813).
[19] 2 Pollack and Maitland, History of English Law (2nd Ed.) 563.
[20] Report of the Section of Judicial Administration, 68.
[21] *Ibid*, 72.