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Foreword: Illinois Evidence—The Question of Codification

HONORABLE JOHN POWERS CROWLEY*

When the editors of the *Loyola Law Journal* conceived of this issue exhaustively treating the state of the law of Evidence in Illinois there was some anticipation by the bench and bar that the Illinois Supreme Court would recommend the adoption of the Illinois Code of Evidence, based, in part, upon the Federal Rules of Evidence. The supreme court has now acted, or failed to act, by not taking a position on the Proposed Illinois Code.

As the articles and student notes in this issue of the Journal aptly demonstrate, certain ambiguities exist within the law of evidence in Illinois. There are many individuals, familiar with these ambiguities, who are opposed to the codification of the law of evidence, feeling in the main that codes will stultify the development of the law and that rulings will be made, not based upon reasoned analysis of the competing arguments, but upon the strict application of rigid rules.

I suggest that the practice under the Federal Rules does not support such negative speculations. On the contrary, the codification and application of the Rules has produced an awareness of the foundation upon which they are based, and a continuing dialogue on their application. Indeed, although the Federal Rules contain infirmities as are present in any body of law and while they do not explicitly establish guidelines in many areas, particularly presumptions and privileges, the drafters did not attempt to cover all areas of the law of evidence or to conceive of all possible questions. These omissions were intended to avoid the rigidity which could interfere with the development of the law. In those areas where the Rules do not provide a definitive answer, they do provide the starting point for the inquiry, thus compelling the practitioner and the judge to examine the theory behind the rule. Those who deal with the Federal Rules are compelled to follow Mr. Justice Holmes' teaching: "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of the house. . . . It is not to be feared as impractical, for, to the competent, it simply means going to the bottom of the subject."

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The Federal Rules have introduced many long-needed reforms. In conspiracy cases we are no longer faced with the frightening prospect of having jurors determine the admissibility of co-conspirators' statements. That responsibility has been placed squarely upon the trial judge where it always belonged.

There is a disagreement among various circuits as to the admissibility of other acts and occurrences and many aspects of the hearsay rule are being reexamined in light of the Confrontation Clause of the Sixth Amendment.

The admissibility of prior convictions to impeach credibility, and the scope and exercise of the discretion of the trial court, as well as the standard applicable to the introduction of other acts to support an inference other than propensity have received critical analysis in recent opinions.

Indeed, practically every aspect of the Federal Rules has been considered by the Courts since their implementation. If there is any lesson to be learned from their use it is that to a great extent they are general rather than specific and serve as a guide rather than as restrictive dogma. The rules encourage the exercise of sound judgment while at the same time allowing litigating parties to plan their action with these guides in mind, rather than requiring them to wander through a maze of often inconsistent rulings.

In the absence of codification in Illinois, this issue of the Law Journal with its excellent analysis of varied evidentiary problems and principles may cause us all, and particularly Illinois lawyers and judges, to take to heart Dean Wigmore's admonition of 1904:

If we are to save the law for a living future, if it is to remain manageable amidst the sprawling mass of rulings and statutes which stand increasingly to clog its simplicity, we must rescue these meanings from forgetfulness.