Advisory Committee on Evidence
Memorandum No. 14

Article VI. Witnesses

First draft

Rule 6-01. General rule of competency. Every person is competent to be a witness except as otherwise provided in these rules.

Comment

This is the general gound-clearing provision with respect to witnesses, in the pattern previously followed by the Committee. See, for example, proposed Rule 5-01 which abolishes all privileges not specifically recognized.

A similar provision is found in Model Code Rule 9 and Uniform Rule 7, both of which provide: "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness. . . ." In order to obtain greater emphasis, the draft has rearranged the sequence of the sentence, with the general rule preceding and the exception provision at the end. The Reporter has also substituted the word "competent" in place of "qualified." This usage is believed to be more consistent with that generally followed. "Competent" is the term generally employed to describe a person who is free from personal characteristics which would disable him to be a witness. Instances will be found in Fryer, Note on

Disqualification of Witnesses, SELECTED WRITINGS ON EVIDENCE AND TRIAL 345 (1957); McCORMICK 139; Maguire, Weinstein, et al., CASES AND MATERIALS ON EVIDENCE 202-204 (1965); and numerous statutes collected in 2 WIGMORE § 488. Cf. 2 WIGMORE §§ 483-488. "Qualified" is commonly used in professional parlance affirmatively to refer to expert or other witnesses who are required to possess characteristics not possessed by witnesses generally. McCORMICK § 13; Maguire, Weinstein, et al., op. cit. supra, 262. These same authorities use the words "incompetent" and "disqualified" pretty much interchangeably, with "disqualified" perhaps having something of an edge as a means of describing a person who is not competent to be a witness. The draft uses "competent" when the sense is affirmative, "disqualified" when the reference is to a characteristic which destroys competency.

Certain traditional grounds for disqualification are not treated elsewhere in these proposed rules and hence would be abolished. They include religious belief, conviction of crime, connection with the litigation as a party or interested person, and marital disqualification. Conviction of crime will be reverted to as a ground for impeachment, rather than disqualification, and the marital disqualification is examined and discarded in the Comment to proposed Rule 5-06 (Memorandum No. 11, Part 2, pp. 67-70). A note which

follows this Comment deals with the Dead Man's Acts as a surviving remnant of the common law disqualification of parties and recommends against its perpetuation in these rules. Beyond these treatments, the Reporter does not believe that the grounds for disqualification enumerated above merit any serious consideration, and he does not propose to explore them unless directed to do so by the Committee.

NOTE

Patterns and Problems of Dead Man's Acts

Introduction

The "dead man's acts" are statutory preservations[1] of portions of the common law incompetency which prevented testimony by those witnesses who were parties to or had a financial or proprietary interest in the outcome of litigation. Wigmore, EVIDENCE, § 578 (3d ed. 1940). The various states followed England in the nineteenth century by abolishing testimonial disqualification, first of interested persons and then of parties themselves. The complete destruction of traditional incompetencies in England was not effected in American states, however, perhaps because of a carryover of the distrustful attitude which had sustained the broad common law rule over a long period. See Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A.L. Rev. 175 (1957).

The assumption underlying the general disqualification was that persons interested in the outcome of litigation would fabricate testimony in order to obtain favorable decisions. See Chadbourn, supra. This theory may be slightly modified in the case of dead man's act disqualifications to

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[1] For convenience all state "dead man's acts" are cited only once, in Addendum A.

assert that persons interested in the outcome of litigation will lie unless they are in danger of being contradicted. Ladd, Symposium on the Uniform Rules of Evidence - Witnesses, 10 Rutgers L. Rev. 523 (1956); see Lee, The Dead Man Statute and the Uniform Rules of Evidence, 11 Miami L. Q. 103 (1956) (emphasizes the importance of contradiction). A second dead man's act justification, a sportsman-like gesture, is that fairness requires sealing the survivor's lips equally with those of a deceased. Schulman, Repeal the Dead Man's Act, 35 Pa. B.A.Q. 183 (1964). This rationale is not a mere reiteration of the first since a survivor might have a claim based upon mistaken memory rather than fraud. On the other hand, it does not take great perspicacity to see that an incompetency designed to protect against fraudulent or mistaken claims also prevents satisfaction of honest, just claims as well. Furthermore, it is widely accepted that frustration of just claimants is a much more frequent occurrence under dead man's acts than is deterrence of perjurers. E.g., McCormick, EVIDENCE 143 (1954). Indeed, there is a striking concurrence of authorities upon the inutility and injustice of the dead man's statutes. E.g., Ray, Dead Man's Statutes, 24 Ohio St. L.J. 89 (1963) (quoting several criticisms). Nevertheless, the statutes, though nearly without defenders among commentators, persist. The Pennsylvania Bar Association, for instance, has opposed the dead man's act in that state for several years without success. Taxis, The "Dead Man's" Rule, 35 Pa. B.A.Q. 179

(1964); see Carpenter, The Dead Man's Statute in Pennsylvania, 32 Temple L.Q. 399 (1959); compare Schulman, Repeal the Dead Man's Evidence Act, 35 Pa. B.A.Q. 183 (1964) with Eckert, The Dead Man's Rule Should Be Retained, 35 Pa. B.A.Q. 192 (1964). In Maryland the bar association felt the statute ought to be retained even though its own committee's interim report suggested that "'the volume of cases in which the rule has been before the Court of Appeals demonstrates either the difficulty of its application or the harshness of its result . . . .'" 21 Md. L. Rev. 60, 68 (1961). The bar endorsement was given at the annual meeting in 1959. See, Transactions of the Md. State Bar Ass'n, 64th Ann. Meeting 227 (1959).

There is at least some sentimental attachment to a dead man's act, and there are persons who believe real objectives are served by these laws. E.g., Eckert, supra. However, as Dean Ladd pointed out, "it is significant that no state that has eliminated the dead man's statute has ever re-enacted it." Ladd, The Uniform Rules of Evidence - Witnesses, 10 Rutgers L. Rev. 523, 526 (1956). Not only is that statement still true today, but in the intervening time a few more states have moved away from the dead man's act. Kansas has repealed its dead man's act in adopting the Uniform Rules of Evidence, as has California in the adoption of its code adaptation. Calif. Evidence Code, 63 (1965); Kan., Laws,

1963, Ch. 303. Neither the Uniform Rules nor the Model Code of Evidence include a provision embodying a dead man's act. Rule 9 and Rule 7, respectively, of the two statutory models abolish all witness incompetencies. The dead man's act is not re-inserted and hence is effectively and intentionally eliminated. Comment, Model Code of Evidence Rule 101. Several states have attempted to solve the problem of the dead transactor without using a dead man's act, either by changing the standard of proof or by creating a new supposedly counterbalancing hearsay exception for the dead man's statements. Other states have created basic variations in the language of the dead man's statute, without, however, abandoning it entirely. This has been accomplished either through provision for judicial discretion or through a substitution of a corroboration requirement for the absolute disqualification of the survivor. These approaches will be examined later.

It would be most difficult to identify a particular piece of legislation as typical. The term "dead man's act" in fact does not refer to one statute or one type of statute but to a variety of acts, often differing basically from one another and usually varying in many details regarding coverage of situations and persons and exceptions. Furthermore, interpretation is not consistent from state to state even when a similar phrase is being addressed. See e.g.,

Annot., 80 A.L.R.2d 1296 (1961) (auto accidents as "transactions"). Therefore, the variety of statutes is only partially apparent from a reading of the formulations found in the statute books. It would indeed be a difficult problem to select one existing statute as a model for drafting purposes. Editing and clarifying current statutory language in an attempt to avoid extensive future litigation would be an even lengthier task. The tradition of litigiousness surrounding the existing dead man's acts does not augur will for even the most careful attempt to draft a straightforward rule. If the obvious difficulties are considered with the dubious usefulness of a dead man's provision, the conclusion may be that the provision is best not included in the federal evidence rules.

To aid the Committee in assessing this problem, an analysis of the existing patterns of the dead man's acts has been made below. Some of the problems which arise under them will be indicated, but no attempt will be made to detail the great volume of cases.

Patterns and Problems

Functionally, a dead man's statute is an approach to the general problem of protection of the estates of deceased persons from imposition by the living. What sort of scheme does a dead man's act adopt for this purpose? There is no

single formulation, nor even any common model. Perhaps the unifying characteristic of a dead man's act aside from the involvement of a dead man is that some testimony is disqualified in an attempt to satisfy the statutory purpose. Thirty-six jurisdictions have such a provision. Related legislation, discussed later, may proceed through operation upon the standard of proof in certain cases, or through a corroboration requirement, but such laws are not properly dead man's acts. Thus, the statutes requiring corroboration, which are closely related to dead man's acts in intent and result, are excluded here because testimony is admissible, though it may be insufficient to support a favorable decision.

Isolation of a common element does not, of course, solve the practical problem of devising a good dead man's statute. Indeed, it should be emphasized that there is no agreement among the thirty-six jurisdictions on just how a law ought to be phrased. In most general form, a dead man's act disqualifies, in actions involving specified parties or situations relating to a deceased, designated persons either from testifying as witnesses or from testifying as to conversations, transactions, or the like which have occurred in specified connections with the deceased. A set of exceptions of uncertain length usually, but not always, follows the basic provision.

Finding statutory patterns invites difficulties; yet, some attempt to make an orderly inspection of the thirty-six statutes seems worthwhile. Many crucial details will have to be overlooked, and many slight but potentially important differences in phrasing of similar items will have to be effaced. Moreover, interpretation may, as mentioned at the outset, make similar terminology different in practical effect. Finally, there are, in addition to dissimilar interpretations of particular points, entirely different attitudes toward proper construction of dead man's acts. Some acts are viewed in a liberal manner, while others are construed so as to restrict the application of the dead man's act principle. Morgan, Basic Problems of Evidence 84 (1954). Note the Ohio statute ("when a case is plainly within the reason and spirit of this section and sections 2317.01 and 2317.02 of the Revised Code, though not within the strict letter, their principles shall be applied.") The import of the interpretative philosophy upon specific statutes cannot be pursued here; however, generally, narrow construction is predominant and appears to represent the modern trend. This study is largely restricted to the terms of the statutes, which may sufficiently suggest diversity without the reference to hundreds of interpretative decisions.

Who is disqualified from giving testimony under the dead man's acts? In broadest outlines, the various statutes

restrict or prohibit testimony by witnesses who are (1) adverse parties in a suit involving a protected party (discussed later) or (2) either adverse parties or persons with an interest in the action, or (3) both parties to the controversy. Interpretation of the coverage of "adverse party" has been required. For example, in Ohio it appears that only an actual litigant is a party, while a merely nominal party is excluded from that disqualifying designation. Real interest of an actual litigant determines the applicability of the statute, regardless of the formal designation of the litigant in the suit. Note, The Ohio 'Dead Man' Statute, 4 W. Res. L. Rev. 61 (1952). In Iowa it seems that a nominal party has been disqualified from testifying. See 35 Iowa L. Rev. 115 (1949) (discussing and criticizing case). Obviously, the possibility exists of using the dead man's act as a tactical weapon to disqualify witnesses through manipulative joinder of parties to the extent controlled by the protected party. Definition of an interested party has not been uniform either. Usually "interest" is pecuniary or proprietary in nature, but this is not always true. Ray, Dead Man's Statutes, 24 Ohio St. L.J. 89 (1963). Eight jurisdictions forbid testimony by either side, a view which seems to have no basis in logic or policy. It is hard to follow the reasoning which says that the decedent's estate will fraudulently impose upon itself, and it makes slight

sense to impose a disqualification on an adverse party to "even the score" and then to disqualify the protected party to even the score again.

In what situations do these disqualifications apply? Usually, the situations are defined by identifying protected parties who may invoke the rule. In large categories, the statute may be said to apply when either (1) the decedent's estate or representative is defending, or (2) the estate or representative is either suing or defending, or (3) any of a list of persons in addition to the estate or representative, including, for example, heirs, or grantees of the decedent, is party, for the purpose of either suing or defending, or (4) any member of such a list is defending in the action. It has been pointed out that there is a certain illogicalness in protecting the estate only when the suit is brought against it, since the protection would seem necessary whatever the estate's position. Ray, supra. Failure to collect an asset depletes an estate as surely as does the allowance of a claim against it. Application of the statute to protect successors to the decedent's interests is a policy choice. Coverage varies in ways which may be hard to explain at times. For instance, in Texas heirs are protected "apparently as an afterthought" but legatees, devisees, and assignees are not. Ray, supra.

What is the extent of the prohibition? In some states the statute may provide (1) a general incompetency to testify except as to matters occurring after the decedent's death, while in others there may be (2) a disqualification of testimony only upon particular subjects, usually transactions or conversations with the deceased.

Several combinations of the alternatives found in the definition of extent of protection, protected parties, and persons disqualified can be made. It is interesting to see that of the twenty-four possible combinations of the alternatives discussed in the three preceding paragraphs, that is, twenty-four possible general statutes, no one predominates. In fact, thirteen of the possible twenty-four combinations do occur, and no more than four statutes fit any one pattern. Twelve existing statutes do not comfortably fit any general category. Thus, it is very hard to find specific patterns for the dead man's acts. Perhaps of the three factors mentioned above the most significant is the amount or kind of restriction or prohibition imposed. The general witness incompetency approach is used in eleven jurisdictions. Twenty-three restrict testimony only as to particular matters, whose exact definitions differ somewhat. Two jurisdictions forbid testimony as to any matter of fact equally within the decedent's knowledge. The list of protected

parties is the least significant of the three elements mentioned since the difference is largely based on a fairly simple policy decision as to the extent of coverage. Therefore, the existing statutes might be analyzed as to two components only, that is, to determine who is disqualified and to what extent the disqualification occurs, without specifying to whom the protection extends. Nineteen states disqualify or restrict the testimony of both the adverse party and any interested person whose interests are adverse to the estate. The adverse party's testimony alone is prohibited in thirteen jurisdictions.

Pairing disqualified persons and extent of disqualification alternatives outlined broadly above, one finds there are twelve possible formats. The statutes fall into nine of the available categories since all states which prohibit either side from testifying do so with respect to certain matters only. Thus, the most basic statutory categories and examples of each would be:

(1) In an action involving protected parties, an interested person or adverse party may not testify to transactions or conversations with one who is deceased. Eleven states have a statute of this sort. (Ala., Fla., Ky., Ia., Mont., N.Y., N.C., S.C., Wash., W.Va., Wis.) For example, the New York statute provides:

"§ 4519. Personal transaction or communication between witness and decedent or lunatic. Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is give in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof. No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him. A party or person interested in the event or a person from, through or under whom such a party or interested person derives his interest of title by assignment or otherwise, shall not be qualified for the purposes of this section, to testify in his own behalf or interest, or in behalf of the party succeeding to his title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.

"Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action includes a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased." C.P.L.R. § 4519 (1963).

The Kentucky statute, while basically similar to that of New York, seems quite different when read as a whole.

"§ 210 "Competency of certain testimony. ...(2) Subject to the provisions of subsection (7) of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statements, or was present when such transaction took place, and except in actions for personal injury, death or damage to property by negligence or tortious acts, unless:

[(a), (b), are like (c), infra, except they refer to infants and guardians and person of unsound mind]

"(c) The decedent, or a representative of, or someone interested in, his estate, shall have testified against such person, with reference thereto; or

"(d) An agent of the decedent or person of unsound mind, with reference to such act or transaction shall have testified against such person, with reference thereto, or be living when such person offers to testify with reference thereto. . . .

"(5) If the right of a person to testify for himself be founded upon the fact that one who is dead or of unsound mind has testified against him, the testimony of such person shall be confined to the facts or transactions to which the adverse testimony related.

"(6) A person may testify for himself as to the correctness of original entries made by him against persons who are under no disability--other than infancy--in an accounting, according to the usual course of business though the person against whom they were made may have died or have become of unsound mind; but no person shall testify for himself concerning entries in a book, or the contents or purport of any writing, under the control of himself, or of himself and others jointly, if he refuse or fail to produce such book or writing, and to make it subject to the order of the court for the purposes of the action, if required to do so by the party against whom he offers to testify.

"(7) The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another. . . .

"(9) None of the proceeding [sic] provisions of this section apply to affidavits for provisional remedies, or to affidavits of claimants against the estates of deceased or insolvent persons, or affect the competency of attesting witnesses of instruments which are required by law to be attested." Ky. Rev. Stat., ch. 21, § 210 (1960).

(2) In an action involving a protected party, an adverse party is rendered generally incompetent to testify in the litigation. This is the form of the statute in seven jurisdictions. (Ind., Miss., Mo., Nev., Ohio, Vt., Wyo.) Examples may be helpful. The Ohio statute provides:

> "Cases in which a party shall not testify.
>
> "A party shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person except:
>
> "(A) As to facts which occurred after the appointment of the guardian or trustee of an insane person, and in the other cases, after the time the decedent, grantor, assignor, or testator dies;
>
> "(B) When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject;
>
> "(C) If a party, or one having a direct interest, testifies to transactions or conversations with another party, the latter may testify as to the same transaction or conversations;
>
> "(D) If a party offers evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions; and, if evidence of declarations against interest made by an insane, incompetent, or deceased person has been admitted, then any oral or written declaration made by such insane, incompetent, or

deceased person concerning the same subject to which any such admitted evidence relates, and which but for this provision would be excluded as self-serving, shall be admitted in evidence if it be proved to the satisfaction of the trial judge that the declaration was made at the time when the declarant was competent to testify, concerning a subject matter in issue, and, when no apparent motive to misrepresent appears;

"(E) In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transaction with, or admission by, a partner or joint contractor since deceased, unless they were made in the presence of the surviving partner or joint contractor, and this rule applies without regard to the character in which the parties sue or are sued;

"(F) If the claim or defense is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made in the regular course of business by himself, a person since deceased, or a disinterested person, and the book is then competent evidence in any case, without regard to the parties, upon like proof by any competent witness;

"(G) If after testifying orally, a party dies, evidence may be proved by either party in a further trial of the case, whereupon the opposite party may testify to the same matters;

"(H) If a party dies and his deposition is offered in evidence, the opposite party may testify as to all competent matters therein.

"This section does not apply to actions for causing death, or actions or proceedings involving the validity of a deed, will or

codicil. When a case is plainly within the reason and spirit of this section and sections 2317.01 and 2317.02 of the Revised Code, though not within the strict letter, their principles shall be applied." Page's Ohio Rev. Code Ann., § 2317.03 (Supp. 1964).

The Missouri statute states:

"Witness' interest does not disqualify--exceptions.

No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from on who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as has been done or made since the probate of the will or the appointment of the administrator; provided further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no farther." Mo. Rev. Stat., § 491.010 (1949).

(3) A third form provides that, in an action involving a protected party, neither party may testify as to transactions or conversations with the deceased. Six statutes and a constitutional provision generally follow this outline. (Del., Md., Minn., N.D., Tenn., and Tex., and the Ark. constitutional provision.) For example, the Minnesota law says:

> "Conversation with Deceased or Insane Person. It shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission given before his death or insanity, has been preserved, and can be produced in evidence by the opposite party, and then only in respect to the conversation or admission to which such testimony relates." Minn. Stat., § 595.04 (1953).

(4) In an action involving a protected party the adverse party is incompetent in the action generally and so are all interested persons in four states. (Colo., Ill., Me., Pa.) The Illinois statute provides:

> "§2 No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

"First--In any such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee shall have attained his or her majority.

"Second--When, in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction.

"Third--Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction.

"Fourth--Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.

"Fifth--When, in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency.

> "§3. Where in any civil action, suit or proceeding, the claim or defense is founded on a book account or any other record or document, any party or interested person may testify to his account book, or any other record or document and the items therein contained; that the same is a book, record, or document of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident person of the state at the time of the trial, and where made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries or any other record or document shall be admitted as evidence in the cause...." Ill. Rev. Stat., ch. 51 §§ 2-3 (1965).

(5) In three states only the adverse party is restricted from testifying as to certain transactions and conversations. (Ga., Ida., and Okla.)

(6) In Michigan the adverse party may not testify regarding any matter equally within the decedent's knowledge, (7) while in Utah both adverse parties and interested persons are subject to this restriction. Thus, the Michigan statute reads:

> "(1) When an action or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true must have been equally within the knowledge of such deceased person. When any action or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner, and not within the knowledge of any one of the surviving partners.

"(2) No person who has acted as an agent in the making or continuing of a contract with any person who has died, is a competent witness in any action involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representatives or heirs of such decedent, unless he is called by such heirs or legal representatives.

"(3) When any action or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation, nor when any action or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation (or its assigns) shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person.

"(4) Whenever the words 'the opposite party' occur in this section they shall be deemed to include the assignors or assignees of the claim or any part thereof in controversy....

"(6) Whenever the deposition, affidavit or testimony of such party taken in his lifetime or when mentally sound is read in evidence in such action or proceeding, the affidavit or testimony of the other party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit or testimony. When the testimony or deposition of any witness has once been taken and used (or has heretofore been taken and used) upon the trial of any cause, and the same was, when

> so taken and used, competent and admissible under this section, the subsequent death or incompetency of such witness or of any other person shall not render such testimony incompetent under this section, but such testimony shall be received upon any subsequent trial of such cause." Mich. Stat. Ann., § 27A.2160 (1962).

These statutory examples and the few suggested subsidiary definition problems, together with the exceptions discussed below, give some indication of the intricate diversities found in laws which seem, in a general way, similar. Many more interpretative problems could be discussed without much profit. Particularly difficult modern problems have concerned the applicability of statutes to automobile accidents and to wrongful death actions. Automobile accidents present problems when the wording of a statute restricts its applicability to transactions and communications with a decedent. Statutory wording is important, for "the statutes are not of a single pattern, but vary greatly. The peculiarities of some of them give support to the idea that the reference made therein is simply to personal transactions and not to such mere chance events as may occur between strangers in the same fashion as between friends." Annot., 80 A.L.R.2d 1296, 1298 (1961). However, some courts do apply their dead man's acts to automobile accidents. Ray, Dead Man's Statutes, 24 Ohio St.L.J. 89 (1963) (finding this type of result indefensible). Questions then arise as to whether there can be testimony

given upon the decedent's acts and conduct. Some cases deny the right to testify even to the physical facts surrounding the accident. Annot., supra. On the other hand, some statutes, such as the Kentucky statute set out above, specifically exclude personal injury and property damage incidents from the coverage of the dead man's act. See Ray, supra.

A critical note suggests that the literal application in tort actions of the statute providing a general incompetency for any matter taking place before death is not justifiable. For matters surrounding an accident decedent's testimony is not the only possible source of contradiction. Note, The Dead Man's Rule as Applied to Tort Actions in Pennsylvania, 62 Dick. L. Rev. 174 (1958). A Texas judge states that application of the statute to an automobile collision represents a violation of the basic restrictive philosophy of statutory interpretation. Stout, Should the Dead Man's Statute Apply to Automobile Collisions? 38 Tex. L. Rev. 14 (1959). He suggests that a particular statute, often necessarily read with cases to determine the attitude, restrictive or liberal, toward the dead man's statute, must govern each state's result on this question.

Wrongful death actions present other questions. Often these actions are prosecuted by the executor or administrator,

but the beneficiary of the statute is usually some other person related to the decedent. The statutory cause of action is really independent of the person whose death gives rise to it. When the personal representative brings suit, the court may disregard him as a nominal party, or it may view the statutory language literally. Annot., 77 A.L.R.2d 676 (1961). It is possible that the liability of the estate for costs might affect the attitude of some courts in this situation. Other details of statutory wording which have been omitted in the general statutory outlines above may be important here. Thus, some statutes specify that not only must the personal representative be a party, but the action must be one in which judgment can be rendered for or against the estate. Annot., supra. New York has solved this problem by a specific statutory exclusion of wrongful death actions from the scope of its dead man's act.

An overview of dead man's acts would be incomplete without an examination of their exceptions. The extent of incompetency varies with the extensiveness of accompanying exceptions. Compare the Illinois statute, supra, with the Mississippi statute, which has no exceptions. The exceptions in the Montana and Arizona statutes which allow the judge descretion to admit testimony despite the statutory prohibition seem so crucial as to form the chief characteristics

of those laws. General observations are difficult since some exceptions are found in several statutes and some statutes have no exceptions. E.g., Idaho. Some statutes, through phrasing or approach, include ideas which are stated as exceptions in other statutes. For example, a statute which forbids testimony as to conversations or transactions with a deceased person necessarily allows testimony as to matters occurring after death, while testimony on post-mortem transactions may be allowed through an exception to a statute creating a general incompetency. It would be burdensome to identify each exception with all its existing contexts. Instead, it seems sufficient and useful to join the individual exceptions to a few very general categories of dead man's statutes even though the categories may suppress many other important differences among the included statutes. The statutes arranged in nine groups earlier will be put into four categories here. One may be able to maintain at least an overall conception of the composition of a complete statute. Therefore, to provide convenient hooks upon which to hang exceptions, the following statutory formats will be used:

(1) In an action involving a protected party an interested person or adverse party may not testify as to certain transactions, conversations, and the like. (15 jurisdictions.)

(2) The adverse party and any interested person are incompetent generally as witnesses in specified actions. (Eleven jurisdictions.)

(3) Neither party may testify as to certain transactions, conversations, and the like. (Eight jurisdictions.)

(4) No adverse party or interested person may testify as to any matter equally within the knowledge of decedent. (Two states.)

Thus, on the basis of existing statutes, group (1) might produce statutes of the following kinds: An interested person or adverse party may not testify as to certain transactions and conversations and the like unless:

(a) The decedent's testimony on the subject is introduced. This is a common sort of exception. See statutes of Ky., Neb., Fla., Iowa, N.C., Okla., S.C., and Ala. Decedent's testimony or statements may be available in the form of prior testimony given in the same action, in deposition form, or in the form of an affidavit. A given statute may not allow testimony from all of these sources. Often it is stated that the testimony which is allowed by the survivor as a result of the applicability of the exception is confined to only those matters upon which the decedent's testimony is heard. Other states suggest that the entire conversation may be the subject of testimony,

and still others make it clear that only the exact facts upon which decedent's recorded statement are given may properly be testified to by the survivor.

(b) The representative of the decedent is examined in his own behalf. Fla., Iowa, N.C., S.C., W.Va., and Wis.

Several other exceptions are found in only one statute in this group. Thus, additional exceptions, found in the Kentucky statute, occur when:

(c) The testimony is introduced to affect one who is living.

(d) The action is one for negligence, tortious personal injury or death or property damage.

West Virginia has a related exception, though more limited in scope, which allows testimony,

(e) In wrongful death actions provided no testimony is given as to an actual conversation with the decedent.

Further Kentucky exceptions occur when:

(f) Decedent's agent testifies on the matter;

(g) An interested person testifies on the side opposed to the person disqualified by the statute on some matter.

Alabama declares an exception when:

(h) The adverse party calls the disqualified witness.

Nebraska allows an exception when:

(i) The representative introduces a witness regarding the conversation or transaction, but allows testimony only to the specific fact upon which that witness has testified.

Washington allows testimony by an otherwise disqualified person who, as a party of record and with no other interest, is appearing in a representative or fiduciary capacity. This type of exception is apparently designed to facilitate introduction of useful and disinterested testimony by officers of banks and trust companies. It suggests that in drafting a dead man's act one must consider carefully all of the potentially reliable and useful evidence which may be excluded by a general prohibition. Finally, there may be an exception when:

(j) The judge believes exclusion of the testimony will work injustice. (Montana only).

Applying the same approach to group (2), one can produce a composite "statute" of the following sort. The adverse party and any interested person are <u>incompetent generally</u> as witnesses in specified actions <u>unless</u>:

(a) The agent of the deceased testifies to the transaction or conversation between the agent and the disqualified party, in which case the disqualified party may testify to that conversation. This exception is found in five of the eleven statutes in this group. Here, it should be noted

three, those of Illinois, Colorado, and Wyoming are nearly identical in language and exceptions. The other states are Nevada and Indiana. Note that this is not a conversation in which decedent was the participant.

(b) The decedent's deposition is read, in which case testimony may be adduced as to any relevant matter in the deposition. (Illinois, Wyoming, Colo., Ind., and Me.)

(c) Account books are introduced, in which case the disqualified witness may identify them as his or the deceased's or those of some else not present. This simply allows the books to be introduced in evidence. (Ill., Colo., Wyo., Me., Vt.)

Illinois, Wyoming, and Colorado also have exceptions for situations in which the testimony is

(d) To a fact occurring after death of decedent, or when

(e) The opposite party or interested person testifies as to a conversation or transaction with the disqualified party, in which case the disqualified party may testify as to the transaction (Maine has a similar exception) or when

(f) Witness in behalf of the protected party testifies to a conversation or admission by the disqualified party outside of deceased's hearing, in which case testimony may be adduced as to that conversation.

Illinois and Colorado make an exception

(g) When the adverse party calls the disqualified party as a witness.

Colorado has two additional exceptions.

(h) When, in a situation involving a matter occurring before death and in the presence of deceased and a member of deceased's family over age 16 or an heir, legatee, or devisee, over the age of 16, if that person is present or his testimony is procurable, and

(i) Where a defendant survivor's testimony has previously been taken in accordance with statutory rules, in which case it may be read into the record.

Wyoming has two additional, different exceptions. The dead man's act does not apply.

(j) In will cases or

(k) In wrongful death actions.

Vermont allows testimony

(l) To meet living witnesses.

Maine allows an exception when

(m) The protected party is a nominal party only, or

(n) The heirs are opposed to the protected party, in which case an heir may testify if the protected party calls another heir as witness.

When neither party may testify as to certain transactions, conversations, and the like according to statutes which are designated here as belonging to a third group, exceptions are made when:

(a) The opposite party calls the disqualified party (seven of eight jurisdictions).

(b) The decedent's testimony has already been given, either by the decedent himself or through his representative. (Three jurisdictions).

(c) A surviving husband or wife seeks to testify to a transaction or conversation with the decedent regarding property or business interests. (N. Dak.)

(d) The disqualified person is required by the judge to testify. (Ariz.)

Finally there are those few states which prohibit testimony by the adverse party and interested persons as to matters equally within the knowledge of the decedent. Exceptions are made in Michigan when

(a) The deposition, affadavit or testimony of the decedent has been admitted, in which situation the other party may testify upon the same matter and

(b) Testimony of the witness has been taken before decedent's death. Utah allows an exception when

(c) The adverse party calls the disqualified witness.

Finally, one finds that the dead man's statutes are often extremely tortuous in construction. This in itself suggests that the underlying policy to be effectuated is hazy.

Conclusion

In the introduction it was pointed out that the dead man's acts are exceptions to the general extension of competency which occurred in the United States in the latter half of the nineteenth century. The American insistence upon the dead man's exception is anamolous in that its model, English legislation lifting the incompetency bar for parties and interested persons, contains no such exception. The reasoning underlying the statutes in the United States has been broadly assailed, though, as is witnessed by the continued existence of statutes in many jurisdictions, the reasons have not been universally found to be specious. Criticism ought not, however, to rest simply upon the unconvincing nature of the theory of dead man's statutes, but rather ought also to suggest that the existing statutes through their lack of agreement in approach and through the litigiousness they spawn, demonstrate the difficulty of attempting a statutory solution to the problem by means of an incompetency provision (or an exception to competency). The complexity of the approach suggests it is artificial.

The death of a person with information in his possession which is later important in litigation presents problems, some of which can never be solved. Various safeguards against imposition may be propounded, and attention will now be directed to jurisdictions which have not used the traditional sort of statute whose various forms have been examined above.

The most popular of these approaches has been through use of a hearsay exception for the dead man's memoranda or statements as a "counterweight" to the survivor's testimony, which is not rendered incompetent.[2] Note, 62 Dick. L. Rev. 174 (1958). This approach is well endorsed. E.g., McCormick, EVIDENCE 143 (1954); Ladd, Some Further Observations and a Legislative Proposal, 26 Iowa L. Rev. 207 (1941); Ray, Dead Man's Statutes, 24 Ohio St. L.J. 89 (1963). The A.B.A. Committee on Improvements in the Law of Evidence (1938) approved the Connecticut statute, which is a typical formulation:

> "Sec. 52-172. Declarations and memoranda of deceased persons. In actions by or against the representatives of deceased persons, and by or against the beneficiaries of any life or accident insurance policy insuring a person who is deceased at the time of the trial, the entries, memoranda and declarations of the deceased, relevant to the matter in issue,

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[2] For convenience all hearsay exceptions commonly thought of as counterweights to the admission of survivor's testimony are cited only once, in Addendum B.

> may be received as evidence. In actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination upon the application of such trustee or receiver, shall be received in evidence.
>
> "Sec. 52-173. "Entries admissible for those claiming title from decedent. Whenever the entries and written memoranda of a deceased person would be admissible in favor of his representatives, such entries and memoranda may be admitted in favor of any person claiming title under or from the decedent."

Another method of addressing the dead man situation is to allow the survivor to testify without any disqualification or restriction while at the same time requiring corroboration of his testimony. Thus, the New Mexico provision states:

> "Transaction with decedent--Corroboration required. --In a suit by or against the heirs, executors, administrators or assigns of a deceased person, a claimant, interested or opposite party shall not obtain a judgment or decision on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is supported by some other material evidence tending to corroborate the claimant or interested person."

Four states currently have a provision of this type.[3] Three also have a hearsay exception of the type referred to above, as well.

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[3] For convenience all state statutes requiring corroboration of a survivor's testimony are cited only once, in Addendum C.

The corroboration approach, while always mentioned by commentators, has not been well received by them as an alternative to the dead man's statutes. All the questions involved in identifying the elements of a dead man's act situation occur under the corroboration provision along with the added problem of deciding what constitutes sufficient corroboration. Note, 46 Harv. L. Rev. 834 (1933). Courts have not agreed on the answer to this added issue even when interpreting similar statutes. Note, 1 Natural Res. J. 189 (1961). Moreover, ability to produce an independent witness would avoid the survivor's handicap even under the traditional incompetency statute. Lee, The Dead Man's Statute and the Uniform Rules of Evidence, 11 Miami L. Q. 103 (1956). Therefore, further complication without discernible advantage appears to be the only result. However, a 1959 change in the New Mexico statute, aimed at the issue of what amount of corroboration is required, may be interpreted in a way which does substantially change the dead man's statute scheme. Prior to 1959 corroboration of testimony by material evidence was needed. This meant in practice the corroboration of each essential allegation. Now the statute requires corroboration of the claimant, which may mean that only his credibility need be supported. Note, 1 Natural Res. J. 189 (1961). The District of Columbia provision seems to be interpreted with a more lenient attitude than that which

characterizes the earlier New Mexico attitude. Nevertheless, despite a probable easing of the dead man's act strictures, the corroboration requirement has not been enthusiastically received. See, e.g., McCormick, EVIDENCE 143 (1954); Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A. L. Rev. 175 (1957).

A third type of statute is one of disqualification (and hence the citations are included in Addendum A), but with discretion on the part of the judge to admit survivors' testimony. Only Montana and Arizona adhere to this scheme. New Hampshire, which now has only a hearsay exception for decedent's statements, formerly had this kind of provision. Chadbourn, supra. Inevitable formalization of situations in which discretion may properly be employed appears to be the principal drawback here. Note, 46 Harv. L. Rev. 834 (1933).

New Jersey has virtually repealed its dead man's act by providing only for a higher standard of proof in some instances involving lunatics' or decedents' representatives. N.J. Stat., § 2A:81-2 (Supp. 1964), requires that an opposing party establishing a claim or affirmative defense "supported by oral testimony of a promise, statement or act [of a lunatic of decedent] shall be required to establish the same by clear and convincing proof." [Emphasis added.] In many

ways, this statute is the most sensible in that it dispenses with troublesome and outmoded incompetency provisions and substitutes a standard of proof which quite likely suggests itself to a trier of fact anyway. "The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard." McCormick, op. cit. supra.

Certainly it is apparent that the incompetency approach has not led to a satisfactory solution of the problem caused by the death of one connected with the subject matter of a subsequent lawsuit. That the disqualification of testimony is not a particularly useful device is the decision of the drafters of the Uniform Rules and the Model Code. Commentary and criticism add to the strength of that conclusion. Wigmore is critical of the rationale underlying the incompetency perpetuated by dead man's acts, which, in the face of the general competency of witness, he finds "deplorable". Wigmore, EVIDENCE, § 578 (3d ed. 1940). Moreover, a footnote indicates the diversity and intricacies of existing statutes: "the interpreting decisions are not given. . .; first, they depend largely on the wording of the local statute; secondly, they are extremely numerous, and usually cannot be correctly summarized without a voluminous statement of the circumstances of the case and a comparison with the various parts of the

statute, for which the present space does not suffice...." Id. at n. 1. Professor Morgan affirmed that the statutes are generally ineffective and are litigation breeders. Morgan, BASIC PROBLEMS OF EVIDENCE 84 (1954). Dean Ladd bluntly suggests that "if piecemeal change of the law of evidence were to be attempted, their elimination would be one of the first improvements to be made." Ladd, Uniform Rules of Evidence-Witnesses, 10 Rutgers L. Rev. 523, 526 (1956). The American Bar Association Committee on Improvements in the Law of Evidence also was hostile to the statute. 63 A.B.A. Rep. 581 (1938). Individual statutes have been criticized frequently. E.g., Young & Jones, A Code of Evidence for Wisconsin? Rules 9 and 101, Compentency of Witnesses, Interested Survivors, 1947 Wis. L. Rev. 155; Hutchings, 40 Me. Bar Ass'n Proc. 207 (1951). The Illinois statute has been described as "abstruse and technical" in an explication of its interpretations. Uniform Rules of Evidence and Illinois Evidence Law -- Transactions with Deceased Persons, 49 Nw. U. L. Rev. 504, 505 (1954). The editor's note to the Alabama Code states that "few sections in the entire Code have given rise to so many conflicting and inharmonious rulings...." The tricky applications permit, nevertheless, clever falsifications while barring honest claims. See Morgan, Foreward, Model Code of Evidence 16-17

(1942); see also 46 Harv. L. Rev. 834 (1933). Ladd also decries the necessary legislative assumption that dishonesty normally outweighs honesty, as a relic of an earlier day in which the broad interest disqualification statutes existed. Ladd, The Dead Man Statute: Some Further Observations and a Legislative Proposal, 26 Iowa L. Rev. 207 (1941).

The California Evidence Code repeals the dead man's act in that state. Calif. Evidence Code, § 63 (1965). This accorded with the Law Revision Commission's recommendation, based upon its view that "although the Dead Man Statute undoubtedly cuts off some fictitious claims, it results in the denial of just claims in a substantial member of cases. ...[T]he statute balances the scales of justice unfairly in favor of decedents' estates.... Moreover, it has been productive of much litigation; yet, many questions as to its meaning and effect are still unanswered." See also Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A. L. Rev. 175 (1957). Professor Chadbourn concluded that interpretation of the recently repealed statute had been uneven. "Sometimes the courts express sympathy for and approval of the statute. Sometimes they express disapproval and suggest revision or repeal. In sum, there has been and there is no consistent philosophy either in the legislation or in the decisions construing it on the basic question: What if anything, should

be done respecting survivors' testimony in litigation involving estates." Id. at 207. See also Stout, Should the Dead Man's Statute Apply to Automobile Collisions? 38 Tex. L. Rev. 14 (1959) (application said to represent inconsistent, interpretative approach).

While the dead man situation does remove the opportunity for direct refutation, it would seem that there are other inherent safeguards which make disqualification an unnecessarily drastic measure. Thus, the trier of fact will be aware of the opportunity for self-serving testimony and will as a result be more suspicious of that testimony than of statements subject to contradiction by living witnesses. Moreover, cross-examination is available. McCormick, EVIDENCE 143 (1954). Discovery also should not be overlooked. Young & Jones, supra. But see, Lee, The Dead Man Statutes and the Uniform Rules of Evidence, 11 Miami L. Q. 103 (1956) (availibility of refutation deemed crucial). McCormick, moreover, emphasizes that it is honest and not dishonest claimants who are excluded by the present statutes. "One who would not stick at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story." McCormick, supra. This argument is difficult to refute.

Addenda

A. State statutes disqualifying witnesses or testimony: "dead man's acts."

Ala. Code, tit. 7, § 433 (Recompil. 1958).

Ariz. Rev. Stat. Ann., § 12-2251 (1956).

Ark. Const., Schedule, § 2 (1874).

Colo. Rev. Stat. Ann., ch. 154, art. 1, § 2 (1963).

Del. Code Ann., tit. 10, § 4302 (1953).

Fla. Stat., ch. 90, § 5 (1959).

Ga. Code, § 38-1603 (1933).

Ida. Code, tit. 9, § 202 (Supp. 1965).

Ill. Rev. Stat., ch. 51, §§ 2-4, 7 (1963).

Burns Ind. Stat. Ann., § 2-1715 (1933).

Iowa Code, ch. 622, §§ 4-6 (1954).

Ky. Rev. Stat., ch. 421, § 210 (1960).

Me. Rev. Stat. Ann., tit. 16, § 1 (1964).

Md. Code Ann., Art. 35, § 3 (1957).

Mich. Stat. Ann., § 27A.2160 (1962).

Minn. Stat., § 595.04 (1953).

Miss. Code Ann., tit. 10, ch. 8, § 1690 (Recomp. 1956).

Mo. Rev. Stat., § 491.010 (1949).

Mont. Rev. Codes Ann., tit. 93, ch. 701, § 3 (1947).

Neb. Rev. Stat., art. 25, § 1202 (1956).

Nev. Rev. Stat., tit. 4, ch. 48, §§ 10, 30 (1963).

McKinney's Consol. Laws of N.Y. Ann., § 4519 (1963).

N.C. Gen. Stat., ch. 8, § 51 (1953).

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Addenda

N.D. Century Code, tit. 31, ch. 1, § 3 (1959).

Okla. Stat. Ann., tit. 12, § 384 (1960).

Page's Ohio Rev. Code Anno., ch. 23, tit. 17, § 3 (Supp. 1964).

Purdon's Pa. Stat. Ann., tit. 28, §§ 322-26 (1930).

S.C. Code of Laws, tit. 26, § 402 (1962).

Tenn. Code Ann., tit. 24, §§ 104-05 (1955).

Vernon's Tex. Stat., Art. 3716 (1936).

Utah Code Ann., tit. 78, ch. 24, § 2 (1953).

Vt. Stat. Ann., tit. 12, §§ 1602-03 (1959).

Wash. Rev. Code, tit. 5, § 60.030 (Supp. 1956).

W. Va. Code Ann., ch. 57, Art. 3, § 5726 (1961).

Wis. Stat., ch. 325, §§ 16-7 (1955).

Wyo. Stat., tit. 1, § 140 (1957).

D. State provisions admitting hearsay statements of decedent as counterweight to admission of survivor's testimony.

Alas. Rules of Civ. Pro., Rule 43(g)(4)(Supp. 1964).

Calif. Evidence Code, § 1261 (1965).

Conn. Gen. Stat., ch. 899, tit. 52, § 172 (1958).

Kan. Laws, § 60-460(d)(Rev. 1963).

Mass. Laws Ann., ch. 233, §§ 65-6 (1956).

N.H. Rev. Stat. Ann., ch. 516, §§ 25-6 (1955).

Ore. Rev. Stat., ch. 41, § 850 (1963).

R.I. Gen. Laws, tit. 9, ch. 19, §§ 9-11 (1956).

S.D. Code, § 36.0104 (Supp. 1960).

Addenda

C. State provisions allowing a survivor to testify but requiring corroboration.

D. C. Code, § 14-302-04 (Supp. IV 1965).

La. Rev. Stat., tit. 13, §§ 3721-22 (1950).

N.M. Stat. Ann., ch. 20, § 2-5 (Supp. 1965).

Va. Code Ann., tit. 8, § 286 (1950).

First draft

Rule 6-02. General grounds for disqualification. A person is disqualified to be a witness with respect to a matter:

(a) Lack of sense of duty to tell the truth. If evidence, including his own testimony, is introduced which reasonably permits the judge to make no finding other than that he lacks a sense of the duty of a witness to tell the truth concerning the matter; or

(b) Lack of personal knowledge. Unless evidence, which may consist of his own testimony, is introduced sufficient to support a finding that he has personal knowledge of the matter; or

(c) Lack of expertness or experience. Unless the judge finds from evidence introduced, including the testimony of the proposed witness, that he possesses sufficient special knowledge, skill, experience, training, or education, if the same is required in order to lend significance to his testimony.

Comment

Subsection (a)

The components which make up the probative force of testimony as distinguished from other forms of evidence have been considered to be the initial perception of the event by the witness, his recollection of it, and his narration of it. See 2 WIGMORE § 478. If any one of these components is totally lacking, then it seems apparent on the face of things that the testimony is really not testimony in any serious sense and must, in any event, be considered wholly worthless. If any component is present but less than completely, then the value of the testimony, though pro tanto impaired, is not destroyed. The foregoing assumes an honest witness, performing to the full measure of his capabilities, both past and present. If he is not honest, his intentional deceit, depending upon its impact upon his narration may merely impair or it may fully destroy probative value. In the latter situation, the devaluation of the testimony results from a moral defect in the witness, rather than lack of capacity. This analysis is obviously an over-simplification, since it ignores such grey areas as the effect of interest upon perception, memory, and narration, and the like. However, it affords an adequate working background for considering problems which relate to the mental and moral qualities of witnesses.

Essentially these problems revolve around the question whether mental incapacity and moral deficiency properly involve competency, which is by tradition a matter for the judge, or credibility, which is by tradition a matter for the jury, or both. Since the traditional allocation of functions which assigns to juries the task of assessing the credibility of a witness in terms of his willingness and ability to tell the truth can scarcely be considered open to debate, the only question which requires consideration is whether the trial judge functions usefully in screening out testimony because the witness is deficient in mental capacity or sense of moral responsibility. Should the tradition that the judge determines competency and the jury credibility be retained, or should the whole matter be relegated to the area of weight and credibility, with the functions of judge and jury recast accordingly?

Under the early common law, insane persons and idiots were wholly disqualified to testify. This rule of total disqualification, along with the classification of derangement in terms of absolutes, has disappeared. Insofar as any rule of disqualification on account of derangement or mental defect survives, the evaluation is made with respect to the specific subject of testimony, rather than generally. 2 WIGMORE § 492.

Wigmore describes mentality qualifications in current practice in terms of capacity. If the witness at the time of the event lacked capacity to observe, or if he now lacks capacity to recollect, or if he now lacks capacity to understand questions and to give intelligent answers, he is incompetent. Id. §§ 493-495. The judge makes the determination. Id. § 497. If, however, the judge finds him capable in all three respects, the question once having been raised, then the facts of the actuality and adequacy of his observation, recollection, and narrative are for the jury.

Somewhat the same pattern emerges with respect to children as witnesses, with the element of uncertainty shifting from difficulties in evaluating the bearing of particular types of mental illness upon testimonial capacity to difficulties in assessing the impact of being very young. According to Wigmore, the earlier common law decisions failed to make any clear differentiation between the mental capacity of a child to testify and his capacity to take an oath, though in any event it is settled that capacity is not automatically achieved at any given age but is a question to be determined individually as to each child. 2 WIGMORE § 505. A presumption of incompetency, sometimes as to children under 14, and certainly as to children under seven, has been recognized. 2 WIGMORE §§ 508, 1821. According to a summary of legislation

regarding child witnesses, no statute prescribes an age below which children are incompetent per se, but a large number raise a presumption that children under 10 years of age, or sometimes 12 years, are incompetent. Note, 10 Va. L. Rev. 358 (1953).

A leading commentator observes that few witnesses are ruled to be disqualified on grounds of mental incapacity. Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53 (1965). This observation is borne out by the decisions summarized in the footnotes supporting the Wigmore sections cited above. While the matter is said to be largely within the discretion of the trial judge, that discretion seems almost always to be exercised in favor of allowing the testimony. Cases are found in which children as young as four years of age (and of course considerably younger when the event transpired) were allowed to testify. Cf. O'Shea v. Jewel Tea Co., 233 F.2d 530 (7th Cir. 1956), wherein the trial judge struck all testimony of an 84-year old physician who testified that he could remember some things about plaintiff's case but not others, and was reversed.

The elusive nature of the traditional standards, together with the infrequency with which they have found effective application, particularly in recent years, raises a most substantial doubt whether mental capacity merits being preserved as a prerequisite to competency to be a witness.

The two cases which follow may be illuminating. In Schneiderman v. Interstate Transit Lines, 394 Ill. 569 69 N.E.2d 293 (1946), plaintiff in an automobile collision case testified in part:

> Q. When did you go to the Cook County Hospital? Ans. Right arm and brain. Q. Do you remember when you went to the County Hospital? Ans. One day.... Q. Then after you were in the Cook County Hospital, where did you go? Ans. Five weeks, Cook County, five weeks. Q. Well, from Cook County Hospital, where did you go? Ans. Oak Park Hospital, thirteen days, and County Hospital five weeks. Q. Where did you go from County Hospital? Ans. I was going to take light, doctor, light. Q. You went to Dr. Light? Ans. Yes, green. Q. Green light? Ans. Light. Q. Was that the name of your doctor at Cook County Hospital? Ans. No, no. Six days. Light. Q. Light for six days? Ans. Kalamazoo. (326 Ill. App. 1, 7, 60 N.E.2d 908, 910).

According to medical testimony, due to the head injury sustained, he suffered from aphasia, i.e. inability to coordinate thoughts and words, his speech was involved, his mental condition was disturbed, he could not repeat simple phrases, his judgment was poor, and he could not recall events or names correctly. The Appellate Court ruled that he was incompetent and his testimony must be disregarded, leaving him without sufficient evidence to support the verdict in his favor. This ruling was in turn reversed by

the Supreme Court of Illinois, which held that the testimony was not without value and should be considered for what it was worth.

People v. McCaughan, 49 Cal. 2d 409, 317 P.2d 974 (1957), was a prosecution of an attendant in a mental institution on a charge of causing the death of a patient through use of excessive force in feeding the patient. The trial judge admitted, for the state, the testimony of certain other patients who had histories of delusions relating to food and to persecution by hospital personnel. Reversing on other grounds and remanding for a new trial, the Supreme Court of California issued an admonition to the trial judge that the exercise of sound discretion required great caution in qualifying, as competent, witnesses with histories of insane delusions relating to the very subject of inquiry. The trial judge could scarcely have read the opinion except as a direction not to allow these witnesses to testify.

Two cases with stronger grounds for disqualification on account of lack of mental capacity could scarcely be found. Yet both seem to require the conclusion that the testimony ought to be admitted for what it is worth, against a background of full examination and cross-examination and complete disclosure of the mental disability of the particular witness. A witness wholly without capacity is difficult to

imagine. Moreover, it is far from clear how or why a trial judge is better equipped in these matters than a jury. Frank recognition that the concept of mental capacity as a qualification has small basis in reality calls for its abandonment. This would not, however, impair the trial judge's authority to consider the weight and sufficiency of the evidence as a means of controlling juries.

Wigmore, after describing the practice relative to mental capacity as a requirement of competency, then expressed his own views in vigorous terms:

> The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible. The subject is not one which deserves to be brought within the realm of legal principle, and it is profitless to pretend to make it so. Here is a person on the stand; perhaps he is a total imbecile, in manner, but perhaps, also, there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it. The step was long ago advocated by the English commission of judges, in their proposals of reform, and has been approved by two such distinguished writers on the law of Evidence as Mr. Best and Mr. Justice Taylor. (2 WIGMORE § 501)

At a subsequent point he continued in the same vein regarding children:

> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure 'a priori' the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable. The desirability of abandoning this attempt and abolishing all grounds of mental or moral incapacity has already been noted, in dealing with mental derangement (ante, § 501). The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come. Id. § 509.)

To the same effect, see McCORMICK § 62.

Consistently with the foregoing views, the draft rule contains no provision requiring any measure of mental capacity as a condition precedent to the giving of testimony.

This approach is at variance with that of the Uniform Rules. It might be expected that a rule would either embrace no requirement of mental capacity or spell one out in conventional terms of perception, memory, and narration. Uniform Rule 17(a), which follows Model Code Rule 101(b), does neither. Instead it singles out the single element of

narration and sets forth inability to express oneself as a ground of disqualification. Perception and memory are not mentioned. The comments to the Model Code and to the Uniform Rule afford no explanation of this pattern. To say that a person cannot express himself except as to things seen and remembered and hence that perception and memory, are not in fact excluded from consideration seems to be too contrived an argument to be taken seriously. It is true that capacity to perceive becomes unimportant when it merges into the actuality of having in fact perceived, and Uniform Rule 19 requires evidence of personal knowledge in order to qualify as a witness. The actuality of perception, however, is a jury question, with the judge's function being only to decide whether evidence sufficient to support a finding of perception has been introduced. See California Law Revision Commission Study, IV. Witnesses 731 (1964). California Evidence Code §.701(a) is substantially Uniform Rule 17(a). The comment thereto offers no justification for retaining capacity to narrate as a technical qualification but does suggest that changes from existing law are of slight practical significance, since in practice the California courts have permitted children of very tender years and persons with mental impairments to testify.

The question of moral qualification to be a witness remains to be considered. Should a requirement in terms of sensitivity to the duty of a witness to tell the truth be imposed? A provision along this line is found in Uniform Rule 17(b), taken from Model Code Rule 101(b), and is incorporated in California Evidence Code § 701(b). This provision is phrased in terms of capacity to understand the duty of a witness. Since it is the actual moral sense which furnishes the underpinnings of the testimony, rather than mere capacity to understand the moral duty, capacity here seems to be irrelevant. Wigmore discusses the matter in terms of the sense of moral responsibility, rather than capacity, and suggests that "the clear absence of such a sense would disqualify the witness." 2 WIGMORE § 495, §. 587.

Whether the moral qualification can be distinguished from requirements of mental capacity presents some difficulty. Certainly a measure of understanding is a prerequisite to an awareness of the duty. If the courts have not drawn a satisfactory line, the reason may be because none can be drawn. While definite techniques of impeachment have evolved, efforts to fashion adequate threshold standards of moral adequacy remain unimpressive.

> Minimum moral qualification generally rests upon an assumption or a solicited verbal statement indicating the witness is aware

> that some form of punishment may be expected to follow a failure to speak truthfully when committed to do so. A typical examination of moral qualifications as an aspect of testimonial capacity will ask in approximate language, "Do you know what happens to anybody who tells a lie?" If the witness, who in most instances is a child, gives a response indicating that punishment is the consequence, the court may draw from this and related response the impression that the witness can and will act on the witness stand under moral restraint.... The moral commitment presumably is directed to the motive of the witness rather than to his intellectual capacity.... It may not be reasoned that moral obligation prevents a failure of truth accountable to a lack of intellectual capacities to recognize it sufficiently, unless moral capacity is based on a presupposition of intellectual capacities. The theory of the law on this point is not altogether clear." Redmount, The Psychological Bases of Evidence Practices: Intelligence, 42 Minn. L. Rev. 559, 563 (1958).

Despite the seeming interrelationship between mental capacity and moral sense, rejection of the former does not require rejection of the latter as a standard of qualification. Doubts as to mental capacity can be adequately exposed and explored on cross-examination, regardless of any voir dire inquiry. The preliminary examination as to moral qualifications, however, may serve as a valuable opportunity to impress upon the witness the nature of his obligation. When so viewed, the essential illogic of a procedure which evaluates a person's truthfulness in terms of his own answers about it, and the practical difficulties of applying a standard, recede somewhat in importance. Proposed Rule 4-02(a) has been drafted with these considerations in mind.

Some further observations should be made. Under the proposed rule, all witnesses would be considered competent in the absence of a showing to the contrary. The proposal places the burden, and a fairly heavy one, on the proponent of incompetency. The judge makes the determination. The proposal is phrased in terms of a sense of the duty of a witness rather than in the traditional language of comprehending the nature and obligation of an oath. There are several reasons for this departure. A definition in terms of the oath is inappropriate when witnesses are permitted also to affirm or even to testify with neither oath nor affirmation. The concept of an oath is sophisticated and quite likely beyond the reach of a witness who is perfectly able to grasp the duty to speak the truth, as is demonstrated by many of the cases of child witnesses. The concept of an oath may, on the other hand, lie beyond the beliefs of a very sophisticated witness. The proposal does not involve doing away with the requirement of testifying under oath or affirmation, which will be covered in a later rule.

Subsection (b)

The requirement of personal knowledge involves, as Wigmore points out, not absolute knowledge but what the witness thinks he knows; it is concerned with opportunity to observe and actual observation. 2 WIGMORE § 650. McCormick

speaks of "the rule requiring a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" as a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCORMICK § 10, p. 19. Certainly the requirement, properly construed, is of universal application. The problem is to insure proper construction.

The two areas in which misunderstanding must be guarded against are the hearsay exceptions and expert opinions. With respect to the hearsay exceptions, if it is borne in mind that the matter about which the witness is testifying is the making of the hearsay statement ~~itself~~, and not what is asserted in the hearsay statement, no difficulty arises. With respect to expert opinions, likewise no problem arises if the opinion, rather than its basis, be taken as the subject of the testimony. The California draftsman felt, however, that liberalization of the bases of expert testimony (herein contemplated by proposed Rule 7-03) by allowing experts to base opinions on matters reasonably relied upon by experts, though not admitted or admissible in evidence, called for a specific exception. For several reasons the Reporter has not followed that pattern. Cross-reference ought to be avoided whenever

possible. If a conflict does exist, it is readily resolved by applying the role that the specific controls the general. Consistency might also require a particular reference to hearsay exceptions, with attendant undue complication of the rule.

Uniform Rule 19 treats personal knowledge and expertness together. It is believed that some clarity is gained by separating them. See California Evidence Code §§ 701, 801; Model Code Rules 104, 402. The provision in the proposal that evidence must be introduced sufficient to support a finding of personal knowledge is in language employed in comparable situations in these rules (see Rule 9-01, Second Draft), specifies the quantum of evidence, and clearly empowers the judge to reject it if it could not reasonably be believed. It is believed to be an improvement over Uniform Rule 19.

Subsection (c)

This proposed subsection restates existing law. Experience by a witness beyond what may fairly be attributed to the ordinary run of persons is necessary in essentially two situations: first, where the function of the witness is to put the trier of fact in possession of specialized or technical knowledge needed for an evaluation of the facts in

the case, and second, where the witness needs a measure of particularized experience in order to lend meaning to his own observations. In the first category may be placed expert witnesses generally, and in the second those witnesses who relate such things as speed of vehicles or identification of handwriting on the basis of previously acquired familiarity. See 2 WIGMORE § 556. Whether a proposed witness is possessed of the experience, whether by way of education or otherwise, thus needed to lend significance to his testimony, has been regarded as a matter largely within the discretion of the judge. McCORMICK § 13; 2 WIGMORE § 561.

The proposal follows the substance of Model Code Rule 402, which makes the decision as to whether an expert is qualified one for the court. The Uniform Rules leave the matters somewhat in doubt. Uniform Rule 19, read alone, states that "there must be evidence" that the witness has the experience of an expert. This would seem to contemplate sufficient evidence to support a finding, at which point the judge's function would terminate. Compare Uniform Rule 8 to the effect that when "the qualification of a person to be a witness...is...subject to a condition," the judge determines whether the condition has been fulfilled.

The policy of leaving the qualification of experts to the discretion of the judge seems to have worked well in practice, and there is no reason to disturb it.

A relocation of this subsection might be advantageous. It does not involve a general problem of qualification but only one peculiar to certain kinds of witnesses. It might be more logically transferred to the topic of opinion and expert testimony, with the added advantage of being more readily found.

First draft

Rule 6-03. Oath or affirmation. Before testifying, every witness shall be required to ~~express his purpose to~~ make that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind ~~in accordance with his religious or ethical beliefs.~~ with his duty to do so.

Comment

The requirement that witnesses be sworn is of ancient origin and so deeply imbedded in our jurisprudence that the only problem is that of making it consistent with the views of the modern world. The practice of swearing witnesses in the federal courts seems to rest upon common law foundations. No statute so requiring is found, although there are ample manifestations of a basic assumption that a mandatory requirement exists. Thus "oath" is stated to include affirmation, 1 U.S.C. § 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. §§ 459, 953; affirmations may be accepted where oaths are required under the civil rules, F. R. Civ. Proc. 43(d); and perjury by a witness is a crime, 18 U.S.C. § 1621.

Certainly no stimulus to truthfulness ought to be omitted, and the oath should be left intact with respect to those witnesses whom it may reasonably be supposed to influence. However, it ought not to be used as excluding three groups of persons who were once foreclosed from testifying: atheists, infants lacking religious beliefs, and those forbidden by conscience to take an oath. Affirmation has now for a long time been permitted in these cases in many jurisdictions. See the federal statutes and rules above cited. Affirmation, properly viewed, is simply a solemn undertaking to tell the truth, and no special verbal formula is required. The language of the proposed rule is derived in part from Model Code Rule 103 and in part from N.Y. C. P. L. R. § 2309(b). It is designed to afford the flexibility demanded in dealing with the religious adult, the atheist, the conscientious objector, the mental defective, and the child. If they have the sense of duty required by proposed Rule 4-01, they can be reached under the present one. Cf. Uniform Rule 18.

The proposal makes no effort to deal specially with the child witness, on the theory that an appropriate form of undertaking by him to tell the truth is within the rule. The Committee may, however, wish to take note of certain special legislation on the subject. The New York Code of

Criminal Procedure § 392 provides that when the judge is of opinion that a child under 12 does not understand the nature of an oath, its evidence may be received if the judge is of the opinion that it is possessed of sufficient intelligence to justify reception of the evidence, though no conviction can stand on the basis of such testimony unsupported by other evidence. The New York statute apparently dates back to 1881. A similar English statute originated in 1885, St. 48 & 49 Vict. c. 69, § 4, found in modern version in Stats. Revised, 1933, c. 12, § 38. See note, 114 L. J. 331 (1964). The Canadians adopted the same statute but deleted the provisions restricting applicability to criminal cases with appropriate substitutions. Canada Evidence Act, R. S. C. 1952, c. 307, § 16. In the view of the Reporter, these provisions involve needless complications.

Rule 6-04. Interpreters. When an interpreter is necessary to enable a witness to testify understandably or to enable a party to understand the proceedings, the judge may appoint an interpreter of his own selection and fix his reasonable compensation. In civil cases, the compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately costs, in the discretion of the court. In criminal and commitment proceedings, the compensation shall be paid out of funds provided by law or by the government, as the court may direct. An interpreter is subject to the provisions of these rules relating to witnesses.

Comment

The need for an interpreter may arise from a communication disability on the part of either a witness or a party. The disability commonly results from a physical impairment of speech or hearing, or from the lack of a common language. 3 WIGMORE § 811, 5 id. § 1393. The only real question to be considered is the amount of detail with which the subject should be covered in these rules.

Currently both the Federal Rules of Civil Procedure [Rule 43(f)] and the Federal Rules of Criminal Procedure [Rule 28(b)] contain provisions authorizing the appointment of interpreters, added by the 1966 amendments. Neither makes any effort to spell out the circumstances under which an interpreter is required, and it may well be that none is needed. The first sentence of the proposal, however, points out that the need for an interpreter may be occasioned by either a handicapped witness or a handicapped party, and then continues in the language of the two existing Federal rules mentioned above. The second and third sentences of the proposal are respectively the final sentences of the same two rules, with introductory language indicating the kinds of proceeding to which applicable. The final sentence of the draft is the final sentence of Uniform Rule 17 [semble Model Code Rule 102(2)], with the word "all" deleted as inappropriate. It is included primarily to make clear that interpreters are to be sworn or to affirm, require a demonstrated expertness, and so on.

The Committee may conclude that the subject of interpreters is adequately covered in the present Federal Civil and Criminal Rules and should be left undisturbed, without mention in the Rules of Evidence. In the view of the Reporter, however, some gain results from transferring the topic to the Rules of Evidence and expanding its treatment to the extent set forth in the proposal. The matter is essentially one of evidence; access to the provisions is facilitated; some additional clarification results.

A more detailed coverage seems to involve unwarranted complications. The proposal may be compared with California Evidence Code §§ 750-754. These provisions deal with both witnesses and translators. Section 750 provides that they are subject to all rules of law relating to witnesses, conformably to the last sentence of Uniform Rule 17 and of the rule here proposed. Section 751 specifies in detail special oaths to be taken by each. Section 752 provides for the appointment of an interpreter when the witness labors under specified disabilities. Section 753 provides for the appointment of a translator when a writing cannot be deciphered or understood directly. Section 754 provides for the appointment of an interpreter when a deaf person is charged criminally or sought to be committed. Several comments may be made concerning these provisions. First, as to translators, no special treatment of them is necessary, since ordinarily one or both parties will offer translations prepared in advance by translators employed by them who will testify and qualify as witnesses. Section 753 is susceptible of being read as requiring that all translators be sworn in advance, like interpreters. Documents and witnesses do not require

the same treatment. In the rare case where a court-appointed translator is needed, the provisions for appointment of experts generally will take care of the situation very adequately. Second, the specification of a particular oath appears needless in view of the language of proposed Rule 4-03, providing for oath or affirmation in a form best calculated to bind the conscience of the witness. The oath form of California § 751(a) is, incidentally, in language not quite appropriate to the case of a deaf person who is an accused or the subject of commitment proceedings. Third, no provision is made for the difficulties of a person with communication handicaps who is an accused or the subject of commitment proceedings if his handicap is other than deafness. Thus no provision is made with respect to those persons whose disability arises from speaking only a language other than English. If the Committee wishes the matter of interpreters and translators, or either, to be treated more in detail, the California provisions may furnish a guide, but the deficiencies noted should be remedied.

First draft

Rule 6-05. Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. If he is called to testify, no objection need be made in order to preserve the point for review.

Comment

A federal judge is required to disqualify himself in "any case in which he . . . is or has been a material witness . . . ." 28 U.S.C. § 455. In view of this provision, the likelihood that the presiding judge in a federal court might be called upon to give testimony in the trial over which he is presiding appears to be slight. Nevertheless, the possibility cannot be regarded as wholly nonexistent, and wisdom would seem to lie in the direction of adopting a rule to govern the unusual situation.

The over-all problem is susceptible of being treated in several ways. (1) A broad rule of incompetency. A special committee of the American Bar Association reported the law to be so. Report of Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950). The cases in 157 A.L.R. 311 support this position, absent a controlling statute. The Report is quoted and other authorities collected

in Maguire, Weinstein, et al., CASES ON EVIDENCE 884-886 (5th ed. 1965). (2) A rule of incompetency as to material matters. This approach is consistent with but not necessarily required by the Act of Congress quoted above, which specifies disqualification only when the judge is a material witness. (3) A rule recognizing discretion in the judge as to his handling of the situation. Statutes not uncommonly are to this effect. 157 A.L.R. 311. The now supplanted California Code of Civil Procedure § 1883 was of this character. See California Law Revision Commission Study, Article VI. Extrinsic Policies Affecting Admissibility 609, 636 (1964). (4) A rule of general competency. McCormick describes this as the older view and as the tenor of some statutes. McCORMICK 147.

The proposal adopts the first of these treatments, i.e. complete incompetency. This position is the result of inability to evolve satisfactory answers to the following questions which arise when the judge abandons the bench for the witness stand: Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial,

avoid entangling himself in the process of presenting facts to an extent destructive of impartiality? Wigmore thought the matter should be left to the discretion of the judge. 6 WIGMORE § 1909. McCormick favored the rule of complete incompetency, on the grounds that allowing the presiding judge to testify is inconsistent with his role of judge, that the line between material and merely formal matters is not easily drawn, and that if a matter is merely formal it can usually be proved by other witnesses. McCORMICK 147.

The proposal is in accord with Uniform Rule 42 in adopting the approach that the judge is incompetent. In contrast, Model Code Rule 302 provided that the judge should not, over objection, continue as judge if he testified to a disputed material matter. This approach is considered unacceptable in view of the discussion in the preceding paragraph.

Once the decision is reached in favor of a rule of incompetency, the troublesome problem remains of the mechanics of handling the situation when it arises. Uniform Rule 42 provides that the judge is incompetent "against the objection of a party." Under this provision a party can, by calling the judge, force upon his opponent a hard choice between not objecting, which would result in allowing the testimony, and objecting, which would result in excluding

the testimony but at the price of continuing the trial before a judge who might well feel that the objecting party had reflected upon his integrity. The California draftsmen sought to resolve the dilemma by adopting the Uniform Rule with the addition of a provision that upon the making of the objection the judge should declare a mistrial. California Evidence Code § 703(b). This solution likewise empowers the party calling the judge to confront his opponent with a hard choice, which now becomes one between not objecting, with the result again of allowing the testimony and objecting, with the different but still undesirable result of the hardship and expense of a new trial attendant upon a mistrial. The latter has overtones of double jeopardy in criminal cases. See, e.g., Commonwealth ex rel. Montgomery v. Myers, 422 Pa. 839, 220 A. 2d 859 (1966), suggesting that double jeopardy may bar a re-trial when a mistrial results from the deliberate act of the prosecutor. The California Evidence Code, § 703(c), purports to deal with this problem by providing that the calling of the judge is deemed a consent to a mistrial and the making of an objection is deemed a motion for a mistrial. It may be doubted whether a court would be thrown off a strong constitutional scent by this contrived disguise.

It is the act of calling the judge which brings the problem into existence. Once a party has called the judge, no really satisfactory solution seems to be at hand. Hence,

the best solution seems to lie in the direction of discouraging parties from calling the judge in the first place. The most effective way of achieving this objective is to preserve the error without the necessity of making any objection at the trial. While "automatic" objections ought in general to be avoided, a parallel is found in Uniform Rule 43, which omits any requirement of an objection when a juror is called as a witness in the trial. The case of the judge as a witness is believed to call for the same treatment, and the second sentence of the proposal is designed to set at rest any doubt concerning the matter by putting it in the category of "plain error." See Rule 52(b), Federal Rules of Criminal Procedure.

First draft

Rule 6-06. Competency of juror as witness.

(a) At the trial. A member of the jury may not testify as a witness in the trial of the case in which he has been empaneled and is sitting as juror. If he is called to testify, no objection need be made in order to preserve the point for review.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment of a juror may not testify concerning the effect of anything upon his mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or statement by received for these purposes.

Comment

Subsection (a)

The considerations bearing upon the permissibility of testimony by a juror in the course of the trial on which he sits as juror differ only in detail from those evoked when

the judge becomes a witness. Hence the discussion contained in the Comment to proposed Rule 6-05 becomes relevant here. The present proposal follows the pattern of that rule in adopting Uniform Rule 43, with the addition of the second sentence for reasons previously indicated. Compare California Evidence Code § 704 and Model Code Rule 302.

Subsection (b)

A familiar rubric, dating from the time of Lord Mansfield, is that a juror may not impeach his own verdict. The matter, however, is not that simple. Whether testimony, affidavits, or statements of jurors offered for the purpose of invalidating or supporting a verdict or indictment should be received in evidence at all, and if so, under what circumstances, has given rise to substantial differences of opinion.

Before turning to considerations of policy, some illumination of the problem may be gained from examining into the kinds of situations which arise. An exhaustive catalog of the grounds for setting aside verdicts would exceed the proper scope of this study, but a fair sampling should serve the purpose. Matters which might be urged to impair a verdict may be grouped in a rough chronological pattern. Some of the illustrations are susceptible of being placed in more than one category. At best, the categories are inexact. They are:

(1) Falsely answering on voir dire; (2) error at the trial (inadmissible evidence received, improper argument, incorrect instructions); (3) entire jury receiving information, usually but not always of an inadmissible character, through channels other than presentation as evidence in regular course of trial (prior convictions, indictment for another offense, using dictionary to ascertain meaning of disputed term in contract, referring to book for reaction time in braking automobile, unauthorized view by one juror who describes to all); (4) same but as to one juror only (unauthorized view); (5) extraneous influences (bribery, newspaper stories commenting on weight or credibility of evidence, misbehavior of bailiff); (6) misconduct of jurors (separation during retirement); (7) improper method of reaching verdict (majority, quotient, chance); (8) improper mental operations and emotional reactions (misunderstanding or disregard of evidence, misunderstanding or disregard of instructions, considering election of accused not to take the stand, belief that recommending mercy would avoid death penalty, being overcome by weariness, being overcome by unsound arguments of other juror).

The values sought to be promoted by a policy of excluding evidence of any of the foregoing include freedom of deliberation, the stability and finality of verdicts, and the protection

of jurors against annoyance and harassment. McDonald v. Pless, 238 U.S. 264 (1915). On the other hand, simply putting a verdict beyond all reach can only result in injustice and irregularity. It seems obvious that some accommodation must be sought.

The authorities are in virtually complete accord that failure to reach a verdict on a sound mental and emotional basis, number (8) above, is not a proper subject of proof. Fryer, Note on Disqualification of Witnesses, SELECTED WRITINGS ON EVIDENCE AND TRIAL 345, 347 (1957); Maguire, Weinstein, et al., CASES ON EVIDENCE 887 (1965); 8 WIGMORE McNaughton rev. 1961) § 2359. Wigmore justifies exclusion on the grounds that to permit the evidence would involve "the loss of all certainty in the verdict, the impracticability of seeking for definiteness in the preliminary views, the risk of misrepresentation after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict were allowed to effect its overthrow." Id. Perhaps a more convincing reason is that mental operations and emotional reactions are highly subjective and peculiarly within the knowledge of the individual juror and no one else. If these matters are provable to upset a verdict, the evidence must consist either of the testimony of the juror or of proof of statements by him. In

either event, the stability of the verdict is put completely at the mercy of the juror, and tampering and harassment are invited. The ease with which jurors may be approached and convinced of having made a mistake is illustrated by Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964), a negligence action by guest passengers, in which an attack upon a verdict for plaintiffs was based upon identical affidavits by all jurors that they agreed that defendant was not guilty of gross negligence but felt that plaintiffs should recover something. The court refused to disturb the verdict. See also Davis v. State, 328 S.W. 2d 315 (Tex. Cr. App. 1959), in which the trial judge denied a motion for new trial supported by an affidavit that the jurors had "received other and new evidence" from a fellow juror in the form of a statement that the accused had probably been committing the same kind of offense previously. The reversal of this latter ruling can best be explained in terms of the peculiar Texas practice in this area. Note, 25 U. Chi. L. Rev. 360 (1958).

In addition to number (8), similar considerations would seem to apply to number (4) of the enumeration above, i.e. the obtaining of information irregularly by one particular juror only. Since the factors militating against admission of the evidence in this instance, however, are not present when the witness is a non-juror, the rule of exclusion should

close the language of the rule covers (4)?

be phrased in terms of incompetency of the juror rather than exclusion of the evidence without regard to source. The fact that, as a practical matter, the sole source of information as to the mental operations and emotional reactions of a juror is the juror himself, either through his testimony or statements, suggests dealing with the entire matter in terms of incompetency. This is the approach taken in the proposal. It has the added advantage of dealing with the problem in the familiar language of the incompetency of the juror to impeach his verdict.

Outside the area of mental operations and emotional reactions, discussed above, the pattern of the authorities is less certain. Probably the weight of the cases is against permitting a juror to disclose what transpired in the jury room, though testimony as to irregularities occurring there is allowable if from other witnesses. With respect to allowing a juror to testify concerning irregularities which took place outside the jury room, the authorities are divided. Maguire, Weinstein, et al., CASES ON EVIDENCE, 888 (1965); 8 WIGMORE § 2354; Model Code of Evidence, Rule 301 Comment.

Using the door of the jury room as the dividing point has not proved satisfactory. The Supreme Court has refused to accept it. Compare Mattox v. United States, 146 U.S. 140 (1892), setting aside a verdict in a murder case on the basis

of jurors' affidavits that a highly prejudicial newspaper account had been read to the jury during their deliberations, and McDonald V. Pless, 238 U.S. 264 (1915), refusing to allow the testimony of a juror that the verdict was a quotient, reached pursuant to agreement to abide by an average. In both cases the jury room was the scene of the alleged impropriety.

The trend over the years has been in the direction of allowing the testimony of jurors as to all irregularities, except those whose existence can be determined only by exploring the consciousness of a single particular juror. The old leading cases are Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866), and Perry v. Bailey, 12 Kan. 539 (1874), pointing out that it is the fact of irregularity which avoids the verdict, that the best source of proof is the jurors themselves, and that no risk of abuse is present when the matter is something overt, not resting solely in the consciousness of a particular juror. Both cases are quoted at length in 8 WIGMORE § 2353 (McNaughton rev. 1961). More recently, the case attracting the most attention is State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955), also quoted in Wigmore, id., and commented upon in numerous law reviews. The court reversed the trial judge's denial of a motion for new trial supported by the affidavit of a juror that the jury had been present in

the courtroom when accused pleaded to a different indictment and had discussed it during their deliberations. The opinion, by Mr. Justice Brennan, is a vigorous attack upon the traditional rule against allowing jurors to impeach their verdict. It calls attention to the unwisdom of allowing the testimony of a tompeepingbailiff or other spying court officer (or chance Zaccheus) but of disallowing the testimony of those who really know what happened. The opinion then rejects any distinction between matters taking place within and without the jury room and concludes that the proper dividing line for impeaching testimony is between mental processes on the one hand and the existence of conditions or the occurrence of events calculated to exert an improper influence on the verdict, on the other hand.

The proposal accepts these arguments and imposes no incompetency beyond matters lying only within the consciousness of an individual juror. It will be observed that the effect of the proposal is also to exclude testimony as to mental processes and emotional reactions when offered to <u>support</u> a verdict, e.g. testimony by a juror that he was not influenced by an erroneously admitted item of evidence or an improper argument. While it is true that the exclusion of the evidence leaves the question of actual effect unanswered except somewhat speculatively by reference to what it might be expected to be on a hypothetical reasonable man or jury, the perils

inherent in admitting the evidence, whether to impeach or support the verdict, are believed to predominate.

The proposal follows Uniform Rule 41 except for being phrased in terms of incompetency rather than admissibility. The proposal is also consistent with Model Code Rule 301.

Once having stated what is prohibited, the question remains whether the rule should also state what is permitted. Model Code Rule 301, in addition to excluding evidence of the juror's mental processes, expressly provides that any witness, including a juror, may testify to any other material matter, including "any statement or conduct or condition of any member of the jury, whether the matter occurred or existed in the jury room or elsewhere; and whether during the deliberations of the jury, or in reaching or reporting its verdict or finding . . . ." Uniform Rule 44 approaches the question in more diffident fashion by stating that the rules (a) do not exempt a juror from testifying to these matters if the law of the state permits, and (b) do not exempt a grand juror from testifying in a lawful inquiry. The actual content of these provisions is obviously slight. The New Jersey draftsmen included an affirmative provision phrased in terms of admissibility rather than competency, but otherwise similar to Model Code Rule 301. Report of New Jersey Supreme Court Committee on Evidence 79 (1963).

California Evidence Code § 1150 is substantially the same. In the view of the Reporter these provisions would be improved by phrasing them in terms of competency, since the real controversy has not centered upon what evidence is admissible but upon who may give it.

The proposed rule, unlike those mentioned in the preceding paragraph, makes no effort to cover the affirmative aspects of the situation. A general provision that all witnesses are competent except as otherwise provided (proposed Rule 4-01), together with a general provision that all relevant evidence is admissible except as otherwise provided (proposed Rule 4-02), ought to make it amply clear that the evidence is admissible and that a juror may testify to it, except to the extent of the prohibition in paragraph (b) of the proposal.

Finally, the proposal should be read in conjunction with Rule 6(e) of the Federal Rules of Criminal Procedure, governing the secrecy of grand jury proceedings. The latter rule contains a prohibition against disclosure of "matters occurring before the grand jury," except when directed by the court under specified conditions. The testimony prohibited by the proposal does not fall within the category of "matters occurring before the grand jury," and hence no conflict is apparent. The Criminal Rule further provides: "No obligation of secrecy may

be imposed upon any person except in accordance with this rule." Considering the purpose and spirit of the Criminal Rule, the prohibition contained in the proposal can scarcely be regarded as an "obligation of secrecy;" the purpose is wholly different, and the matter is one of competency of witnesses and of certain evidence, a refusal to give effect to disclosure rather than trying to prevent disclosure.

If the Committee should conclude that the wholly negative approach of the proposal needs to be implemented by provisions affirmatively setting forth what evidence is admissible and who may give it, then careful consideration will have to be given to Rule 6(e) of the Criminal Rules in drafting.

First draft

Rule 6-07. Who may impeach. The credibility of a witness may be attacked by any party, including the party calling him.

Comment

Seemingly without exception, the modern writers have opposed the traditional rule that a party is not permitted to impeach his own witness. Illustrative are Ladd, Impeachment of One's Witness--New Developments, 4 U. Chi. L. Rev. 69 (1936), in SELECTED WRITINGS ON EVIDENCE AND TRIAL 410 (1957); California Law Revision Commission Study, IV, Witnesses 714, 744 (1964); Maguire, Weinstein, et al., CASES ON EVIDENCE 299 (1965); McCORMICK § 38; 3 WIGMORE §§ 896-918. The literature is extensive.

Complete judicial rejection of this judge-made rule, as in United States v. Freeman, 302 F.2d 347 (2d Cir. 1962), is still a comparative rarity. Nevertheless, piecemeal case law exceptions have made very substantial inroads. The decisions are collected in 3 WIGMORE § 905. They disclose a variety of situations in which the rule is held to be inapplicable. "Surprise" is a frequently encountered ingredient. A witness may surprise the party calling him by telling a different story or by disclaiming any knowledge or recollection.

Some of the cases limit the calling party to calling the attention of the turncoat witness to a prior statement or otherwise leading him in a manner calculated to "stir his conscience and refresh his recollection." Others, however, permit proof of the prior statement itself by way of impeachment, particularly if it is "damaging" to the cause of the calling party. What constitutes surprise is, of course, the subject of decisions in great variety. When both sides call a witness, impeachment may be permitted in the form of prior statements inconsistent with the testimony given for the opponent. The compelled witness, e.g. an attesting witness to a will, is usually impeachable by the party calling him. Court's witnesses may be impeached by either party. And, finally, if a party knows that his witness is vulnerable to impeachment, he is completely within the bounds of acceptable practice in bringing out the damaging matter and mitigating it as best he can. In fact, disclosure by the prosecution has been said to be a duty. United States v. Freeman, supra, and see Napue v. Illinois, 360 U.S. 264 (1959).

Encroachments upon the rule by statutes and rules have also been substantial. Perhaps the most commonly encountered one is found in conjunction with provisions for calling an adverse party, or someone closely connected with him, as a witness. He may usually be cross-examined and impeached. An illustration is Rule 43(b) of the Federal Rules of Civil Procedure:

> "A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party...."

It is followed in the numerous states adopting the Federal Rules. Some of the statutes and rules limit the kind of impeachment which can be directed against these hostile-as-a-matter-of-law witnesses, e.g. the Illinois Civil Practice Act which allows the calling party to impeach only by prior inconsistent statements. Ill. Rev. Stats. 1965, c. 110 § 60. Some states observe this same limitation on method of impeachment but allow it to be used against any witness found by the judge to be adverse. 20 N.M. Stats. Anno. 1953 § 20-2-4; 12 Vt. Stats. Anno. 1959 § 1642; 8 Va. Code Anno. § 8-292. New York requires no particular category of witness but limits impeachment to a prior inconsistent statement either in the form of a writing signed by the witness or given under oath. N.Y.C. P.L.R. § 4514; 5 Weinstein, Korn and Miller, NEW YORK CIVIL PRACTICE §§ 4514.01, 4514.08. Massachusetts also permits the calling party to impeach any witness by the use of any prior statement, but without regard to whether written or oral. Mass. Laws Anno. 1956, c. 233 § 23.

These judicial and legislative inroads upon the rule against impeaching one's own witness leave one with the impression that there is no deep conviction supporting the rule. Nevertheless enough remains of the rule to require examination of its policy bases before reaching a decision whether to abolish it entirely. Dean Ladd has subjected the rule to a searching analysis, which in essence sets the pattern for the discussion which follows. Op. cit., supra.

The first reason advanced to support the rule is that a party by offering a witness holds him out as worthy of belief. Possibly a hangover from the days of compurgators and oath helpers, the theory rests upon the wholly false assumption (except perhaps for character witnesses and experts) that a party exercises free choice in selecting his witnesses. To regard the rule as an essential corollary of the adversary system involves a fundamental misapprehension of those aspects which make the adversary system a powerful instrument for ascertaining truth.

The second reason advanced is that to allow the impeachment would give the calling party an inordinate power of control over the witness. The argument is essentially that the witness can be blackmailed into testifying falsely as desired. In fact, the result is to leave the party at the mercy of the witness and his adversary. If the witness testifies truthfully, the adversary may impeach him; if he

testifies falsely, the adversary will not attack him, and the calling party cannot. McCORMICK § 38, pp. 70-71. Moreover, the control theory fails further when the impeachment is by a showing of interest, hostility, or bias, since coercive effect is lacking in these instances.

The third reason is fear that the jury will accept an impeaching statement as substantive evidence. While it is relevant only when the method sought to be used is a prior inconsistent statement, almost all cases of attempts to impeach one's own witness in fact involve this method, and it is here that the traditional rule has its principal impact. McCORMICK § 38, p. 71. It is also here that legislative encroachments have been the most extensive. The problem is essentially one of limited admissibility: for purposes of impeachment, the statement is not hearsay; as proof of the matters asserted, the statement is hearsay when measured by strict standards. Several observations will demonstrate the unsoundness of precluding impeachment on this ground. It does not bar impeaching an adversary's witness, nor does it bar using the statement of one's own witness to refresh his recollection or stir him conscience, although in each instance the statement is placed before the jury and the same danger would necessarily arise. More fundamentally, however, it is believed that when the Committee

reaches the subject of hearsay evidence it will take the position that a prior extrajudicial statement is not excludable as hearsay if the declarant is available in court to be cross-examined under oath thereon. This position receives powerful support in McCORMICK § 39 and was the view espoused by Wigmore after his conversion from the contrary doctrine. 3 WIGMORE § 1018, m.2. It is found in Model Code Rule 503(b), in Uniform Rule 63(1), and in modified form in California Evidence Code §§ 770, 1235. Virtually all the writers are in accord, and support in the cases is increasing. A more extended treatment will be given when the topic of hearsay is reached. The matter is noted here merely as an additional reason for concluding that the rule against impeaching one's own witness is unsound with respect to prior inconsistent statements.

In view of these considerations, the draft proposes complete elimination of the rule against impeaching one's own witness. This is the position of Uniform Rule 20, derived from Model Code Rule 106. It is found in California Evidence Code § 785. In the words of the Comment to the Uniform Rule:

> "It makes the witness the witness of the court as a channel through which to get at the truth."

The other feature of Uniform Rule 20, allowing evidence to support the credibility of a witness without any attack thereon having been made, is dealt with in connection with proposed Rule 6-09, infra.

Rule 6-08. Impeachment by evidence of conviction of crime.

(a) General admissibility. For the purpose of attacking the credibility of a witness, evidence is admissible that at a time not unreasonably remote he was convicted of a crime under the laws of the United States or of any State or nation (1) punishable by death or imprisonment in excess of one year or (2) involving dishonesty or false statement regardless of the punishment.

(b) Method of proof. A prior conviction, offered for the purpose of attacking the credibility of a witness, may be proved by the record of the judgment or by a certified copy thereof. If the witness is not the accused, prior convictions may be brought out on cross-examination but only after satisfying the court, outside the presence of the jury, of the fact of conviction.

(c) Effect of pardon. If a pardon therefor on grounds of innocence has been granted, a conviction is not admissible for the purpose of attacking the credibility of a witness. A pardon therefor on any grounds is admissible to mitigate the impeaching effect of a conviction.

(d) Effect of appeal pending. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Pendency of an appeal is not admissible.

Comment

The theoretical foundation for impeaching a witness by evidence that he has been convicted of crime is an aspect of character. The basic assumption is made that a person acts in a manner consistent with his character, and the conclusion is drawn that his character may then have a significant bearing upon the probability that he is or is not telling the truth. (Compare proposed Rule 4-05, generally rejecting the circumstantial use of character evidence but with important exceptions.) Conviction of crime then becomes a method of proving character, along with opinion and reputation evidence. See proposed Rule 4-06 as to methods of proving character. The theory of impeaching by evidence

of conviction of crime is discussed in Ladd, Credibility Tests--Current Trade, 89 U. Pa. L. Rev. 166, 175-184; 3 WIGMORE §§ 926, 980; California Law Revision Commission Study, IV. Witnesses 756 (1964).

The initial general question whether the character of a witness may properly be considered at all in appraising his credibility has already been answered in the affirmative. See Comment to proposed Rule 6-07. Consequently the key question to be answered at this point is whether convictions are an acceptable method of proving character.

Proposed Rule 4-06 disallows evidence of specific acts to prove character except when character is in issue in the strict technical sense, and it must be conceded that a witness does not place his character in issue in that sense by testifying. The present proposal therefore represents a departure which requires justification. Concededly, in impeachment by conviction it is the underlying act of committing the offense which is relied upon to establish character; the conviction merely establishes that the act was committed. The reasons for excluding specific acts as proof of character are the danger of unfair prejudice, of confusion of the issues, and of misleading the jury, waste of time (as to those see Comment, proposed Rule 4-04), and surprise (see Comment, proposed Rule 4-05). These reasons disappear or diminish to a large extent when the specific

act is the subject of a conviction. A person may be expected to know and remember the occasions when he has been convicted of crime, and, if the inquiry is limited to the fact of conviction and the nature of the crime, risk of wasting time or creating confusion by exploring collateral issues is slight. 3 WIGMORE § 979. With these risks eliminated, the principal grounds for rejecting the most convincing proof of character, specific acts (Comment, proposed Rule 4-05), are no longer present. True, some further objections may be rasied. It is certainly arguable that a single act does not afford a sound basis for judging character. See Ladd, op. cit., at 177. But a fair answer is that the question is one of relevancy and the evidence meets the test of relevancy stated in proposed Rule 4-01. It may also be urged that a rule admitting convictions tends to discourage witnesses from stepping forward and testifying, yet experience seems to demonstrate that no serious obstacle has resulted from the practice. The case of the accused who elects to take the stand presents a special situation, requiring separate consideration.

Once the view is accepted that the character for veracity of a witness should be provable by convictions, attention naturally turns to deciding what kinds of convictions should be allowed. Examination of the practice in different states discloses some variety in pattern. Probably the most

frequently encountered is conviction of a crime falling within the group of treason, felony, and crimes in the nature of crimen falsi. These are the crimes which at common law disqualified the witness but have been switched over from disqualification to impeachment. 3 WIGMORE § 980; Ladd, op. cit. at 174. An offense was a felony in the early English law if conviction resulted in forfeiture of lands and goods to the crown, in addition to other punishment provided by law. Today the term felony has no precise meaning in American law and depends upon local statutes; commonly the word indicates the graver crimes, perhaps in terms of the measure of punishment as in 18 U.S.C. § 1 which defines a felony as a crime punishable by death or imprisonment for over one year. See Black's Law Dictionary 764 (3rd ed.). In some states, California, for example, whether a crime is a felony depends upon the sentence actually imposed. California Law Revision Commission Study, IV. Witnesses 758 (1964). Another fairly common pattern admits any conviction of a crime created by statute, presumably relying on a sense of the ridiculous to keep out such matters as traffic convictions. Some allow convictions only of crimes supposedly indicating an unveracious character, variously described as crimes involving moral turpitude or crimes in the nature of crimen falsi. Finally there is some authority for leaving the matter to the discretion of the

trial judge, a result reached by so construing the applicable statute, though not without a vigorous dissent, in Luck v. United States, 348 F.2d 763 (D. C. Cir. 1965). In the whole area, terminology tends to the inexact, and lines of demarcation are indistinct. Governing statutes are collected in 3 WIGMORE § 987. The practice in various jurisdictions is described in Ladd, op. cit. at 175; Levin, The Impact of the Uniform Rules of Evidence on Pennsylvania Law, 26 Pa. B. A. J. 216, 222 (1955); Notes 42 B.V.L. Rev. 91, 66 Dick L. Rev. 339, 23 Ohio St. L. J. 144, 113 U. Pa. L. Rev. 382, 9 Wes. Res. L. Rev. 218, 1959 Wis. L. Rev. 312; Maguire, Weinstein, et al., CASES ON EVIDENCE 320 (1965); McCORMICK § 43.

An argument with considerable logical appeal can be made for limiting provable convictions to those for crimes which demonstrate a propensity for untruthfulness. One aspect of the argument depends upon analogy to the use of reputation evidence to prove character. In the latter situation, general reputation evidence is not allowed, and evidence is restricted to the pertinent trait of truthfulness. McCORMICK § 44, at p. 95. It is then argued that logic compels similar limitations upon the use of convictions. However, the validity of the analogy is questionable. In the reputation situation, the nature of the subject of inquiry makes it "clear that in this elusive realm of opinion

as to reputation as to character it is best to reach for the highest degree of relevancy that is obtainable." Id. In contrast, few things in the field of evidence are more concrete than convictions of crime. Hence it can be concluded that the argument is by no means compelling.

The essential inquiry then remains what crimes ought to be included. The proposal adopts the approach derived from the common law grounds of incompetence: (a) crimes which in essence are felonies according to federal standards and (b) lesser crimes involving dishonesty or false statement.

As to offenses which fall in the felony class, the proposal rejects the theory that only crimes involving dishonesty or false statement furnish clues of value in appraising the credibility of the convicted person. Instead it assumes that the commission of even a single major crime reflects significantly upon credibility. The reasoning is simple: acts are constituted major crimes because they involve substantial injury to and disregard of the rights of other persons or the public. That is why they have been made crimes. A demonstrated instance of this kind of behavior indicates a willingness to engage in conduct which inflicts injury upon and disregards the rights of others and the public. The giving of false testimony falls within this pattern. In essence, the approach depends upon a broader view of character than is taken in most other situations (cf. proposed Rule 4-05), but it is character demonstrated most convincingly.

The proposal has the added advantage of obviating, in felony situations, the need for making such distinctions as classifying rape as an honest and forthright crime but seduction as one involving dishonesty and false statement, and of wrestling with possible differences between murder committed in the course of a theft and one in the heat of passion. There may be major crimes of the mala prohibita variety which do not bear upon character. If so, then the good sense of counsel would indicate not offering the evidence, and if it is nevertheless offered the jury should be able to cope with it, probably to the disadvantage of the offeror. This feature of the proposal is exactly opposite to Uniform Rule 21 and Model Code Rule 106, both of which limit evidence of conviction of crime to those involving dishonesty or false statement. Compare California Evidence Code § 788, allowing convictions of felonies generally.

With respect to lesser crimes, the proposal follows the pattern of Uniform Rule 21 and Model Code Rule 106, in admitting those involving dishonesty or false statement. Compare California Evidence Code § 788 which allows no crime below the grade of felony. At first glance the proposal may in this respect appear to be inconsistent with its treatment of major crimes. The differences, however, between the two situations are substantial. The relatively insubstantial

nature of the lesser crimes requires the drawing of a line of exclusion at some point. No one would argue for admitting ordinary traffic offenses, for example. Here the relevancy of many offenses becomes far less apparent, and a stricter view seems not only justified but required. Problems of distinguishing crimes which involve dishonesty or false statement from those which do not will still have to be dealt with, but at this level they seem to diminish in acuteness.

In formulating a rule for impeachment by evidence of conviction in the federal courts, regard must be had for the incompleteness of the system of criminal law created by the federal code due to inherent constitutional limitations. To illustrate, 18 U.S.C. c.31, treats of embezzlement and theft in terms of public property and money, things used in printing money and the like, federal court officials, federal officers, banks which are members of the Federal Reserve System or insured by the F.D.I.C., federal lending agencies, interstate or foreign shipments, special territorial and maritime jurisdiction, Indian country (§ 1153), and Post Office (§§ 1704, 1707, 1708). The area thus bounded is not of sufficient dimension to include cases of plain ordinary theft and embezzlement which lack the necessary federal overtones. Hence resort must be had to the laws of the states, a procedure which the Congress has been willing to

follow in other appropriate situations. See, e.g., the Assimilative Crimes Act, 18 U.S.C. § 13, making offenses under state law applicable to the special territorial and maritime jurisdiction of the United States. Cf. Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962), evaluating an Australian larceny conviction in terms of the District of Columbia Code for deportation purposes. In so doing, it seems wise to evaluate the crime, as to whether serious enough to impeach, in terms consistent with the federal definition of felony (subject to imprisonment in excess of one year) rather than to adopt the state definitions, which vary considerable. See United States v. Green, 140 F. Supp. 117, 120 (E. D. N.Y. 1956), aff'd 241 F.2d 63 (2d Cir.), aff'd 356 U.S. 165. This sensible approach is found in People v. Kirkpatrick, 413 Ill. 595, 110 N.E. 2d 519 (1953), denying admissibility to a conviction under the Dyer Act, a federal felony, since the most closely analogous crime under Illinois law, receiving stolen property, was not included in the statutory list of crimes usable for impeachment purposes in Illinois. The only alternative to this sort of borrowing procedure would be to itemize the major crimes in detail or to refer to the District of Columbia Code, neither being attractive solutions.

Military convictions fall within the terms of the proposal and should not present problems different from ordinary convictions. Juvenile delinquency adjudications,

however, are more difficult to deal with. The general pattern of juvenile court legislation is that an adjudication of delinquency is not a conviction. Hence it is reasoned as a matter of construction that a juvenile adjudication may not be used to impeach, a conclusion which is said to be reinforced by the policy considerations underlying this kind of legislation. Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941). Statutes are collected in 1 WIGMORE § 196. It may be argued that since it is the underlying act which impeaches, distinctions between convictions and juvenile adjudications are not significant, and also that impeachment is not one of the disadvantages sought to be protected against. See dissenting opinion, Thomas v. United States, supra. Wigmore was outspoken in his condemnation of the prevailing practice of disallowing the use of juvenile adjudications to attack credibility, especially when the witness is the complainant in a case of molesting a minor. 2 WIGMORE § 196; 3 id. §§ 924a, 980. It is submitted, however, that these arguments are outweighed by the policy considerations underlying juvenile legislation plus problems of practical administration which would arise, in attempting to use juvenile adjudications to impeach, by virtue of common statutory provisions requiring that juvenile records be kept confidential, that they be released only by court order, that they be destroyed after a relatively short time, the

nature of many adjudications, and so on. Consequently, the proposal is phrased in terms of conviction of crime, thus excluding juvenile adjudications. If this is unacceptable to the Committee, a possible alternative would be a provision granting the trial judge discretion to admit a juvenile adjudication if it amounted to a definitive finding of the commission of a crime of impeachment grade and if exclusion would raise a grave danger of a miscarriage of justice. An approach along these lines would be feasible under a statute similar to the 1965 Illinois act which requires an adversary-type hearing to determine whether the juvenile has committed an offense and, if the determination is affirmative, a second-stage dispositional hearing. Ill. Rev. Stats. 1965, c. 37 §§ 701-1 to 708-4. The comments upon juvenile court procedures in Kent v. United States, 383 U.S. 541, 555 (1966) may foretell a trend toward enactments of this kind. The outcome of In re Gault, 99 Ariz. 181, 407 P.2d 760 (1965), probable jurisdiction noted 384 U.S. 997 (1966), should be significant.

No time limit is recognized in most of the statutes governing impeachment by evidence of conviction, though it may well be that the good sense of counsel may recommend against offending the jury by dredging up long bygone misdeeds. Nevertheless, the good sense of counsel has not always achieved this result, and cases of proof of convictions 15 and 20 years earlier are not uncommon. In Michelson v. United

States, 335 U.S. 469 (1948), the Government queried a character witness for the accused about an arrest 27 years previously. In the interest of keeping matters within bounds, the proposal limits conviction proof to those not unreasonably remote in time, a provision designed to allow the judge to consider the nature of the crime and other circumstances in deciding whether to admit or exclude. Recent judicial authority shows some tendency to follow this view. Comment, 17 U. Pitt. L. Rev. 299. It finds support in Ladd, Credibility Tests--Current Trends, 89 U. Pa. L. Rev. 166, 189 (1940), suggesting an analogy to reputation evidence which generally is required to be not too remote in time.

By far the most troublesome aspect of impeachment by evidence of conviction is presented when the witness is the accused himself. The conventional view, unhesitatingly supported by Wigmore, has been that an accused who elects to take the stand is subject to impeachment precisely like any other witness, including proof of conviction. 3 WIGMORE §§ 889-891. Yet there is apparently an increasing uneasiness over the acceptability of this approach. Thus it is said that the admission of this particular variety of impeaching evidence not only casts doubt upon his credibility "but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury

that he is an habitual law breaker who should be punished and confined for the general good of the community." Richards v. United States, 192 F.2d 602, 605 (D.C. Cir. 1951). The same idea has been stated somewhat more colorfully by Dean Griswold:

> "We accept much self-deception on this. We say that the evidence of the prior convictions is admissible only to impeach the defendant's testimony, and not as evidence of the prior crimes themselves [to prove bad character]. Juries are solemnly instructed to this effect. Is there anyone who doubts what the effect of this evidence in fact is on the jury? If we know so clearly what we are actually doing, why do we pretend that we are not doing what we clearly are doing?" Griswold, The Long View, 51 A.B.A.J. 1017, 1021, (1965).

The probability of drawing the wrong and forbidden inference of bad character and hence substantive guilt, rather than the permissible inference of unveracious character and hence falsity of testimony, is no doubt enhanced when the prior convictions are for the same crime as that now charged. Illustrative is State v. Adams, 257 Wis. 433, 437 W.2d 446 (1950), in which an accused on trial for abortion was impeached by proof of four earlier abortion convictions.

It is true that in proposed Rule 4-05 the position is taken that evidence of other crimes is not excludable when offered for an ostensibly non-character purpose, such as motive and so on, despite the risk that the impermissible

inference of bad character may be drawn. It is quite possible that the need for the evidence of other crimes is more pressing in those situations than in this one. In any event, the growing dissatisfaction with the traditional rule is of sufficient dimension to require exploration of possible alternatives.

The University of Chicago jury study tends to implement the doubts which have been raised about the acceptability of impeaching the accused by evidence of conviction. A significant factor in causing judges to disagree with verdicts of acquittal was shown to be knowledge of the judge that accused had a prior record, which was not disclosed to the jury. Kalven and Zeisel, THE AMERICAN JURY 124, 126-130 (1966). Defendants elect to testify in 82% of the cases. Id., 137-138. The decision to testify has a high correlation to the absence of a prior record. Id. 144-145. If he has no record, he elects not to testify in only 9% of the cases, but if he has a record the figure rises to 26%. Id., 146. Whether the prior convictions involved similar or different crimes is of slight significance. Id., 147-148. When the prior record is disclosed, no attempt is made by the study to draw a line between effect on credibility and general probability of guilt. Id. 180-181.

The most obvious change of approach would involve a swing to the opposite extreme by adopting a rule which simply prohibited any impeachment by evidence of prior convictions

when the witness was the accused. Two arguments may be advanced in favor of such a rule: (1) No real need exists for impeaching the accused, since the jury is quite aware that he is strongly motivated to testify falsely. Note, 66 Dick. L. Rev. 339. (2) The actual legitimate impeaching effect of conviction evidence is always slight when weighed against its prejudicial effect. See authorities above. A compelling counter-argument is that a rule of complete exclusion enables an accused to appear as a person entitled to full credence when the fact is to the contrary. See McCORMICK § 43, at p. 94. This counter-argument acquires added force when it is realized that the rejection of evidence of conviction practically also requires the abandonment of reputation evidence as an approach to the character for veracity of witnesses. The latter point will be adverted to in later discussion.

If, then, neither of the extremes is calculated to reach proper results, are there intermediate positions which may be more consonant with striking a balance between the public interest and the interest of the accused? Several which may be suggested are, with brief comments, as follows:

(1) Allow only crimen falsi. This would exclude most of the serious crimes heretofore in this comment considered as having a substantial impeaching effect. Also, if the

charge on trial were crimen falsi, the damage from similar crime evidence would be present.

(2) Exclude if the crime is similar. While this approach would eliminate the most obviously damaging evidence of other crimes, it would still admit evidence with a very high degree of probability of misuse. Moreover, pure coincidence would determine admission or exclusion.

(3) Confine the evidence to the fact of conviction without disclosing the kind of crime. This suggestion loses sight of the fact that it is the basic act, not the conviction, which impeaches. How a jury would be expected to assess a conviction for an undisclosed type of crime is not apparent. The difficulty is great enough when the nature of the crime is disclosed.

(4) Admit conviction evidence only if the accused first introduces evidence admissible solely for the purpose of supporting his credibility. This approach, combined with a general limitation to crimes involving dishonesty or false statement, is taken by Uniform Rule 21, derived from Model Code Rule 106. Several observations must be made. First, the Uniform Rule is premised upon the admissibility of evidence to support credibility in the absence of any attack thereon, a reversal of existing law to the extent that the evidence relates to good character for veracity. California Law Revision Study, IV. Witnesses 765-766 (1964); McCORMICK

§ 49, at p. 105; 4 WIGMORE § 1104. While Uniform Rule 20 speaks only in general terms of the admissibility of evidence in support of credibility, following in the steps of Model Code Rule 106, neither comment emphasizes the departure from existing law, nor does either contain any specification of the kind of evidence which is contemplated. In the discussion of the Model Code, however, it was assumed that the supporting evidence would be of good character for veracity. 19 A.L.I. Proceedings 94, 112, 113, 114, 119, 120 (1942). This conclusion is supported by the fact that other supporting evidence is generally regarded as admissible and requires no special treatment. Compare California Evidence Code § 785 and § 790. It is, then, evidence of good character for veracity which is relied upon to open the door to proof of conviction. Second, the Uniform Rule seems to involve serious difficulties of practical administration. It rejects evidence of conviction unless the accused offers evidence of good character for veracity. This is not, however, a complete rejection of the view that an accused, like any witness, by the act of testifying puts his character for veracity "in issue." It is merely a limitation of the circumstances under which bad character for veracity may be shown by convictions. Other methods, notably bad reputation, and now opinion, remain undisturbed. Consequently, if an accused testifies, the prosecution may call witnesses to

testify to his bad reputation for truth and veracity. Unless the accused is satisfied to let this evidence go unrebutted, an unlikely event, he will call rebuttal witnesses to testify to good reputation, and at this point another door-opening occurs, since it seems inconceivable that inquiry at least as to crimen falsi should be denied the cross-examiner. The scheme simply seems unworkable unless the committee is prepared to reject all variety of attacks upon the character of the accused for veracity. No proposal thus far advanced goes that far.

(5) Another type of door-opening is found in the English Criminal Evidence Act. 1898, St. 61 & 62 Vict. c. 36. For text see 2 WIGMORE § 488, and for analysis see 1 id. § 194a. The statute forbids asking the witness accused about prior convictions unless he has offered evidence of his own good character, has impugned the character of prosecution witnesses, or has given evidence against another person charged with the same offense. Since the reference to his own good character is not limited as to trait, the emphasis is on character generally rather than on character for veracity, and it is seen that the first provision is on the familiar ground of putting character in issue generally. Why attacking the character of prosecution witnesses should open up his character, as in the second provision, is difficult to follow. The third provision allows a co-defendant the tactic of impeachment by proof of conviction which the crown is

denied. It is believed that this English statute offers little in the way of helpful suggestion.

(6) Some gain may result from allowing prior convictions to be proved only by the record. This practice is followed in some states. People v. Halkens, 386 Ill. 167, 53 N.E.2d 923 (1944); Buck v. Commonwealth, 107 Pa. 486 (1884); Levin, The Impact of the Uniform Rules of Evidence on Pennsylvania Law, 26 Pa. B.A.Q. 216, 223 (1955); Notes 66 Dick. L. Rev. 339, 113 U. Pa. L. Rev. 382, 392. While it does not close the door upon impeaching the witness-accused by prior convictions, it may well tend to encourage him to take the stand by giving assurance that the proof will assume the least inflammatory form possible and will not encourage collateral inquiries.

The conclusion seems inescapable that none of the foregoing proposals offers a wholly acceptable solution of the problem of the witness-accused. The exclusionary policy of Uniform Rule 21 was, as is emphasized in the Comment, buttressed by the provision of Rule 23(4) allowing the prosecutor to comment upon the election of the accused not to testify. Both were designed to implement a basic policy of encouraging, in fact almost compelling, the accused to take the stand. The decision in Griffin v. California, 380 U.S. 609 (1965), imposing a constitutional restraint upon comment, destroys the base for Uniform Rule 23(4). While the arguments advanced by the Uniform draftsmen in favor of

Rule 21 are not thereby demolished, their force is somewhat weakened. On the other hand, perhaps this essentially odd bit of horsetrading (minus convictions for plus comment) never had any real validity in the first place.

The Reporter finds himself in the position of having to return a Scotch verdict. In the absence of acceptable alternatives, the proposal continues the traditional practice of allowing the witness-accused to be impeached by convictions, subject to the modest amelioration produced by limiting proof to the record as provided in subsection (b) of the proposal. This solution will encounter substantial disapproval. See McGowan, J., in Luck v. United States, 348 F.2d 763, 768-769 (D.C. Cir. 1965); Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 Nev. U. L. Rev. 506, 512 (1966). On the other hand, it is the view incorporated in California Evidence Code § 788 (which lacks the limitation on method of proof). The only realistic alternative is to exclude the evidence altogether.

Subsection (b)

The proposed subsection deals with the methods of proving convictions. In all cases the record is a proper means, and in the case of the witness-accused, consistently with the discussion under subsection (a), the only means. Convictions of other witnesses may be brought out on cross-examination, as under existing practice in most jurisdictions. In order

to avoid fishing expeditions, with possible unfounded insinuations, questions concerning convictions are disallowed unless the cross-examiner has first satisfied the court of the fact of conviction. This is along the lines suggested by the 1954 Committee on Administration of Justice of the California State Bar, as described in California Law Revision Commission Study, IV. Witnesses 760 (1964). Support for the requirement is found in the cases. People v. Perez, 58 Cal.2d 229, 23 Cal. Rptr. 569, 373 P.2d 617 (1962). And see Michelson v. United States, 335 U.S. 469, 481 (1948), speaking with approval of the manner in which a trial judge, confronted with cross-examination of a character witness about an earlier arrest, "satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box."

The proposal does not deal with the extent to which the conviction may be explored and explained. Development of the circumstances, especially of aggravating factors, is generally not allowable cross-examination, McCORMICK § 43, at p. 92, although it is apparent that some measure of this information may be disclosed when proof is by the record. Whether the accused is entitled to make an explanation or to deny guilt is a question upon which the authorities are divided. Annot. 166 A.L.R. 211. Arguments in favor are considerations of fairness and the principle allowing an

examiner on re-direct to develop matters brought out on cross. The arguments against allowing explanation are the principle of finality of judgments and the usual considerations which preclude exploration of collateral issues. Wigmore labels allowing explanation a "harmless charity." 4 WIGMORE § 1117, at p. 191. Federal authority has favored allowing the explanation. United States v. Boyer, 150 F.2d 595 (D.C. Cir. 1945); United States v. Crisafi, 304 F.2d 803 (2d Cir. 1962). If the Committee disagrees with this position, the drafting of an additional sentence staking out the permissible boundaries should present no problem.

Subsection (c)

The effect which should be given a pardon was suggested long ago.

> "[I]f the king pardons these offenders, they are thereby rendered competent witnesses, tho their credit is still to be left to the jury, for the king's pardon takes away poenam & culpam in foro humano . . . but yet it makes not the man always an honest man . . ."
> 2 Hale, Pleas of the Crown 278 (Wilson ed. 1778).

Following the line of reasoning thus indicated, Professor Weihofen demonstrated convincingly the essential difference between a pardon granted for innocence and a pardon granted for other reasons. The former should be treated as the equivalent of an acquittal, while the latter quite apparently is not. Weihofen, The Effect of a Pardon, 88 U. Pa. L. Rev.

177 (1939). To the same effect is Richards v. United States, 192 F.2d 602 (D.C. Cir. 1951), cert. denied 342 U.S. 946. The fact of a pardon on grounds other than innocence does not under most authorities require exclusion of the conviction, but the pardon is provable by way of mitigation. Richards v. United States, supra; Annot. 30 A.L.R.2d 893; Note, 42 Iowa L. Rev. 435. For an enumeration of the many grounds for pardon other than innocence, see Weihofen in Rubin, The Law of Criminal Correction 571-588 (1963). The broad assertion in Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1867), that a pardon renders the offender as innocent as if he had never committed the offense, must be regarded as hyperbole going far beyond the needs of the case (admission to the bar of the Supreme Court by an adherent to the Confederate cause).

Subsection (d)

The effect of the pendency of an appeal has occasioned some division, with most state courts holding it does not impair the admissibility of a conviction. Federal decisions disclose somewhat the same pattern. The District of Columbia Circuit holds that pendency of an appeal bars use of the conviction. Campbell v. United States, 176 F.2d 45 (D.C. Cir. 1949). To the contrary are the Seventh and Ninth Circuits. United States v. Empire Packing Co., 174 F.2d 16 (7th Cir. 1949), cert. denied 337 U.S. 959; Block v. United

End of Comment on R 6-08

States, 226 F.2d 185 (9th Cir. 1955), cert. denied 350 U.S. 948 and 353 U.S.959. And see Newman v. United States, 331 F.2d 968 (8th Cir. 1964). The presumption of correctness which ought to attend judicial proceedings militates in favor of the majority view that a pending appeal is without effect. The same consideration requires denying the pendency of the appeal admissibility in evidence. It is, moreover, a circumstance beyond the possibility of evaluation by a jury and equally so by a court without pursuing collateral issues in great number.

First draft

Rule 6-09. Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness upon matters of religion are inadmissible to attack or support his credibility, and the witness has a privilege not to disclose them.

Comment

The admissibility of evidence of the religious opinions of a witness as reflecting upon his credibility was originally presented to the Committee in the form of a privilege against disclosure on the part of the witness. (Proposed Rule 5-08, First Draft.) The accompanying Comment pointed out that the door was thereby left open to the contention that credibility could still be attacked by evidence of religious opinions, provided it be produced from sources other than the witness himself. At the December 21, 1966, meeting the Committee voted to transfer the topic to the area of impeachment of witnesses, which would permit treatment in broader terms of admissibility generally without regard to source.

The present draft is presented in response to these considerations. It differs slightly from California Evidence Code § 789 in substituting "beliefs or opinions upon matters of religion" in place of "religious belief or lack thereof." Clarity is believed to be enhanced somewhat by the change.

The proposed rule leaves it open to introduce evidence of religious adherence when offered for a purpose other than attacking or supporting credibility e.g. for the purpose of showing bias by virtue of membership in a church which is a party to the litigation or when connected with loss of earnings by a clergyman-litigant. In some instances of limited admissibility the Committee has included in the draft rules illustrative examples of permitted use of the evidence. See Rule 4-05, character evidence as proof of conduct; Rule 4-08, subsequent remedial measures; Rule 4-09, compromise and offers to compromise; Rule 4-12, insurance. The illustrative examples in these situations are, however, of a stereotyped recurring nature, a characteristic which is believed to be absent in the present case.

Rule 6-10. Character of witness.

(a) Limitation to truthfulness or untruthfulness. For purposes of attacking or supporting the credibility of a witness, evidence of his character is limited to his truthfulness or untruthfulness.

(b) Evidence of untruthfulness. The credibility of a witness may be attacked by evidence of his character for untruthfulness.

(c) Evidence of truthfulness. The credibility of a witness may be supported by evidence of his character for truthfulness, but only after the introduction of evidence of character for untruthfulness or other evidence impugning his character for truthfulness.

(d) Method of proof. The character of a witness under this rule is provable by testimony as to reputation or in the form of an opinion. Specific instances of his conduct, other than conviction of crime as provided in these rules, may not be proved by extrinsic evidence but may, subject to the limitations upon relevancy, be inquired into on cross-examination.

Comment

Subsection (a)

The character of a witness is in no sense an issue in a case in which he testifies. Evidence of his character is, then, circumstantial only, suggesting the inference that the witness, in testifying, more probably than not behaved consistently with his character. Hence a person shown to be truthful would be more likely to tell the truth than one not shown to be so. The problem thus appears primarily as one of relevancy. Is the underlying behavioral premise sound? If so, are there nevertheless countervailing factors which require exclusion?

The Committee has already taken the position in general that character is not admissible to prove that the person acted consistently therewith. Second draft, proposed Rule 4-05. However, the general position is subject to exceptions so important that it is open to doubt which is the rule and which are the exceptions. In any event, one of the exceptions there recognized is evidence of the character of a witness as bearing on his credibility. Second draft, Rule 4-05(d), as revised in language at the meeting of September, 1966. In that connection, the use of evidence of the character of witnesses was not considered in depth, and it should now be done.

The proposition that witnesses are more likely to speak truthfully if they are disposed to be truthful persons, and its converse, has been generally accepted or assumed. As Professor McCormick put it:

> "Obviously the character of a witness for truthfulness or mendacity is material circumstantial evidence on the question of the truth of particular testimony of the witness." McCORMICK § 41, p.86.

Wigmore, however, had his doubts.

> "From the point of view of modern psychology, the moral disposition which tends for or against falsehood is an elusive quality. Its intermittent operation in connection with other tendencies, and the difficulty of ascertaining its quality and force, make it by no means a feature peculiarly reliable in the diagnosis of testimonial credit. Hence, to the psychologists, the common law's reliance on character as an index of falsehood is crude and childish." 3 WIGMORE § 922, p. 447.

Despite these doubts, Wigmore went along with the crowd, in default of better.

> "Nevertheless, Psychology itself has thus far discovered no feasible substitute. The crude belief of the common law must therefore hold its place until science provides a better method." Id.

The proposed draft accepts the majority premise largely for the reason that its unwisdom, for the present at least, is undemonstrable.

The admissibility of character evidence can scarcely be considered as an abstract proposition, divorced from questions of what kind of character, when is it admissible, and what means of proof may be

employed. In fact, one may question whether character really exists apart from these manifestations. Subsection (a) of the draft addresses itself to the first of these questions, viz. what kind of character may be proved.

The case law seems to offer a satisfactory guide. The great majority of the decisions confine the inquiry to character for veracity when the proof is by extrinsic evidence in the form of reputation testimony, McCORMICK § 44, p. 95, and this pattern is followed in the draft. McCormick justifies it thus:

> "Surely it is clear that in this elusive realm of opinion as to reputation as to character it is best to reach for the highest degree of relevancy that is obtainable." Id.

Contrasted with the practice in the few jurisdictions which allow reference to general character, the limited nature of character evidence contemplated in the draft has several discernible advantages: it tends to reduce surprise, waste of time, and confusion; it makes the task of being a witness somewhat less unattractive; and by minimizing the scope of the inquiry it lessens the area for doubts as to the wisdom of allowing this type of evidence at all.

Subsection (b)

The provision for impeachment by evidence of character for untruthfulness restates existing law. McCORMICK § 41.

Subsection (c)

The first question which arises in connection with supporting the credibility of a witness by evidence of his truthful character is whether it should be permitted unless and until his truthful character has first been attacked. The common law has generally imposed this preliminary requirement. Maguire, Weinstein et al., CASES ON EVIDENCE 295; McCORMICK § 49, p. 105; 4 WIGMORE § 1104. The enormous consumption of time which a contrary practice would entail is enough, in itself, to justify the limitation.

Uniform Rule 20, in addition to providing for impeachment of a witness by any party, also allows any party to introduce evidence to support the credibility of a witness, without imposing any requirement of a preliminary attack. In this latter respect, the Uniform Rule and its progenitor Model Code Rule 106 represent a departure from existing law which is not mentioned in the Comment to the Uniform Rule and receives only the most casual reference in that to the Model Code. Nor have the commentators made much of the point. Instead, emphasis has been placed upon the abolition of the rule against impeaching one's own witness. See Ladd, Symposium on Uniform Rules, 10 Rutgers L. Rev. 523, 529 (1956). The question of supporting a witness does receive brief discussion in California Law Revision Commission Study, IV. Witnesses 715, 765-768 (1964); Report of New Jersey Supreme Court Committee on Evidence 64-65 (1963).

While California has included a general provision that the credibility of a witness may be attacked or supported by any party, California Evidence

Code § 785, it is deprived of much significance with respect to support by a subsequent provision requiring a preliminary attack on character as a condition precedent to the introduction of evidence of good character. Id., § 790. This is the common law pattern and the one followed in the proposed draft.

Once the decision has been made to require a preliminary attack, the question must then be resolved, what constitutes such an attack? The most limited view would be that it consists solely of testimony which in terms states that the primary witness is a person of untruthful character, either in the form of reputation or opinion. The propriety of admitting evidence of reputation or opinion of good character for truthfulness to rebut evidence in the same form of bad character for truthfulness would seem to be self-evident. There are, however, other ways of attacking character: notably, specific instances of misconduct (whether brought out on cross-examination or proved by evidence of conviction of crime). An issue is posed by this evidence as to the moral character of the witness, and evidence of good character seem naturally relevant to that issue. Wigmore first suggests that the evidence suggesting bad character in these instances is neither explained nor denied by the evidence of good character, and accordingly he questions the logic of the conclusion. However, this position is correct only if the issue is whether the witness committed the act of misconduct, and in fact that is not the issue: the issue is whether the witness is a person of truthful disposition. Wigmore himself concludes that the broader view is preferable in giving some protection

against the insinuations of an unscrupulous cross-examiner. It commands, he says, the support of most courts. 4 Wigmore § 1106. Evidence of corruption also falls within this category. Id., § 1107; MCCORMICK § 49, p. 107. But a contrary view is taken as to bias or interest. Id. Wigmore contends that evidence of contradiction, whether by the prior statement of the witness himself or by the testimony of another witness, involves the moral character of the witness only as a remote contingency and should not serve as a basis for the introduction of rehabilitating evidence of good character. 4 WIGMORE §§ 1108, 1109. McCormick, however, argues more appealingly that whether an attack on character is made by this sort of evidence must depend upon an evaluation of the total situation. MCCORMICK § 49, p. 107.

Consistently with these observations, the draft allows evidence of good character for veracity to be introduced after evidence "impugning his character", as well as evidence directly of untruthful character, has been introduced.

Subsection (d)

The methods of proof under this rule are opinion and reputation, in conformity with the position previously taken by the Committee with respect to proof of character when used circumstantially. Second draft, Rule 4-06(a). The proposal conforms realistically to the prevailing practice of following evidence of reputation for truth and veracity with a question whether the impeaching witness would believe the primary witness under oath. United States v. Walker, 313 F. 2d 236 (6th Cir. 1963), and cases cited therein.

The final sentence disallows extrinsic evidence of specific instances of misconduct except in the form of conviction of crime. This is consistent with the position adopted in second draft, Rule 4-06 (b) of admitting such evidence only when character is an issue in the case.

In order, however, not to impede cross-examination unduly, specific provision has been made for bringing out these matters on cross-examination. Thus both the primary witness and the witness as to his character may be questioned as to specific acts, the one for the purpose of developing a character of untruthfulness and the latter with a view to undermining testimony of opinion or reputation. See McCORMICK § 42; § 158, pp. 335-337.

It will be noted that rehabilitation under the proposed rule is treated only in terms of reputation or opinion of being a person of truthful character. One form of rehabiliting evidence which receives no mention is the prior consistent statement. While not generally allowable as supporting evidence in the first instance or even to rebut a claimed prior inconsistent statement, the prior consistent statement has traditionally been admitted for the purpose of repelling claims that the witness was testifying under the influence of a particular event or situation by showing that he told the same story before the same came into existence. McCORMICK § 49, pp. 108-110. Special treatment is not required in the rule if prior statements of an available witness are excluded from the operation of the rule against hearsay, which is assumed to be the position that the Committee will take. See Comment, first draft, Rule 6-07, pp. 90-91.

Rule 6-11. Mode of interrogation subject to control by judge.

The judge shall exercise reasonable control over the mode of interrogating witnesses and presenting evidence, so as to (1) make the interrogation as effective as possible for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect the witness from undue harassment or embarrassment.

Comment

The Uniform Rules contain virtually no treatment of the mechanics of examining and cross-examining witnesses, other than some specific provisions relating to attacks on credibility. The Model Code, by way of contrast in Rule 105 sets forth 13 items of procedure to be determined by the judge, "among other things," in his discretion. The Model Code has two disadvantages: excessive detail and unduly prominent discretion on the part of the judge. The present proposed rule and the several which follow proceed on the assumption that some procedural guides are necessary and helpful but that detail should in general be avoided. California Evidence Code §§ 760-778, while needlessly rigid and detailed in some respects, furnish a useful itemization of possible subjects to be covered and suggestions as to method of treatment.

The rule here proposed is designed primarily as a realistic recognition that the ultimate responsibility for the effective working of the adversary system rests with the judge and that for the main part it is not feasible to spell out in detail the manner of achieving it. The most practical treatment seems to be the one here followed, i.e. to state objectives. The proposal is patterned generally after California Evidence Code § 765, with the addition of language enlarging its applicability to include the presentation of evidence as well as interrogation of witnesses, and of language including avoidance of time-wasting as an objective.

Item (1) restates in broad terms the common law power and obligation of the judge as they exist under common law principles. Model Code Rule 105, Comment, p. 104. It is sufficiently broad to cover such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCORMICK § 5, the order of calling witnesses and presenting evidence, 6 WIGMORE § 1867, the use of demonstrative evidence, McCORMICK § 179, and the many other questions arising during the course of a trial which can be solved only by the trial judge's common sense and fairness, exercised under the particular circumstances of the case. Many of these matters are enumerated specifically in Model Code Rule 105.

Item (2) introduces avoidance of needless consumption of time, a matter of daily concern in the disposition of cases.

Here the concern is with expediting cases through procedures followed. A companion provision directed to the same end has been embodied as a rule of exclusion in proposed Rule 4-04, second draft.

Item (3) calls for protection of witnesses from undue embarrassment or harassment. McCormick suggests that the matter is within the discretion of the trial court, to be determined with a view to such factors as the relative importance of the testimony, the relevancy of the inquiry to credibility, waste of time, and confusion. McCORMICK § 42. The provision is believed to be needed in view of the provision of proposed Rule 6-10 allowing inquiry on cross-examination into specific acts of the witness bearing on credibility. The point at which the harassment or embarrassment becomes "undue" calls, of course, for a judgment under the particular circumstances. That it may on occasion prove to be a difficult one to make furnishes no reason for avoiding the issue. In Alford v. United States, 282 U.S. 687, 694 (1931), the Court pointed out that while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," the protection by no means forecloses efforts to discredit the witness. The importance of the word "merely" in the quoted language is apparent. Doubts as to the need for judicial control in the area should be laid at rest by referring to the transcript of

the prosecutor's cross-examination in Berger.v. United States, 295 U.S. 78 (1935).

Rule 6-12. Leading questions. Leading questions may be used on the direct examination of any witness insofar as necessary to a full development of his knowledge and on cross-examination. A party is entitled to call an adverse party or witness identified with him and interrogate him by leading questions.

Comment

The rule against leading one's own witness could be approached in a spirit of complete skepticism as without foundation in fact.

> The verbal response of the witness on the stand is the result of at least one further stimulus in addition to the original event, viz., the question put to him. Experiments demonstrate the great influence which context exerts upon the choice of the reaction word. Word-association and sentence-completion tests also show the existence of groups of words which function together, leading to ready transitions and becoming likely or unlikely in similar contexts. While Münsterberg may have taken a somewhat incautious view of suggestion, the effects of it nevertheless are readily shown experimentally. The general prohibition against asking one's own witness leading questions thus seems to rest on solid ground -- until the time factor is taken into consideration.
>
> The witness is protected against suggestion only while on the stand, seemingly on the assumption either that intervening influences are unimportant or that he comes untouched from event to court. The former is directly contrary to the theory upon which leading questions are prohibited. The latter simply is not so, and the requirement of an offer of proof to preserve a ruling on excluded evidence assumes that it is not so. Under the system of party responsibility for the production of witnesses, no competent attorney dreams of calling witnesses who have not previously been interviewed. The preliminary interview affords full play to suggestion and context and evokes in advance of trial a complete verbal-

> ization, the importance of which cannot be overlooked. When the witness testifies, are his verbalizations at that time based upon his recall of the event or upon his recall of his former verbalizations? In any event it seems inevitable that he will attempt to be consistent with his earlier statement. The trial assumes the character of a play, and the witness proceeds to "tell his own story" under a type of questioning which is required by the rules of evidence, even if the good sense of counsel fails to suggest such a technique, to produce an almost wholly false impression of spontaneity. The essential naivete of this procedure must afford some amusement to any experimental scientist. Cleary, Evidence as a Problem in Communicating, 5 Vand. L. Rev. 277, 286 (1952), SELECTED WRITINGS ON EVIDENCE AND TRIAL 22, 30 (1957), footnotes omitted.

It may well be, however, that the attachment of the profession to the rule against leading one's own witness is sufficiently great that a proposal simply to abolish it would encounter substantial opposition. The fact seems to be that whatever bite the rule ever had has been pretty well eliminated, at least at the appellate level, by the general run of the cases which hold that the use of leading questions under the particular circumstances was harmless error or within the discretion of the trial judge or within the purview of an exception.

With respect to regarding leading questions as harmless error or treating their use as discretionary with the judge, the cases from many jurisdictions cited in 3 WIGMORE § 770 virtually without exception decline to reverse for permitting the practice. This is not to say that the trial judges have let down the bars entirely, but it does mean that the rule is essentially trial court law. This does not, of course, require the conclusion that the formulation of some guides is unnecessary or inadvisable.

Consequently the proposal assumes that generally a trial judge will continue to deny the use of leading questions but will relax the prohibition in exceptional situations. Over the years a number of these exceptional situations have achieved recognition: the witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 WIGMORE §§ 774-778. The first sentence of the proposed draft is designed to include all of them, without any attempt at enumeration. It also, merely to repel any negative implication, mentions cross-examination. The second sentence incorporates the substance of the second sentence of Rule 43(b) of the Federal Rules of Civil Procedure, which designates the adversary and certain persons closely allied with him as, in effect, hostile and accordingly examinable on direct by leading questions. Witnesses to whom the provision applies are described in Rule 43(b) as "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." The result is a category virtually limited to persons whose out-of-court statements would have been admissible as admissions of a party-opponent under traditional views of scope of authority to make statements. The Court of Appeals for the Fifth Circuit has managed nevertheless to hold that an assured, though not himself a party, falls within the provision in an action against his

insurer under the Louisiana direct action statute, but the conclusion was reached almost in spite of the language of Rule 43(b). Maryland Casualty Co. v. Kador, 225 F.2d 120 (5th Cir. 1955); Degelos v. Fidelity and Casualty Co., 313 F.2d 809 (5th Cir. 1963). A broadening of the category of those who are to be regarded automatically as hostile seems desirable, and the proposal seeks to accomplish this end by employing the phrase "person identified with" an adverse party as in California Evidence Code § 776.

Rule 6-13. Writing used to refresh memory. If a witness uses a writing to refresh his memory, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the subject of the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall proceed as provided in 18 U.S.C. § 3500. If the writing is not produced, the judge shall make such order as justice requires.

Comment

The rule is substantially based upon California Evidence Code § 771, with considerable streamlining. So far as concerns writings used to refresh recollection while on the stand, it is in accord with settled principles. McCORMICK § 9, p. 17. So far as concerns writings used for that purpose prior to taking the stand, it falls within an area of controversy which requires exploration.

The bulk of the cases have denied the existence of a right to the production, inspection, and use of a writing used by a

witness called by the opposite party to refresh his recollection prior to taking the stand. While they recognize a discretion on the part of the judge in dealing with the matter, it is apparent that the discretion has generally been exercised against requiring production. Annot. 82 A.L.R.2d 473, 562; 7 A.L.R.3rd 181, 247. To the same effect are Goldman v. United States, 316 U.S. 129 (1942), and Needelman v. United States, 261 F.2d 802 (5th Cir. 1958), cert. dismissed 362 U.S. 600, reh. denied 363 U.S. 854.

Notwithstanding this weight of authority, Wigmore saw the matter in a different light.

> "The rule should apply, moreover, to a memorandum consulted for refreshment before trial and not brought by the witness into court; for, though there is no objection to a memory being thus stimulated, yet the risk of imposition and the need of safeguard is just as great. It is simple and feasible enough for the Court to require that the paper be sent for and exhibited before the end of the trial."

3 WIGMORE § 762, p. 111. To the same effect is McCORMICK § 9, p. 17.

A small but apparently increasing group of state court decisions has accrued in support of repudiating the distinction between writings used to refresh before and those used while testifying. People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814 (1963); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957);

State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); State v. Deslovers, 40 R.I. 89, 100 Atl. 64 (1917). The case is impressively put in State v. Mucci, supra: The risk of "imposition and false aids" is equally great (Wigmore); cross-examination aided by the writing is a surer test of credibility; the factual basis for the testimony is a proper subject of inquiry; the ipse dixit of the witness as to present recollection revived cannot itself be conclusive of the fact.

The difference between this and the Jencks situation should be noted. The Jencks statute, 18 U.S.C. § 3500, applies only (1) in criminal cases and (2) only to statements of a witness (3) for the Government but (4) without regard to whether he has referred to the statement prior to testifying. The proposal, in its aspect now under consideration, would apply in (1) all cases, (2) to writings regardless of nature, (3) referred to by any witness (4) prior to testifying. There would, of course, be a substantial overlap since many writings would qualify under either theory. One of the main purposes of taking statements from witnesses is for future use to refresh memory prior to testifying. See Rosenberg v. United States, 360 U.S. 367 (1959), in which complaining witness wrote a letter stating that her memory had dimmed and she would have to reread her original statement prior to testifying.

The differences mentioned in the preceding paragraph are of detail, not of principle. The fact is that the Jencks procedure

and the one here set forth are in basic purpose identical: in the one case to search credibility and memory by use of prior statements which may contradict and in the other case to search credibility and memory by furnishing effective means for exploring their existence and foundations. Against this background it is difficult to imagine that a court which decided Jencks v. United States, 353 U.S. 657 (1957), would not now reach a contrary result upon the facts of Goldman v. United States, supra.

If the proposal is adopted, it is apparent that the same problems of sensitivity over disclosure which arose under Jencks with respect to government files may now arise with respect to those of any party or of the witness himself. Consequently the procedure of 18 U.S.C. § 3500(c) is incorporated in the rule, providing for in camera inspection and so on.

The final matter to be dealt with is the consequences of nonproduction. The Jencks statute, 18 U.S.C. § 3500(d), provides for striking the testimony if the Government elects not to produce, with declaration of a mistrial available in exceptional situations. These alternatives are unduly limited for a rule applicable to all parties in both civil and criminal cases. Such possibilities as contempt, dismissal, finding issues against the offender, and the like should not be foreclosed. See Rule 37(b) of the Federal Rules of Civil Procedure dealing with the closely related question of penalties for failure to comply with discovery orders. See also Rule 16(g) of the

Federal Rules of Criminal Procedure. Accordingly the last sentence of the draft broadly authorizes the entry of "such orders as justice requires."

Rule 6-14. Scope of cross-examination. (a) General rule. The scope of cross-examination is not limited to matters testified to on direct but extends to all matters material to every issue in the action, including the credibility of the witness. (b) Accused in criminal case. The accused in a criminal case does not, by testifying to preliminary matters such as the voluntariness of his confession or the legality of means by which evidence was obtained, render himself subject to cross-examination on the issues in the case generally.

Comment

The Final Report of the Advisory Committee on Rules of Civil Procedure, November, 1937, p. 31, contained the following language in the final sentence of Rule 44(b):

> . . . [A]ny witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action.

The provision was not included in the Rules of Civil Procedure as adopted by the Court. The history is told by Judge Maris in Moyer v. Aetna Life Ins. Co., 126 F.2d 141, 143 (3rd Cir. 1942), by Professor Moore in his FEDERAL PRACTICE ¶43.10 (2nd ed. 1964), and appears in American Bar Association, Proceedings of the

Institute on Federal Rules, Cleveland, 345, 389-391 (1938). Reasons for the non-adoption are not stated. The matter is believed to be of sufficient importance to be brought once more before the Court.

The essential difference between the draft and the 1937 proposal is that the draft deals only with scope, separating it out from any effort to spell out the right of cross-examination. A reference to credibility has been added, in order to lay at rest any doubts on that score, and the special problems of the accused have received separate treatment.

Subsection (a)

History, for what it is worth in these matters, indicates a traditional practice of wide-open cross-examination. The idea of restricting cross-examination to the scope of the direct appears to have been invented by Chief Justice Gibson of Pennsylvania in 1827, given currency by Justice Story, and adopted by the Federal courts as their practice. 6 WIGMORE § 1885. The matter should not, of course, be disposed of on the basis of history but on its merits, so attention is turned to an evaluation of the practice described by Professor Moore as "oft-criticized," with the failure to deal with it in the Federal Rules of Civil Procedure "disappointing," op. cit., supra.

A look at some sample cases will show the Federal rule in action. (1) In Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3rd

Cir. 1942), the controversy centered on the issue whether the deceased insured was disabled. The attending physician was called by plaintiff and testified to hospital record entries listing diseases from which insured suffered. Defendant cross-examined as to the extent, treatment, and prognosis of these diseases. When, however, defendant sought to elicit an opinion as to the ability of the witness to perform the usual duties of his occupation, it was not permitted. After considerable discussion of the Federal rule, the court concluded that no error had been committed, particularly in view of the facts that he had been subpoenaed by defendant and was permitted to testify fully for defendant immediately after testifying for plaintiff. (2) Butler v. New York Central R. Co., 253 F.2d 281 (7th Cir. 1958), was an FELA case in which defendant's track supervisor testified for defendant on direct that he did not instruct the men to pull the jacks from under the ties while the tamping machine was on the rails over the jacks. On cross he was asked whether pulling the jacks before the tamper had cleared would be dangerous and whether, if the job were not progressing as fast as it should, he would try to rush and get them to do it. An objection was overruled, and the ruling was affirmed on appeal. Cross-examination was said not to be confined to the "specific questions asked or details elicited" on direct but to extend to "the subject matter about which inquiry was made." (3) In United States v. Johnson, 285 F.2d 35

(9th Cir. 1961), an eminent domain proceeding, a witness, who had been in charge of the housing project now being taken when it was built, testified on direct for the owner as to the cost of reproduction on December 31, 1957, the date of taking, by applying 1957 prices to the amounts of labor and material used in the construction in 1950-52. The judge excluded cross-examination as to the 1950-1952 cost, since it was not within the scope of the direct. (4) Plaintiff's theory in Union Automobile Indemnity Ass'n v. Capitol Indemnity Ins. Co., 310 F.2d 318 (7th Cir. 1962), was that defendant had become the primary insurer by virtue of an oral agreement of insurance with one Carol Newman. On behalf of plaintiff, Miss Newman testified that defendant's agent had insured the car orally at the time of purchase, May 20, 1958. Defendant then called the agent, who, beyond identifying himself, was asked a single question and answered that on May 20, 1958, he did not tell her that she had insurance on her car effective on that date or at any time. Cross-examination was disallowed as to whether in the course of the conversation his relationship with defendant was discussed and as to the substance of the conversation. Efforts by plaintiff to explore these matters on rebuttal were likewise rebuffed. The ruling resulted in reversal of a judgment for defendant, but not without a vigorous dissent.

One might agree or disagree with these various trial judge rulings and the disposition made of them on appeal. The significant

thing is the outlay of time and effort of both judges and lawyers in dealing with a matter so devoid of importance. In the three instances where the trial judge sustained the objection, how was the development of the facts in any wise aided by the ruling? Why, in fact, should there be anything in the books to suggest to the lawyers that they make this kind of objection? And could not these appellate judges have devoted their time to a more profitable pursuit?

Various reasons have been advanced to justify the rule of limited cross-examination.

(1) A party vouches for his own witness but only to the extent of the subject matter which he elicits from him on direct examination. The justification for this limitation is far from clear. See the attempted explanation by Sanborn, J., in Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., CASES ON EVIDENCE 277, n. 38 (1965). It is conceivable that a witness could be trustworthy as to some matters but not as to others, but the assumption is a doubtful one to accept as a general principle. In any event, the rejection of the old rule against impeaching one's own witness (proposed Rule 6-07) renders the whole point moot.

(2) A party cannot ask his own witness leading questions. Like the notion of vouching, this argument also depends on the concept that a witness is one's own only to the extent that one

chooses to examine him on direct. Again, why this should be so is unclear. Moreover, in view of the encroachments heretofore made upon the rule against leading one's own witness, and with the advent of a rule along the lines of proposed Rule 6-12, the objection assumes proportions which are indeed minute.

(3) A practice of limited cross-examination promotes the orderly presentation of the case. See Finch v. Weiner, 109 Conn. 616, 145 Atl. 31 (1929), holding it error to allow defendant, whose driver was called by plaintiff to establish agency and identify an accident report, to call for full details of the accident on cross-examination. The contention flies in the face of the accepted principle that the order of presenting evidence generally is subject to the control of the judge. McCORMICK §§ 4, 24, 27. Moreover, it may be questioned "whether the direct examiner is in justice entitled to the psychological advantage of presenting his facts in this falsely simple and one-sided way." Id., § 27, p. 51.

Judge Donworth gave the following illustration of the application of the rule of limited cross-examination now found with respect to adverse parties in Rule 43(b) of the Federal Rules of Civil Procedure

> Take the form of complaint that is given in the appendix in Form 9. It involves a collision in Boylston Street in Boston. As attorney for the plaintiff you may want to show the hour of the day and your own witnesses may not be able to establish that. You call the defendant to the stand -- the plaintiff's attorney calls the defendant to the stand and says, "You were driving a car in Boylston Street in Boston on the first day of August?"

"Yes."

"At what hour did you come into collision with another car there?"

"At one o'clock."

Now mind you, the defendant has been put on by the plaintiff to prove a certain fact. The attorney for the defendant cannot then go into the whole matter of the collision, the pros and cons. He can only cross-examine his client on the specific fact that has been brought out. That is what that part of the rule means.

American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, 390 (1938).

Perhaps even more persuasive than the unsoundness of the reasons advanced in support of limited cross-examination are the practical difficulties encountered in its administration. The entire concept hinges upon what is the "scope" of the direct. The cases mentioned at the outset of this discussion illustrate the point. As McCormick says:

> The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many court rooms, of continual bickering over the choice of the numerous variations of the "scope of the direct" criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisions were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of

the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:

> "'The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.
>
> "'We recommend that the rule allowing questions upon any part of the issue known to the witness . . . be adopted. . . .'"

The statement and the recommendation seem well sustained by reason and experience. McCORMICK § 27, p. 51.

Subsection (b)

When the present Federal rule which limits cross-examination to the scope of the direct is applied to the accused in a criminal case the result is quite different from what happens in the case of an ordinary witness. Since the ordinary witness can be called at a later point by the cross-examiner, the application of the limited rule affects only the time and order of obtaining the testimony, not its ultimate availability. But when the witness is the accused, whom the prosecution cannot call, the effect of the limited rule is to serve as a measure of the waiver of the privilege against self-incrimination. The unacceptability of this result is illustrated by Tucker v. United States, 5 F.2d 818 (8th Cir. 1925), a prosecution for devising a scheme to defraud and using the mails to distribute newspaper

advertisements in furtherance of it. One of the defendants testified as to the scheme but said nothing about the advertisements or using the mails. It was held error to allow him to be asked on cross-examination whether he had caused the advertisements to be inserted in the newspapers.

The Supreme Court has not had the precise question before it. In Fitzpatrick v. United States, 178 U.S. 304 (1900), the Court stated (permissively rather than restrictively) that when the accused takes the stand the prosecution has the right to cross-examine him with the same latitude as an ordinary witness. The extent of waiver by a testifying accused was described in Raffel v. United States, 271 U.S. 494 (1926), as "within limits of the appropriate rules" of cross-examination. In contrast, the waiver was described in Johnson v. United States, 318 U.S. 189 (1943), as extending to "all other relevant facts." And see also Brown v. United States, 356 U.S. 148 (1958).

As McCormick says, "Surely the according of a privilege to the accused to select out a favorable fact and testify to that alone, and thus get credit for testifying but escape a searching inquiry on the whole charge, is a travesty on criminal administration." McCORMICK § 26, p. 50. Accordingly the draft in general makes no distinction between the scope of cross-examination of accused and of ordinary witness. This approach would leave the Court free to deal with the matter as a purely constitutional one, unhampered and uncomplicated by any over-

lapping restriction in the purely procedural terms of cross-examination.

In one respect, however, a different treatment of the accused seems to be required, and that is the subject of subsection (b). The difference is with regard to the giving of testimony on such preliminary matters as the voluntariness of a confession or the legality of a search and seizure. See Stein v. New York, 346 U.S. 156 (1953), in which defendants claimed they did not testify that their confessions were coerced because to do so would have subjected them to a general cross-examination. There may be other situations involving preliminary questions of like nature. Fairness seems to militate against any general rule of waiver in these cases, a position which finds support in the authorities. McCORMICK § 131, p. 276, confessions; People v. Williams, 25 Ill.2d 562, 185 N.E. 2d 686 (1962), search and seizure.

Rule 6-15. Prior statement of witness. (a) Examining witness. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him. (b) Extrinsic evidence. Extrinsic evidence of a prior statement by a witness is inadmissible unless the opposite party is afforded an opportunity to examine or cross-examine him thereon.

Comment

Subsection (a)

The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), announced the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. This impediment to cross-examination was abolished by statute in its country of origin in 1854, St. 17 & 18 Vict., c. 125, § 24, but achieved some currency in the United States through Greenleaf's espousal of it. McCORMICK § 28, p. 53. Professor McCormick suggests, however, that the profession generally is unaware of the rule. The writers have been highly critical of the rule. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L. Q. 239, 246-247 (1967); McCORMICK § 28; 4 WIGMORE

§§ 1259-1260. Dean Ladd, id., expresses the criticism in these words:

> The Rule of The Queen's Case confused the principles applicable to the best evidence rule with principles applicable to cross-examination concerning the terms of a writing of the witness, when he is being examined about the writing only for the purpose of discrediting his testimony given in court. Under the best evidence rule, where the writing itself is the subject of inquiry, the proof of the contents of the writing is the document itself. Inquiry through secondary sources as to its content cannot be made until it is shown by acceptable proof that the original document is unavailable. If, however, the purpose of the examination into the content of the document is to discredit the witness about matters stated therein, cross-examination as to whether he wrote it and what he said in it may be a most effective method of determining his credibility if he denies making the writing or states its content to be something different than in fact it is. The Rule of The Queen's Case required that the writing be shown to the witness before permitting interrogation upon its content, thus eliminating what may be an effective part of the impeachment. Likewise, in reference to an oral statement made out of court, counsel on cross-examination may prefer, for the purpose of impeachment, first to ask the witness what he had said, if anything, rather than confront him initially with the statement. In the situation either of a writing or of an oral statement, if the witness were asked what he said before being confronted with the statement, he might give a different story, thus disclosing his desire to evade the effect of what he had said previously. Whatever the effect of the divergent answers on his credibility may be, there have been strong protests against restraints on this type of cross-examination.

In view of these considerations, it seems wise to incorporate a provision abolishing the rule in The Queen's Case and to accompany it with a like provision relative to statements not in writing, thus opening the door to free and unrestrained inquiry concerning prior statements. See California Evidence Code § 768.

It will be noted that subsection (a) of the proposed draft does not in any respect defeat the application of the rule

requiring production of the original writing when and if the contents of a written statement are sought to be proved. It will further be noted that this subsection does not treat the problem of affording an opportunity to explain before offering a prior statement by the witness, which is reserved to subsection (b).

While subsection (a) is not in terms limited to impeaching statements, it is apparent that its principal application will involve them. The broader language is used in the expectation that the rules as finally evolved by the Committee will treat hearsay requirements as satisfied by the production for examination or cross-examination of a person making an extrajudicial statement.

Subsection (b)

Every trial practitioner knows by rote the familiar foundation requirement for impeachment by extrinsic proof of a prior inconsistent statement and the formula for satisfying it: The attention of the witness must, on cross-examination, be directed to the time, place, and persons present, if oral, or shown the statement, if written, and he must then be asked whether he made the statement or its substance. See Ladd, supra, at p. 247. Model Code Rule 106 and Uniform Rule 22(b) make exclusion for noncompliance with these requirements discretionary with the judge. The Comment to the Uniform Rule asserts that "Any other approach is too technical and unrealistic." That to

the Model Code says, "The rule is sometimes applied rigidly, even to cases where the contradictory statement is not discovered until after the witness has become unavailable." These justifications for entrusting the matter to the discretion of the judge are not believed to be sufficiently impressive to support the result. See California Evidence Code §§ 769-770.

It will be observed that subsection (b) makes no distinction between prior statements used to impeach and those used as substantive evidence. If the latter are to be regarded as being not obnoxious to the rule against hearsay, then the same procedural treatment seems to be indicated.

Rule 6-16. Calling and interrogation by judge. The judge, on his own motion or at the suggestion of a party, may call witnesses and may interrogate witnesses, whether called by himself or by a party. The parties may object to questions so asked and to evidence thus adduced but are not required to do so in order to preserve error for review.

Comment

The authority of the judge to call witnesses is well established. Instances of its exercise are more frequent in criminal cases than in civil, but this seems to arise from inherent differences in the basic situations rather than from the existence of any broader authority in the criminal cases. See Model Code of Evidence, Rule 105(d), Comment; California Evidence Code § 775, Comment; McCORMICK § 8, p. 14; Maguire, Weinstein, et al., CASES ON EVIDENCE 303-304; 9 WIGMORE § 2484. Perhaps the principal reason for asking the judge to call a witness has been to escape from the technical implications of the concept of vouching for one's own witness: Any party may cross-examine and impeach a court's witness. With the disappearance of the theory of vouching, these technical considerations would also disappear. However, it seems likely that vouching has a non-technical aspect in the sense that jurors,

and, perhaps judges, tend to associate a witness with the party calling him, in disregard of the fact that a party generally does not choose his witnesses. If this appraisal is sound, there may still be good reason for a party not to wish to call a particular witness. In any event, it seems unwise to imprison the judge within the case as made by the parties by denying him the power to call witnesses on his own motion.

The authority of the judge to question witnesses is similarly recognized. Model Code of Evidence Rule 105(d), Comment; McCORMICK § 8, pp. 12-13; Maguire, Weinstein, et al., CASES ON EVIDENCE 737-739; 3 WIGMORE § 784. It is, of course, subject to abuse when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the extent of its exercise would be difficult to outline in the form of a rule. Recognizing the power would in no sense preclude courts of review from continuing to reverse for abuse of it.

The provision dispensing with the need for objection in order to preserve error for review is based upon the embarrassing situation in which counsel finds himself in objecting to questions by the judge, not only with respect to the impact upon his relations with the judge but also because of the role in which he is cast in the eyes of the jury. Similar dispensations with objections have been incorporated in first draft Rules 6-05 and 6-06, dealing respectively with judge and juror as

witness. Compare California Evidence Code § 775, which contains no provision dispensing with objections.

Rule 6-17. Exclusion of witnesses. At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own motion. This rule does not authorize exclusion of a party who is a natural person, or of an officer or employee of a party which is not a natural person designated as its representative by its attorney, or of a person whose presence is shown by a party to be essential to the management of his cause, but the person thus exempted from exclusion may be required to testify prior to other witnesses for his side. The judge may also order witnesses not to communicate with other persons. In the event of a violation of an order entered under this rule, the judge is authorized in his discretion to exclude the witness from testifying.

Comment

The efficacy of sequestering witnesses as a means of exposing fabrication and inaccuracy of testimony has been recognized since Biblical times. Wigmore gives a graphic portrayal,

beginning with the story of Susanna and the elders. The procedure serves to safeguard against contrived correlation of testimony with that of other witnesses on the same side as well as the shaping of testimony with a view to that of witnesses for the opposite party. 6 WIGMORE §§ 1837-1838.

No question exists as to the authority of a judge to exclude witnesses, the only diversity of opinion being with respect to whether it is demandable by a litigant as of right or is a matter committed to the discretion of the trial judge. Traditionally the view has been that exclusion rests in the discretion of the judge. Coolman v. State, 163 Ind. 503, 72 N.E.2d 568 (1904); Zambarano v. Massachusetts Turnpike Authority, 215 N.E.2d 652 (Mass. 1966); Annot., 85 A.L.R.2d 478 (expert witnesses). While some cases suggest the possibility of review in the event prejudice results from a denial, Williamson v. United States, 310 F.2d 192 (9th Cir. 1962), the impossibility of making an affirmative showing of prejudice in most cases is manifest. Wigmore argues vigorously that exclusion, like cross-examination, ought to be regarded as a matter of right, id. § 1839, and cases and statutes to that effect appear to be increasing in number. See 8 WIGMORE § 1837, n. 11, § 1839, n. 2. In People v. Dixon, 23 Ill.2d 136, 177 N.E.2d 206 (1961), the court ruled that exclusion was discretionary with the trial judge but that denial was an abuse absent justification shown of record. The proposal takes the view that exclusion is de-

mandable as of right and may also be ordered by the judge on his own motion. Compare California Evidence Code § 777 which in terms seems to make exclusion discretionary with the judge.

The Reporter considered incorporating a requirement that the demand be made prior to the calling of any witness. He concluded, however, that a provision of this kind would be too rigid, since the need for exclusion might arise unforeseeably in the course of the trial. In any event, the making of a demand would be open to any party, and a party who failed to demand exclusion while his opponent's witnesses were testifying would have only himself to blame if the opponent made a demand with respect to his witnesses.

The proposal excludes from its application several categories of persons. (a) A party who is a natural person is not excludable. This exception accords with recognized practice and seems scarcely to be open to question. 6 WIGMORE § 1841. (b) A party which is not a natural person is entitled to have an officer or employee present, as the equivalent to the right of a natural party to be present. This again is in accordance with recognized practice. Most of the cases involve allowing a police officer, who has been in charge of the investigation and will testify, to remain in the courtroom to assist the prosecutor despite a general order of exclusion. United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956), cert. denied 351 U.S. 986; Portomene v. United States, 221 F.2d 582 (5th Cir. 1955);

Powell v. United States, 208 F.2d 618 (6th Cir. 1953); Jones v. United States, 252 F.Supp. 781 (W.D. Okla. 1966). The persuasiveness of these decisions in this respect is not impaired by the fact that they were decided by courts adhering to the view that entering an order of exclusion is discretionary. Probably the logical source for the designation of the officer or employee would be the client. However, the obvious awkwardness engendered suggests seeking an easier solution, and one is found, and here followed, in the California Evidence Code § 777 provision for designation by the attorney. The result may be a peculiar inversion of the attorney-client relationship, but it impresses one as simple and workable. (c) The third exception is much less likely to be invoked, as it involves the presence of a person whose presence is shown to be essential to the management of the case. Persons in this category might include an agent who handled the transaction being litigated or an expert needed to advise counsel. See cases cited in 6 WIGMORE § 1841, n. 4.

As a means of minimizing the ill effects of allowing the foregoing witnesses to remain, the draft authorizes the judge to require them to testify prior to other witnesses for that side, following the suggestion found in 6 WIGMORE § 1841, p. 364, and in some statutes. Id., § 1837, n. 11.

The proposal also provides for the entry of an order that witnesses not communicate with other persons. In view of the

practical difficulties of making an order of this kind effective, no choice is apparent except to commit the matter to the discretion of the judge. See 6 WIGMORE § 1840, p. 361.

The circumstances under which violation of an order may occur and the attendant adverse effects vary too greatly to allow the drafting of a rule attaching fixed consequences to violation. A witness may violate the order innocently or wilfully; the party desiring his testimony may or may not have connived at the violation; the nature of his testimony may or may not be such as might be affected by hearing other witnesses testify. These factors, plus the very limited nature of the control exercised by a party over his witnesses, call for the exercise of discretion in penalizing infractions. The only apparently available penalty is to exclude the witness from testifying. See 6 WIGMORE § 1842.

The subject matter of this rule is not treated in the Model Code or in the Uniform Rules.