Advisory Committee
on Evidence
Memorandum No. 19

ARTICLE VIII. Hearsay
Preliminary Note on Hearsay

The Components of Credibility

There is general agreement that the factors which a trier must take into consideration in evaluating the testimony of a witness include the following:

(1) Perception. Did the witness in fact perceive the event or does he otherwise know the matter about which he testifies? Was his perception or knowledge accurate and full?

(2) Memory. Has the witness retained an accurate conception? To what extent has he been affected by subsequent events? Is what is in his mind actually something constructed since the event?

(3) Narration. Has the witness used words in their ordinary sense? Is there anything in his choice of language to indicate anything less than a full and accurate rendition.

For example, Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948), SELECTED WRITINGS ON EVIDENCE AND TRIAL 764, 765 (Fryer ed. 1957), hereinafter cited as SELECTED WRITINGS; Shientag, Cross-Examination -- A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 485, SELECTED WRITINGS 756, 757; Weinstein, The Probative Force of Hearsay, 46 Iowa L. Rev. 331 (1961).

To these three components, a number of the writers have added a fourth, sincerity. Ibid. It would seem, however, that sincerity should not be regarded as a separate component of credibility but rather as an aspect of the witness which bears importantly upon his perception, memory, and narration. If the witness testifies that he saw an event, when in fact he did not, a fatal flaw permeates all three components: he had no perception; his memory is nonexistent; and his narrative does not relate the facts. Regardless of whether the witness lies deliberately or is honestly under a misapprehension, the impact upon his credibility is not dissimilar.

Achieving and Exploring Credibility

If credibility is, then, the product of perception, memory, and narration, it seems self-evident that testimony should be presented under conditions calculated to encourage the witness to his best effort with respect to each and to expose any inaccuracies which may enter in. To this end, the Anglo-American tradition has evolved three conditions under which witnesses ordinarily will be required to testify.

(1) Oath. Whether based upon fear of divine punishment in the hereafter or upon fear of punishment for perjury more immediately or upon an enhancement of the solemnity of the occasion, standard procedure calls for the swearing of witnesses, although it recognizes a right to affirm by those with scruples against taking oaths. McCORMICK 457. While it may be true that the oath currently exerts

less influence than in an earlier and less sophisticated time, Morgan, op. cit., SELECTED WRITINGS at 770, no disposition is apparent to recede from the requirement of oath or affirmation.

(2) Personal presence at the trial. Sometimes mentioned, Morgan, op. cit., SELECTED WRITINGS at 770, Strahorn, op. cit. SELECTED WRITINGS at 756; Weinstein, op. cit. at 333, sometimes overlooked or minimized, McCORMICK 457; Morgan BASIC PROBLEMS OF EVIDENCE 248 (1962), the requirement that testimony be given in the presence of both trier and opponent is generally accepted. Douglas v. Alabama, 380 U.S. 415 (1965) quoting with approval a passage from Mattox v. United States, 156 U.S. 237, 242 (1895), which emphasizes the importance of confrontation and observation.

The demeanor of the witness traditionally has been believed to furnish the trier with important clues in evaluating the elements of his testimony and the opponent with valuable clues for cross-examination leading to the same end. So-called "demeanor evidence", as a significant and essentially non-reviewable element of the fact-finding process, has often been the subject of comment. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 495-496 (1951). Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 A.B.A. J. 580 (1961), collects and quotes authorities, including Chief Justice Appleton, Jerome Frank, Sir James Fitzjames Stephen, and Learned Hand. All agreed that observing demeanor is important in determining credibility and all found great difficulty in describing what you look for. Perhaps use of the lie-detector would diminish

the emphasis upon demeanor, but the possibility now is too remote to be considered. The impression upon the witness himself cannot be ignored, as the solemnity of the occasion and the possibility of public disgrace are brought home. Strahorn, op. cit., SELECTED WRITINGS 756-757. And it seems reasonable to suppose that falsehood becomes more difficult if the person against whom it is directed is present.

Examination and cross-examination of witnesses in the presence of the jury was fundamental to the common law jury trial. Lebeck v. William A. Jarvis, Inc., 250 F.2d 285 (3d Cir. 1957). In equity, however, the situation was otherwise. The former equity practice in the federal courts has been described as follows:

> "The court did not see or hear the witnesses. The depositions were taken in the lawyer's office, at the convenience of lawyers and witnesses, objections were noted on the record and almost invariably ignored thereafter. The cases were not well prepared in advance, the depositions were diffuse, the right of cross-examination was frequently abused and the printing bills were exorbitant. An equity case, particularly a patent case, was looked on as a meal ticket for the lawyer. The whole process became a scandal." Dike, A Step Backward in the Federal Courts: Are We Returning to Trial By Deposition? 37 A.B.A.J. 17 (1951).

The Equity Rules of 1912 required that trials be in open court. Federal Rule of Criminal Procedure 26 provides:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules."

Federal Rule of Civil Procedure 43(a) contains the identical language, save for the reference to act of Congress.

The development of the constitutional right of confrontation furnishes additional fortification to the requirement that witnesses testify in the presence of trier and opponent. It will be examined further at a later point.

(3) Cross-examination. While emphasis on the basis of the hearsay rule has changed over the years, today it tends to center on the condition of cross-examination. McCORMICK 457-459; Morgan, Foreward to MODEL CODE OF EVIDENCE 37 (1942); 5 WIGMORE § 1362. All may not agree with Wigmore's characterization of cross-examination as "beyond doubt the greatest legal engine ever invented for the discovery of truth," 5 WIGMORE § 1367, p. 29, and cf. McCORMICK § 31, but all will agree with his statement that it has become a "vital feature" of the Anglo-American system. 5 WIGMORE § 1367, p. 29.

The process of cross-examination has a direct effect inasmuch as the process of exploring and illuminating the perception, memory and narration of the witness operates as an aid to evaluating his testimony. Moreover, it can scarcely be doubted that the knowledge of the witness that he will be subjected to cross-examination exerts some indirect and probably salutary effect upon the kind of story he tells in the first place.

The extent to which any serious proposal to curtail or abolish cross-examination would arouse the opposition of the bar and enhance the dissatisfaction of litigants and public with the processes of the law can scarcely be exaggerated. The belief, or perhaps hope, is fundamental that imperfections and insincerities will be exposed by cross-examination Morgan, Foreward to MODEL CODE OF EVIDENCE 37 (1942).

What Hearsay Is

The ideal, then, is achieved by the testimony of a witness given (1) under oath (2) in the presence of the trier and the opponent and (3) subject to cross-examination. The hearsay rule represents an effort to attain this ideal, and any evidence which falls short of full compliance with the conditions just mentioned may broadly be described as hearsay. At this juncture, fine lines dividing hearsay from non-hearsay are of slight importance. The question in the large is what to do about hearsay in the large?

The Hearsay Problem

The logic of the discussion which has preceded might suggest that no evidence be received unless in full compliance with the three conditions. Of course, no one advocates this position, the reasons probably being twofold. In the first place, much evidence which fails to comply with all three conditions will, as measured by standards of what for lack of a better term must be called "common sense," be found to be equal or perhaps even inherently superior to evidence introduced under ideal circumstances. There is slight utility, it has been said, in a concept

> "so broad as to include the prattling of a child and the mouthings of a drunk, the encyclical of a pope, a learned treatise, an encyclopedia article, a newspaper report, an unverified rumor from an anonymous source, an affidavit by a responsible citizen, a street corner remark, the judgment of a court . . . ." Loevinger, Facts, Evidence and Legal Proof, 9 Wes. Res. L. Rev. 154, 165 (1958), and see McCORMICK 459,

and so narrow as to ignore the fact that human knowledge is derived not only from individual experience but also in learning from others. Loevinger, op. cit. at 166. Secondly, when the choice is between less-than-best and none, only clear folly compels doing without.

The problem resolves itself into retaining as much of the values represented by the three conditions as is feasible within the realities of an imperfect world in which the judicial process very likely assumes somewhat less importance in the total scheme than is usually accorded it by those who are its intimate associates.

The solution to the hearsay problem now in vogue after a couple of centuries of evolution consists of a general rule which excludes hearsay but is subject to numerous exceptions. Attacks upon it, and most of the writers have mounted them, proceed generally along two lines: first, the scheme is too bulky and complex to serve as a practical guide for the trial of lawsuits, and second, it fails to screen the wheat of good hearsay from the chaff of bad hearsay on a realistic basis. There may be added a third, that it inhibits the growth of the law.

As to the first objection, it may be observed that 25% of the pages in McCormick's text are devoted to hearsay and its exceptions, while Wigmore requires over a thousand pages to cover the subject. An English authority has estimated that hearsay and its exceptions make up one-third of the law of evidence. Nokes, The English Jury and the Law of Evidence, 31 Tulane L. Rev. 153 (1956). Most of this bulk is concerned with the exceptions. How many exceptions there are

depends, of course, in some measure upon the degree of specificity used in classifying them. Cross counts 20, Cross, The Scope of the Rule Against Hearsay, 72 L. Q. Rev. 91 (1956), while Uniform Rule 63 enumerates 31 exceptions, with some containing in fact more than a single exception. A general rule so riddled with exceptions has been called "farcical." Nokes, op. cit. Yet note should be taken that a substantial number of the exceptions, for example those involving pedigree, judgments against persons entitled to indemnity, and statements by voters, are called into play only infrequently and then probably with a reasonable degree of foreseeability. No more than ten or a dozen are likely to arise in ordinary litigated situations, perhaps unforseeably in many instances, but to expect mastery of this relatively modest kit of tools seems not to be an undue tax upon the resources of a learned profession. If the scheme of the hearsay rule and exceptions is otherwise workable, perhaps the difficulties of bulk and complexity are more apparent than real.

The second and more serious complaint against the present scheme is that it fails to screen out good (reliable or persuasive) hearsay from bad (unreliable or unpersuasive) hearsay. Illustrations are not lacking. McCormick points out the unrealism of saying in advance that a patient's statement of symptoms to a treating physician is admissible, while his statement to the same physician of how he got hurt is excluded, or that a dying declaration merits admissibility in a prosecution for killing the declarant but not in other cases. McCORMICK 626; McCormick, Tomorrow's Law of Evidence, 24 A.B.A.J. 507,

512 (1938). Morgan suggests the inconsistencies present in rejecting former testimony in many situations but admitting pedigree declarations by remote relatives, in rejecting declarations against penal interest but admitting those against a pecuniary one, and in rejecting a record of conviction as evidence of guilt in another case but admitting the record of a deed as evidence of execution and delivery. Morgan, Foreward to MODEL CODE OF EVIDENCE 46 (1942). The illogic of what is thus disclosed can scarcely be denied, but it should be noted that, at this point, the criticisms mentioned are susceptible of being interpreted as suggesting either that the classifications into which the hearsay exceptions have been moulded are unsound or that any system of classifying exceptions is itself impossible of accomplishment in an acceptable fashion.

Possible Solutions

No one advocates excluding all hearsay, so the question resolves itself into one of when shall hearsay be admitted. Three possible solutions may be suggested: (I.) abolish the rule against hearsay and admit all hearsay without restriction; (II.) admit hearsay if it possesses sufficient probative force, but with procedural safeguards; (III.) revise the present system of class exceptions.

I. Abolition of the hearsay rule. Abolishing the rule and admitting all hearsay possesses a beautiful simplicity as perhaps its strongest appeal. It would at a stroke clear away the debris of two centuries of improvisation and hairsplitting.

Two situations are possible when it is contemplated that a hearsay statement may be offered in evidence: the declarant may be available or he may not. If he is available, the ideal conditions for the presentation of testimony (oath, presence of witness, cross-examination) do not necessarily disappear, but they do become optional. The proponent of the evidence, wishing to make the strongest case possible, is under considerable pressure to produce the declarant as a witness in person and to forget the hearsay statement because it is inferior. If he opts in favor of the hearsay statement notwithstanding, then two courses would be open to the opponent: he could rely argumentatively upon the weakness of proponent's position arising from his failure to produce the best evidence at his command, or he could himself secure the attendance of the declarant for cross-examination under oath in the presence of the trier. If declarant's existence and identify are known or discoverable, and if he is available, and if it is conceded satisfactory compliance with the three conditions for the giving of testimony is attained by placing declarant under oath and in the presence of the trier, subjecting him to cross-examination concerning a prior statement by him which has been proved in evidence but was not itself made under the prescribed conditions, then opponent can effectively protect himself against the element of hearsay. Thus, when declarant is available, the question is really one of who does the work of producing him. This may or may not involve a substantial burden. The best evidence rule has resolved a similar problem by

imposing the burden on the proponent of the evidence, and the provision of Uniform Rule 63(1) admitting the hearsay declaration of a person "who is present at the hearing and available for cross-examination...." seems pretty clearly to place the burden of making him available upon the proponent.

When the declarant is not available, there is, of course, no way in which the opponent can secure his attendance. Whether admitting his out-of-court statement involves foregoing all or only some of the ideal conditions will depend upon circumstances. Thus the statement may have been made under oath, resulting in loss of personal presence before trier and opponent and of cross-examination, as in the case of an affidavit, or it may have been under oath in the presence of opponent and subject to cross-examination, with the loss only of presence before trier, as in the case of testimony given in a former trial of the same case; or it may involve total noncompliance with the ideal conditions, as in a statement contained in a letter. A rule of free admissibility of hearsay attaches no significance to these differences and exacts no quid pro quo by way of some assurance of enhanced trustworthiness in exchange for complete noncompliance with the ideal conditions when the declarant is unavailable. The Model Code did exactly that.

Rule 503 of the Model Code provides:

> "Evidence of a hearsay declaration is admissible if the judge finds that the declarant
> (a) is unavailable as a witness . . . ."

Described in the Comment as effecting "radical changes in the common law," the proposal found support in the Massachusetts Act of 1898, enacted at the instance of Thayer, and the English Act of 1938.

The Massachusetts statute provides:

> "A declaration of a deceased person shall not be inadmissible in evidence as hearsay . . . if the Court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." Mass. Gen. L. 1932, c. 233 § 65.

The English statute permits the introduction of a written statement made on the personal knowledge of the maker or in the regular course of business if the maker is called as a witness or is unavailable (dead, mentally or physically disabled, beyond the seas, or cannot be found). The Court may also, if satisfied that undue delay or expense would otherwise be caused, admit such a statement, notwithstanding the maker is available and not called. Statements made by interested persons when proceedings were pending or anticipated are not included. St. 1938, c. 28, Evidence.

The English statute is in terms limited to civil proceedings, and the Massachusetts statute has been so construed. Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718 (1931), denying the benefit of the statute to an accused on the ground that the word "action" does not include a criminal proceeding. The decision is one purely of statutory construction. Cf. In re Kaenan, 287 Mass. 577, 192 N.E. 65 (1934), applying the statute in a disbarment proceeding.

The Uniform Rules draftsmen retreated from the Model Code position. The Comment to Rule 63 states:

> "In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness. In this respect this rule is a drastic variation from A.L.I. Model Code of Evidence Rule

> 503(a) which recognizes a finding of unavailability as the sole criterion for the admissibility of a large body of hearsay statements. The Model Code theory is that since hearsay is evidence and has some probative value it should be admissible if relevant and if it is the best evidence available. That policy is rejected by the Conference of Commissioners on Uniform State Laws. The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made."

This statement reflects the rather general view that one of the reasons for the nonacceptance of the Model Code was this aspect of its treatment of hearsay. No doubt the thinking of the profession has moved forward in the intervening 25 years with respect to hearsay, yet general admission of statements of unavailable declarants seems still calculated to arouse the stoutest resistance. Moreover, there is intrinsic doubt as to the wisdom of abandoning the traditional assurances of credibility without seeking substitutes.

Professor Davis probably goes about as far as anyone in advocating abandonment of the hearsay rule, yet he recognizes the hearsay objection as an appropriate ground for exclusion under the guise of lack of relevance or utility. Davis, Evidence Reform: The Administrative Process Leads the Way, 34 Minn. L. Rev. 581, 608 (1950); 2 Davis, ADMINISTRATIVE LAW TREATISE 250 (1958). See also Nokes, op. cit. at p. 171, advocating abolition of the rule in civil cases.

Finally, the constitutional requirement of confrontation without doubt bars any across-the-board abandonment of the hearsay rule in criminal cases.

II. Admitting on basis of probative force with procedural safeguards. This approach to the hearsay problem rests upon the assumption that compliance with the normal conditions for the giving of testimony should be regarded as a rule of preference and not an absolute rule of exclusion, and upon the assumption that the triers of today, including jurors, are endowed with sophistication equal to the task of evaluating the probative strength or weakness of hearsay evidence in a particular situation. Weinstein, op. cit. at 335, 353. A parallel may be found in the general abolition of the rules which at common law declared parties, interested persons, spouses, and felons to be incompetent as witnesses, while allowing the former bases of incompetency to be considered on the question of credibility. See On Lee v. United States, 343 U.S. 747, 757 (1952). It then proposes the abandonment of the system of class exceptions in favor of individual treatment within the context of the particular case, accompanied by certain procedural safeguards designed to minimize any hearsay dangers which survive the initial screening. Weinstein, op. cit. 338-342. The guide for the judge in determining admissibility would be to weigh the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. This is said to be an application of the "well recognized principle embodied in Rule 45 of the Uniform Rules giving the court discretion to exclude admissible evidence." If declarant is available, the spoliation argument could be applied, but preferably his statement would be excluded or at least excluded unless the proponent

produced him for cross-examination. The bases of the traditional hearsay exceptions would be helpful in assessing probative force, presumably by both the judge and by the trier of fact. See Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn. L. Rev. 506 (1934), suggesting that as rules of admissibility become more liberal, principles which formerly called for exclusion will become bases for evaluation, and that an understanding of these principles would prevent the chaos which otherwise might result from free admissibility. The parallel to the history of competency of witnesses has already been noted.

The procedural safeguards to accompany admissibility thus determined would consist of notice of intention to use hearsay, free comment by the judge upon the weight of the evidence, and a greater measure of authority by both trial and appellate courts in dealing with weight of evidence which is hearsay. As to the notice-of-intention procedure, a suitable environment is provided by the growth of discovery and pre-trial hearings. Some rudimentary examples of the procedure are now in existence, for example Federal Rule of Civil Procedure 26(d)(3), item 5, dealing with use of depositions under exceptional circumstances, the English Evidence Act of 1938, providing for advance rulings on the admission of written hearsay, and the notice requirement of Uniform Rule 64 when certain kinds of official records or reports are to be used. Admittedly the need for hearsay cannot always be anticipated, and some leeway should be

permitted. Comment upon the evidence is designed to bring into play the more highly trained critical faculties of the judges after counsel have first attacked the weight question argumentatively. Giving trial and appellate judges greater power in assessing weight when hearsay is involved is justified by the fact that no demeanor has been observed by the trier. Precedent may be found in the traditional equalization of the positions of trial and appellate judges when the testimony has been heard by a master.

The case so made is impressive and deserving of the serious consideration of the Committee. In its consideration, the Committee should take into account, however, certain arguments which may be made against the proposal.

(A) Discretion. Since the proposal envisages a very large measure of discretion in the trial judge, some scrutiny must be made of the nature and implications of judicial discretion.

(1) When a matter is left to the discretion of the trial judge, it means either one of two things: that it is impossible to frame a rule for his guidance in the circumstances, or that it really does not make any difference how he rules in any event. The net result is that his rulings is final. See Report of Committee on Improvements In the Law of Evidence of the American Bar Association, 63 A.B.A. Rep. 570, 576 (1938), which points out the misleading nature of the term "discretion", and that "abuse of discretion" means a ruling on grounds clearly untenable, rather than bad motive or wrongful purpose. The report also suggests that finality cannot be allowed the trial judge

in the formulation of a rule but can often be conceded in application.

Since it can scarcely be conceded that rulings by the trial judge are a matter of indifference, advocacy of discretion must rest upon the view that formulation of a rule is impossible. This counsel of despair will be examined further in the discussion.

(2) The idea that rules actually do influence conduct dies hard. It may be that judicial opinions are only post-rationalizations, but the general acceptance of the judicial process in this country has not been premised upon that assumption. The difficulties currently being experienced by administrative agencies which lack norms for their guidance in evaluating a particular situation is a matter of some notoriety. When courts go awry it is for other reasons.

> "The suitor must feel that success is dependent upon the truth of his contentions and not upon the personality of the judge who passes upon the question of the truth, or who determines what evidence he will receive or submit to the consideration of the jury." Lehman, Technical Rules of Evidence, 26 Colum. L. Rev. 509, 512 (1926).

(3) The only way in which the probative-force aspect of hearsay is any different from the probative-force aspect of other testimony lies in the fact that the trier in the hearsay situation is deprived of oath, demeanor, and cross-examination as aids in determining credibility. When it is proposed to confer upon the trial judge a greater discretion to admit or exclude hearsay depending upon its probative force, the effect is to move him into the area of credibility, one traditionally reserved to the trier of fact and in any event not a basis

heretofore for admitting or excluding evidence generally. For a judge to exclude evidence upon the ground that he does not believe it has been described as "altogether atypical, extraordinary...." Chadbourn, Bentham and the Hearsay Rule - A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932, 947 (1962). Nokes, op. cit. at 171, believes that admitting all hearsay in civil cases is preferable to the dubious expedient of discretion. A parallel is found in the decisions holding that determination of the truth or falsity of supporting affidavits is not a function of summary judgment procedure; the question is for the trier.

(4) In areas of discretion there is no precedent. The Comment to Rule 303 of the Model Code, giving the judge discretion to exclude evidence if he found that its probative value was outweighed by waste of time, risk of prejudice, confusion of issues, or surprise, is relevant:

> "The application of this Rule should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as a precedent in another."

Admittedly the law of evidence suffers from a myriad of precedents, but the substantial destruction of guidelines save for those couched in terms of the utmost generality may be hard to accept.

(5) The effect upon the trial judge of the substantial destruction of precedent is apparent. The side effect upon the trial lawyer in the preparation of a case is at least equally important. Again, the influence of rules should not be exaggerated, but to do away with them for all

practical purposes makes the planning and preparation of a case an almost hopeless venture. As Professor Maguire has pointed out, with the emphasis of understatement "...it is uncomfortable to go to trial without knowing whether important evidence will be let in or excluded." Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 776 (1961). True, a notice and hearing procedure prior to trial will attain a measure of certainty in advance. However, this procedure presents problems of its own, and in any event it scarcely seems that a lawsuit ought to have to be filed in order to get a fair idea whether certain key evidence is admissible.

(B) Control Over Jury. One of the procedural safeguards suggested as a companion piece to a rule committing hearsay to the discretion of the trial judge is greater trial court control over the jury. Since comment upon the evidence is singled out for separate treatment, Weinstein, op. cit. at 341, the control measures envisioned must be the direction of verdicts and the setting aside of verdicts accompanied by grant of a new trial. Traditionally verdicts have been directed for defendants when a plaintiff's case was considered insufficient to enable the jury reasonably to find for the plaintiff; counter evidence is not considered. On rare occasions verdicts have been directed for plaintiff's on the basis of the strength of an uncontradicted case. After a verdict has been returned, it is subject to attack as against the weight of the evidence, in which case all the evidence is considered, and if the motion to set aside is allowed a new trial is granted. The pattern thus evolved

represents a fairly effective scheme of jury control. Today in many jurisdictions the pattern has undergone basic change by procedural provisions which permit the trial court to let the case go to verdict and then set the verdict aside and render judgment. F. R. Civ. P. 50(b); Ill. Rev. Stats. 1965, c. 110 § 68.1(2); N.Y.C.P. L. R. § 4404(b). This new procedure is designed to prevent the needless retrial of cases. However, there is little reason to doubt that one of its principal effects has been a considerable diminution of trial court control over juries because of the natural reluctance of a judge to set aside a verdict which he has allowed a jury to return. This contention cannot, of course be documented.

(C) Notice of Hearsay. A further concomitant procedure suggested is the giving of notice of intention to offer hearsay. This proposal has the obvious disadvantage of injecting an added complication into a procedural picture already overcrowded with motions for summary judgment, depositions, interrogatories, orders to produce, and pre-trial conferences. Controversies over what is hearsay are not eliminated, they are merely transferred from the context of admissibility generally to the context of whether evidence should be excluded because required notice (because hearsay) was not given. Moreover, a notice plan in effect amounts to a requirement that hearsay evidence be pleaded (which even the common law neither required nor permitted as to any evidence), contrary to the scheme of the Federal Rules of Civil Procedure which contemplates the giving of only the most general type of notice, leaving it to the adversary to extract additional information by employing the

various discovery devices. Finally, the proposal of a notice requirement seems to assume that counter evidence to disprove hearsay is in existence and may be discovered and used if notice is given. The basic objection to hearsay is not, however, the fact that the party against whom it is offered is surprised, since hearsay is just as discoverable as any other evidence. The basic objection is grounded upon the nature of the hearsay evidence itself, and notice leaves that unaffected.

(D) Different rules for civil and criminal cases. A further argument against the proposed discretion-plus-procedural-safeguards treatment of hearsay is that it would require different rules for civil and criminal cases. This is the result of two factors: first, some difficulties with respect to working out a notice practice for criminal cases, and second, limitations imposed in criminal cases by the constitutional right of confrontation. Weinstein, op. cit. at pp. 340, n.51, and 355, n. 159, recognizes these difficulties and suggests that the proposal be made applicable only to civil cases. See also Chadbourn, op. cit. at p.950, advocating the abrogation of the hearsay rule for declarations of all unavailable declarants but only in civil cases.

The first factor may be disposed of rather briefly. A requirement of notice of intention to use hearsay could hardly be regarded as satisfactory unless it applied to both parties to the litigation. In civil cases, this presents no particular problem, but in criminal cases the same considerations which have blocked the development of a fully

rounded discovery procedure would stand in the way of a complete scheme of giving notice of hearsay. While pushing back the privilege against self-incrimination into its narrowest limits might permit the adoption of a rule requiring the accused to give notice of what hearsay evidence generally he intends to offer, and it may be doubted whether the most advanced case, Jones v. Superior Court, 22 Cal. Rptr. 879, 372 P.2d 919 (1962), may be so construed, extending the requirement to include his own testimony insofar as it contains hearsay would seem under any view of the constitutional privilege to be going too far. Certainly a contrary view would hardly be consistent with the views underlying the Federal Rule of Criminal Procedure which deals with discovery. F. R. Crim. P. 16. While some use could be made of a theory of waiver, as in the Federal Rules of Criminal Procedure dealing with discovery, ibid., this puts the whole matter within the control of the defendant, and it seems unwise to extend this approach so as to permit an accused to choose his own rules of admission and exclusion. While no constitutional limitations apply in favor of the government, and a notice provision could be made fully applicable to the prosecution, a decision to require the government to disclose but permitting the accused to conceal seems unlikely.

The second factor is the limitations imposed upon the use of hearsay in criminal cases by the constitutional right of confrontation. It will be examined under a separate heading.

It may be that the Committee would be satisfied to have different rules for civil and criminal cases. However, the pattern of Committee thinking up to now has been one of making no distinction between civil and criminal cases as such. Rather impressive arguments may be made against a departure from this position: the rules should be as uncomplicated as possible; settling for an inferior brand of fact finding in civil cases is unwarranted; differences in the rules would impede the effort to involve the civil trial bar in criminal cases; and due process serves in civil cases as something of a counterpart of confrontation in criminal cases, a point to be explored with confrontation.

III. Rationalizing the hearsay exceptions. The Reporter has chosen to present to the Committee a proposal for an approach to the hearsay rule and its exceptions based upon the evolution of over-all inclusive rationalizations for two large categories of exceptions to the hearsay rule. Professor Morgan described the existing law of hearsay as "a conglomeration of inconsistencies due to the application of competing theories haphazardly applied," with historical accidents also playing a part. Foreward to MODEL CODE OF EVIDENCE 46 (1942). And Professor Chadbourn may be correct in saying:

> "To admit some, but to stop short of admitting all, declarations of unavailable declarants and to perform the operation on a rational basis is, as experience has proved, a difficult endeavor. To define the outer limits of advance in terms of recognizing some kinds of unavailability but refusing recognition to other kinds is arbitrary. To recognize all kinds of unavailability but only some kinds of statements involves

> imponderables regarding the rationality and wisdom of the bases for inclusion and exclusion. . . ." Op. cit. at 949.

Nevertheless the Reporter believes that the hearsay exceptions may be seen in larger outlines of acceptable rationality.

The plan presented consists essentially of recognizing two general exceptions to the rule excluding hearsay, one prescribing conditions for declarations of unavailable declarants and the other prescribing conditions for declarations without regard to whether declarant is unavailable. The traditional hearsay exceptions are then drawn upon heavily to illustrate the applicability of one or the other category. It is believed that such an attack upon the hearsay problem would serve to encourage growth and development in this area of the law, while at the same time preserving the values of the past as a guide to the future.

Confrontation (and Due Process)

The Sixth Amendment, submitted by the Congress in 1789, became effective through ratification in 1791. It is the great charter of the rights of persons accused of crime. In addition to assuring the right to a speedy and public trial by an impartial jury, to be informed of the nature of the accusation, to have compulsory process for obtaining witnesses, and to have the assistance of counsel, it provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

A reading of the decisions of the Supreme Court construing the confrontation clause leaves one with some feeling of surprise that it has not been invoked and applied oftener. The decisions are relatively few in number, a fact probably explainable on two grounds. In the first place, the traditional refusal to apply Bill of Rights provisions to the States, as exemplified in the confrontation case of West v. Louisiana, 194 U. S. 258 (1904), was departed from only recently with respect to confrontation when the Court decided Pointer v. Texas, 380 U. S. 400 (1965). And in the second place, the sensitivity of counsel and judges to the supposed imperatives of the rule against hearsay avoided need to resort to constitutional doctrine. In the totality of cases in both state and federal systems, those involving hearsay vastly outnumber those decided with reference to confrontation. The same pattern pervades the literature generally. Confrontation, at least until very recently, has been fairly consistently assigned the position of a sort of appendage to the rule against hearsay, an essentially odd relationship between a common law rule and a constitutional precept. Nevertheless, an outline of considerable clarity emerges from the cases in the Supreme Court.

The most often quoted exposition of the purpose of the clause is that in Mattox v. United States, 156 U. S. 237, 242 (1895):

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes used in civil cases, being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

The ideal which is outlined in the quotation coincides strikingly with the ideal conditions of testimony which were at the outset of this discussion posited as the bases for the rule against hearsay, i.e. the giving of testimony (1) under oath (2) in the presence of the party and the trier, (3) with opportunity to cross-examine. True, nothing is said about putting the witness under oath, but it is assuredly implicit in the picture which is painted.

At this juncture it might be concluded that the right of confrontation is coextensive with the rule against hearsay broadly construed and without any exceptions. Yet the case from which the quotation is taken involved the exception to the hearsay rule which admits the former testimony of a now unavailable witness and ruled that its application constituted no violation of the right of confrontation. In fact the opinion continues:

> "There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness. . . . But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . .
>
> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face and subjecting him to the ordeal of cross-examination." 156 U.S. at 242, 244.

Now the conclusion might be that confrontation equals cross-examination, that it demands cross-examination and is satisfied only by it. Yet the course of the same opinion points out the admissibility of dying declarations, where no conceivable aspect of confrontation occurs. Ibid. at 243.

The tenable conclusion thus compelled is that the clause states standards of conduct which ought to be followed in all respects in the staging of a trial, if it is possible to do so, but that departures are allowable up to a point, with the extent of departure depending upon the needs of the situation and the existence of substitutional assurances of some kind.

Two cases decided shortly after Mattox held that in each instance a violation of the confrontation right had occurred. Kirby v. United States, 174 U.S. 47 (1899), was a conviction for possessing stolen postage stamps. The Government's proof that the stamps were stolen was made by introducing the record of conviction of the thieves.

> "The record showing the result of the trial of the principal felons was undoubtedly evidence, as against them, in respect of every fact essential to show their guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused--charged with a different offense for which he may be convicted without reference to the principal offender--except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the rules governing the trial or conduct of criminal cases." Ibid. at 55.

Nevertheless there are exceptions, notably dying declarations. The language suggests the possibility that confrontation means physical presence at the trial, with cross-examination and impeachment finding their basis elsewhere, perhaps merely in the common law. Yet the result itself is wholly consistent with Mattox. Motes v. United States, 178 U.S. 458 (1900), was, like Mattox, a case of using the former testimony of a now unavailable witness. Unlike Mattox, however, where the witnesses were dead, in Motes the chief witness for the Government had disappeared from custody as the result of some extraordinary conduct on the part of the officer in charge of the case, which the Court charitably characterized as negligent. It seems quite apparent that the Government had not complied with the standards laid down in Mattox.

Two additional cases decided prior to the recent burst of confrontation cases require mention. Delaney v. United States, 263 U.S. 586 (1924), ruled that declarations of a co-conspirator might be admitted without violating the confrontation clause. And Snyder v. Massachusetts, 291

U.S. 97 (1934), overruled petitioner's claim that he was deprived of due process by denial of his application to be present when judge and jury, viewed the scene of the alleged crime, accompanied by counsel for both sides, who pointed out salient features. Mr. Justice Cardozo, somewhat in advance of his time, began by assuming that the right of confrontation in state courts was "reinforced" by the Fourteenth Amendment. He then followed with this observation:

> "Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence. . . . The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." Ibid. at 107.

On a somewhat different front, the nonapplicability of the confrontation clauses to state cases and to federal cases other than criminal gave rise to some exploration of the implications of confrontation--hearsay considerations as aspects of procedural due process. An irregular pattern emerges. Bridges v. Wixon, 326 U.S. 135 (1945), was a proceeding in which an order of deportation was in part based upon a prior unsworn statement of a witness who denied having made it. The Court concluded that the evidence was inadmissible under the governing rules of the Immigration and Naturalization Service, which, said the Court, were designed to afford the alien due process.

> "The statements which O'Neill allegedly made were hearsay. . . . certainly . . . not . . . admissible in any criminal case as substantive evidence. . . . So to hold would allow men to be convicted on unsworn testimony of witnesses--a practice which runs counter to the notions of

> fairness on which our legal system is founded." Ibid. at 153.

In re Oliver, 333 U.S. 257 (1948), ruled that "a right to examine the witnesses against him" is an essential attribute of due process and set aside a state court judgment of contempt based in part upon testimony of a witness whom petitioner had no opportunity to cross-examine. In contrast to Bridges v. Wixon, supra, United States v. Nugent, 346 U.S. 1 (1953), affirming a conviction for refusal to submit to induction in the armed forces, sustained the procedure for passing upon claims for Selective Service exemption as a conscientious objector. Under this procedure, an FBI investigation was followed by a hearing at which the registrant was entitled to appear, bring an advisor, and present witnesses. He was also entitled to know the general nature of the unfavorable evidence against him but not to see the FBI report or have the names of persons interviewed. This was held to satisfy the Selective Service Act requirement of a "hearing." No constitutional claims were made or passed upon. Stein v. New York, 346 U.S. 156 (1953), overruled a complaint by one defendant that the confession of a co-defendant was used against him.

> "The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment." 346 U.S. at 196.

In Greene v. McElroy, 360 U.S. 474 (1959), petitioner's security clearance was revoked, and his ability to secure employment virtually destroyed, on the basis of confidential reports not made available to him. The Defense Department was held unauthorized to take this action on the basis of proceedings denying "confrontation and cross-examination."

> ". . . [W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important when the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination." 360 U.S. at 496.

Neither President nor the Congress was shown to have authorized this procedure, and hence its validity, if authorized, need not be passed upon. Finally, in Willner v. Committee on Character, 373 U.S. 96 (1963), a lawyer claimed that he was denied confrontation of the accusers who were blocking his admission to the bar. The Court said:

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. . . . We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this." 373 U.S. at 103, 104.

As suggested earlier, the pattern which emerges is irregular, if indeed it is a pattern at all. The cases of federal origin are decided on considerations of statutory construction and agency authority. The cases of state origin seem to regard cross-examination as an essential of due process and to some extent to equate it with confrontation, but without

any exploration of the status of exceptions of the kind allowable under the hearsay rule. In fact Stein expressly disavows coincidence of the Fourteenth Amendment and the hearsay rule. It must be said that the cases do not forward an effort to determine the constitutional outlines of the hearsay-confrontation aggregate.

In 1965, the Court ruled that the confrontation clause of the Sixth Amendment applied to the States. Pointer v. Texas, 380 U.S. 400 (1965). In the intervening two years, the Court has, as a consequence, had before it more cases squarely involving the confrontation clause than in its previous history.

In Pointer, at the trial the State introduced the testimony which its chief witness had given at the preliminary hearing, after showing that he had moved to California. Neither petitioner nor his co-defendant had counsel at the preliminary hearing, though the co-defendant made some attempt to cross-examine. This procedure was held to be erroneous. The Court began by observing that petitioner's claim was based not so much on the fact that he had no lawyer at the preliminary hearing as on the fact that the use of the transcript at the trial denied him the benefit of having his lawyer cross-examine the principal witness against him. The Court then announced that the right of confrontation is obligatory on the States by virtue of the Fourteenth Amendment. The "right of cross-examination, said the Court, is included" in the confrontation right, and the "right of confrontation and cross-examination" is essential to a fair trial. The "guarantee of confrontation and cross-examination" was denied to petitioner. A "major reason underlying the constitutional confrontation rule" is to give opportunity to cross-examine. The Court has recognized the admissibility of dying declarations and former testimony, and nothing herein is contrary. The case would be "quite different" if petitioner

had had counsel with an opportunity to cross-examine. And "There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses."

In the companion case of Douglas v. Alabama, 380 U.S. 415 (1965), petitioner and one Loyd, charged with the same crime, were tried separately. Loyd had been tried first and found guilty. When called by the State, he claimed the privilege against self-incrimination on the basis of a plan to appeal. He was nevertheless ordered to testify but refused to do so. The judge then declared him hostile and gave the State the right to cross-examine him. This the State did by producing a purported confession, reading it to the witness a part at a time, and asking him if he made that statement. The confession implicated petitioner. The procedure was ruled a denial of the right of confrontation. "Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." Petitioner's inability to cross-examine the witness denied him the right of cross-examination secured by the confrontation clause. While the reading by the prosecution and the refusal to answer did not, strictly speaking, constitute testimony, nevertheless the effect on the jury was as though Loyd had made the statements. The prosecutor was not a witness and could not be cross-examined. "Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him. . . . Hence effective confrontation of Loyd was possible only if Loyd affirmed the statement as his." "We need not decide whether Loyd properly invoked the privilege. . . ." It is sufficient that no suggestion is made that petitioner procured his refusal to answer.

Brookhart v. Janes, 384 U.S. 1 (1966) was another case of using the confession of a co-defendant. In this instance, however, the co-defendant was in the reformatory and not produced by the State of Ohio at the trial. The Court ruled that the right of confrontation was violated and that the circumstances relied upon to constitute a waiver were not sufficient for that purpose. An additional or alternative ground for the decision was that petitioner was denied the right to cross-examine state's witnesses who did appear at the trial.

Denial of confrontation was relied upon by petitioner as one basis for setting aside the conviction in McCray v. Illinois, 386 U.S. 300 (1967), upholding the state practice of refusing to disclose the identity of an informer whose information allegedly served as the basis of a warrantless arrest. The majority dismissed the confrontation claim virtually without discussion, and the dissent made no mention of the point.

Finally, at the end of the 1966 term, the Court handed down a pair of cases, United States v. Wade, 386 U.S. ____, 87 S. Ct. 1926 (1967), and Gilbert v. California, 386 U.S. ____, 87 S. Ct. 1951 (1967), both hinging upon practices followed in identifying accused persons through the use of lineups and kindred procedures. In Wade, the witnesses testified only to a courtroom identification. The fact that prior identification had been made in a lineup was brought out on cross-examination. The court ruled that an accused is entitled to have counsel present at a lineup and remanded the case for determination whether the courtroom identification was tainted by the earlier lineup-without-counsel identification. In Gilbert, the witnesses testified to both courtroom identification and to a prior lineup identification at which accused was without counsel. Admission of the lineup-without-counsel identification was held to be error,

and the case in addition of course involved the Wade question whether the prior unlawfully made identification tainted the one made in court. Wade, the vehicle chosen for the principal discussion of right to counsel at a lineup, involved no hearsay problem: no earlier assertion as to identity was sought to be proved. The only question was as to the effect of the earlier impropriety upon the otherwise admittedly proper court-room identification. The opinion uses the term "confrontation" in two vastly different senses and alternates between the two usages. The basic theory of the case is that pretrial identification may be a decisive aspect of the case and that the only way to insure adequate exploration of it is to have counsel present while it is taking place. Thus, says the Court, the presence of counsel at this "pretrial confrontation of the accused" is a necessary prerequisite for "a meaningful confrontation at trial." 87 S. Ct. at 1932, 1936. Since it can scarcely be thought that an accused is entitled to have witnesses inspect him for purposes of identification in advance of trial, the "pretrial confrontation" is not a confrontation in the constitutional sense of the term. The only real reference in the opinion to confrontation in the constitutional sense is to confrontation at the trial, which is to be made "meaningful" by putting counsel in a position to know what transpired at the earlier identification.

In Wade, as previously mentioned, the Court remanded to determine whether the earlier identifications had tainted those made in Court. In Gilbert, on the other hand, the witnesses testified to the earlier identification, and this was held to be error, absent counsel. Thus Wade did not present the question whether the prior identification itself would be admissible, aside from the right-to-counsel question, but the facts in

Gilbert unmistakably presented it as an available alternative ground of decision. It is completely clear in the two lineup cases of Wade and Gilbert and in the hospital identification case of Stovall v. Denno, 386 U.S. ____, 87 S. Ct. 1967 (1967), that when the Court speaks of "pretrial identification" it is referring to something more than a mere viewing of a suspect by a witness, with the conclusions reached by the witness remaining uncommunicated within himself. What is contemplated as constituting an identification is, in addition to the viewing, an external manifestation of the result of the viewing, "--that's the man." United States v. Wade, 87 S. Ct. at 1937. Thus testimony as to a pretrial identification in effect means "I said that's the man," or "He said that's the man," depending upon whether the testimony is by the person making the identification or by someone else who was present at the time, probably a police officer. Whether the testimony in either case is regarded as hearsay depends upon whether the hearsay dangers are regarded as eliminated by having the declarant now available at the trial for cross-examination concerning an earlier statement. The position taken in the proposed first draft on hearsay is that they are satisfied and that the statement is not excludable as hearsay. The Court was quite aware of the hearsay problem in Gilbert, as appears from the extended footnote discussing it. 87 S. Ct. at 1956, n. 3. The note refers to the "recent trend" as being in favor of admissibility and quotes extensively from People v. Gould, 54 Cal. 2d 621, 354 P.2d 865 (1960), upholding the admission of evidence of a pretrial identification despite the inability of the witness to make an identification at the trial. The tenor of the note is in general friendly to the view that a prior statement by a declarant now available at the trial to be cross-examined concerning it

is not excludable hearsay, and the Court obviously was unwilling to take the opposite position and rule out the evidence on right of confrontation grounds other than absence of counsel at the lineup as an impairment of ultimate cross-examination.

The picture of the relationship between the hearsay rule with exceptions and the constitutional right of confrontation (with due process standing in the wings) which emerges from these cases, beginning with Mattox, is not wholly clear. An appealingly easy answer is that the confrontation clause requires the exclusion of hearsay except for such as falls within a traditionally recognized exception or within a newly created exception which enjoys a justification consistent with those of the old ones. In effect, the confrontation clause under this view incorporates the hearsay rule, with some room for growth, in the constitution. The cases may be read as being consistent with it. Thus dying declarations are admissible, as is former testimony upon a proper showing of unavailability of the witness, both falling under recognized hearsay exceptions and neither involving violation of confrontation rights. But a judgment in another case is hearsay falling under no exception and is a denial of confrontation. Declarations of co-conspirators are not excludable on either ground. Procedural due process forbids hiding the identity of adverse witnesses and shielding them from cross-examination.

Yet there is another, and substantially different view, suggested at the very outset by Mattox itself, never really departed from, and brought again into the foreground by Pointer. It is simply that the confrontation right is designed to force prosecutors to produce witnesses in open court whenever it is possible to do so and not apparent that production will not

serve a useful purpose. Thus the constitutional rule is a guide for prosecutorial behavior, while the hearsay rule is one of admission and exclusion of evidence. Pointer is then explainable in terms of what the prosecutor failed to do (see that counsel was appointed for the preliminary hearing or produce the witness at the trial). Douglas similarly is explainable in terms of the action of the prosecutor in making the confession of the mute witness seem to merge from his lips. Brookhart is somewhat of a combination of the two. And the lineup cases, Wade and Gilbert, are explainable in terms of the prosecutor's failure to see that accused was represented at a critical stage. See also Parker v. Gladden, 385 U.S. 363 (1966), confrontation violated when bailiff made prejudicial statements to jurors.

Now all these cases are not inconsistent with conventional hearsay doctrine. Thus in Pointer, usual standards of unavailability were not met. In Douglas, the declaration (confession) was against penal interest, but traditional doctrine requires a pecuniary or proprietary one. A question whether unavailability was satisfied under the circumstances also arises. Similarly as to Brookhart. Wade involved no hearsay point. And Gilbert could have been decided on the ground that a prior statement is still hearsay even though the declarant is produced for cross-examination. The significant thing is that in no case did the Court rely on the hearsay ground. It made confrontation cases of them.

The moral for the Committee seems to be reasonably clear. The policy of not attempting to incorporate constitutional principles in the rules is sound and should be followed with respect to confrontation. This policy can best be implemented by approaching hearsay in the manner of the California draftsmen, i.e. a general prohibition of hearsay, followed by exceptions which the general rule of exclusion does not exclude. The advantages of such a treatment, rather than phrasing in positive terms of admissibility for the exceptions, seems obvious. Compare the general

organization of California Evidence Code §§ 1200-1340 and Uniform Rule 63(1) to (31). More importantly, however, it permits hearsay to be approached as a problem essentially of evidence and the confrontation problem to be approached at a somewhat loftier constitutional level. This is not to suggest, however, that hearsay rules ought to be drafted contrary to the confrontation developments.

The literature on confrontation tends to be sparse. The position taken in this note is in substantial agreement with a note, Confrontation and the Hearsay Rule, 75 Yale L. J. 1434 (1966). Compare Note, Preserving the Right to Confrontation--A New Approach to Hearsay Evidence in Criminal Trials, 113 U. Pa. L. Rev. 741 (1965), which would admit hearsay statements only if defendant is afforded an adequate substitute for confrontation and then finds many of the traditional exceptions lacking in at least some aspect when so measured.

The commentators on the Uniform Rules have raised an occasional confrontation question as to particular provisions. Chadbourn, Bentham and the Hearsay Rule--A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932 (1962); Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N. Y. U. L. Rev. 651 (1963); Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204 (1960); Wallace, Official Written Statements, 46 Iowa L. Rev. 256 (1961). Most of the hearsay exceptions have aroused no confrontation misgivings in print.

A similar sketchy pattern appears in the various rules studies and comments. The Model Code introduction and comments contain most extensive discussions of hearsay but no mention of confrontation. The Introduction to the Uniform Rules (p. 163) recognizes the possibility of a constitutional

question in applying Rule 63(3) to criminal cases, and the Comment to Rule 7 says:

> "Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

The Utah Committee proposed to add a rule, 66A, providing that in criminal prosecutions no exception to the hearsay rule makes admissible any statement in violation of the right of confrontation. Utah Committee on Uniform Rules of Evidence, preliminary Draft of the Rules of Evidence, 27 Utah Bar Bul. 5 (1957). California Evidence Code § 1204 excludes hearsay statements if a constitutional violation would result. And see the confrontation provision in § 711. Kansas added a provision that Uniform Rule 63(3) should not apply in criminal actions "if it denies to the accused the right to meet the witnesses face to face." Vernon's Kan. Code of Civil Procedure 1963 § 60-460(c). The New Jersey Supreme Court Committee indicated confrontation doubts and imposed limitations accordingly on Rules 63(3), 63 (4)(c), and 63(15)(c). In the California Law Revision Commission Study and Recommendation, Hearsay, confrontation is mentioned as raising a problem only in connection with former testimony (pp. 317, 450-457), though confrontation assumptions appear to underlie the proposal to limit a new exception 63(21.1), to civil cases (pp. 491-496, 541), and may be inherent in pointing out the possibility that expanding declarations against interest to include penal interests may be used against as well as for an accused (500).

The Congress has made no distinctions on confrontation grounds in providing for the admissibility of regular entries and public records. 28 U.S.C. §§ 1732, 1733.

The Federal Rules of Criminal Procedure contain two provisions dealing with situations possessing confrontation overtones. Rule 15, governing depositions, contains no provision for taking at the instance of the

government. It does provide for taking at the instance of the defendant, out of which it is easy to spell a waiver if the defendant offers it in evidence, perhaps more difficult when the Government makes the offer. The rule also provides for taking his deposition at the instance of the witness himself if he is committed for failure to give bail to secure his appearance. It seems impossible to spell out a waiver in the latter situation if the Government offers the deposition, as subsection (e) seems to permit. The inference to be drawn is that confrontation in the non-waiver instances does not require "demeanor evidence" when a stated ground of unavailability is met. The other provision is in Rule 27, to the effect that an official record or entry or lack of record or entry may be proved in the same manner as in civil case. The implication is clear that at least some of these kinds of evidence must be free of confrontation problems, else there would be no justification for the rule.

The Reporter proposes to explore confrontation problems further in connection with particular aspects of the hearsay rule.

First draft

Rule 8-01. Definitions. The following definitions apply under this Article:

(a) Statement. ~~Conduct of a person either verbal or non-verbal is not a "statement" unless intended by him as an assertion.~~ A statement is an oral or written expression or (2) non-verbal conduct of a person if it is intended as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter ~~intended to be~~ asserted, unless

(1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing; or

(2) Declarant testifies present at hearing. The declarant ~~is~~ testifies ~~present~~ at the hearing and is subject to cross-examination by the other party concerning the statement; or only in the instance of rehabilitation.

(3) Deposition. The statement was made by a deponent in the course of a deposition taken and offered in the

proceeding in compliance with applicable Rules of Civil or Criminal Procedure; or

(4) Admission by party-opponent. As against a party, the statement is (i) his own statement, in either his individual or a representative capacity, or (ii) a statement by a person authorized by him to make a statement concerning the subject, or (iii) a statement of which he has manifested his adoption or belief in its truth, or (iv) a statement by an agent or servant of the party concerning a matter within the scope of his ~~an~~ agency or employment ~~of the declarant for the party~~, made before the termination of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, or (vi) a statement tending to establish the legal liability of the declarant when that liability is in issue.

~~relevant party wishes to establish his own liability in case of suit, i.e. a liability insurer?~~

(d) Unavailability. In both civil and criminal cases a person is "unavailable as a witness" if (1) he is dead,

Move to dead v. interest?

or, (2) if he is out of the United States, unless it appears that his absence was procured by the party offering his hearsay statement, or (3) he is unable to attend or testify because of sickness or infirmity, or (4) the party offering his hearsay statement has been unable to procure his attendance by subpoena. In civil cases a person is also "unavailable as a witness" if he is at a greater distance than 100 miles from the place of trial or hearing, unless it appears that his absence was procured by the party offering his hearsay statement.

Comment

Subsection (a)

The principal effect of the definition of "statement" in subsection (a) when taken in conjunction with the definition of "hearsay" in subsection (c), is to remove from the category of hearsay any conduct (verbal or non-verbal), which is (1) not intended as an assertion, or (2), even though intended as an assertion, is not offered to prove the truth of the matter intended to be asserted. An example of (1) would be

the old favorite of offering evidence that people turned up their coat collars, to prove that the weather was cold. An example of (2) would be the statement in a wife's will "My husband has been faithless and cruel to me" on the issue of loss of support in an action by him for her wrongful death. Loetsch v. New York City Omnibus Corp., 291 N.Y. 308, 52 N.E.2d 448 (1943). These are matters of some controversy and will be developed more fully.

First, however, it will be well to point out that the familiar concepts of "verbal act" and "verbal part of an act" remain undisturbed, as they traditionally have been, wholly outside the operation of any rule excluding hearsay. In situations which involve them, no question arises as to the truth or falsity of the statement. The inquiry ends with the determination whether the statement was made, and an issue of truth or falsity would be devoid of significance. Examples of verbal acts are: letters of complaint from customers as a basis for cancellation of a dealer's franchise, to rebut a claim that the franchise was revoked for refusal to finance sales with GMAC, Emich Chevrolet Co. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1951), rev'd on other grounds 340 U.S. 558; testimony that the owner told the driver he could take the car, on the issue of consent under the omnibus clause in a liability policy, Coureas v. Allstate Insurance Co., 198 Va. 77, 92 S.E.2d

378 (1956). Any situation in which the statement itself affects the legal rights of the parties or is a significant circumstance bearing on the conduct of a party will fall within the verbal act category. "Verbal part of an act" is closely related. It includes words which give character to an act. Thus a physical act of handing over money is ambiguous in the absence of qualifying words which indicate whether it is loan, repayment, gift, bribe, or otherwise. And an employee who assaults a customer may be acting for the employer or he may be on a frolic of his own: knowing what he said will help to decide. None of this is hearsay under any view. It should present no problem of substance and will not be referred to further.

Returning to consideration of the proper treatment of conduct (verbal or otherwise) not intended as an assertion or, even though intended as an assertion, not offered to prove the matter asserted, a threshold problem arises as to how the judge makes the preliminary determinations of whether the conduct was intended as an assertion and what was intended to be asserted. Then it is necessary to pass on to the principal question of whether the hearsay dangers are present to an extent which calls for classing the evidence as hearsay.

As to the preliminary question, Uniform Rule 62(1) provides:

> "'Statement' means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated."

It is thus apparent that the draftsmen of the Uniform Rules contemplated a preliminary determination of intent by the judge and considered it feasible for him to embark upon an inquiry of this nature.

The principal criticism of this position is found in Finman, Implied Assertions as Hearsay, 14 Stan. L. Rev. 682, 695-697, where the author says:

> "Careful analysis of the Uniform Rule approach confirms this a priori suspicion about its claim to simplicity. Under rules 62 and 63 whether conduct is hearsay depends on whether it was 'intended ... as a substitute for words in expressing the matter stated.' Here we see the first retreat from simplicity. The trial judge cannot rule on a hearsay objection without first deciding whether the conduct offered in evidence was "intended" to

assert the proposition it is offered to prove. Since the person whose intent is critical is not available for questioning, his intent must be inferred from the conduct offered as an implied assertion. Yet in many cases whether the conduct was or was not intended as an assertion will be unclear. One inference will be no more plausible than the other. For example, suppose that a confession, taken from D while he was sick in a hospital, is offered in evidence, and, in order to show that D was physically and mentally competent to make a rational statement, the prosecution offers to prove that the interrogation was conducted pursuant to permission granted by D's doctor. The purpose of this proof, of course, is to indicate that the doctor believed that D was in condition to be questioned. The problem is whether the doctor, in consenting to the interrogation, intended to communicate

his belief about D's condition. How can the court know what the doctor's intent was? Or consider this set of facts: D, who was being prosecuted for theft of his grandmother's cow, contended that he had been given permission to make the sale; to show that permission had not been given, the prosecution wanted to prove that when the grandmother heard about the sale, she went to the purchaser and demanded not the purchase price but the return of the cow. Did she intend to assert that she had not agreed to the sale? Again, how is the court to know?

"In situations like those above and innumerable others that could be mentioned, the courts will be free to decide either (a) that the actor did intend to assert the proposition his conduct is offered to prove, and thus that the offered evidence is hearsay, or, (b) that the actor had no such intent, and thus that the evidence is nonhearsay.

> The facts do not compel either decision. Consequently such cases cannot be intelligently decided by approaching the intent issue as if it could be resolved as a question of fact. Faced with equally tenable factual inferences, the judge must decide the intent question by examining the consequences of his decision. Here the consequence of the decision on intent is that the evidence will be classified either as hearsay or nonhearsay. Therefore the court must ask how the evidence should be classified. In brief, under the Uniform Rules the hearsay problem is posed as one of fact: What, in fact, was the actor's intent? But when, as in the examples above, intent cannot be determined through a factual analysis, the problem becomes one of judgment: The court must determine whether the evidence should be considered hearsay and resolve the question of intent accordingly."

Other writers, however, have not found so substantial a difficulty. For example, Professor Maguire, The Hearsay

System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 765-766 (1961), observes:

> "Throughout the preceding discussion runs a tacit concession that any evidence of extrajudicial human action or inaction offered for a purpose necessitating reliance upon the sincerity of the particular human being must be classified as hearsay. The foregoing statement is of course an alternative way of wording the familiar "offered to prove the truth of the matter stated" formula. No difficulty exists in recognition of particular instances fitting the exclusionary formula so long as the manifestation takes the form of ordinary verbal assertion. More or less difficulty does result whenever the immediate significance of the manifestation, verbal or otherwise, must be got at by inference. The question is, of course, whether the author of the manifestation intended the inference to be drawn.

"It seems to the present writer that too little attention has here been paid to the problem of burden of proof. Assuming as the sound broad principle that relevant evidence is acceptable unless barred by some technical rule of incompetency or privilege, the proper normal course must be to put on objecting parties the burden of establishing, in debatable cases, the intention stated by the last sentence of the preceding paragraph. To return to the stock example: Defendant D, prosecuted for a crime obviously committed by only one person, asserts innocence and offers evidence that X, on hand at the right place and time to be guilty, fled and hid after the crime. The prosecutor P objects to this evidence, claiming that X was intentionally seeking by his action to attach suspicion and pursuit to himself. The prosecutor should have the burden of establishing that claim.

"But it is far from clear that actual court practice embodies this procedural rule.

Unreasoned talk of parallelism between such evasive behavior and an outright confession by the absentee can be found. Fear is implied that admission of evidence of another's flight would encourage falsely trumped up semblances of guilt. Only in quite extreme instances has this or comparable evidence been given anything like a cordial reception.

"Some rather obvious considerations cast doubt on this restrictive attitude. To begin with, while the flight-after-crime situation has been featured for illustrative purposes, it or analogous situations are not likely to be those ordinarily encountered. Most easily conceivable sets of fact raising the issue as to whether non-verbal behavior was staged with deliberate intent to convey assertive propositions by dumb show lack the complication of possible under-world deceptive practice. Even where underworld risks lurk, why should it be hopelessly assumed that ability of

> opposing counsel and common sense perceptiveness of jurors will lack adequate power to expose and appraise them? Getting full information to the triers of fact usually has value outweighing rather remote chances of their being hoodwinked."

Professor Falknor in his forthright article, The "Hear-Say" Rule as a "See-Do" Rule, 33 Rocky Mt. L. Rev. 133, 136 (1961), after giving various examples to support his contention that non-assertive conduct evidence ought not to be regarded as hearsay, says:

> "This is on the assumption that the conduct was 'non-assertive'; that the passers-by had their umbrellas up for the sake of keeping dry, not for the purpose of telling anyone it was raining; that the truck driver started up for the sake of resuming his journey, not for the purpose of telling anyone that the light had changed; that the vicar wrote the letter to the testator for the purpose of settling the dispute with the latter, rather than with any

> idea of expressing his opinion of the testator's sanity. And in the typical 'conduct as hearsay' case this assumption will be quite justifiable." (Underscoring supplied).

Thus there is substantial support in reason and authority for the position of the draftsmen of the Uniform Rules that a determination by the judge of the preliminary question of intent to assert presents no greater difficulty than the resolution of a good many other preliminary questions of fact. This is likewise the position taken in the proposal. Moreover, the proposal is based upon the supposition that the probabilities are far greater than not that nonverbal conduct or verbal conduct offered to prove something other than what it asserts are not intended as assertions of the inference for which offered. Hence the definition in subsection (a) is phrased so as to put the burden on the objector and to direct the judge to resolve the doubtful cases in favor of admissibility as nonhearsay.

With the preliminary question disposed of, the way is now clear to consider the basic question whether conduct not intended as an assertion should be treated as hearsay. Perhaps the best access to the question is by examining the validity of the premise upon which the most extreme position in favor of the affirmative is founded. It is represented by Morgan's statement in Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177,214,217 (1948):

> "If Declarant's state of mind, whether proved by his utterances or by his nonverbal conduct, is used as a basis for an inference to the objective facts that created it, is it any less clearly hearsay than is an assertion offered for the truth of the matter asserted and made by a declarant who is not subject to the conditions imposed upon witnesses? Consider, for example, the previously mentioned instances where one person takes such precautions with reference to another as are suitable only for the care of one who is insane, or where a physician administers a drug suitable only in treating a specified disease, and assume that the actor intended his conduct to be revealed to no one. If it is to be used as evidence of his belief concerning the condition of the subject, and of the subject's objective conduct which produced the belief, is this not essentially a case in which the actor makes an assertion to himself and his conduct is used as if it were such an assertion? . . .
>
> ". . . In order that a state of mind with reference to specified objective facts be relevant as evidence of them, it must, as shown earlier, have become so definite as to have been capable of articulate statement. In such

> a situation the thinker thinks in words or symbols that serve the same purpose. If objective conduct is used to prove a state of mind, it is in fact merely circumstantial evidence of an assertion which the actor is making in words or symbols to himself silently instead of in audible soliloquy. Thus the proponent in such a case is offering the evidence for a purpose which requires an assumption that the person whose conduct is offered had made to himself a statement and is asking the trier to find the truth of the matter so stated."

This point of view is elaborated in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan. L. Res. 682 (1962). To the dangers arising from inability to test the perception, memory, narration, and sincerity of declarant (actor) by cross-examination, which are present with respect to express hearsay assertions, Professor Finman adds and emphasizes the possibility of drawing an erroneous inference from conduct to belief. In contrast, Professor Maguire, after exploring much the same territory, focuses on dangers arising from untested perception and memory. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741 (1961). The Model Code approached the problem through its definition of "statement." Rule 501 provides:

> "(1) A statement includes both conduct found by the judge to have been intended by the person making the statement to operate as an assertion by him and conduct of which evidence is offered for a purpose requiring an assumption that it was so intended."

The first part of the definition, dealing with conduct intended as an assertion, offers no difficulty: it would be difficult to defend treating it otherwise than as the equivalent of a verbalization of unequivocally assertive character. The latter part, however, presents problems. When is evidence of conduct offered for a purpose requiring an assumption that it was intended as an assertion? The language is inept as a description of conduct actually intended as an assertion, and, in any event, that subject has already been covered in the first part of the definition. Neither is it particularly apt as a description of evidence of conduct indicating a belief used to suggest the happening of the event producing the belief. The result is, as Professor Morgan indicated, an ambiguity, although he believed that the conduct-to-belief-to-event sequence was in fact included. Morgan, op. cit. at 217.

It is noteworthy that Professor Morgan later abandoned the position espoused by him in the article quoted above. In 1953, he wrote:

> "It would be a boon to lawyers and litigants if hearsay were limited by the court to assertions, whether by words or substitutes for words. . . . It would exclude [from the category of hearsay] evidence of a declarant's conduct offered to prove his state of mind and the facts creating that state of mind if the conduct did not consist of assertive words or symbols." Morgan, Hearsay, 25 Miss. L.J.1,8 (1953).

The shift of position may likely have resulted from the appearance, in the meanwhile, of the Uniform Rules.

Uniform Rule 62, like the Model Code, used the avenue afforded by a definition of "statement." It says:

> "(1) 'Statement' means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated."

By omitting any mention of non-verbal conduct not intended as an assertion, it seems clear that the draftsmen meant to exclude the conduct-to-belief-to-event sequence from the category of hearsay. In so doing, it is believed that they occupied solid ground.

The essential fallacy in the argument which would class conduct-to-belief-to-event as hearsay lies in the assumption that the furnishing of a basis (conduct showing belief) for drawing an inference (happening of event which produced belief) is the equivalent of an assertion that the event happened. In the view of

the Reporter, this simply is not so. People do not, prior to raising their umbrellas, say to themselves in soliloquy form, "It is raining," nor do they go on the green light only after making an inward assertion, "The light is green."

The true parallel is probably found in animal behavior. The cases have experienced little, if any, difficulty in admitting evidence that the allegedly stolen chickens when turned loose from the premises of the accused went down the road and entered the henhouse of the complaining witness to roost. Everyone knows that chickens come home to roost. Nor has there been any particular hesitation in admitting evidence that bloodhounds following an apparent scent went from the scene of the crime to the back door of the accused. The writers treat these as questions of relevancy, 1 WIGMORE § § 148,177, and it would be a hardy soul who would raise the hearsay question. In the judgment of the Reporter, conduct not intended as an assertion is better given the same treatment.

Some objections may be raised. See Finman, op. cit. at 702-703. (a) The evidence is subject to fabrication, but no class of evidence is free of this possibility. (b) Sincerity cannot be tested by cross-examination, but the type of situation involved is

such as virtually to eliminate questions of sincerity as a concomitant of the elimination of intent to assert. It seems safe to assume that far more falsehoods are uttered as words than as conduct, since verbal behavior is peculiarly adapted to mendacity. As Falknor, op. cit. at 136, puts it:

> ". . . [I]f in doing what he does a man has no intention of asserting the existence or nonexistence of a fact, it would appear that the trustworthiness of this conduct is the same whether he is an egregious liar or a paragon of veracity. Accordingly, the lack of opportunity for cross-examination in relation to his veracity or lack of it, would seem to be of no substantial importance. Accordingly, the usual judicial disposition to equate the 'implied' to the 'express' assertion is very questionable."

(c) Wholly aside from sincerity, reliance is placed on the actor's perception and memory, and these are not subject to being tested. Falkner, op. cit. at 137, notes this difficulty and disposes of it as follows:

> "His opportunity to observe the event or condition in question, the quality of the sense-impressions which he received, and of his recollection, are all matters which bear upon the trustworthiness of his conduct, and, ideally, these ought to be subject to being probed by cross-examination. Nonetheless, the absence of the danger of misrepresentation does work strongly in favor of by-passing the hearsay objection, at least where the evidence of conduct is cogently probative. And it will be, where the action taken was important to the individual in his own affairs, e.g. the action of the vicar in communicating with the testator, the action of the

> truck-driver in moving ahead [to prove the traffic light had changed to green]. Cases can be found involving conduct of a trivial character, such as the Connecticut case involving the admissibility, on the issue of the competency of the testatrix in a will contest, of evidence that boys in the neighborhood made fun of her. In such case, any claim of relevancy is very precarious and doubtless should yield to countervailing considerations.
>
> "Accordingly, it has sometimes been suggested, that the admissibility of evidence of non-assertive conduct should depend on a preliminary finding by the judge that the conduct was of a sort 'as to give reasonable assurance of trustworthiness,' that is to say, that it was of substantial importance to the actor in his own affairs. But for application in the 'heat and hurry' of the trial, such a solution leaves a good deal to be desired. As Thayer observed, 'we should have a system of evidence, simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied.'
>
> "The 'simple, easily grasped and easily applied' rule, 'not nice or refined in its details,' would seem to be one which would eliminate completely the hearsay stigma from evidence of non-assertive conduct. Because such conduct is evidently more dependable than an assertion, there is rational basis for the differentiation. And there is a cogent practical argument for such a rule in the circumstance that experience has shown that very often, probably more often than not, and understandably, the hearsay objection to evidence of non-assertive conduct is overlooked in practice with the result that the present doctrine operates very unevenly."

It will be observed that not every "statement," although it be such by definition under subsection (a), is hearsay under subsection (c), since the latter includes as hearsay only statements offered to prove

the truth of the matter asserted. Thus an utterance, though meeting the requirements of a statement, is not hearsay when offered to prove something other than what is asserted. For example, the familiar "I am Napoleon" to prove the mental condition of testator. And, of course, the entire range of the "verbal acts" doctrine is excluded from the definition since in these cases (words of contracting or of notice or of defamation) the end inquiry is whether the words were uttered and no question of their truth arises.

While the proposed definition follows Uniform Rule 62(1), it is more explicit in providing that non-assertive conduct is not hearsay and in excluding from the hearsay category statements, though assertive, not offered to prove what is intended to be asserted. See also California Evidence Code § § 225 and 1200, adopting the Uniform Rules definitions without change of substance, and Report of New Jersey Supreme Court Committee on Evidence, 122,128 (1963), suggesting no departure from the Uniform Rules terminology.

One change of terminology should be noted. Uniform Rule 62(1) uses the word "express," while Uniform Rule 63 uses the word "state," to describe

what a hearsay statement does. The proposal, however, uses "assert," following Model Code Rule 501. Wigmore also uses this terminology, 5 WIGMORE § § 1361, 1362, and it seems to be superior in this setting.

Subsection (b)

The definition of "declarant" is that of Uniform Rule 62(2). It is also found in California Evidence Code § 135.

Subsection (c)

The proposal defines hearsay in terms of "a statement, offered in evidence to prove the truth of the matter intended to be asserted." Uniform Rule 63 defines hearsay as "a statement . . . offered to prove the matter stated." The proposal, in injecting the element of intent, follows Model Code Rule 501(2). Since subsection (a) limits "statements" to those intended to assert, consistency seems to require inclusion of the reference to intent in this subsection (c). The definition is subject to four exceptions.

(1) A statement made by a witness in the course of the hearing is excluded from the definition and no discussion is called for.

(2) Model Code Rule 503(b) and Uniform Rule 63(1) treat the prior statement of a person present at the hearing and subject to cross-examination as a hearsay exception. The proposal treats a statement under these circumstances as not falling in the category of hearsay in the first place. As the Uniform Rule Comment points out:

> "It has the support of modern decisions which have held that evidence of prior consistent statements of a witness is not hearsay because the right of confrontation and cross-examination are not impaired. Other decisions have admitted evidence of prior inconsistent s"atements for its full value, not limited merely to impeachment. When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay."

It is true, of course, that the result is the same, whether a statement under these circumstances is classed as hearsay but falling within an exception or as not being hearsay at all. In either event the hearsay rule does not operate to exclude the evidence. However, in the view of the Reporter, the basis for not excluding the evidence is that the conditions of giving testimony are satisfied, and hence logic dictates a classification as non-hearsay.

The basic question is whether the evidence should be admitted at all. The problem is thoughtfully and extensively considered in the Comment to Rule 63(1) in the Report of the New Jersey Supreme Court Committee on Evidence 130-137 (1963) which is drawn upon very largely in the comments which follow.

Under traditional doctrine, prior statements of a witness are usable only under certain circumstances. (1) Inconsistent statements may be admitted to impeach.

(2) Consistent statements may be admitted to rebut claims that testimony is the result of influences brought to bear upon the witness. (3) Prior statements may be used to refresh recollection. (4) Prior statements may qualify under the hearsay exception for recorded past recollection. The New Jersey Report, p. 131, aptly characterizes the use of prior statements thus enumerated as "a compound of artificial limitations and fictions." More importantly, the net effect is to lose much in the way of contemporaneous narrative possessing obvious inherent superiority over testimony given long after the event.

Various objections have been raised in opposition to the position taken in the proposal. The first, as listed in the New Jersey Report, p. 132, is that witnesses would be pressured to give statements which would then be introduced in evidence, thereby cluttering the record and in effect presenting the jury a written brief. Perhaps the difficulty which is here sensed, but not thrown into clear focus, is that lawyers would deliberately obtain statements and use them in lieu of the witnesses, thus affording an opportunity to fabricate and furnishing the trier an inferior product. The answer to the first aspect is

that all evidence is subject to fabrication, and the formulation of exclusionary rules based on the possibility of fabrication is a hopeless enterprise. The answer to the second aspect lies in the weakness of the position of the lawyer who presents inferior evidence when better is at his command. Moreover, the same tactic would be available equally to both sides, so no undue advantage should accrue.

The second ground advanced in opposition is that the cross-examination which is contemplated will be inadequate in view of the time lag between the making of the statement and the cross-examination. New Jersey Report 133. The case most often cited and quoted upon this point is State v. Saporen, 205 Minn. 358, 285 N.W. 898, 901 (1939):

> "The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth."

The remarkable thing about this passage is that it appears in spite of the fact that the witness admitted

having made the prior statement but claimed that he was forced to do so under threats of seven years in the reformatory if he refused. Whether the ground on which the witness repudiated his earlier statement was developed on direct or on cross-examination is both unclear and unimportant. The important thing is that the statement was thoroughly explored and repudiated. Cross-examination could scarcely achieve more, regardless of when it occurs in point of time.

A recent Michigan case which rejects the admissibility of a prior statement by the witness as substantive evidence attempts to support its position by comparing two imaginary cross-examinations, one at the time of the making of the statement and one at the trial, with a tremendous differential supposedly in favor of the former. In fact, however, and despite the purely literary nature of the exercise, the cross-examination at the trial seems effectively to disclose all weaknesses and doubts as to the earlier statement. Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). The basic fallacy in the opinion is the assumption that when a witness recants on cross-examination, the result is the total destruction of his testimony given on direct. In the view of the Reporter, this is not so: the result

instead is to present a jury question as to whether the original story told on direct or the recantation on cross-examination is the truth.

Nothing in these cases detracts from Judge Learned Hand's expression in Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925):

> "The possibility that the jury may accept as truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are nonetheless deciding from what they see and hear of that person and in court."

There are in fact three possible situations with respect to prior statements: (a) The witness admits having made the statement and adopts it on the stand. No problem arises since the statement has now become his testimony. (b) The witness admits having made the statement but repudiates it on the stand. This is the case just considered and appears to offer no substantial obstacle to effective cross-examination. (c) The witness denies having made the statement. In this event, it is evident that nothing in the way of direct retraction can be extracted from the witness, just as in the case of recorded past recollection. However, there is no barrier to exploring the subject

matter of what was included in the alleged statement. It may be observed that there exists in connection with the established hearsay exception for recorded past recollection a far more formidable barrier to effective cross-examination, since in that case the position of the witness is that he remembers nothing of the subject matter but only that at or near the time he made an accurate record.

The third ground suggested is the facilitation of manufacturing or shading evidence. New Jersey Report 134. It is believed that the discussion under the first objection disposes of the point.

The fourth ground which is advanced is that a defendant, particularly an accused, "might be convicted on the basis of an out-of-court statement where, for example, there is no testimony at trial." New Jersey Report 134. This statement cannot be taken literally, as there must in any event be some testimony in order to establish the fact that the out-of-court statement was made. What is probably meant is skepticism as to the propriety of basing a conviction upon a statement not made under oath. To this contention, two answers may be made. (a) Much evidence is admitted which taken alone would not support a finding or a conviction,

and this insufficiency has never been regarded as calling for exclusion. "A brick is not a wall," McCORMICK 317, or as Professor McBaine used to say, "Every player does not have to hit a home run." In People v. Gould, 54 Cal. 2d 621, 354 P.2d 865 (1960), the court set aside a conviction based on evidence of a prior identification, not for error in admitting the evidence or because the witness failed to make an identification at the trial or because a prior identification standing alone could not support a conviction, but because the circumstances of the prior identification were so rife with suggestion as to negate probative value. (b) Of the ideal conditions for the giving of testimony, probably the one most easily dispensed with is the oath. As Judge Learned Hand said in Di Carlo v. United States, supra, "There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court." The relative unimportance of the oath is demonstrated by the fact that an out-of-court statement is not removed from the hearsay category by virtue of having been made under oath. It is further demonstrated by the fact that, of all the manifold hearsay exceptions which have achieved recognition, only

one (former testimony) contemplates a statement under oath.

The fifth ground suggested is that untrue statements will be obtained for use in evidence by "aggressive insurance adjusters, investigators and the like." New Jersey Report 135. It is believed that this objection has already been answered. In any event, the practice of obtaining statements, for impeachment purposes and refreshing recollection, now exists, and no substantial change in motivation could be anticipated.

An extended treatment of the subject is found in McCORMICK 73-82. Admittedly, the bulk of the case law is opposed to the position here taken, yet since McCormick wrote, impressive decisions have broken away from the conventional pattern and have allowed the prior statement of the witness as substantive evidence. For example, People v. Gould, 54 Cal. 2d 621, 354 P.2d 865 (1960); Judy v. State, 218 Md. 168, 146 A.2d 29 (1958); and State v. Simmons, 63 Wash. 2d 16, 385 P.2d 389 (1963). See also New York Code of Criminal Procedure § 393-b, allowing a witness to testify to his own prior identification, construed in People v. Spinello, 303 N.Y. 193, 101 N.E.2d 457 (1951).

While these authorities happen to involve evidence of a prior identification, no difference exists in principle between statements which identify and those making other kinds of assertions. Thus in People v. Spriggs, 36 Cal. Rptr. 841, 389 P.2d 377 (1964), a narcotics prosecution, it was held error to exclude an admission by a co-defendant that she was the one in possession of the narcotics, since if she declined to testify (thereby becoming unavailable) it qualified under the hearsay exception for declarations against interest and if she did not decline to testify she could be cross-examined on the statement and it was not hearsay. Similarly, in Thomas v. State, 186 Md. 446, 47 A.2d 43 (1946), it was held error to exclude evidence of an alleged confession of a third person who took the stand and could be questioned about it. And in Vance v. State, 190 Tenn. 21, 230 S.W.2d 987 (1950), cert. denied 339 U.S. 988, the admission in evidence of the confession of a co-defendant implicating the accused was held proper since the co-defendant testified for the state and could be cross-examined as to everything contained in the confession.

As to the federal authorities, one must first examine Bridges v. Wixon, 326 U.S. 135 (1945), the Harry Bridges

deportation proceeding. A witness for the government testified to having made unsworn and unsigned statements and that they were true, but he denied that they included particular acts by Bridges indicating membership in the Communist Party. The stenographer who took them down testified that these matters were included and an officer testified to like effect as to other unsworn and unsigned statements by the witness. The Court held that using the prior statements as the basis for a finding was error. The Regulations of the Immigration and Naturalization Service were construed as limiting the use of prior statements to those made pursuant to interrogation under oath and signed. Since the disputed statements did not conform to these requirements, their use violated the regulations.

> "A written statement at the earlier interviews under oath and signed by O'Neil would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription. Statements made under those conditions would have an important safeguard--the fear of prosecution for perjury." 326 U.S. at 153.

The Court then went on to point out that the statements were hearsay and

> ". . . certainly . . . not admissible in any criminal case as substantive evidence. (Citations.) So to hold would allow men to be convicted on unsworn testimony of

> witnesses--a practice which runs counter to the notions of fairness on which our legal system is founded." 326 U.S. at 153-154.

Does Bridges v. Wixon bar the use of prior statements of the witness as substantive evidence? Narrowly, the case merely construes an agency regulation and exacts compliance with it. Yet, in language at least, the opinion goes farther and leaves the issue in doubt.

The matter seems however to be resolved in favor of allowing use as substantive evidence in Gilbert v. California, 386 U.S.___, 87 S.Ct. 1951 (1967). In this case witnesses made in-court identifications and there was also evidence of prior identifications made in the course of a lineup. As to the in-court identifications, the case was remanded under the authority of United States v. Wade, supra, for determination whether they were the tainted result of a lineup at which the right to counsel was denied. The prior identification was ruled inadmissible in any event on the ground of denial of counsel at the lineup. The latter ruling is highly significant for present purposes: the hearsay objection was available as a ground for exclusion and the Court pointedly did not apply it. The Court's awareness of the hearsay possibility and its attitude respecting it are disclosed

in the following footnote passage, 87 S.Ct. 1956, n.3:

> "There is a split among the States concerning the admissibility of prior judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 A.L.R.2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial. See 5 A.L.R.2d Later Case Service 1225-1228."

Most of the circuits have followed the older view. Byrd v. United States, 342 F.2d 939 (D.C. Cir. 1965); Valentine v. United States, 272 F.2d 777 (5th Cir. 1959); United States v. Barnes, 319 F.2d 290 (6th Cir. 1963); United States v. Rainwater, 283 F.2d 386 (8th Cir. 1960); Brooks v. United States, 309 F.2d 580 (10th Cir. 1962). In the Second Circuit, however, the matter has had a different history. It begins with Judge Learned Hand's notable statement in Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925):

> "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are nonetheless deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."

This position was virtually abandoned in United States v. Block, 88 F.2d 618 (2d Cir. 1937), in an opinion by the same judge, but some ground was regained in United States v. Graham, 102 F.2d 436 (2d Cir. 1939). By 1957, however, despite the intervening decision of the Supreme Court in Bridges, Judge Hand had returned to and was amplifying his original position:

> "It is one thing to put in a statement of a person not before the jury: that is indeed hearsay bare and unredeemed. But it is quite a different matter to use them when the witness is before the jury, as part of the evidence derived from him of what is the truth, for it may be highly probative to observe and mark the manner of his denial, which is as much a part of his conduct on the stand as the words he utters. Again and again in all sorts of situations we become satisfied, even without earlier contradiction, not only that a denial is false, but that the truth is the opposite: 'The lady doth protest too much, methinks.' This is not to rely upon the statement as a ground of inference, taken apart from the sum of all that appears in court; it is to allow the jury to use the whole congeries of all they see and hear to tell where the truth lies. We and other courts have a number of times allowed this course to be taken. Indeed to deny this is to hold that nothing that comes from a witness on the stand can be used in support of the issue except his words under oath: the rest of his conduct may be used to refute what he asserts, but for nothing else. In short, out of the whole nexus of his conduct before the jury, they may treat those words alone as affirmatively relevant." United States v. Allied Stevedoring Corp., 241 F.2d 925, 933 (2d Cir. 1957).

In United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964), cert. denied 377 U.S. 979, a prosecution for hijacking a truck, the court returned to the problem, with Judge Friendly writing the opinion. An earlier conviction having been reversed, at the second trial the truck driver Fine identified the accused, who had large tatoo marks on his arms. On cross-examination Fine said that he had seen the arms of the hijacker but no tatoo marks, and that he could not say that accused was the man. On redirect he testified to a good description of the accused (but without mention of tatoo marks) which he had given the FBI, to picking accused out of a lineup, to identifying a photograph of his face, and to identifying him at the first trial. It was also brought out that the witness was told of the tatoos prior to the second trial and that when shown photographs of accused's arms said the man did not have such marks and he was in doubt as to the identification. FBI agents testified that the tatoo marks were plainly visible at the lineup. The trial judge's rulings in admitting the evidence of prior identification and the FBI testimony, without limiting them to credibility, was sustained. The court said:

"The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as 'pious fraud,' 'artificial,' 'basically misguided,' 'mere verbal ritual,' and an anachronism 'that still impede(s) our pursuit of the truth.' Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 193 (1948); United States ex. rel. Ng Kee Wong v. Corsi, 65 F.2d 564, 565 (2 Cir. 1933, Judge Swan); McCormick, Evidence 77 (1954); United States v. Allied Stevedoring Corp., 241 F.2d 925, 934 (2 Cir. 1957, Judge L. Hand). See also 3 Wigmore, Evidence, § 1018 (3d ed. 1940); ALI, Model Code of Evidence, Rule 503 (1942); Judge L. Hand in Di Carlo v. United States, 6 F.2d 364, 367-368 (2 Cir.), cert. denied, 268 U.S. 706, 45 S.Ct. 640, 69 L.Ed. 1168 (1925); and the ruling of Mr. Justice Van Devanter at the trial in United States v. Graham, stated in Morgan, supra, 62 Harv.L.Rev. at 194, fn. 39, aff'd 102 F.2d 436 (2 Cir.), cert. denied, 307 U.S. 643, 59 S.Ct. 1041, 83 L.Ed. 1524 (1939). The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that 'The fresher the memory, the fuller and more accurate it is. * * * Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy * * * [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences.' McCormick, Evidence 75-76 (1954). As against this, we are bound by

the admonition, in Bridges v. Wixon, 326 U.S. 135, 153-154, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), against allowing 'men to be convicted on unsworn testimony of witnesses--a practice which runs counter to the notions of fairness on which our legal system is founded.'

"Whether or not this ruling in Bridges v. Wixon will survive the attacks of scholars, see, e.g., Morgan, supra, 62 Harv.L.Rev. at 192-96; McCormick, Evidence 73-82 (1954), we do not think the Supreme Court meant to require rigid adherence to the much criticized orthodox rule in the situation here presented where the prior statements were themselves testimony before a grand jury or at a former trial or were adopted by such testimony. The Bridges opinion emphasized that the statements there received as substantive evidence were simply a stenographer's notes of an investigative interview, whose accuracy the witness denied. 'A written statement at the earlier interviews under oath and signed * * * would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription. Statements made under those conditions would have an important safeguard--the fear of prosecution for perjury.' 326 U.S. at 153, 65 S.Ct. at 1452, 89 L.Ed. 2103. These comments are inapplicable to testimony, transcribed by a court reporter, before a grand jury or at a former trial. Testimony at a former trial has already been once subjected 'to the test of Cross-Examination' on which our law places primary reliance for the ascertainment of truth. 5 Wigmore, Evidence, § 1362 (3d ed. 1940). Both such testimony and evidence before a grand jury have had the sanction of what Wigmore calls the 'prophylactic rules' relating to the oath and to perjury, influencing 'the witness subjectively against conscious falsification, the one by reminding of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power.' 6 Evidence, §§ 1813, 1831 (3d ed. 1940)--with the oath administered not in any perfunctory fashion but in a setting calculated to impress

> the witness with the gravity of the responsibilities assumed. And in the case of identification testimony, we think the exception to the orthodox rule which seems to be permitted by the Bridges opinion may properly embrace not only testimony so given but the even more probative consistent earlier identifications for which the witness has later vouched under oath in the secrecy of the grand jury room or at a former trial. See Judges L. Hand and Hough in Di Carlo v. United States, 6 F.2d 364, 366, 369 (2 Cir.), cert. denied, 268 U.S. 706, 45 S.Ct. 640, 69 L.Ed. 1168 (1925); Judge A. N. Hand in United States v. Forzano, 190 F.2d 687 (2 Cir. 1961); 4 Wigmore, supra, § 1130; McCormick, Evidence, supra, 108-09."

The problem was again before the court in United States v. Nuccio, 373 F.2d 168 (2d Cir. 1967), a narcotics case in which the accused complained of the judge's refusal to instruct the jury that the testimony given by a witness in another case was substantive evidence that he had not delivered narcotics to the accused, contrary to his present testimony. The refusal was upheld. The court distinguished De Sisto, pointing out that the objective of the accused was achieved by destroying the credibility of the witness and thereby his testimony (and the prosecution's entire case), without need to have the earlier statement accepted as substantive evidence. Moreover, the former testimony in De Sisto was given in an earlier trial of the same case, with focus on the same parties and issues. Two comments should be made. (1) Subsequent developments, previously

discussed, have shown the Court's fears in De Sisto as to the possible limiting effect of Bridges were unfounded. (2) While a special hearsay exception for identification cases would be better than nothing, neither logic nor practical considerations warrant so narrow an approach.

Anyone who reads the cases is compelled to the conclusion reached by Professor McCormick: "[A]fter reading hundreds of illustrative cases the writer believes that as a class prior inconsistent statements, when they are so verified that their actual making is not in doubt, are more reliable as evidence of the facts than the later testimony of the same witnesses." McCORMICK 76. When a story is changed, the effect of intervening pressures is almost invariably apparent. And in at least one area, that of identification, the Supreme Court's position is firmly grounded on the theory that an earlier out-of-court hearsay identification is so crucial as to require assistance of counsel.

(3) The third item excluded from the definition of hearsay is a statement "made by a deponent in the course of a deposition taken and offered in the proceeding in compliance with applicable Rules of Civil or Criminal Procedure."

McCormick considered depositions and former testimony to be hearsay and hence admissible only under an exception to the hearsay rule. McCORMICK § 230. Uniform Rule 63(3) takes the same position. Wigmore, on the other hand, believed that neither was hearsay. 5 WIGMORE § 1370. Perhaps the significant thing is that in each instance the two are grouped together, either as hearsay-but-under-exception or as nonhearsay. The proposal separates them, treating the deposition taken and offered in the proceeding as nonhearsay and former testimony as a hearsay exception.

It is believed that the thinking of the profession generally does not put depositions in the category of hearsay. To the contrary is McCORMICK 480-481. On the other hand, a lawyer seeking to explore the admissibility of former testimony or of a deposition taken in another action would probably turn to hearsay as an appropriate classification. This treatment finds support in California Evidence Code § 1290 and Comment.

In view of the considered and detailed treatment given the taking and use of depositions in Rules 26-32 of the Federal Rules of Civil Procedure and Rule 15 of

the Federal Rules of Criminal Procedure, it would be needless and unwise for this Committee to enter the area. Probably the only substantial question is whether former testimony should be covered at this point and in the same manner as depositions. Certainly the similarity between depositions and former testimony is more than a superficial one: in both the statement was under oath and subject to cross-examination, and a degree of unavailability of the declarant-witness-deponent is required. However, other factors, such as mutuality, identity of issues, similarity of motive to cross-examine, and identity of or privity between parties, have traditionally been thought to have a bearing upon the admissibility of former testimony but are without relevance to depositions taken in the case. To attempt to treat them together seems to invite needless complication.

It should be noted that a deposition may be taken out of the hearsay category by subparagraph (c)(2) of the proposed rule, if the deponent is present, as well as by this subparagraph (3). It should also be noted that the proposed rule does not follow Uniform Rule 63(3)(a) in making a deposition admissible without regard to the availability of the deponent, since both

Rule 26(d) of the Federal Rules of Civil Procedure and Rule 15(e) contain unavailability requirements.

The definition is believed to be broad enough to include depositions in perpetuam memoriam or pending appeal. See Rule 27 of the Federal Rules of Civil Procedure.

(4) The fourth and final category of assertive statements excluded from the hearsay classification by subparagraph (c)(4) of the proposed rule consists of admissions by a party-opponent. Here again the question whether a particular type of statement-evidence is classed as nonhearsay or as hearsay-but-under-exception may seem on first impression to be mere terminological quibbling: in either event the hearsay rule does not call for exclusion. If, however, the Committee is favorably disposed to the general design of the over-all proposed approach to hearsay, it is desirable to eliminate admissions from the category of hearsay as it will not fit comfortably into either of the major exception groups laid out in proposed Rules 8-03 and 8-04. (See Reporter's Memo of 9/12-67.) Moreover, some flexibility may be gained by treating admissions as nonhearsay.

The authorities have differed in some measure as to whether admissions are hearsay and why they are, in any event, admissible. The modern writers have had a more than usual influence on one another, however, and in general have tended to end up closer together than when they began. Thus Wigmore changed position in at least some degree in each edition of his text and acknowledged the influence of Morgan's writings upon him. 4 WIGMORE § 1048 at p. 2.

If admissions are treated as a hearsay exception, it is difficult to find the circumstantial guarantee of trustworthiness believed to be present with respect to the other exceptions. Hence there may be some urge to discard the traditional free-wheeling common law treatment and to search instead for some assurances of reliability. See Hetland, Admissions in the Uniform Rules: Are They Necessary? 46 Iowa L.Rev. 307 (1961). It is submitted that much would be lost by pursuing such a course.

Morgan's finally stated position appears in the following passage:

> "Whether an admission is an exception to the hearsay rule depends upon one's definition of hearsay. If we define hearsay as an extra-judicial statement offered as tending to prove

the truth of the matter stated, an admission clearly falls within it, and most commentators so regard it. It must be conceded that the rule which makes admissions receivable is older than the hearsay rule and is a necessary concomitant of the accepted doctrine that evidence of any relevant conduct of a party is admissible against him, unless the subject of a claim of privilege. (This doctrine has been modified to exclude improperly induced confessions.) Whatever may be true as to personal conduct of a party, there is no escape from the conclusion that a vicarious admission has all the essential characteristics of hearsay. (Footnote omitted.) For the practitioner the all-important fact is that evidence of an assertive admission is receivable for the truth of the matter asserted.

"The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath. His adversary may use against him anything which he has said or done. Originally he had no chance to make an explanation, but since about the middle of the 1800's, he has been competent as a witness and can furnish the trier with all pertinent information within his knowledge. Consequently the orthodox decisions refuse to apply to evidence of personal admissions restrictions usually applicable to testimonial evidence." Morgan, BASIC PROBLEMS OF EVIDENCE 265 (1962).

Wigmore placed the admissibility of admissions upon two grounds: the same inconsistency essentially as is found in cases of self-contradiction by a witness and the incongruity of a party's objecting that he had no opportunity to cross-examine himself. He concluded that admissions were not hearsay. 4 WIGMORE § 1048. Strahorn, in A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937), perhaps the most searching examination yet made of the hearsay rule, advanced the view that admissions were relevant conduct tending to throw light on the affair on which the case hinges, somewhat comparable to the "verbal part" of an act (of giving, for example), and consequently was not classifiable as hearsay. The affinity between this view and Wigmore's is apparent. McCormick took a position straddling Morgan and Strahorn. McCORMICK 503.

These differences are probably more apparent than real. There seems to be substantial agreement that no guarantee of trustworthiness is required in the case of an admission. While the impulse to look for one in the guise of an against-interest aspect is often evident, as indicated in Hetland, supra, and the regrettable tendency in judicial opinions to speak of "admissions

against interest," certainly no requirement that an admission be against interest has achieved recognition. The fact is, of course, that an against-interest aspect is to a large extent built into the admission situation: if the statement is not against interest, the opponent has no motive for offering it. If he does nevertheless offer it, no harm is done by its reception in evidence. It is a self-executing type of thing. True, a statement which is against interest when offered may not have been against interest when made, but the matter is one of probative weight rather than admissibility, and represents a situation likely to occur only with relative infrequency.

In questioning the advisability of continuing a hearsay exception for admissions, Hetland, supra, points out that a statement qualifying as an admission may also be admissible as a prior statement of a person available for cross-examination at the trial under Uniform Rule 63(1), or be admissible as the statement of an unavailable declarant made in good faith and while his memory was clear under Uniform Rule 63(4)(c), or be admissible as a declaration against interest under Uniform Rule 63(10), which eliminates the common

law requirement of unavailability. This, of course, is true, and there may be other avenues of admissibility in addition to these. However, it is hard to justify a requirement that the little cat go only through the little door, and the fact that an item of evidence may have more than one door available should be viewed as an advantage rather than otherwise. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for no curtailment of this avenue to admissibility.

Proceeding then on the theory that admissions should be exempted from the hearsay rule, and that not in the form of an exception but by virtue of not being hearsay at all, proposed subparagraph (4) of subsection (c) enumerates six categories of admissions. They are derived from Uniform Rules 63(7),(8),and (9), with some modifications.

Category (i) is a mildly shortened version of Uniform Rule 63(7). It is believed to state

conventional doctrine. Comment, Model Code of Evidence Rule 506; California Law Revision Commission Study, VIII. Hearsay 483 (1962). The Uniform Rule requirement that a representative be acting as such in making the statement has been deleted as needless and as presenting difficulties of application: a statement by a person who has a representative capacity ought to be admissible if relevant to representative affairs, without embarking upon inquiries whether he was acting as representative in making the statement. See California Evidence Code § 1220; Rule 63(7), Report of New Jersey Supreme Court Committee on Evidence 161 (1963); California Law Revision Commission Recommendation, VIII. Hearsay 320 (1962).

Category (ii) is, for the most part, familiar agency doctrine based upon authority to make the statement and is Uniform Rule 63(8)(a), slightly streamlined in language. A question has been raised as to the status under this rule of statements authorized by the principal to be made but made to the principal himself rather than to an outsider. These statements are likely to be in the form of reports. Should they be admissible despite the

hearsay rule? Does the Uniform Rule (and the proposal) adequately deal with them? Morgan, BASIC PROBLEMS OF EVIDENCE 273 (1962), unequivocally took the position that the agent whose duty was to make statements to the principal did not speak for him, relying on the Restatement of Agency, and the "few courts" admitting the statements were said to be mistaken. McCormick, however, thought the cases about evenly divided for and against admitting the evidence. Rejecting Morgan's assertion that respondent superior does not apply to transactions between principal and agent (as contrasted with transactions between agent and an outsider), he drew upon the analogies of a person talking to himself or writing in a secret diary, either of which he thought would be admissible. He believed, however, that the question basically was one of reliability, and he considered the evidence reliable. (This is at variance with the view that admissions doctrine is the product of the adversary system or the theory that admissions are relevant conduct.) McCORMICK § 78, pp. 159-161. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand.L.Rev. 855, 860-861 (1961), takes the position that the Uniform Rule means that these statements are not admissible but he questions

whether the language is sufficiently clear, although "the single word 'for' may do the trick." The Reporter believes that the rule should be one in favor of admissibility. He has therefore omitted the phrase from the draft, as was done in the draft of Rule 63(8) in Report of New Jersey Supreme Court Committee on Evidence 162-163 (1963). California Evidence Code § 1222, on the other hand, has retained the phrase.

Category (iii), dealing with adoptive admissions, is based on Uniform Rule 63(8)(b) and embodies the established principle that an admission may be made by adopting or acquiescing in the statement of another. The Uniform Rule reference to knowledge has been deleted. While ordinarily one could not be said to adopt or acquiesce in a statement without knowing its contents, conceivably it could happen: "X is a reliable person and knows what he is talking about." See McCORMICK § 246, p. 527, n. 15. The existence of knowledge would usually appear from circumstances, and lack of it would always be open to proof. The proposal also deletes the Uniform Rule specification of the manner in which adoption or belief will be adopted, i.e. "by words or other conduct." The words seem to

be unnecessary, since it seems quite apparent that an adoption or belief may be manifested by conduct other than verbal. The real problem area is where silence is relied upon, on the theory that the normal human reaction is to protest a statement damaging to him, made in his presence, if it is untrue. (A question may be raised whether "conduct" in common parlance connotes only action, excluding the kind of inaction which silence constitutes.) Basically the decision to be made in each case is an evaluation of probable human behavior under the circumstances of the case. In civil cases, the results seem to be satisfactory and to involve decisions no more difficult than many other evidence rulings require. In criminal cases, however, more troublesome considerations arise:

> "Silence under circumstances naturally calling for a denial is also recognized as an admission in criminal cases. . . . In addition to the weakness of the inference itself, other considerations raise doubts as to the propriety of applying the rule in criminal cases when an accusation is made under the auspices of law-enforcing officers. Silence may be motivated by advice of counsel or by the common conception that 'whatever you say may be used against you.' Treating silence as an admission affords unusual opportunity to manufacture evidence. Moreover, the accused is effectively compelled to speak, either at the time or upon the trial by way of explaining his reasons for remaining

> silent, which, to say the least, crowds his privilege against self-incrimination uncomfortably." Cleary, HANDBOOK OF ILLINOIS EVIDENCE 283-284 (2d ed. 1963).

It may be that the Committee will wish to give some special treatment to silence as an admission in criminal cases. In the judgment of the Reporter, however, the misgivings expressed in the quoted passage have been pretty well laid at rest by subsequent developments in the confession and right to counsel decisions of the Supreme Court.

Category (iv) returns to the area of agency and in a redraft should be placed in juxtaposition to (ii), which also deals with that subject. Here the departure from the traditional view is substantial, though in accord with the trend of modern authority. The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual standards of agency. Was the admission made by an agent acting in the scope of his employment? The result was almost invariably the exclusion of the evidence, since few employers hire agents to go around making damaging statements against them. The truck driver was hired to drive the truck, not to make statements. Recently there has been apparent a substantial dissatisfaction with this line of reasoning

and its attendant loss of valuable and helpful evidence. As is pointed out in the Comment to Rule 508(a) of the Model Code, the provision "goes farther than most of the authorities, but many cases reach the same result by purporting to apply the so-called res gestae doctrine." McCormick advocated the position taken in the proposal for the reasons that

> "The agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make such statements unless they are true." McCORMICK § 244, p. 519.

Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 580 (1937), suggests, however, that

> "The true principle for vicarious admissions would seem to be that the relevant conduct of those bearing a presently relevant relation to a party may be offered against him."

In any event, and regardless of theory, the trend of the case law is disclosed in the 1964 Supplement to 4 WIGMORE. Disagreeing with Wigmore's view (4 WIGMORE § 1078) that statements relevant to the agency ought to be admitted, without regard to authority to make them, the editor lists cases from California, Florida, Idaho, Kentucky, Minnesota, and North Carolina, in

each instance adding a disapproving parenthetical comment that the court had allowed the statement in evidence though not within the scope of his employment or duty. 4 WIGMORE, 1964 Supp., pp. 67-70. Federal decisions supporting the position taken in the draft are Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958; KLM v. Tuller, 292 F.2d 775, 784 (D.C. Cir. 1961); Martin v. Savage Truck Lines, Inc., 121 F. Supp. 417 (D.C. Dist. 1954). For examples of the traditional view see Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein.

Category (v) relates to statements by co-conspirators, a subject dealt with in Uniform Rule 63(9)(b). The Uniform Rule specifies three conditions for admissibility: first, "the party and the declarant were participating in a plan to commit a crime or civil wrong," second, "the statement was relevant to the plan or its subject matter," and third, the statement "was made while the plan was in existence and before its complete execution or other termination." For the first condition of the Uniform Rule provision, the proposal merely speaks in terms of conspiracy as being more in the pattern of ordinary discourse, though

without difference of meaning. For the second and third, however, the proposal substitutes a requirement that the statement be made "during the course and in furtherance of the conspiracy," and this return to more conventional phraseology involves a substantial difference in meaning. It seems apparent that statements "relevant to the plan or its subject matter" contemplates statements purely historical or narrative, as well as those employed in executing the enterprise which traditionally constitute the outer boundary. Perhaps the answer should depend upon whether admissibility is predicated upon the theory that each co-conspirator is an agent for the others. If it is, then the broadened view taken of the admissibility of agents' statements in category (iv) would suggest broadened admissibility here. The agency theory, however, has been the subject of considerable criticism, Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Comment, 25 U. Chi. L. Rev. 530 (1958), and does seem to involve a considerable intermixture of fiction. It may well be that the actual basis for admitting co-conspirators' declarations is the very great probative need for them and that the rule which has evolved is the result of an accommodation of this

need to the need to protect defendants against the hearsay hazards, as Levie, supra, suggests. Wholly aside from theory, however, the Supreme Court in Krulewitch v. United States, 336 U.S. 440 (1949), refused to extend admissibility to include statements made after the objectives of the conspiracy had either failed or been achieved. While probably not required in order to decide the case, the Court phrased the rule in terms of "pursuant to and in furtherance of" the objectives. And in Wong Sun v. United States, 371 U.S. 471, 490 (1963), the Court said:

> "We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking."

The proposal is drafted in conformity with these views and reflects a lesser measure of responsibility for statements than in the case of true agency. To the same effect, see Rule 63(9)(b), Report of New Jersey Supreme Court Committee on Evidence 164, 167 (1963), and California Evidence Code § 1223, both of which phrase the hearsay exception essentially in terms of "during the course and in pursuance of" the conspiracy.

Category (vi) is derived from Uniform Rule 63(9)(c), which in turn derived it from Model Code Rule 508(c). The Model Code comment is as follows:

> "Clause (c) is sometimes embodied in a statute. Its theory is that where a plaintiff must establish the liability of a third person as a condition of his right to recover against a defendant, any evidence that would have been admissible against the third person had he been a party, is admissible against the defendant. This was applied in an early English case in an action against a sheriff for the escape of plaintiff's debtor (Sloman v. Herne, 2 Esp. 695 (1798)), and is sometimes suggested as a reason for admitting a principal's declaration in an action against his surety. If applied generally to non-contractual duties and breaches of them, it will make material changes in existing law, particularly in actions against a master for injuries by his servant to property or person of third parties." A.L.I. MODEL CODE OF EVIDENCE 250 (1942).

In the judgment of the Reporter, the provision extends the theory of party responsibility for admissions to an unwarranted degree and should not be adopted. Most of the situations will, in any event, be taken care of as vicarious admissions by agents, or as declarations against interest if the declarant is unavailable. See, however, California Evidence Code § 1224, based upon an earlier California statute, which no doubt was one of those referred to in the Model Code Comment

quoted above. A fuller discussion will be found in California Law Revision Commission Study, VIII. Hearsay 491-496 (1962).

A few familiar categories of vicarious admissions, it will be observed, have been omitted from the itemizations of subsection (c)(4). These include declarations by a joint obligor or joint obligee offered against another joint obligor or joint obligee, declarations by a joint tenant offered against another joint tenant, and declarations of a predecessor in title offered against a successor. In each instance the declaration is offered on the theory of an admission, it being supposed that the relationship between the declarant and the party against whom offered possesses characteristics sufficient to bring the declaration within the area of party responsibility. They were rejected by the Model Code as being unsound in principle and as leading to absurd distinctions, particularly in bankruptcies, wrongful death actions, and actions on policies of insurance. MODEL CODE OF EVIDENCE 252-254 (1942). This, as McCormick points out, was the view of Morgan, opposed by Wigmore on the grounds that the hearsay rule should be relaxed when possible and that the ante litem motam

statement was inherently superior to testimony. McCORMICK § 246, p. 525. McCormick suggests that in any event virtually all these declarations would come in under a liberalized rule for declarations against interest. Ibid. In the view of the Reporter, admissibility of these statements ought to be achieved through avenues other than that afforded by categorization as admissions by a party-opponent.

Subsection (d)

As the hearsay exceptions developed over the years, some of them allowed the admission of the hearsay evidence without regard to whether the declarant was available, while others required that he be shown to be unavailable. The two grand divisions of hearsay exceptions which thus emerge are believed to be justified in reason and experience. In the first division are those in which the nature of the statement and the circumstances under which it was made lead to the conclusion that no greater accuracy is likely to be secured by calling the declarant in person, and unavailability accordingly is not a relevant factor. In the second division,

however, fall hearsay statements admittedly inferior to the testimony of the declarant but with such assurances of accuracy as to make admitting them a wiser choise than doing completely without, and here unavailability becomes a determinative factor in the operation of what is essentially a rule of preference. See proposed Rules 8-03 and 8-04, Reporter's Memo of 9/12-67. A definition of what constitutes unavailability is required to implement this scheme.

At common law, the unavailability requirement was evolved in connection with particular hearsay exceptions rather along general lines. McCORMICK § 234, former testimony; § 257, declarations against interest; § 297, pedigree. No reason is apparent, however, for making distinctions as to what satisfies unavailability for the different exceptions, and a uniform treatment is proposed here, except for a single difference recognized between civil and criminal cases. This general uniformity of treatment is found in Model Code Rule 1(15) and Uniform Rule 62(7) and their offspring. The single difference between civil and criminal cases which appears in the draft is new.

The four situations spelled out in the first sentence of the subsection find ample support as instances of unavailability in the law as it now stands. See, for example, the detailed discussion of unavailability as a requirement for admitting former testimony in McCORMICK § 234. The language is that of Rule 15(e) of the Federal Rules of Criminal Procedure and of the first four grounds of Rule 26(d)(3) of the Federal Rules of Civil Procedure, governing the use of depositions. It is believed to incorporate the substance of Uniform Rule 62(7), and in considerably fewer words, except for not recognizing that the exercise of a claim of privilege constitutes unavailability.

Uniform Rule 62(7) provides:

> "Unavailable as a witness includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. . . .
>
> "But a witness is not unavailable (a) if the judge finds that his exemption . . . is due to procurement . . . of the proponent of his statement for the purpose of preventing the witness from . . . testifying. . . ."

In support of this position it is said:

> "There is no valid distinction between admitting the statements of a dead, insane or absent declarant and admitting those of

> one who is legally not available to testify." California Law Revision Study, VIII. Hearsay 311 (1962).

To the same effect is McCORMICK § 234, p. 495.

The New Jersey Committee advocated this approach also but chose as an example a communication between attorney and client, overheard by W. When the client is called, he claims privilege. Unless this constitutes unavailability, it is argued, the result is to exclude the overheard statement, thereby in effect extending the privilege to an unwarranted degree. The New Jersey's illustration may be an apt one in a jurisdiction which does not protect privileged communications against disclosure by eavesdroppers, but it is not apt if protection against such disclosure is afforded, as is the case with the proposed rules as thus far approved by this Committee. The real problem arises when the declarant makes a disclosure and then refuses to testify regarding the matter on the ground of privilege. The reported decisions disclose this situation arising by virtue of exercise of the privilege against self-incrimination and by virtue of a marital privilege not to testify against a spouse. Both involve claims personal to the witness, not a claim exercised by the proponent of the

hearsay statement. There is substantial authority that by claiming privilege the witness has rendered himself unavailable and that this hearsay requirement for the particular exception (usually former testimony) is satisfied. Thus in Wyatt v. State, 35 Ala. App. 147, 46 So.2d 837 (1950), when the wife claimed her privilege at the trial not to testify against her husband in a prosection for rape of the daughter, the testimony given by the wife at a hearing to place the husband under a peace bond was held properly admitted for the State; and in State v. Stewart, 85 Kan. 404, 116 Pac. 489 (1911), when the husband claimed his privilege at the trial not to testify against his accused wife, the judge's ruling in admitting his testimony given at her preliminary hearing was upheld. A few additional cases are collected in Annot., 45 A.L.R.2d 1354. The difficulty with this view is that the decision whether his hearsay statement is admissible is thus entrusted to the declarant himself: he may make himself unavailable or not as he chooses. If the test is simply the unavailability of the testimony as these cases suggest, the same result should follow in case the declarant when called as a witness simply refuses to answer. And there are

decisions so holding. Johnson v. People, 152 Colo. 586, 384 P.2d 454 (1963), upheld the admission of former testimony of a witness then serving a life sentence who simply refused to testify at a second trial of the accused, and People v. Pickett, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954), upheld the admission of the testimony given at the preliminary hearing when the witness at the trial claimed self-incrimination and refused to testify at the trial although ordered to do so under an immunity grant. A contrary result was reached in Pleau v. State, 255 Wis. 362, 38 N.W.2d 496 (1949), which in the judgment of the Reporter represents sounder policy.

The proposed definition of "unavailable" is extended by the second sentence to include the situation of a declarant who is more than 100 miles from the place of trial. The provision is derived from Rule 26(d)(3) of the Federal Rules of Civil Procedure, governing use of depositions and offers an opportunity to ameliorate very substantially the rigors of the hearsay rule in civil cases, while at the same time preserving a relatively strong policy of preferring the presence of the witness in person.

Part 2 of Memo 19, Rule 8.01 + Comment, is missing. See the second draft Comment in Memo 22

Advisory Committee
on Evidence
Memorandum No. 19
(Part 3)

First Draft

Rule 8-02. Hearsay rule. Hearsay is inadmissible in evidence except as otherwise provided by these rules or by the Rules of Civil and Criminal Procedure or by Act of Congress.

Comment

The provision excepting hearsay made admissible by the Rules of Civil or Criminal Procedure or by Act of Congress is inserted in order to avoid conflicts in situations where hearsay is made admissible by those rules or by statute but would not qualify under these rules. The need for a provision of this kind is demonstrated by the following instances:

Federal Rules of Civil Procedure

Rule 4(g) provides for proof by affidavit when summons is served by person other than marshal or his deputy.

Rule 43(e) permits the use of affidavits when a motion is based on facts not appearing of record.

Rule 56 provides for affidavits in support of and opposition to motions for summary judgment.

Rule 65(b) authorizes the entry of a temporary restraining order upon a showing by affidavit.

Criminal Rules

Rule 4(a) allows the grounds for issuing a warrant to be shown by affidavit.

Rule 12(b)(4) provides for the use of affidavits in determining issues of fact in connection with motions.

Acts of Congress

10 U.S.C. § 7730 allows use of the affidavit of an unavailable witness in actions for damages caused by a vessel in naval service or towage or salvage of same when the taking of testimony or bringing of the action is delayed or stayed on security grounds.

28 U.S.C. § 5206 states that the posting of notice of sale of unclaimed

property by the Veterans Administration is provable by affidavit.

It will be observed that each of the examples set forth above involves the use of an affidavit, and it might be concluded that the problem would be covered adequately by the language of Uniform Rule 63(2):

> "(2) Affidavits to the extent admissible by the statutes of this state."

However, in at least one other notable situation, that involving the use of depositions, matter which is hearsay by definition is admissible because the Civil and Criminal Rules so provide. The manner in which depositions ought to be treated was a subject of extensive discussion and considerable difference of opinion at the meeting of October, 1967, with the Committee voting to strike subsection (c)(3) from the first draft of Rule 8-01. As this provision was designed to exclude depositions from the definition of hearsay, the result was to class depositions as hearsay and to require treating them as an exception. The Reporter believes that the language of the proposal is wholly adequate for that purpose and avoids the complications which would result from endeavoring

to incorporate in a single paragraph the admissibility of depositions, which already receives elaborate treatment in the Civil and Criminal Rules, and former testimony, which is not treated elsewhere and must be covered in the present rules. This treatment of depositions accords with the California treatment. California Evidence Code § 1200 states:

> "(b) Except as provided by law, hearsay evidence is inadmissible."

The Code contains no other provision purporting to deal with the status of depositions taken in the action, and the Comment to the above section does not discuss the subject. However, the Comment to § 1290, which deals with depositions taken in another action, and then as "former testimony," points out that the deposition provisions of the Code of Civil Procedure and the Penal Code will continue to govern the use of depositions in the action in which they are taken.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

(a) General provisions. Evidence is not ~~in-~~ to be ~~admissible~~ excluded under the hearsay rule if, regardless of whether the declarant is unavailable as a witness, the nature of the statement and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness.

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. Any statement made while the declarant was under the stress of a nervous excitement caused by perceiving a startling event or condition.

Comment

The Model Code attacked the hearsay problem by setting forth a general rule that hearsay was inadmissible except as stated in the rules immediately following. Model Code of Evidence Rule 502. Then followed Rules 503 to 530 containing the exceptions. The exceptions were phrased in positive terms of admissibility. Thus Rule 503 provided:

> "Evidence of a hearsay declaration is admissible if the judge finds that the declarant
> (a) is unavailable as a witness, or
> (b) is present and subject to cross-examination."

This form of statement is believed to be mildly misleading in that it is calculated to lead the reader to conclude that if these requirements are met then no further obstacle to admission exists, though in fact the declarant might lack the requisite first-hand knowledge, or the statement might violate the so-called best evidence rule, and so on.

The draftsmen of the Uniform Rules indicated awareness of this undesirable tendency when they provided in Uniform Rule 63(1) that the statements there treated were excepted from inadmissibility "provided the statement would be admissible if made by declarant while testifying as a witness." The qualification seems, however, to have been abandoned and does not again appear in this language in the exceptions of Uniform Rule 63, although its substance is no doubt present in some of them.

The appropriate way of expressing the exceptions would seem to be phrasing them in terms of non-application of the hearsay rule, rather than in positive terms of admissibility. This effectively repels any implication that other possible grounds of exclusion need not be considered. Accordingly, proposed Rules 8-03 and 8-04, which incorporate the exceptions, read in terms of not being inadmissible under the hearsay rule. This treatment finds reinforcement in the terminology of the California

Evidence Code. See, for example, § 1220:

> "Evidence of a statement is not made inadmissible by the hearsay rule when. . . ."

Subsection (a)

This subsection, as previously indicated, represents an effort to synthesize and rationalize the situations in which hearsay is admissible even though the declarant is available. It proceeds upon the assumption that the particular situation of each exception contains elements which warrant the conclusion that the proffered hearsay statement is inherently superior to, or at least as good as, the testimony of the declarant given at the trial, else waiving the production of an available witness would be without justification.

It is believed that the Committee at this juncture is not as well situated to consider the adequacy of the language of the proposal as will be the case after the various illustrative exceptions have been examined and discussed. The

Reporter therefore suggests that only a casual consideration be given to this subparagraph at this time, with a view to taking it up further at a later time.

Subsection (b)

The first two of the illustrative exceptions are based upon mildly divergent theories of the reliability of spontaneous statements, (1) being based on Thayer-Morgan doctrine and (2) being the result of Wigmore's efforts to bring sense and order into the higgledy-piggledy of res gestae. In a large measure they are overlapping and probably the only significant point of difference lies in the amount of time allowable between event and statement. The proposal is derived from Model Code Rule 512, which was in substance carried over into items (a) and (b) of Uniform Rule 63(4).

Morgan, BASIC PROBLEMS OF EVIDENCE 340-341 (1962) describes the theory underlying part (1) of the proposal as follows:

"Rule 512 (a) indicates the scope of the rule which James Bradley Thayer deduced from the numerous decisions dealing with declarations concerning an event or condition offered for the truth of the matter declared on the theory that they were part of the res gestae. (Footnote omitted.) The reception of a declaration made in such circumstances, he explained, did not require the trier to rely solely upon the credibility of the unexamined declarant. If the witness were the declarant himself he could be fully examined as to the facts declared. If the witness were another, he could be cross-examined concerning his perception of the event or condition sufficiently to enable the trier to put a fair value upon the declarant's statement. Furthermore, the utterance must be substantially contemporaneous with the event or condition, and this would normally negative the probability of deliberate or conscious misrepresentation. The event or condition need not be exciting or such as to still the reflective faculties. It need not be the subject of an ultimate issue in the case; it may be an item of circumstantial evidence."

The theory of part (2) is expounded in 6 WIGMORE § 1747, p. 135:

"This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be

> taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts. (Footnote omitted.) The ordinary situation presenting these conditions is an affray or a railroad accident. But the principle itself is a broad one."

Both of the exceptions proceed on the assumption that the circumstances in each instance preclude fabrication. The first emphasizes the time aspect: lack of time to fabricate assures spontaneity. The second emphasizes the impact of an exciting event upon the reflective faculty which is essential for fabrication: lack of capacity to fabricate assures spontaneity. The Wigmore theory has been subjected to vigorous criticism on the ground that the same excitement which is relied upon to eliminate conscious fabrication also operates to impair the accuracy of perception. Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928). This disadvantage does not, of course, attend the Thayer-Morgan aspect.

Cases almost without number support the Wigmore position. See, for example, the citations to

6 WIGMORE § 1750; Annot. 53 A.L.R.2d 1245 (statement as to cause of or responsibility for motor vehicle accident); Annot. 4 A.L.R.3d 149 (accusatory statement by victim of homicide). Those actually passing upon the Thayer-Morgan view are less numerous. In the oft-cited case of Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942), one of the passengers in an automobile testified that plaintiff's car passed them some four miles from the scene of the accident for which it was destined and that it was bouncing and zig zagging. The judge excluded his testimony that the driver of the car in which witness was riding said "they must have been drunk, that we would find them somewhere up the road wrecked if they kept that rate of speed up." This ruling was reversed, with the court quoting McCormick and Ray's Texas Law of Evidence favoring admissibility of a comment made by a person while perceiving an event "not at all startling or shocking in its nature, nor actually producing excitement in the observer." Nevertheless, being passed by a careening car at high speed on the highway would seem to be fairly classifiable as exciting. In fact, the same may be said as to all the cases cited to support the Thayer-Morgan view

in McCORMICK § 273, n.4, with the exception of Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So.2d 83 (1942), in which the helper of an about-to-be-electrocuted electrician testified that the latter said in the course of their work that he had telephoned the plant to disconnect the line on which they were working and which shortly thereafter proved to be energized with fatal results. Unexciting event cases, regardless as to the view taken of admissibility, seem to be relatively rare, probably because unexciting events are not likely to evoke any comment, while the cases cited to 6 WIGMORE § 1750 (to support the exciting event theory) filled with actual or imminent carnage from speeding vehicles, crimes of violence, and the like are numerous. The writer of a note in 46 Colum. L. Rev. 430 (1946), in order to gather illustrative applications of the Thayer-Morgan view, was forced to class as non-exciting any event in which the declarant did not believe he would be a participant.

On the other hand, the avowedly exciting event cases have not hesitated to allow some fairly generous stretching of the concept of what constitutes

an exciting event. Thus in People v. Fitzsimmons, 320 Mich. 116, 30 N.W.2d 801 (1948), a prosecution for offering a bribe to a member of the legislature, evidence was admitted that he had promptly told others of the offer, although the best he could come up with in the way of describing his condition was that he was "a little mad and disgusted." Compare Roy Annett, Inc. v. Kerezsy, 336 Mich. 169, 57 N.W.2d 483 (1953), sustaining the exclusion of the wife's telephone call to a neighbor telling terms of a sale of real estate following two hours of negotiation, on the ground that the event was not exciting and the call not timely.

The general result of the cases is satisfactory, despite occasional awkwardness of theory. The conclusion to be drawn is that attempts to classify events as exciting or otherwise as an initial basis for admission or exclusion involves needless niggling. Contemporaneity should be regarded as a sufficient guaranty of sincerity, with what constitutes contemporaneity depending upon the nature of the event and of the statement. This desirable flexibility is believed to be found in the proposed draft.

If the basic approach is acceptable, certain subsidiary problems remain to be considered: the time aspect, whether declarant need be a participant, establishing the actual happening of the exciting event, how declarant's perception is to be established, and possible limitations on the subject matter of the declaration. They will be discussed in that order.

Time. If the Thayer-Morgan theory is adopted, then a statement which is made while the event or condition is being perceived by declarant presents no problem. And it seems reasonable that some latitude in departing from exact contemporaneity should be allowed a judge who is satisfied that the statement is spontaneous despite a slight lapse of time. This was the view of the Model Code, which provided in Rule 512(a) for admitting a statement made either while perceiving or "immediately thereafter." The quoted language was dropped from Uniform Rule 63(4)(a), and this pattern was also followed in Kansas Code of Civil Procedure § 60-460(d) and in New Jersey Rule 63(4). The California Evidence Code eliminates the problem by failing to include a Thayer-Morgan provision at all. Cf. California

Evidence Code § 1241. In clause (1) the proposal adopts the Model Code position and language. Under clause (2), embodying the Wigmore theory, the time allowable between event and statement is expanded to include the duration of a nervous excitement caused by perceiving the event or condition. Further specification as to this time aspect seems to be needless and in any event a hopeless undertaking. See the annotation on the admissibility of accusatory utterances by homicide victims in 4 A.L.R.3d 149, which classifies cases under such headings as "'Immediately' or within 10 minutes," "From 10 to 30 minutes," "From 30 minutes to 1 hour," "More than 1 hour." While this sort of treatment may be inevitable in the working literature, it ought not to be extended into the rule itself.

> "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 243 (1961).

See also McCORMICK § 272, p. 580.

Participation by declarant. According to some of the decisions, the declarant must be a participant or actor, and a declaration by a bystander

does not qualify. The position seems on its face to be unsound, since a non-participant may be moved to describe what he perceives and anyone may be startled by an event in which he is not an actor. Slough, op. cit., at 242; McCORMICK § 272, p. 580, n.14; Morgan, BASIC PROBLEMS OF EVIDENCE 343 (1962). The participation requirement may flow from a misapplication of the "verbal acts" doctrine. Ibid. See California Evidence Code § 1241 and Comment. The great bulk of the cases lay down no requirement of participation. Slough, supra; McCORMICK, supra; 6 WIGMORE § 1755. And see the cases admitting statements made by bystanders at time of arrest, Annot. 78 A.L.R.2d 300. The proposal, like Model Code Rule 512 and Uniform Rule 63(4), contains no condition that the declarant be an actor or participant.

Proving the exciting event. May the exciting event be established by the statement itself? In most of the cases the question does not arise, since there is present either the testimony of the declarant or another witness independently establishing the happening of the event or circumstantial evidence sufficiently establishing that something of

a startling nature must have happened. Illustrative of the latter category are Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1954), a prosecution for carnal abuse in which the grandmother testified that the 10-year old victim was distraught, in shock, and crying when she related the offense; Weatherbee v. Safety Casualty Co., 219 F.2d 274 (5th Cir. 1955), a compensation case involving testimony that decedent in a compensation case came home during the day, said he had ruptured himself "kicking" on a gasoline engine, and exhibited an abdominal swelling; and Lampe v. United States, 229 F.2d 43 (D.C. Cir. 1956), in which declarant obviously had been the victim of a severe beating which he described before dying from its effects. In the leading case of Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397 (1869), plaintiff sued on a policy insuring against accidental death, and the issue was whether insured fell downstairs, suffering fatal injuries, or died from natural causes. The widow testified that insured left his bed during the night and on his return said he had fallen down the back stairs, hit the back of his head, and almost killed himself. A son also testified that he saw his father downstairs at the time in question

and the latter said he had fallen down the back stairs and hurt himself very badly. The majority of the Court sustained the trial judge in admitting the hearsay declarations. In a dissenting opinion, however, Mr. Justice Clifford took the position that the event could not be proved by the declaration which it in turn authenticated. While the case has been viewed by some commentators as presenting this problem, Slough, Res Gestae, 2 Kan. L. Rev. 41, 254 (1954), there were in fact other items of evidence tending to establish that something had happened to declarant: the widow testified that his voice was trembling and that he complained of his head and appeared to be faint and in great pain, and the son said his father was lying with his head on the counter. Nevertheless, in some instances even this quantum of proof is missing, and reliance must be had on the declaration itself to prove the happening of the startling event. A goodly number of cases, described as "increasing," Slough, op. cit. at 255, sustain admissibility under these circumstances, and McCORMICK § 272, p. 579, describes this as "prevailing practice." Illustrative cases are Armour & Co. v. Industrial Commission, 78 Colo. 569, 243 Pac. 546 (1926), and Young v. Stewart, 191 N.C. 297,

131 S.E. 735 (1926). In theory the result may be difficult to justify, Maguire and Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L. J. 1101, 1123-1124 (1927), unless as suggested in McCORMICK § 272, p. 579, n.8, the view is taken that the rules of exclusion do not apply to determination by the judge of preliminary questions of fact. The "bootstrap" problem is carefully examined in California Law Revision Commission Study, VIII. Hearsay 468-472 (1962), which concludes that the utility of the exception would be much curtailed if the hearsay rule applies to the judge, that the question is left in doubt by Uniform Rules 2 and 8, and suggests amending the latter to provide specifically that the exclusionary rules do not apply to the judge's determination of preliminary questions. Wigmore is commonly cited as supporting this view (5 WIGMORE § 1385, which refers to 1 id. § 4, which does not address itself to the point). If the Committee is not disposed to follow the California suggestion mentioned above, the best alternative solution probably is to make no attempt to deal with the problem, since no other treatment is readily apparent and in any event cases totally lacking in

circumstantial evidence are rarely encountered.

Proving perception. A similar problem arises as to whether the fact of the declarant's perception may be proved by his own statement. It becomes particularly troublesome when declarant is an unidentified bystander, and some cases have excluded in the absence of evidence aliunde from which it can reasonably be inferred that declarant did see the event. Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939); Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963). The unidentified bystander is, moreover, unusually subject to fabrication. The identified declarant, on the other hand, can usually be placed at the scene and from that fact plus the nature of the utterance it is reasonable to infer perception. See People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961), upholding the admission, in support of a charge that Buster murdered Maria in their apartment, of testimony of neighbor Pat that shortly after she heard an uproar and shots Buster's mother pounded on the back door and said, "Oh, my God, Pat, Buster just shot Maria. . . ." The evidence to support perception was that the mother declarant lived in the same apartment with

Buster and Maria, that she was present there earlier in the day, that she was wearing a night dress and slippers when she appeared at the back door. The Committee may wish to approach this problem in the same fashion as the one just preceding.

Subject matter. As long as the statement is purely descriptive or explanatory of the perceived event, no question arises as to what subject matter of the statement is permissible; if this kind of subject matter is not allowable, then none would be. At least two other kinds of situation seem to be possible, however: (1) the statement may be a narrative of events connected with or leading up to the event in question, or (2) it may be evoked by but wholly unrelated to the event in question. Some decisions have simply excluded the statement if it does not "elucidate" the event. Extreme applications are such slip-and-fall cases as Bagwell v. McLellan Stores Co., 216 S.C. 207, 57 S.E.2d 257 (1949), disapproving admission of statement by bystander that floor had recently been oiled. Less extreme perhaps are the cases involving agency or permission to use or ownership of a vehicle. Cook v. Hall, 308 Ky. 500, 214 S.W.2d 1017 (1948), error

to admit statement of boy driver of truck immediately after accident that he had father's permission; McAvon v. Brightmoor Transit Co., 245 Mich. 44, 222 N.W. 126 (1928), proper to exclude statement by driver as to ownership of truck, though made immediately after collision; Adams v. Quality Service Laundry & Dry Cleaners, Inc., 253 Wis. 334, 34 N.W.2d 148 (1948), error to admit statement by driver shortly after accident that he had permission to use the truck. In each of these cases the subject matter of the statement seems to be such as would likely be evoked by the event, spontaneously and unreflectively, and the exclusion in each instance is unacceptable. Much better results seem to be reached in Sanitary Grocery Co. v. Snead, 90 F.2d 374 (D.C. Cir. 1937), sustaining admission in a slip-and-fall case of a clerk's statement, "That has been on the floor a couple of hours," as being spontaneous although narrative in character, and Murphy Auto Parts Co., Inc. v. Ball, 249 F.2d 508 (D.C. Cir. 1957), sustaining the admission on the issue of agency of a statement by the driver, immediately following an accident, that he had to call on a customer and was in a hurry to get home. The insistence of some of the decisions that admissible statements

be limited to those which explain or describe the event appears to be the result of incorporating an essential aspect of the Thayer-Morgan theory into cases calling for application of the Wigmore theory. Thus in non-startling cases, under part (1) of the proposal, it is assumed that narratives of past happenings or statements on other subjects on their face lack the required contemporaneity. In the startling event cases of part (2), however, it is assumed, as suggested in 6 WIGMORE §§ 1750, 1754, that a narrative of past events or a statement on other matters may tend to indicate a reflective rather than spontaneous statement but does not compel that conclusion.

The Model Code in both subsections (a) and (b) required the statement be one which "narrates or describes or explains" the event. It thus inserts into subsection (b), described as the Wigmore subsection in 18 A.L.I. Proceedings 165 (1941), a restriction which Wigmore repudiated. 6 WIGMORE §§ 1750, 1754. Moreover, in using the word "narrates" the Model Code either suggests a narrative of past events, which would be wholly at variance with the context, or uses it as a redundant

version of "describes or explains," implying that something in addition is intended though they seem to cover the allowable area quite adequately. Uniform Rule 63(4) in part (a) uses the language of subsection (a) of Model Code Rule 512 (except for excising "or immediately thereafter") and, except for the use of "narrates" as suggested above, seems to be an acceptable phrasing of the Thayer-Morgan theory. In part (b), however, Uniform Rule 63(4) in place of the clear (except for "narrates"), although erroneous language of Rule 503(b), limiting startled utterances to those describing the event, limits admissible statements to those made while the declarant was under the stress of a nervous excitement "caused by such perception." Whether this is meant to restore the Wigmore true view or to continue the Model Code Rule 512(b) of it is unclear. See Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204, 206-209 (1960). The proposal, it is believed, eliminates these difficulties by avoiding the word "narrates" in part (1) and by making clear that no subject matter limitation per se is contemplated in

part (2). To the same effect see Rule 63(4) of the Report of the New Jersey Supreme Court Committee (1963).

The Kansas rule is in the language of Uniform Rule (a) and (b). Kan. Code of Civ. Pro. § 60-460(d). California Evidence Code § 1240 is substantially in the language of Model Code Rule 512(b) with the addition of "spontaneously." No Thayer-Morgan section was adopted in California. Cf. Cal. Evidence Code § 1241, somewhat confusingly setting forth a part of the "verbal acts" doctrine as a hearsay exception. As finally adopted in New Jersey the rule is in the language of Uniform Rule 63(4)(a) and (b) with the following addition: "in reasonable proximity to the event, and without opportunity to deliberate or fabricate." It is difficult to see that any improvement is the result.

It will be observed that the subject matter of part (c) of Uniform Rule 63(4) is not treated at this point, since it involves an unavailable declarant, the subject of another rule under the proposed approach.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing ~~mental, emotional,~~ state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including memory or belief to prove the fact remembered or believed.

Comment

The present exception is essentially a specialized application of the Thayer-Morgan theory of statements describing an event or condition which the declarant was perceiving while he made the statement. Its guarantee of trustworthiness is found in the spontaneous nature of the statement, which is believed to be superior, or at least equal, to testimony subsequently given on the stand and subject to all the influences which the passage of time implies. See McCORMICK §§ 265, 268. Moreover, these are matters which for their proof are peculiarly dependent upon what the person says, whether on the witness stand or otherwise. Although it might have been incorporated in exception (1) of the present rule, it is believed that its accessibility and usefulness are enhanced by treating it as a separate exception.

The language is essentially that of Uniform Rule 63(12)(a) with some slight modifications in the interest of clarity, and two substantial changes.

The first substantial departure from the Uniform Rule is the elimination of the requirement that the statement not be found by the judge to have been

made in bad faith. This change was made on the theory that good and bad faith are so essentially jury matters that the judge ought not be invited to venture into the area in jury cases. No good or bad faith requirement is found in proposed exception (1) or its forbears, and none is believed to be appropriate here. Compare California Evidence Code § 1252, calling for exclusion "if the statement was made under circumstances such as to indicate its lack of trustworthiness," and New Jersey Rule 63(12) which imposes as a condition of admissibility that the statement "was made in good faith." The Kansas provision is identical with the Uniform Rule. Kan. Code Civ. Pro. § 60-460(1).

The second substantial departure from the Uniform Rule is the elimination of the language "when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. . . ." The quoted language says too much and too little. It says too much in purporting to stipulate conditions of admissibility other than those related to the hearsay quality of the evidence. These particular

conditions relate to relevancy. The requirements of relevancy are covered elsewhere and need not and should not be repeated throughout the rules whenever a relevancy problem appears on the horizon. For example, whether evidence of a statement of intent to do an act is admissible to prove that the act was done, as in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892), involves a two-stage inquiry: (1) Does this method of proving intent violate the hearsay rule? (2) Is intent, by whatever means proved, relevant to prove the doing of the intended act? The second stage is no concern of a rule dealing with hearsay. If, however, it is believed that the relevancy problem must be treated at this point, then the excised language says too little in that it is susceptible of being read as excluding his statements as a means of proving declarant's condition at a subsequent or possibly a prior time. Thus, while an intent to make a gift ought to be provable by a statement made either before or after the physical handing over of the object, the Uniform Rule language seems not to allow room for the working of the presumption that a condition once proved to exist continues or the drawing of an inference

that it existed earlier because it exists now, despite the Comment to the rule.

It will be noted that the present exception is limited to statements which describe declarant's condition as of the time of making the statement, thus requiring strict contemporaneity. Past conditions, as well as recitals of the cause of a present condition, are excluded. All this is in accord with standard doctrine. McCORMICK §§ 265, 268. Statements of physical condition are not limited to those made to physicians, nor is there any effort to draw a line between groans or the fact of complaining and words of complaining. See McCORMICK § 265, p. 562, n.6.

The final language of the proposal, following Uniform Rule 63(12)(a), excludes "memory or belief to prove the fact remembered." On its face, this is inconsistent with the stand previously taken in this comment that a rule on hearsay is not an appropriate place to treat problems of relevancy. However, a provision of this nature is essential to preserve the hearsay rule as otherwise it is destroyed by allowing proof of state of mind as the basis for an inference of the happening of the event

which produced the state of mind. In the Hillmon case, the statement in question was that of Walters that he was going to Crooked Creek, offered to prove that he actually went, on the theory that a person with an intent to go is more likely to have gone than one not shown to have had such an intent. The present problem is presented by changing the facts to a statement by Walters that he had been to Crooked Creek, again offered to prove that he actually went, but now on the theory that a person in the state of mind of having gone to Crooked Creek is more likely to have gone there than one not shown to have that state of mind. Logically the evidence in the latter case is arguably more convincing: in each instance the declarant may be lying, and in the former there is the added uncertainty of carrying out plans. Tickets get lost. Yet this overlooks the spontaneous nature of the declaration of intent, and of most others, which is absent in the example of what is in effect an historical narrative, however sought to be dressed up as state of mind. The language of the exclusion ("memory or belief") may seem somewhat narrow for the purpose intended, but most of the situations

which might arise are probably translatable into those terms. Thus while it could be argued that an expression of fear by a murder victim to prove threats by the accused would not be memory or belief but rather fear, nevertheless the situation seems primarily to be one of "memory or belief," though it may have incidental aspects of fear.

Some inroads upon the hearsay rule have been made along the lines suggested by the second illustration above. People v. Merkouris, 52 Cal. 2d 672, 344 P.2d 1 (1959), and People v. Atchley, 53 Cal. 2d 160, 346 P.2d 764 (1959), upheld the admission of declarations by murder victims that they had been threatened by the accused. However, the ruling was severely limited by People v. Hamilton, 55 Cal. 2d 881, 362 P.2d 473 (1961), and repudiated by the incorporation of the Uniform Rule provision, with no exception, in California Evidence Code § 1250(b). See the discussion of the California decisions in California Law Revision Commission Study, VIII. Hearsay 509-512 (1962). The principal area in which this sort of departure from the hearsay rule is encountered is in the will and deed cases. Here many cases are found allowing statements by

decedents that they had or had not executed deeds or wills, or had or had not revoked wills, or stating the tenor of the document. McCORMICK § 271; Annot. 34 A.L.R.2d 588; Annot. 62 A.L.R.2d 855. It seems evident that these declarations are of great value and that their admissibility ought not to be curtailed, either by design or through inadvertence. However, it is believed that the matter can more appropriately be handled as an unavailable declarant situation under proposed Rule 8-04. Cf. California Law Revision Commission Study, VIII. Hearsay ↄ12 (1962), recommending an amendment to allow statements of testators as to making wills or their terms or revoking them.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing ~~previous~~ medical history, or past or present symptoms, pain, or sensations, or the inception, general character of the cause, or ~~in~~ external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Comment

Statements of existing symptoms to physicians are covered by exception (3), dealing with declarations of present condition. However, statements to physicians have traditionally been regarded as exceptionally trustworthy, in view of the patient's motivation to tell the truth in order to be diagnosed and treated properly. Hence even those few jurisdictions which have shied away from admitting statements of present condition generally have allowed them if made to a physician for purposes of diagnosis and treatment. McCORMICK § 266, p. 563. As a result they are admitted universally. Ibid.

The present exception, following Uniform Rule 63(12)(b), allows statements of past conditions, on the theory that they fall within the same guaranty of trustworthiness. McCORMICK § 266, p. 563; 6 WIGMORE § 1722, p. 78. "Medical history" has been added as a broadening provision, and "sensations" is used without the modifier "physical" for the same purpose. The draft also allows statements of the cause of the condition insofar as reasonably pertinent to diagnosis or treatment. This is designed

to require exclusion of statements of fault but to recognize that other aspects of how an injury was sustained may fall within the circumstantial guaranty, including statements which bear on scope of employment. Thus a patient's statement that he was struck by a car would be allowable but not his statement that the car was driven through a red light. This is believed to be the trend of the decisions. Shell Oil Co. v. Industrial Commission, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); McCORMICK § 266, p. 564. New Jersey Rule 63(12)(c); Report of New Jersey Supreme Court Committee on Evidence 175-177 (1963); Slough, Some Evidentiary Aspects of the Kansas Code of Civil Procedure, 13 Kan. L. Rev. 197, 204 (1964).

The proposal also eliminates the Uniform Rule requirement that the statement be made to a physician, the essential thing being that the statement be made for the purpose of diagnosis or treatment. It may well be made to a hospital attendant, ambulance driver, nurse, or member of the family, and still fall within the circumstantial guarantee.

Finally, the proposal substitutes "diagnosis or treatment" for the "treatment or . . . diagnosis with a view to treatment" of the Uniform Rule. The purpose of the latter language is, of course, to exclude from the exception all statements made to physicians consulted only for purposes of enabling them to testify. In this respect, the provision is in accord with conventional doctrine which does not allow the statements as substantive evidence. Prevailing doctrine does, however, allow the physician to testify to the basis of his opinion. The distinction is one not likely to be observed by juries, and in line with the Committee's position on the basis of expert testimony (second draft Rule 7-03 provides that it may be based on facts not admissible in evidence if of a kind ordinarily relied upon by experts in the field) the limitation is abandoned.

The proposal may be inadequate in its treatment (or perhaps more properly, lack of treatment) of statements made by a patient to a psychiatrist. Despite the surface resemblance to statements by a patient to an ordinary physician, some fairly fundamental differences will be found. The most

basic is with respect to questions of what is pertinent to diagnosis or treatment. In the ordinary physician case, no great problem is encountered in sorting out and excluding statements which are extraneous to diagnosis or treatment. In the psychiatrist case the situation is quite different: the relationship is basically a verbal one and little, if indeed anything, said by the patient can be discarded as unrelated to diagnosis or treatment. Inevitably, many questions of multiple admissibility will arise, with statements in the form of historical narrative being offered as proof of the patient's condition, acceptable for that purpose but not as proof of the happening of the events recited in the narrative. In final analysis the problem is probably no more troublesome than many other situations in which evidence is admitted for a limited purpose with an appropriate instruction if requested. Perhaps the Committee may wish to face the problem squarely by reinforcing "medical" in the proposal by adding "or psychiatric." The Reporter has been less forthright, leaving it more or less as a matter of construing "medical" to include or exclude

psychiatric treatment, with a reasonable construction probably including it but not extending an invitation to the problem.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(5) Records of regularly conducted activity. any writing or record whether in the form of an entry in a book or otherwise made as a Memoranda, reports, or records of acts, events, conditions, or ~~opinions, made~~ diagnoses, at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless

the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Comment

Probably no single area of the law of evidence has received as much attention from those seeking to effect improvement as that treated in the present exception. The Commonwealth Fund Act was the result of a study begun in 1925 and completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for Its Reform 63 (1927). It was enacted by the Congress in 1936 as the governing rule in federal courts, with a few changes in language too minor to mention, 28 U.S.C.A. § 1732, and a number of states have taken similar action. In 1936 the Commissioners on Uniform State Laws promulgated the Uniform Business Records as Evidence Act. 9A U.L.A. 506. It, too, has acquired a substantial following in the states. The Model Code covered the subject in Rule 514, and it is treated in Uniform Rule 63(13). There are, of course, differences of

varying degrees of importance among these various treatments, and attention will be directed to them as appropriate.

The common law pattern was a strict one and set up troublesome obstacles to the use of even the most ordinary business and commercial records. The Commonwealth Fund report directed itself almost entirely to the tremendous inconvenience occasioned by the requirement of producing as witnesses or accounting for the nonproduction of all participants in the process of gathering, transmitting, and recording business information. Morgan et al., op. cit., 51-63. Professor McCormick also mentioned this requirement as the "most burdensome feature of this archaic system," although he referred also to such gaps as the unavailability of a party's books to prove cash transactions and to such uncertainties as the relationship between shop book rule and regular entries, and the requirement of a recurring pattern. McCORMICK § 289, pp. 606-607. Against this background it can be seen why the reformers' efforts emphasized the elimination of the need to call or account for all participants, in that respect simplifying the requisite foundation

evidence. Moreover, they worked largely within the context of business and commercial records, since that was where most of the difficulties had arisen. The latter aspect is demonstrated by the Commonwealth Fund study, which uses for illustrations no kind of record producing activities other than those of shopkeepers, manufacturers, and wholesalers, with the capstone consisting of a detailed study of the record keeping system of a leading manufacturer of linoleum. Morgan et al., op. cit., 51-63. And the Uniform Commissioners in their Prefatory Note rest largely on the fact that the common law rule "has aroused the ridicule of many business men" and by its vagaries as among states has embarrassed "interstate industry." 9A U.L.A. 505. In fact, the word "business" dominates both the titles and the texts of the various efforts.

In their areas of primary emphasis (witnesses to be called and general admissibility of ordinary business and commercial records) the Commonwealth Fund Act and the Uniform Act have succeeded well, judging from the relative infrequency of more or less current reported decisions involving these points. These aspects, therefore, are sought to be preserved in the proposal.

On the subject of what witnesses may satisfy foundation requirements, the Commonwealth Fund Act is silent, as is its counterpart the federal statute. This omission of the common law requirement of calling : : accounting for all participants can certainly be read as eliminating it, McCORMICK § 290, p. 608, and the cases permit no other result. United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941); La Porte v. United States, 300 F.2d 878 (9th Cir. 1962). The Uniform Act, however, dealt with the situation expressly by providing that the requisite foundation testimony may be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. Model Code Rule 514 reverted to the silent treatment employed by the Commonwealth Fund Act but points out in the Comment that this does not require "the calling of any specified persons as witnesses. . . . [A]ny witness acquainted with the regular course of the business may testify concerning it." MODEL CODE OF EVIDENCE 272 (1942). Uniform Rule 63(13) likewise is silent on the subject.

Although the matter may by now be beyond reasonable question, the draft proposal seeks to

eliminate any possibility of doubt by providing, in the pattern of the Uniform Act, that the foundation testimony may be given by the "custodian, or other person having knowledge" of the identity and mode of preparation. See the Texas statute quoted in McCORMICK 608, and California Evidence Code § 1271(c).

In this connection, one further point to be noted is the proposal in the Report of the New Jersey Supreme Court Committee on Evidence 187-188 (1963) that provision be made for proving records under this rule by affidavit. The present Committee may wish to give this suggestion serious consideration. The Reporter has not included it in the draft, believing that in civil cases the matter can be handled adequately at pretrial conference under Rule 16 or under request to admit procedure under Rule 36 of the Federal Rules of Civil Procedure, and that in criminal cases the pretrial provisions of Rule 17.1 push the matter about as far as is feasible. It must be admitted, however, that the suggestion is somewhat akin to certifying copies of public records, a procedure which encounters little opposition.

Before turning to consideration of what may be called the substantive aspects of the rule, it may be well first to examine briefly the grounds upon which it rests. In his general discussion of the justification of the exception, Professor McCormick states that the element of unusual reliability of business records is furnished (1) by systematic checking through balance-striking [true only of strictly business--financial type records], (2) by the regularity and continuity which produce habits of precision in the record-keeper [this applies only to the accuracy of the record, not the data recorded], and (3) by the actual experience of business in relying on them. McCORMICK § 281, p. 597. Yet a little later he says that the chief foundation of the reliability of business records is that they are "based upon the first-hand observation of someone whose job it is to know the facts recorded," id., § 286, p. 602, and finally that "any written statement made as a part of a continuing job, occupation or business duty furnishes adequately the guaranty of special reliability." Id., § 287, p. 603. Laughlin, Business Entries and the Like, 46 Iowa L. Rev. 276 (1961), advances the

view that reliability depends upon the extent to which the records are relied upon by the persons for whom kept. Powell, Hospital Records in Evidence, 21 Md. L. Rev. 22 (1961), finds the reliability of hospital records in the fact that the recovery, even lives, of patients depends on their accuracy. It seems clear that the experience with business records, to which McCormick clearly was addressing himself in the first instance, cannot be transposed into other fields of activity simply by calling them businesses. The differences between the functioning and record-keeping of a mercantile establishment, a hospital, and a policeman are fairly fundamental, and a common denominator must be sought. The possibilities are various: reliance, the desire of an employer for an accurate record, a duty to make an accurate record, the routineness of the over-all operation of assembling and recording data,--all seem in some aspects to be too restrictive.

All this inevitably seems to lead into the interrelated problem of the kinds of activities which should be regarded as producing records of

an admissible kind. As previously indicated, earlier incursions into the field concentrated primarily upon facilitating the admission of ordinary business and commercial records. However, all recognized that the same factors which conferred credibility upon business-type records might also be present in connection with other activities. As a result the Commonwealth Fund Act defines "business," as does the federal statute, to include "business, profession, occupation and calling of every kind." Uniform Rule 62(6) added "operation of institutions, whether carried on for profit or not," and California Evidence Code § 1270 contributes "governmental activity" to the list.

With unanimity, all the various model statutes and rules have sought to capture these factors constituting the essential basis of the rule by employing the phrase "regular course of business," plus a definition of "business" which extends it far beyond its ordinarily accepted meaning. While this has worked reasonably well, it has two disadvantages: a tendency to emphasize a requirement of routineness and repetitiveness (an entry in the regular course of business vs. an entry in the course of a regular business), and a tendency to emphasize traditional

business-type records, insisting that other kinds of records be squeezed into the fact patterns which give rise to business records. These considerations will be more apparent in the discussion which follows. The proposal seeks to cover the ground more briefly, and it is hoped more accurately, by describing the soil in which acceptable records grow as "the course of a regularly conducted activity." This is believed to set forth the essential basis of the hearsay exception and to contain the essential element which can be abstracted from the various specifications of what is a "business" within the rule.

The amplification which has taken place with respect to the kinds of activities producing admissible records, whether by decision or by statute, has given rise to problems which did not inhere in the conventional business records. Essentially they have been problems of the source of the information reflected in the entries, problems raised by entries in the form of opinions, problems clustering around motivation, and problems of involvement as participant in the matters recorded.

As to what sources of information should be regarded as acceptable, the traditional business records raised no problems. The nature of the situations was such that an employee as participant or observer with first-hand knowledge transmitted the data, perhaps through a fellow employee, to another employee who recorded it. Measured by any standard the record thus produced was reliable: all the participants were acting routinely; all were under a duty of accuracy; and the employer relied upon their joint product in running the business. In short, all were acting "in the regular course of business." When, however, any of these participants is taken out of the pattern an essential link in the chain was broken, and the participant most likely to be in this situation is the one who supplies the data or information in the first instance. If he is not in the pattern of routine, course, regularity, duty, or however described, then it is difficult to avoid the conclusion that the reason for the exception fails. If the assurance of accuracy does not extend to the data or information recorded, the fact that it may be recorded with the most scrupulous accuracy is of no avail.

A recurring situation which raises the question of the admissibility of a record, entirely satisfactory save for the fact that the information recorded was received from a "volunteer," is the police report of an accident investigation. The leading case is the familiar one of Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), construing and applying the Commonwealth Fund Act which was in effect in that state. The court ruled that the act required that the supplier of the information, as well as its recorder, must be acting in the course of the business, and held the report inadmissible. Wigmore, despite the fact that he was quoted liberally in the opinion, commented that "this decision shows how difficult it is to amend the law of procedure effectively even in the presence of an obvious and conceded need for it; the most explicit words of a statute do not always avail to change the cerebral operations of the Judiciary." 5 WIGMORE § 1530a, n.1, p. 392. Most of the courts and writers have, however, sided with the New York court rather than with Wigmore, and reason seems to support them. McCORMICK § 286; Annot. 69 A.L.R.2d 1148. The Commonwealth Fund Act, the Uniform Act,

and Uniform Rule 63(13) contain no provision specifically upon the point, although a requirement of first-hand knowledge by the informant can readily be spelled out of the Uniform Act and Uniform Rule provisions that the sources of information must be such as to justify admission or indicate trustworthiness. Id., at p. 603. In Johnson v. Lutz, the court spelled it out of the general requirement that the record be made in the regular course of business. The Commonwealth Fund Act does contain a provision of some ambiguity to the effect that lack of personal knowledge on the part of the entrant or maker does not affect admissibility but only weight. This was the language which led Wigmore to criticize Johnson v. Lutz as refusing to give effect to the statute. Yet it is quite susceptible of being read as a mere needless restatement of the common law recognition that the maker of the record (as such) need not have first-hand knowledge, not that the informant was not required to have it. Model Code Rule 514 dealt with the question squarely and answered it forthrightly by specifying that "one with personal knowledge" of the matter had either to make the record or transmit the information for recording.

Federal cases construing and applying the statute, 28 U.S.C. § 1732, have generally held that records based on information obtained from volunteers were not rendered admissible by it. Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied 356 U.S. 975; Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D. N.Y. 1965). Compare Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir. 1966), sustaining the admission of a state trooper's motor vehicle accident report based upon his own observations and upon conversations with the two drivers. As to the propriety of admitting the report insofar as based on his own observations there should be no question, Annot. 69 A.L.R.2d 1148, and the court distinguishes Johnson v. Lutz by saying that the two drivers "were hardly bystanders." The explanation is unhelpful but may be taken as indicating that the reliability of the informant may be predicated on the course of an activity different from the one pursued by the recorder. See also Bridges v. Union R. Co., 355 F.2d 382 (6th Cir. 1966), an FELA case of an allegedly

dangerous crossing, upholding the admission of police reports of prior accidents at the same crossing. It will be noted that the focal point here was the mere happening of the prior accidents (which was probably well within the knowledge of anyone who went to the scene to report and saw the results), and not the details gathered from whatever source.

The draft adopts the language, "made by or from information transmitted by a person with personal knowledge." This is in the pattern of Model Code Rule 514 ("that it was the regular course of that business for one with personal knowledge of such an act, event or condition to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record"), rather than the Uniform Rule 63(13) provision that "the sources of information from which made . . . were such as to indicate their trustworthiness." The Committee may prefer the Uniform Rule language as being less definite and correspondingly less restrictive.

In passing it may be observed that simple distrust of certain occupations and of the records produced by them hardly justifies their blanket

exclusion on an ad hoc basis. See Illinois Supreme Court Rule 236, adopting the Commonwealth Fund Act but with an added subsection:

> "This rule does not apply to the introduction into evidence of medical records or police accident reports."

The police report type of situation also has the aspect of a public record or report and will be returned to when that exception is considered.

Turning next to entries which assume the form of opinions, here again is encountered a problem which the nature of the situations giving rise to traditional business records did not present, since the matters to be recorded were basically factual in nature. The question most commonly arises today in connection with medical diagnoses, prognoses, and test results. Report of New Jersey Supreme Court Committee on Evidence 185-186 (1963). The framers of the Commonwealth Fund Act made no mention of the problem in their study, Morgan et al., op. cit., 51-63, and the language of their model statute describes the allowable subjects of a business record offered in evidence as "any act, transaction, occurrence, or event," plainly suggesting the non-inclusion of matters of opinion. Id., at 63.

This is the wording of the federal statute also and perhaps serves to explain the conservative bent of some of the federal decisions. The Uniform Act added "condition," and the word was continued in Model Code Rule 514 and in Uniform Rule 63(13). It is ambiguous, raising doubts as to what degree of certainty is required, or conversely what degree of opinion is allowable.

The most often cited, referred to, discussed, and criticized of the federal decisions is New York Life Insurance Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1945), an issue of accident or suicide, upholding the exclusion of hospital records offered by defendant, containing the observed behavior of insured and a psychiatric diagnosis. These were matters, said Judge Arnold, affected by bias, judgment, and memory, rather than the "routine product of an efficient clerical system"; there was no internal check on reliability. On rehearing, in the same vein, he asserted that the entry must be the product of routine procedure with accuracy guaranteed as the "automatic reflection of observations," while diagnosis involves conjecture and opinion. He conceded, however, that records as to patients'

conditions "on which the observations of competent physicians would not differ are of the same character as sales or payrolls," and indicated some confusion with problems of the source of the information. Judge Edgerton dissented. To him the language of the federal act was no obstacle. Observation, diagnosis, and treatment were acts, occurrences, or events. The admission of any entry under the Shop Book Rule deprives the opponent of the benefits of cross-examination and the disadvantage to a litigant against whom is admitted an entry consisting of a psychiatric diagnosis is no greater than that of "a litigant who is adversely affected by a record of the contents of a freight car." Taylor was followed in Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1958), cert. denied 356 U.S. 960, upholding the exclusion of hospital records containing diagnoses of mental disease. A vigorous dissent advocated the overruling of Taylor. The same court, however, thought that a physician's finding glass fragments during a rectal examination was one on which "competent physicians would not differ," in the language of Taylor, and hence a permissible subject of record

entry. Washington Coca-Cola Bottling Works, Inc. v. Tawney, 233 F.2d 353 (D.C. Cir. 1956). Cases following Taylor in other circuits are England v. United States, 174 F.2d 466 (5th Cir. 1949), proper to exclude navy hospital records offered by accused, containing opinions of physicians that he was suffering from "mental deficiency (organic brain disease)"; Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967), proper to exclude hospital record stating that plaintiffs' condition was due to inhalation of insect spray (not to encephalitis as claimed by defense). However, other federal cases have shown no hesitation in admitting entries which consist of diagnoses contained in the records of doctors or hospitals, Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941), error to exclude, on issue whether insured was under the influence, a physician's hospital record entry, "reacting very well--still apparently well under influence of alcohol"; Buckminster's Estate v. Commissioner of Internal Revenue, 147 F.2d 331 (2d Cir. 1944), proper to admit hospital record containing medical diagnosis of cerebral hemorrhage (Taylor expressly disapproved); Medina v. Erickson, 226 F.2d

475 (2d Cir. 1955), proper to admit hospital record with doctors' diagnosis of "bronchogenic carcinoma and metastasis of the liver" (with more disapproval of Taylor); Glawe v. Rulon, 284 F.2d 495 (8th Cir. 1960), proper to admit hospital records containing doctor's diagnosis of condition of plaintiff's hip. See also Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962), in which Judge Sobeloff's opinion carefully collects the cases and decides in favor of admitting the hospital record of the results of a Bogen's blood-alcohol test.

While the decisions in the state courts are also divided on the question of admissibility of diagnostic entries, the trend seems to be very much in the direction of favoring admissibility. Illustrative cases are: Boruski v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938), proper to admit hospital records containing diagnosis of plaintiffs' condition in food impurities case; Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956), indicates admissibility of doctor's hospital record entry that patient was malingering (actually decided on inadequacy of objection); People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d

490 (1940), error to exclude hospital record entry diagnosing grandmother of accused as manic depressive; Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947), proper to admit nurses' entries that testator behaved irrationally.

Admission or exclusion seems not to have been affected by the terms of the statute in force in the particular jurisdiction; all the federal cases and two of the four state cases cited above were decided under the Commonwealth Fund Act, which refers to "act, transaction, occurrence, or event," while the remaining two state cases were decided under the Uniform Act, which extends its provisions to include records of "conditions." It is believed that the rule adopted by the Committee should deal with the problem of opinions in direct language favoring admissibility, and hence the word "opinion" has been added to those of "act, condition, or event" which appear in Uniform Rule 63(13), and the phrase "to prove the facts stated therein" has been deleted as inconsistent.

An additional aspect of admitting opinion evidence is raised in Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962), namely establishing the

qualifications of the diagnostician or technician whose diagnosis or test results are incorporated in the record. If the diagnostician or technician were testifying in person, generally accepted principles would require that the qualifications of the witness be demonstrated, ordinarily by his own testimony. It was argued in Hogan that the record should not be admitted unless it affirmatively showed the qualifications of the entrant or informant. This argument was rejected on the ground that qualification and regularity of procedures followed could be presumed in cases of routine diagnoses and tests, although not in the case of a rare disease or infrequently performed test. Accord, Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); Hale, Hospital Records, 14 So. Cal. L. Rev. 99, 108 (1941). Proof of qualifications by other witnesses is not, of course, foreclosed by the argument or by this disposition of it. The subject does not lend itself readily to treatment by rule, and none has been attempted. The Committee may disagree.

Problems which may roughly be described as centering around the motivation of the informant have

been a source of trouble and disagreement. The closeness to problems of routineness is apparent; routineness is an oft relied upon motivation, or its equivalent, to be accurate. The leading case is, of course, Palmer v. Hoffman, 318 U.S. 109 (1943), a grade crossing case involving the admissibility of what was in effect an accident report, made by the since deceased engineer, offered in evidence by defendant trustees of the railroad, and excluded. This ruling was upheld on the ground that the report was not "in the regular course of business" within the meaning of the federal statute. It was not a record for the systematic conduct of the business as a business. The basis of the rule is routine reflection of the day-to-day operations of a business. Mere regularity of preparation is not enough. The report was prepared for use in court, not in the business, for use in litigating, not railroading. The Court of Appeals, Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942), had based its decision, also upholding the trial judge, on the ground of motivation: the engineer's statement was "dripping with motivations to misrepresent." Id., p. 991. While the Supreme Court opinion does not

stress, in fact mentions only obliquely, the motivations of the engineer, there can be no doubt that the emphasis on records reflecting routine operations acquires significance only by virtue of their impact upon motivation to be accurate, or conversely their elimination of motive to be other than accurate.

This invitation to explore the motivations introduces a disturbing factor. Despite Judge Frank's vigorous assertions to the contrary, absence of motive to misrepresent has not traditionally been a requirement of the rule, even in its restricted common law form; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Entries and the Like, 46 Iowa L. Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis."

Other cases have struggled with the motivation problem. Should a statement prepared for use in litigation or under circumstances suggesting a high probability of litigation ever be usable? For the engineer who may be blamed for the accident which he reports, substitute a doctor who examines a prospective personal injury litigant and submits an

evaluation report. This seems to be in the routine of the doctor's business, both as to the examining and as to the reporting. Does Palmer v. Hoffman require exclusion? Yes, says Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D. N.Y. 1965), if the report is by plaintiff's doctors of his own choosing in anticipation of litigation and if it is offered by plaintiff. Yes, says Otney v. United States, 340 F.2d 696 (10th Cir. 1965), reversing a conviction because the government introduced a "diagnostic letter-report" written by the superintendent of a mental hospital for use by a state court, stating that accused was sane, responsible, and able to stand trial. In the first case cited, there may be a motive to misrepresent; in the second there is none. In either case it would seem to be well within the ordinary activities of physicians to write letters about patients. In Korte v. New York, N.H. & H.R. Co., 191 F.2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868, physicians hired by defendant railroad examined plaintiff and reported to defendant. Plaintiff offered the reports, and this fact was held to remove them out from under Palmer v. Hoffman. Had defendant offered them, presumably

they would not have been admitted. Yet the motivation of the doctors was unchanged throughout. Perhaps the result is a left-handed extension of the doctrine of admissions by a party-opponent, since the doctors were clearly independent contractors rather than agents and the railroad did nothing in the way of adopting their reports. To the same effect is White v. Zutell, 263 F.2d 613 (2d Cir. 1959), approving the admission, at plaintiff's behest, of the report of a physician who examined him at the request of defendant's insurer. Contra, Masterson v. Pennsylvania R. Co., 182 F.2d 793 (3d Cir. 1950). These troublesome cases tend to reinforce Judge Clark's complaint that construing "regular course of business" as incorporating a requirement of an informant without motive to misrepresent is "hanging so much on so little." 129 F.2d at 1001.

Professor McCormick concluded:

> ". . . [W]ell-reasoned modern decisions have admitted in accident cases the written reports of doctors of their findings from an examination of the injured party, when it appears that it is the doctor's professional routine or duty to make such report. Similarly, it would seem that the report of an employee, such as a bus or truck driver, or a locomotive engineer of an accident in the course of business, when such report is required by the employer's instructions and

> routine should qualify as a business record, and should be evidence of the facts recited, at least so far as it is based on the reporter's first-hand knowledge." McCORMICK § 287, p. 604.

The difficulty with this point of view, of course, is that no stopping place is apparent. To hold that anything observed and recorded in the course of a regularly conducted activity is admissible goes much beyond the scope of the present case law. Efforts to set a limit are found in such cases as Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), error to admit worksheets prepared by now deceased deputy collector in preparation for the instant income tax evasion prosecution, and United States v. Ware, 247 F.2d 698 (7th Cir. 1957), error to admit narcotics agents' records of purchases. Compare McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965), upholding admission, in Securities Act prosecution, of analysis of corporate activities ordered made by defendant president. Some decisions have required involvement as a participant in the matters reported, as in Clainos v. United States, 163 F.2d 593 (D.C. Cir. 1947), police records of convictions excluded because not a part of police business, and in Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957), error to admit employees'

reports of business practices of others, is unduly restrictive. Quite routine and acceptable reports may involve matters merely observed, e.g. the weather.

Some decisions have found that motivation problems are satisfied when the report is made pursuant to a duty imposed by statute. United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir. 1961), error to exclude statutorily required report of injury to waiter, made by chief steward on basis of information from a bystander and the waiter plus his own observations; Taylor v. Baltimore & O.R. Co., 344 F.2d 281 (2d Cir. 1965), proper to admit employer's report of injury, required by statute, offered by employer. In each instance the court emphasized the fact that the report was oriented in a direction other than the litigation which ensued. Compare Matthews v. United States, 217 F.2d 409 (5th Cir. 1954), refusing to countenance admission of "sugar reports," not made for purposes of operating the reporter's business but in compliance with statute.

The formulation of a provision of sufficient specificity to assure satisfactory results in all

these various situations is an obvious impossibility, even assuming substantial agreement on what would be a satisfactory result in each instance. Much must be left to the judge, as does Uniform Rule 63(13) in conditioning admissibility upon a finding "that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness." It is believed, however, that the Uniform Rule is susceptible of improvement in one fairly significant respect in this connection. The Uniform Rule imposes a requirement of "regular course of a business" plus a requirement that sources and preparation be such as to indicate trustworthiness. Since the regular course of business concept is the foundation of the hearsay exception and in itself indicates trustworthiness, the additional requirement, which in effect says the same thing over again, is redundant and surplusage. It does, however, seem wise to provide some escape from a rule which would admit all regular entries. Hence the proposal reframes the Uniform Rule provision in terms of enabling the judge to exclude despite the fact that the record was made in the course of a regularly conducted activity.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(6) Absence of entry in records of regularly conducted activity. Evidence that a matter is not mentioned in the memoranda, reports, or records of a regularly conducted activity, to prove the non-occurrence or non-existence of the matter, if the matter was of a kind of which ~~the activity~~ is ordinarily made and preserved a memorandum, record, or report conforming to example (5) above.

Comment

The proposal is a redraft of Uniform Rule 63(14) so as to conform to subparagraph (5). The general term "matter" has been substituted for "act, event or condition" in the interest of brevity.

The Comment to the Uniform Rule points out that failure to mention a matter which would ordinarily be mentioned is circumstantial evidence of its non-existence (and not hearsay). This position agrees with the one taken by the Committee in defining hearsay in first draft Rule 8-01. The Uniform Rule further points out, however, that there are decisions to the contrary with respect to the absence of a regular entry and hence the occasion for the exception. The division in the cases is discussed in McCORMICK § 289, p. 609, and Morgan, BASIC PROBLEMS OF EVIDENCE 314 (1962). Wigmore gave vigorous support to the principle stated in the rule. 5 WIGMORE § 1531. The Uniform Rule provision appears in haec verba or in substance in California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); and New Jersey Rule 63(14).

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(7) Public records and reports. Written statements of public officials or agencies consisting of (a) records or reports of the activities of the official or agency, or (b) records or reports of matters observed pursuant to duty imposed by law, or (c) factual findings ~~on conclusions~~ resulting from an investigation made pursuant to authority granted by law, unless the sources of information or the method

or circumstances of the investigation indicate lack of trustworthiness. This illustration does not exclude from the hearsay rule statements made with the dominant purpose of using in a prosecution or litigation,

Comment

Public records are a recognized exception to the hearsay rule at common law and have been the subject of statutes without number. McCORMICK § 291. The present federal statute, 28 U.S.C. § 1733, provides:

> "(a) Books or records of accounts or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

The relative narrowness of the statutory language in several respects will be observed. It does not, for example, include the records of non-federal officers or agencies, and as a result the regular entry statute (28 U.S.C. § 1732) may be invoked when the public records exception would appear to be more appropriate. See Kay v. United States, 255 F.2d 476 (4th Cir. 1958), approving admission of certificate of state-conducted blood-alcohol test in prosecution for drunk driving under the Assimilative Crimes Act. Other respects in which

the present federal statute appears to be unwarrantedly narrow will be adverted to in the discussion which follows.

Rule 44 of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure are not relevant to the present inquiry, since they deal with methods of authenticating an otherwise admissible record, not with the question whether a particular record is admissible despite the rule against hearsay.

The justification for the public records exception is said to be the presumption that a public official performs his duty properly, the unlikelihood that he will remember details independently of the record, and the inconvenience which would result from taking them from their duties for purposes of testifying. Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952), and see Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919).

Uniform Rule 63(15) divides official writings into three categories of subject matter: (a) records of things done by the officer, (b) records of things observed by the officer, and (c) the results of

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Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(8) Required reports. Writings made as a record, report, or finding required by statute to be filed with a public officer or agency by those ~~licensed or authorized by law to engage in a profession or to do the acts reported~~ occupying a particular status or engaged in a particular occupation. Cal. provision approved

Comment

Uniform Rule 63(16) excludes from the operation of the rule against hearsay reports required by statute to be made by persons "authorized by statute to perform, to the exclusion of persons not so authorized, the

functions reflected in the writing." The language is substantially that of Model Code Rule 516. The comments to each of these rules, in virtually identical language, point out that the subject is records made by persons sometimes said to be ad hoc public officials, such as physicians, undertakers, and ministers of the gospel, though not confined to them. California Evidence Code § 1281 substitutes a provision dealing only with records of vital statistics, on the theory either that nothing else in fact fell within the language of the Uniform Rule, California Law Revision Commission Study, VIII. Hearsay Evidence 524 (1962), or that the Uniform Rule was too broad, id. at 329.

Admissibility can be reached by either of two routes: (1) a person in a licensed occupation, required to report concerning the exercise of his functions, may be equated to a public official, or (2) a report required by law offers sufficient trustworthiness without more.

The Uniform Rule adopts (1) and stops short of the breadth encompassed in (2). The result is the exclusion even of some vital statistics records, e.g. birth report by parent when no attending

physician. It would also exclude various reports made under statutory duty by non-licensed persons which have been held admissible. Taylor v. Baltimore & Ohio R. Co., 344 F.2d 281 (2d Cir. 1965), report to Secretary of Labor of injury to employee, made by employer's freight agent; United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir. 1961), chief steward's report of injury to waiter; Desimone v. United States, 227 F.2d 864 (9th Cir. 1955), tax returns of club to show defendants' connection with it, in prosecution for conspiracy to operate retail liquor business without paying required special taxes; Hawbaker v. Danner, 226 F.2d 843 (7th Cir. 1955), Social Security records to prove earnings of decedents. While one might in general agree with these results, it should be borne in mind that to provide broadly for the admission of reports made under statutory duty would entail extensive consequences. Thus motorist accident reports, census returns, and income tax returns would be freed from the hearsay rule. Decisions which have rejected reports made under statutory or equivalent duty include United States v. Grayson, 166 F.2d 863 (2d Cir. 1948), mail fraud prosection,

error to admit "offering sheets" filed with SEC; United Mine Workers v. Patton, 211 F.2d 742 (3d Cir. 1954), cert. denied 348 U.S. 824, action for damages for causing coal company to cease doing business with plaintiff, error to admit reports by coal company to Bureau of Labor Statistics, stating that strikes were caused by efforts to unionize mines; Matthews v. United States, 217 F.2d 409, 50 A.L.R. 2d 1187 (5th Cir. 1954), error to admit "sugar reports" of supplier, submitted pursuant to statutorily authorized demand, in prosecution for unlawful distilling.

Wigmore suggests a distinction between "a genuine official duty created and a mere penal responsibility established," giving as an illustration of the former a statute requiring clergymen to certify marriage ceremonies and of the latter a statute requiring owners of property to make a return thereof or requiring employers to make returns of minors and women employed. 5 WIGMORE § 1633a, p. 524. The tenor of Wigmore's discussion, without putting it in so many words, is to limit the applicability of this duty concept to persons engaged in a profession. In the view of the Reporter this is too narrow an approach,

and the draft proceeds upon the theory that the conditions of the exception are satisfied if the duty is one imposed by law upon the reporting person by virtue of his status or occupation. The result would be to exclude such items as motorist accident reports, census returns, and income tax returns, involving no status-connected duty, but to include such other items as vital statistics reports, Social Security records, employer reports of accidents, and other similar matters required by law of those in particular callings or of a particular status. It will be observed that this goes considerably beyond the restrictive language of Uniform Rule 63(16) which limits the exception to those in a licensed or regulated occupation.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

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(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(9) Absence of public record or entry. To prove the absence of a record or report conforming to examples (7) or (8) above, or the non-occurrence or non-existence of a matter of which such a record or report was ordinarily made and preserved, evidence in the form of a certificate of the custodian or testimony that diligent search failed to disclose the record or report or entry therein.

Comment

The non-occurrence of an event of a kind ordinarily mentioned in the records of a regularly conducted activity is provable by evidence of absence of any mention in its records. Example (6), supra. The present example extends this principle to include the records of public officials and ad hoc officials, whose records are admissible under examples (7) and (8). No doubt there is considerable overlap with example (6), but the duplication is harmless and is to be preferred over the risk of leaving an hiatus. The matter is not covered by Uniform Rule 63(17), California Evidence Code § 1284, Kansas Code of Civil Procedure § 60-460(0), or New Jersey Rule 63(16). If a justification is needed, see 5 WIGMORE § 1633(6), p. 519.

Moreover, in some situations, the absence of the record may be the ultimate focal point of the inquiry. See, e.g. People v. Love, 310 Ill. 558, 142 N.E. 204 (1924), certificate of Secretary of State admissible to show failure to file documents under Securities Law. Thus it may be necessary to prove the absence of a record as well as the absence of an entry in a record. While the common law seems

not to have allowed use of a certificate as proof of lack of a record or entry, the position is difficult to defend, 5 WIGMORE § 1678(7), p. 752, and the draft takes the opposite position as do Uniform Rule 63(17) and its progeny mentioned in the preceding paragraph of this Comment.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(10) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(11) Marriage, baptismal, and similar certificates. Statements of fact of the kinds mentioned in example (10), contained in a certificate that the

maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(12) Family records. Statements of fact of the kinds mentioned in example (10), contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

Comment

Examples (10), (11), and (12) are derived largely from the useful provisions of California Evidence Code §§ 1312, 1315, and 1316. Except to the extent that church records are admissible as business records

under Uniform Rule 63(13) and the limited certification provision of Uniform Rule 63(18), which applies only to marriages, the Uniform Rules are silent on these subjects.

Example (10). The records of the activities of religious organizations are currently recognized as being admissible at least to the extent of the business records exception to the hearsay rule. 5 WIGMORE § 1523, p. 371. However, admitting these records only to the extent allowable as business records results in an unfortunate curtailment. As pointed out in the Comment to California Evidence Code § 1315, the business record doctrine requires first-hand knowledge by someone in the business. The result is such decisions as Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924), church record admissible to prove fact, date, and place of baptism but not age of child (except that he had at least been born at the time). It seems highly unlikely that a person would fabricate information furnished on an occasion of this kind, though a doubt might be raised as to paternity designation by the mother. The proposal assumes that the circumstances furnish

as good a guaranty of accuracy as is present in business record situations.

Example (11) extends acceptance of certification as a method of proof. Uniform Rule 63(18) deals only with proving marriage by this means, pointing out in the accompanying Comment that the common law decisions are in conflict. The need seems actually to be greater in related areas. Marriages are generally provable by the record, and it is only in the event of failure to record that need arises to resort to the certificate given by the solemnizing official. Other similar acts, such as baptism or confirmation, are not required, or even authorized, to be recorded, yet certificates issued may contain valuable data. They would seem in principle to be as acceptable evidence as certificates by public officers. See the discussion of marriage certificates in 5 WIGMORE § 1645.

The Uniform Rule specifies preliminary proof that the maker was authorized and that he issued the certificate at the time or within a reasonable time thereafter. The Report of the New Jersey Supreme Court Committee on Evidence 194 (1963) concluded that the Uniform Rule was unduly strict in both

respects and recommended provisions requiring only that the certificate "purport" to have been issued by an authorized person at or near the time. This recommendation is incorporated in New Jersey Rule 63(18). California Evidence Code § 1316, on the contrary, follows the pattern of the Uniform Rule. The Reporter has doubts as to the advisability of conferring upon certificates of this character, when executed by persons who are not public officials, the self-authenticating characteristics of documents emanating from public officials. Hence the draft requires proof that the maker was authorized and did make the certificate. The time element, however, seems appropriately to be dealt with in terms of "purport," as affording sufficient assurance of contemporaneity, especially in view of the generally accepted presumption that a document was executed on the date it bears.

Example (12). Family Bibles have traditionally been admitted as records of matters of family history. 5 WIGMORE §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence

of public or church records. Opinions cited or quoted by Wigmore, supra, also mention inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings, all as falling within the same category. California Evidence Code § 1312 refers to family Bibles "or other family books or charts." The Reporter construes this to include genealogies, and the draft so states.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

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(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(13) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(14) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document ~~and if~~ unless dealings with the property since the document was made have ~~not~~ been inconsistent with the truth of the statement or the purport of the document.

(15) Statements in ancient documents. Statements in documents whose authenticity is established as ancient documents under Rule 9-02(h).

Comment

Example (13) is Uniform Rule 63(19), but with the advance notice provision of that rule deleted for reasons previously discussed. "Record" has been substituted for "official record," since the context sufficiently indicates the official character of the record, as suggested in California Law Revision

Commission Recommendation No. 1, Evidence Code Revisions 124 (1966).

The draft also substitutes "as proof of" in lieu of "to prove," which appears in the Uniform Rule. The language change is believed mildly to repel any notion that the proof is conclusive. California Evidence Code § 1600 provides that a record of this kind is "prima facie evidence." § 602 states that prima facie evidence means rebuttable presumption, and § 605 seems to confer upon a presumption involving titles the effect of imposing upon the adverse party the burden of proving nonexistence. The Reporter believes that the rather vague phrasing of the draft is preferable in that it affords leeway for spelling out the precise effect in local terms, since title questions are essentially matters of local law. See Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939), the first of the post-Erie decisions, holding that the Texas rule placing the burden of proof on the issue of bona fide purchase upon the party attacking the legal title was a "substantial right upon which the holder of recorded legal title to Texas land may rely."

Examples (14) and (15) will be discussed together, in view of their close relationship. Uniform Rule 63(29), upon which example (14) is modeled, deals with statements of fact, often called recitals, contained in dispositive documents. Thus a deed purporting to have been executed by an attorney-in-fact may recite the existence of the power of attorney, though none appears of record, or it may recite that the grantors are all the heirs of the last record owner, though no heirship proceeding appears. The rule makes these recitals admissible to prove the facts recited. As the Comment thereto states, the cases generally require that the document be dispositive in character and that the statements be corroborated. These circumstances are believed to constitute adequate guarantees of trustworthiness. The age of the document is of no significance, although most of the cases in fact involve ancient documents. The draft differs in language from the Uniform Rule, drawing upon California Evidence Code § 1330 for a clearer expression of what is intended as a limitation upon the kind of statement included, i.e. relevant to the purpose of writing.

Professor McCormick pointed out that the Uniform Rule failed to make provision for statements contained in non-dispositive writings, although the writings might qualify as ancient documents. Proposed rule 9-02(h) provides a simplified method, essentially in the pattern of the common law, for authenticating documents which fall in the category of ancient; it does not, however, deal with the admissibility of assertive statements contained therein as against a hearsay objection, which, as Wigmore points out, involves a different principle. 7 WIGMORE § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous cases in support of the statement. Id., § 2145. Most of these items are important evidentially only insofar as they are assertive, and if they are admissible it must be as hearsay exceptions. Hence decisions on admissibility of necessity involve hearsay rulings. Nevertheless, when he treats of recitals in ancient deeds as a hearsay exception he refers to the exception as a

"limited use" which "finds recognition in only a small number of precedents." 5 Id. § 1573, p. 429. The former position is believed to be the correct one in reason and authority. As pointed out in McCORMICK § 298, danger of mistake is minimized by authentication requirements, age furnishes assurance that the writing antedates the present controversy, and opportunity to know the facts at first hand would be required. Cf. Morgan, BASIC PROBLEMS OF EVIDENCE 364 (1962), doubting whether a statement acquires veracity by mere passage of time.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(16) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(17) Learned treatises. A published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established

as a reliable authority by expert testimony or judicial notice.

Comment

Example 16 is based upon Uniform Rule 63(30) but with some amplification of subject matter and some easing of foundation requirements.

With respect to subject matter, the Uniform Rule includes only lists, registers, periodicals, and other compilations, published for persons in a particular occupation. This occupation-oriented approach excludes many of the most commonly encountered items which ought to be included, e.g. newspaper reports of stock market activities and telephone or city directories, since they are not published for persons in any particular occupation. California Evidence Code § 1340 adds "tabulation" and "directory" to the Uniform Rule enumeration and deletes "periodical." The proposal follows the California pattern and adds a specific reference to "market quotations," as in Uniform Commercial Code § 2-724, which provides for admissibility of "reports in official publications or trade journals or in newspapers or periodicals of general circulation

published as the reports of such [established commodity] market."

There is ample authority at common law for the admission in evidence of items falling in the general category. While Wigmore's text is narrowly oriented in the direction of lists, etc., prepared for the use of a trade or profession, 6 WIGMORE § 1702, authorities cited include numerous instances of such other kinds of publications as newspaper market reports, telephone directories, and city directories. Id., §§ 1702-1706. It therefore appears that the basis of trustworthiness is general reliance by the public as well as by persons in a particular occupation, and that the foundation requirement ought to be eased accordingly. As a result, the proposal reads "generally used and relied upon by the public or by persons in particular occupations," rather than the Uniform Rule requirement of being "published for use by persons engaged in that occupation and . . . generally used and relied upon by them," or California Evidence Code § 1340 of being "generally used and relied upon as accurate in the course of a business [broadly defined]."

Kansas Code of Civil Procedure § 60-460(bb) and New Jersey Rule 63(31) are in the language of the Uniform Rule.

Example 17 is based upon Uniform Rule 63(31). The latter was not adopted in New Jersey and appears in California Evidence Code § 1341 only in the very attenuated form of proof of "facts of general notoriety and interest." Kansas Code of Civil Procedure § 60-460(cc) is the Uniform Rule without change.

The Comment to the Uniform Rule states, "Only a few courts receive the evidence made admissible by this exception." Professor Morgan pointed out that only Alabama had recognized a general exception for learned treatises, although an occasional statute makes some inroads on the general rule of exclusion. Morgan, BASIC PROBLEMS OF EVIDENCE 366 (1962). The basis for departing from the great weight of precedent is simply that books by learned individuals constitute the great repository of knowledge. As Morgan says, experts rely in large measure upon what they derive from books and we admit their testimony, hence it is absurd to exclude the source material itself. To the claim that the battle of experts would be turned into

one of books, he calls attention to the Alabama court's reply: "We have not found the ends of justice defeated by our rule, nor the difficulty of its application very great." Ibid.

Wigmore argues vigorously for such an exception.

> "The writer of a learned treatise writes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of method and of accuracy of results."

He reinforces his argument by asserting the superior impartiality of the treatise-writing expert over the testifying expert. 6 WIGMORE § 1692.

Probably resistance to the use of treatises stems basically from the fear that triers of fact cannot understand and use them intelligently without expert assistance. Such is the general tenor of the rather numerous objections discussed and dismissed in Report of the New Jersey Supreme Court Committee on Evidence 212 (1963). It is a hearsay objection in the sense that the writer's expressions could be explored and tested by cross-examination if he were on the stand. Yet his assertions

are not the factual ones of the usual witness; their content, rather, is the specialized learning needed to evaluate the facts of the case. If elucidation or contradiction is required, other authorities either as treatise writers or as witnesses would appear to be inherently superior to cross-examination. If elucidation is needed but not supplied, exclusion on grounds of prejudice and confusion under second draft proposed rule 4-04 would be more appropriate than exclusion as hearsay.

A substantial fringe benefit from the adoption of the proposal would be the elimination of controversy as to when a treatise may be used to cross-examine an expert. See Morgan, op. cit., at 367.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(18) Reputation concerning personal or family history. Reputation among members of his family by blood or marriage, or among his associates, or in the community, concerning a person's birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, ancestry, or other similar fact of his personal or family history.

(19) Reputation concerning boundaries or general

history. Reputation in a community, arising before the controversy, as to boundaries of, or customs affecting lands in, the community, and reputation as to events of general history important to the community or state or nation in which located.

(20) Reputation as to character. Reputation of a person's character among his associates or in the community.

Comment

Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 WIGMORE § 1581, p. 445, and see also § 1583. On this common ground, reputation as to land boundaries, customs, general

history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an example of similar breadth. The tradition, however, has in fact been much narrower and has confined proof by reputation to a relatively small group of situations where the need for evidence of this kind has been most pronounced. The proposal has in general followed this restricted pattern.

Example 18 deals with reputation as to matters of family history, in both the family and in the community. The fact of marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community, 5 WIGMORE § 1602, but the proposal goes beyond this small area by adding other matters of family history and by extending reputation to include that in the family and among associates. Expansion to include items of family history other than marriage seems well justified in principle, and Wigmore cites cases both for and against admissibility of reputation as evidence on issues of legitimacy, relationship, adoption, birth, death, and race-ancestry (i.e.

whether slave or free, whether white, negro, or Indian, which now appears devoid of substantial significance). Id., § 1605. All seem to be susceptible to being the subject of well founded repute. As to the family and associates reputation aspect, the concept of the community as the "world" in which reputation exists has proved capable of expanding with changing times from the simple and uncomplicated neighborhood in which all activities occur to the multiple and unrelated worlds of work, religious affiliations, and social and other activities, each of which may generate a reputation. See People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935); State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956); Mass. St. 1947, c. 410, Mass. G.L.A. c. 233 § 21A; 5 WIGMORE § 1616; Uniform Rule 63(28). With respect to family reputation in particular, it has been pointed out that it has often served as the point of beginning for allowing community reputation. 5 WIGMORE § 1488.

The proposal combines the substance of Uniform Rule 63(26) and (27)(c). The reference to race-ancestry has been eliminated. "Associates" has been added in

order to expand the concept of community. And "personal history" has been substituted for "personal status or condition" as being more in line with the general tenor of the provision. The proposal deletes the requirement of a finding that the matter is likely to have been the subject of a reliable reputation in the community, since this is believed to be inherent in the concept of reputation. See California Evidence Code §§ 1313, 1314, giving somewhat less scope to community reputation than to family reputation with respect to matters of family history. Kansas Code of Civil Procedure § 60-460(x) and (y)(2) are the Uniform Rule provisions, and New Jersey Rule 63(26) and (27)(c) are substantially so.

Example 19 incorporates the substance of Uniform Rule 63(27)(a) and (b). As McCormick indicates, evidence of reputation as to land boundaries and land customs is generally received. Though limited in English practice to public boundaries, it is generally admitted in this country with respect to private boundaries. There is also some authority that the reputation must be "ancient." McCORMICK § 298, p. 625. The proposal, in conformity with the

Uniform Rule, includes private as well as public land and eliminates any common law requirement that the reputation be ancient. Simply requiring that the reputation antedate the controversy seems to afford enough assurance against deciding the issue on the basis of what otherwise might turn into a community vote on the merits.

As to matters of history, questions will frequently be resolved by reference to history books under example (17) or as a matter of judicial notice. However, reputation by word of mouth or as demonstrated by inclusion in publications falling short of the dignity of a treatise seems to be an essential and sufficiently reliable means of proof. The before-controversy requirement imposed with respect to land boundaries in the first part of the example is adequately taken care of by the fact that the matter is one of history. See McCormick, op. cit.

Example 20 deals with proving character by evidence of reputation, a matter treated in Uniform Rule 63(28). The Uniform Rule complicates the matter needlessly and perhaps somewhat confusingly by including qualifications of materiality and

relevancy. All that need be dealt with here is the hearsay aspect of reputation as to character, and that is adequately covered by a simple provision to the effect that the hearsay rule does not exclude it. When character is or is not relevant, and any other considerations which may hedge in the methods of proving it, are handled elsewhere. See proposed second draft rules 4-05, 4-06, and 6-10.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(21) Recorded recollection. A memorandum or record, made when its subject was fresh in the memory of a person who testifies as a witness and accurately reflecting the knowledge which he then had.

Comment

A separate provision based upon the traditional hearsay exception for recorded past recollection is made necessary by the Committee's action of rejecting the proposal to exclude from the operation of the hearsay rule all prior statements made by declarants who are available at the trial for cross-examination thereon.

The exception is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot. 82 A.L.R.2d 478, 520.

The basis of the exception is aptly stated in Owens v. State, 67 Md. 307, 316, 10 Atl. 210, 212 (1887):

> "Few men are so gifted with the powers of memory as to be able to recall the details of past transactions with perfect

> accuracy, especially when such transactions involve a great number of names, dates, amounts, etc.; and therefore the best recollections, and the greatest degree of self-reliance in the statement of past facts, may derive force and reliability from truthful memoranda made at the time of the transaction; and the law always prefers that evidence which insures the greatest degree of certainty in the establishment of truth."

The most important decision to be made in the formulation of a provision on this subject is whether to include a requirement that the witness at the trial have no present recollection of the matter. The so-called New York rule, now seemingly abandoned in that state, incorporated a requirement of absence of recall, and this view acquired some following in the cases. Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99 (1886); 3 WIGMORE § 738. See also California Evidence Code § 1237 and New Jersey Rule 63(1)(b) which require that the witness have "insufficient present recollection to enable him to testify fully and accurately." The requirement is believed to be contrary to the true reason for the exception and is not included in the draft here presented. As Wigmore suggests, admission of recorded past recollection may be sought to be justified on two grounds:

first, necessity arising from a species of unavailability as the result of loss of memory, and second, the inherent superiority of a contemporary accurate record, free of the infirmities of memory. 3 WIGMORE § 738. The second ground is sufficiently impressive to require that the first be disregarded and that no point be made of the quasi-unavailability of the witness. An imposing array of recent decisions supports this position. Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied 373 U.S. 944; Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965); People v. Weinberger, 239 N.Y. 307, 146 N.E. 434 (1925). McCormick says of such a requirement:

> "This requirement is highly inexpedient and it is to be hoped that most courts, if the question were squarely presented, would reject it. The practice of securing witnesses to write down facts when fresh in their memory is commendable and generally serves the interest of the perpetuation of truth. Memoranda of facts, made nearer to the event than later oral testimony, are more reliable than such testimony from later memory. Moreover, when both the memorandum and the testimony come in you have a far better opportunity to use the test of cross-examination, than when you have only the one or the other." McCORMICK § 277, p. 593.

Moreover, it will be observed that the wording of the California and New Jersey provisions is such (insufficient recollection to enable witness to testify "fully and accurately") as to support a finding of compliance in virtually any case and thus serves only to invite needless quibbling.

The simplest situation involves a single person who perceives the matter, accurately records it, testifies to the circumstances, and produces the memorandum. Multiple party involvement is, however, quite possible and on occasion appears in the cases. One of the most picturesque cases is Rathbun v. Brancatella, 93 N.J.L. 222, 107 Atl. 279 (1919), in which witness number 1 testified that he saw the license number of the car which struck plaintiff and called it out correctly; witness number 2 testified that he wrote down what number 1 called out, that he gave the information to a policeman, and that he no longer had the paper; and witness number 3 testified that he was the policeman, that he had written down the license number given him by number 2, and here was the memorandum. This chain quite properly was held to satisfy the requirements of the

exception. It will be observed that every participant in the process of perceiving and recording was produced as a witness, and this is necessary under the exception in every instance save perhaps with respect to the recorder where the record was made in the course of a routine similar to that relied upon in the case of regular entries, e.g. a memorandum of a telephone conversation dictated by witness to his stenographer who is not produced. It may be that this is the effect of the California and New Jersey provisions, though the language is confusing.

The Reporter has thought it better not to attempt to spell out in detail the method of establishing the accuracy of the original observation or of the record thereof, leaving these objectives to be achieved as the circumstances of the particular case might indicate. Thus, while the accuracy of the original observation could scarcely be established without the testimony of the observer, he might do so on the basis of a remembrance of observing, on the basis of a habit or practice of observing, or even on the basis of

knowing that he would not have made a record without observing. McCORMICK § 277. The need for this liberality in such matters as attestation clauses is evident. The accuracy of the record itself may be established through similar techniques, plus a routine on the part of the recorder as noted above.

Since the theory of the exception is the superiority of a contemporaneous accurate record, the time aspect must be treated. This the proposal does by requiring that the record be made while the matter was "fresh in the memory" of the witness. It is probably as precise as reasonably possible and seems more in conformity with the theory than the phrase "at or about the time," found in some of the cases. The California and New Jersey provision says "at a time when the fact recorded in the writing actually occurred or was fresh in the witness'[s] memory." The former alternative seems to add nothing.

The California section specifies that the writing may be read into evidence but is not itself admissible unless offered by an adverse party. The

New Jersey rule provides that any part of the contents not remembered by the witness may be read to the jury but not admitted as an exhibit. The object of these provisions is unclear. The cases generally and the writers take the view that the memorandum itself is admissible in evidence, in view of its verification and adoption on the witness stand. Ettelson v. Metropolitan Life Ins. Co., 164 F.2d 660 (3d Cir. 1947); Papalia v. United States, 243 F.2d 437 (5th Cir. 1957); McCORMICK § 278; 3 WIGMORE § 754. If the purpose sought to be served by the California and New Jersey provisions is to keep these exhibits from going to the jury room, a wholly different problem is presented: many exhibits do not go to the jury room, and the method of controlling the matter is not by way of admitting or excluding the evidence.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered against the accused in a criminal prosecution, judgments against persons other than the accused.

Comment

When the effect of a former judgment upon subsequent litigation is under consideration, three possibilities must be noted: (1) the former judgment may be conclusive of a cause of action or issue under the doctrines of res judicata and collateral estoppel; (2) it may be admissible as prima facie evidence; or (3) it may be given no effect at all.

It is clear that situations which res judicata or collateral estoppel govern do not involve problems of evidence except to the extent that the principles of offer, acceptance, and other aspects of contract govern the admissibility of evidence in a contract action. These are matters of substantive law and not a proper sphere of activity for this Committee.

Res judicata and collateral estoppel have principally found their application when the successive litigations were both civil. Civil litigation rarely precedes related criminal prosecution, but when it does the lighter burden of proof in civil cases is generally held to foreclose the giving of effect to the civil judgment in the criminal case. Annot. 18 A.L.R.2d 1287, 1315. Rules requiring mutuality and

identity of parties have in general precluded applying either of the doctrines in criminal-followed-by-civil situations. And this is the area of the present proposal, together with the relatively rare criminal-followed-by-criminal.

It is true that some tendency is apparent to dispense with the requirement of mutuality in the criminal-followed-by-civil situations, whether by way of relaxation of res judicata and collateral estoppel or simply on grounds of public policy. Thus we find the convicted arsonist barred from recovering from the insurance company, Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490 (1927), and the convicted murderer denied the benefits of insurance upon the life of her victim, Austin v. United States, 125 F.2d 816 (7th Cir. 1942). These decisions are, of course, founded on substantive law, not on any principle of evidence. At the other extreme is the traditional rule that a judgment of conviction has no effect in a subsequent civil case, either as a conclusive adjudication or as evidence of the facts on which it was based. Annot. 18 A.L.R.2d 1287, 1290. However, decisions taking the extreme

position and denying even the status of admissible evidence to a judgment of conviction of arson of the plaintiff suing the fire insurance company, as in Girard v. Vermont Mutual Fire Ins. Co., 103 Vt. 330, 154 Atl. 666 (1931), or of conviction of manslaughter of the plaintiff suing on the life insurance policy of the victim, as in Goodwin v. Continental Cas. Co., 175 Okla. 469, 53 P.2d 241 (1935), have led to an increasingly apparent feeling of discomfort. If the law itself was so totally lacking in confidence in the validity of its own factfinding processes, how could it expect anyone else to accept them? So the move has been toward the middle ground of allowing the judgment of conviction, not as conclusive but as prima facie evidence of the facts on which based. Annot. 18 A.L.R.2d 1287, 1299. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, in Note, 27 Ill. L. Rev. 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfying explanation, which he is entitled to do under the rule. Cf. North River

Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939), in which the jury found for plaintiff despite having before it the record of his conviction of arson. The result seems to be an acceptable position midway between conclusiveness and complete exclusion. See Clark, J., in New York & Cuba Mail S.S. Co. v. Continental Cas. Co., 117 F.2d 404, 411 (2d Cir. 1941); Connecticut Fire Ins. Co. v. Farrara, 277 F.2d 388 (8th Cir. 1960). Perhaps the most convincing manifestation of a parallel federal policy in this regard is found in Section 5 of the Clayton Act, 15 U.S.C. § 16, which provides that a final judgment in a civil or criminal proceeding brought by the United States under the antitrust laws "to the effect that a defendant has violated said laws" is prima facie evidence against him in an action brought by another party "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." The statute was construed and applied in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951), rehearing denied 341 U.S. 906, as entitling plaintiffs to introduce the prior judgment in evidence "to establish

prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." P. 569. It is incumbent on the trial judge, said the Court, to determine from an examination of the record what was decided by the criminal judgment and to instruct the present jury in respect to the issues previously decided and the effect to be given the former judgment. These comments are appropriate in the present broader connection.

Turning next to the question whether some limitations ought to be imposed with respect to the kind of offense involved in the judgment of conviction, principle may suggest no differentiation among grades of crime but practical considerations make a strong case for it. A rule which would exclude evidence of convictions of minor offenses need not be predicated upon distrust of the judicial process in its lower echelons but can realistically be based upon recognition that motive to defend is often minimal or nonexistent at this level. In traffic cases particularly, the stakes may be far higher in subsequent civil litigation. As a result,

both statutes and decisions are found in fair number excluding evidence of convictions of these offenses. Cope v. Goble, 39 Cal. App. 2d 448, 103 P.2d 598 (1940); Jones v. Talbot, 394 P.2d 316 (Idaho 1964); Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943); Annot. 18 A.L.R.2d 1287, 1295-1297; Comments 16 Brooklyn L. Rev. 286 (1950), 50 Colum. L. Rev. 529 (1950), 35 Cornell L.Q. 872 (1950). Accordingly the proposal limits admissible convictions to those of felony grade as defined by federal standards. This treatment conforms to that given convictions as impeachment in proposed second draft Rule 6-08(a). Limiting provable offenses to those of felony grade finds support in Uniform Rule 63(20) and Comment; California Evidence Code § 1300; and New Jersey Rule 63(20).

The Uniform Rules draftsmen saw no reason to treat judgments of conviction differently depending on whether they were entered after trial or upon a plea of guilty or nolo contendere. Uniform Rule 63(20) and Comment. California Evidence Code § 1300, however, excludes judgments based upon a plea of nolo contendere, and New Jersey Rule 63(20) reaches substantially the same result by providing that the

judge may foreclose admission into evidence by so ordering on acceptance of a plea. Federal policy, at least to the extent manifested in the Clayton Act and decisions construing it, is in accord with these provisions. Under Section 5 of the Clayton Act, 15 U.S.C. § 16, previously discussed, "consent judgments or decrees entered before any testimony has been taken" are excluded from the operation of the general provision that judgments or decrees in Government cases, based on violations, are prima facie evidence of violations in subsequent actions by other parties. The question was, of course, raised as to the status of judgments of conviction based on pleas of guilty and nolo contendere. Four careful opinions in the Courts of Appeals agreed that the statutory intent, supported by principle, was that judgments based on pleas of guilty are admissible as prima facie evidence in subsequent civil suits, while those based on nolo contendere pleas are not. Armco Steel Corp. v. State of North Dakota, 376 F.2d 206 (8th Cir. 1967); General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); City of Burbank v. General Electric Co., 329 F.2d 825

(9th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), cert. denied 376 U.S. 939. State court decisions reaching the same result are found in Annot. 18 A.L.R.2d 1287, 1314. As long as pleas nolo contendere continue to be recognized in the federal practice, their inconclusive and compromise nature ought to be recognized in cases other than antitrust, and the proposal is drafted accordingly. Any other approach would entail fundamental conflict with the policy governing the antitrust cases.

While the Committee has generally avoided the making of constitutional decisions, as being inappropriate to our task, nevertheless a rule ought not to be adopted which courts constitutional disaster. A rule admitting evidence of the conviction of a person other than the accused in a criminal prosecution, at the behest of the Government, as proof of a fact essential to sustain the judgment of conviction would seem to fall in that category. In Kirby v. United States, 174 U.S. 47 (1899), defendant was convicted of possessing postage stamps, knowing them to have been stolen

from a post office by three other persons. The only evidence that the stamps were stolen was the record of conviction of the thieves. This procedure was held to violate the right of confrontation. It is possible, of course, to confine Kirby strictly to its facts and to construe it as allowing the judgment of conviction into evidence if the witnesses on whose testimony it was based are also produced, but this construction seems to be forced and against the spirit of the decision. The Kirby situation should, as the Court recognized, be distinguished from the situation in which conviction of another person is an element of the crime, as would be so in the case of a statute prohibiting the interstate shipment of firearms to a known convicted felon, e.g. 15 U.S.C. § 902(d). Nor is it relevant to showing conviction of a witness for purposes of impeachment. It is also distinguishable from cases in which known prior convictions of associates for prior similar acts are introduced to show that SEC violations by accused were wilful. Roe v. United States, 316 F.2d 617 (5th Cir. 1963). California Evidence Code § 1300 and New Jersey Rule 63(20) solve the problem by

limiting admissibility of the criminal conviction to subsequent civil cases. It is believed that neither constitutional limitations nor policy considerations in general preclude the use of the evidence in a subsequent criminal proceeding against the same accused, and the proposal is drafted accordingly. Compare Uniform Rule 63(20), followed in Kansas Code of Civil Procedure § 60-460(r), recognizing no difference between civil and criminal cases.

The constitutional right of confrontation which, as has just been pointed out, seemingly forbids using a prior judgment of conviction of a third person against the accused in a criminal case, is not applicable to civil cases or to the use of a judgment of conviction offered in a criminal case by the accused. These situations present purely policy decisions. The problem of admissibility may arise in a variety of ways. An insurer sued for accidental death may offer the judgment of conviction of a third person to show that the killing was intentional. Bibbs v. Fidelity Health & Acc. Co., 71 S.W.2d 764 (Mo. App. 1934). A traffic conviction of the driver may be offered in a tort action against his master. Pollard v. Harbin,

56 Ga. App. 172, 192 S.E. 234 (1937); Roach v. Yonkers R. Co., 242 App. Div. 195, 271 N.Y.S. 289 (1934). Drunk driving convictions may be offered to show the intemperance of the testator. Page v. Phelps, 108 Conn. 572, 143 Atl. 890 (1928). Finally, in a criminal prosecution, the accused may offer the conviction of a third person when the circumstances indicate that only one committed the offense. 1 WIGMORE § 142. Traditional doctrine would call for exclusion in all these situations. Yet in each of them a decision was reached and incorporated in a judgment only after a trial or plea of guilty by a defendant highly motivated to repel accusations of guilt (save possibly in the traffic case). Surely there is no defensible position other than to admit the evidence, not as conclusive but for what it is worth. A rule favoring admissibility would be consistent with the Committee's position regarding former testimony. See first draft Rule 8-04(b)(1), allowing former testimony given for or against another person with motive to develop the same similar to that of party against whom now offered.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(23) Judgment against person seeking indemnity, contribution, or exoneration. In a proceeding for indemnity, contribution, or exoneration for money paid or liability incurred because of a judgment, evidence of the judgment, offered by the judgment debtor, to prove any fact which was essential to the judgment.

Comment

The draft is offered in the event the Committee should decide that the topic should be covered. It is based largely upon the phraseology of New Jersey Rule 63(21). See also California Evidence Code § 1301. Uniform Rule 63(21) deals with the subject as follows:

> "To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if offered by a judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action."

The proposal is believed to express the substance of the Uniform Rule in more understandable form.

The Comment to the Uniform Rule, adopted from that to Rule 522 of the Model Code of Evidence, says:

> "This is a statement of the doctrine applied by a number of courts in cases where an indemnitee is suing his indemnitor on a contract of indemnity, or a warrantee is suing his warrantor or a surety his principal. It is frequently applicable in actions on official bonds, but its use is not limited to cases where the duty to indemnify or save harmless arises from contract. The cases are in conflict; the Rule adopts the more liberal view, and makes generally applicable the principle underlying a group of decisions."

The hearsay exception finds support in some old cases. See, for example, Lewis v. Knox, 2 Bibb 453 (Ky. 1811), and Cox v. Thomas, 9 Gratt. 323 (Va. 1852), each involving a prior judgment against a sheriff for the default of his deputy, with the sheriff now seeking recovery on the deputy's bond and offering the judgment in evidence. It finds passing recognition in Latimer v. Texas & N.O.R. Co., 56 S.W.2d 933 (Tex. Civ. App. 1933) and Illinois Central R. Co. v. Blaha, 3 Wis. 2d 638, 89 N.W.2d 197 (1958). It is incorporated in California Civil Code § 2778. The Reporter recommends, however, that the draft not be approved.

The objections to a provision of this kind are three.

(1) A rule of this kind represents bad policy. The situation involved is one in which the present plaintiff seeks contribution, indemnity, or exoneration with respect to money paid out or liability incurred by him under a prior judgment. While the common law had no third-party practice under which a defendant could bring in as a formal party one who was, he claimed, liable to him if he were held liable to the plaintiff, it did offer the procedure of

"vouching-in." Under it, the original defendant could notify the third party of the pendency of the action and tender him the management of the defense. Whether the third party accepted the defense was immaterial: a judgment rendered against the original defendant was binding in a subsequent proceeding wherein the original defendant became plaintiff, seeking indemnity against the third party, now defendant. This useful procedure is still available and used. It has the advantage of being free of limitations imposed by requirements of venue and service of process. It has been strengthened in some respects, enlarged in some respects, and incorporated into the formal structure of litigation by rules such as Rule 14 of the Federal Rules of Civil Procedure, outlining a third-party practice whereby a defendant may bring in and proceed against a person who is or may be liable to him for all or part of the plaintiff's claim. Under either the vouching-in procedure or third-party practice, the adjudication of the liability of the original defendant to the original plaintiff is binding upon the third party. It is believed that the use of

these procedures should be encouraged, particularly third-party practice, and that established policy lies in the direction of making the party ultimately liable a party to the litigation. The result of third-party practice is economy of litigation. It also avoids the difficulties which arise when the original plaintiff asserts more than one ground of liability against the original defendant and the third party is liable over with respect to only one of them. Moreover, it avoids the conflict of interest inherent when the vouching-in procedure or no procedure at all is followed in this situation. See Barber-Greene Co. v. Bruning Co., 357 F.2d 31 (8th Cir. 1966). The proposed rule does not promote these policies; on the contrary, it offers a bonus for frustrating them, by declaring the judgment prima facie evidence.

(2) The second objection to a provision of this kind is the lack of need for it and the unwisdom of cluttering up the rules with needless complicating provisions. If the reported cases are an accurate reflection, and it is believed they are, situations of this kind simply are not arising. This serves to

indicate that third-party procedures are in fact being employed.

(3) A third possible objection would be directed to the undue narrowness of the rule. If the Committee embarks into this area, it seems difficult to avoid dealing also with the somewhat similar problem of the status of a prior judgment against a principal in a later action against his surety, a matter as to which views differ. Simpson, SURETYSHIP 261-264 (1950). It is submitted that the matter had better be left to be dealt with as it arises, within the general principles laid down in subsection (a) of the present Rule.

Rule 8-03. Hearsay exceptions: declarant not unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(24) Judgments as to boundaries and matters of history. Judgments as proof of matters of personal or family history, or of boundaries or of matters of general history, essential to the judgment, if the same would be provable by evidence of reputation.

Comment

Model Code Rule 523 and Uniform Rule 63(22) consist of a narrowly defined hearsay exception, allowing judgments determining the interest of the public or of a governmental body in land as evidence of any fact essential to the judgment. The Model Code Comment gives the following Illustration:

> "In an action between P and D to determine the boundary line between Blackacre and Whiteacre, P first introduces evidence tending to show that the boundary is a continuation in a straight line of the boundary between Pinkacre, formerly a public park of State A, and Blueacre adjoining it. P now offers a judgment in an action by State A against the then owner and possessor of Blueacre fixing the boundary between the park and Blueacre. Admissible."

The case so made for the practical utility of the exception rule is unimpressive. While the principle was occasionally invoked in the early cases, instances of its application in modern times seem not to exist. It is thus understandable why this particular hearsay exception was not thought to be worthwhile incorporating into either the California Evidence Code or the New Jersey Rules.

Exploration of the basis of the exception, however, suggests a somewhat broader rule of greater possible

usefulness. While some of the old cases did in fact involve public land boundaries or interests, the fact was that others went considerably beyond. Thus in City of London v. Clerke, Carth. 181, 90 Eng. Rep. 710 (K.B. 1691) earlier judgments ("verdicts") were allowed as evidence of the right of the city to exact a duty on malt, and in Neill v. Duke of Devonshire, 8 App. Cas. 135 (1882), earlier decrees were admitted as evidence of the nonexistence of a public right to fish. The result in the law cases was originally justified on the ground that the verdict was evidence of reputation. This justification did not exist in the case of chancery decrees, and it no longer possessed validity as to verdicts after trial by jury graduated from the category of neighborhood investigation. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment was as good evidence as was reputation. And in this they seem to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation credible occurs in greater measure in the process of litigation. The affinity to reputation, however, remains.

The American cases have followed a similar pattern of development. Thus in Patterson v. Gaines, 47 U.S. (6 How.) 550, 599 (1847), we find the Court saying:

> "The general rule certainly is, that a person cannot be affected, much less concluded, by any evidence, decree, or judgment, to which he was not actually, or in consideration of law, privy. But the general rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigrees. [Numerous English citations omitted.]"

A number of fairly recent applications of this broader hearsay exception are found. In Grant Bros. Construction Co. v. United States, 232 U.S. 647 (1914), an action to recover penalties under the Alien Contract Labor Law, the Court held admissible the decision of a board of inquiry of the Immigration Service that the laborers were aliens. Admitting that defendant was not a party to that proceeding and that judgments generally bind only parties and privies, the Court continued:

> "But it is equally true that a judgment in a prior action is admissible, even against a stranger, as prima facie, but

> not conclusive, proof of a fact which may be shown by evidence of general reputation, such as custom, pedigree, race, death and the like, and this because the judgment is usually more persuasive than mere evidence of reputation. [Citations omitted.] In principle, alienage is within the latter rule, and so the board's decision was properly admitted in evidence for the purpose stated." 232 U.S. at 663.

In United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933), a controversy over land allotted to full blooded enrolled Creek Indians, the records of the enrolling commission were held to be admissible as prima facie evidence of pedigree as to persons not parties to that proceeding. And in Jung Yen Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936), board decisions as to the citizenship of plaintiff's father were ruled admissible in a proceeding for a declaration of citizenship. Cf. In re Estate of Cunha, 414 P.2d 925 (Haw. 1966), rejecting a divorce decree finding that child was illegitimate, offered on issue of illegitimacy of child in subsequent proceeding for instructions by trustee. The apparent basis for the decision is that the testimony in the divorce proceeding would not be admissible in the present case. This seems to misapprehend the foundation of the rule (that the result of inquiry is admissible). The

individual assertions which make up reputation would be excluded, yet their total result is admitted.

Logically, perhaps the rule should go beyond personal or family history, boundaries, and general history. Yet concession to tradition and experience probably justifies the limitation. See proposed first draft Rule 8-03(18). In the same vein, the exception is not extended to proof of character generally, though here reputation is allowable. See proposed first draft Rule 8-03(19).

First Draft

Rule 8-04. Hearsay exceptions: declarant unavailable.

(a) General provisions. Hearsay is not inadmissible under the hearsay rule if the declarant is unavailable as a witness and the special circumstances under which it was made offer assurances of reasonable accuracy.

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a

party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

(2) Statement of recent perception. A statement narrating, describing, or explaining an event or condition made by the declarant at a time when the matter had recently been perceived by him, while his recollection was clear, and in good faith prior to the commencement of the action.

Comment

Example (1)

Two questions may be raised at the outset. The first is whether former testimony ought to be classed as hearsay at all. Fairly persuasive arguments can be made either way, but it is believed that the matter has been settled by the Committee in the affirmative in its

definition of hearsay. The net result is about the same as though it had been excluded from hearsay, as in either event a fairly careful pattern for admissibility must be worked out. The second question is whether unavailability of the declarant ought to be a prerequisite. The proposal answers in the affirmative. A rather impressive argument can be made that hearsay produced under the conditions of former testimony is inherently superior to some of the examples (exceptions) incorporated in proposed first draft rule 8-03, where unavailability is not required. Nevertheless, the tradition of preferring the presence of the witness is a strong one, as is seen not only in the common law decisions on former testimony but also in the statutes and rules on the use of depositions, which deal with substantially the same problem.

The proposal deals with two substantially different situations, as does Uniform Rule 63(3)(b). Situation (i) is where the testimony is now offered against the party who formerly offered it. Situation (ii) is where the testimony is now offered against the party against whom it was previously offered. Despite this difference, exemption from the hearsay

rule in each instance is the result of concluding that the testimony was adequately explored on the prior occasion, or that opportunity to do so existed. Essentially the problem resolves itself into one of when is it fair to require a litigant to accept the handling of a witness on a former occasion.

The basic situation from which inquiry should proceed is a re-trial of the same case, with a witness meanwhile having died. Assuming that plaintiff called the witness, should he now be allowed to introduce the former testimony? There has been compliance with all the ideal conditions for the giving of testimony except for observation of demeanor by the trier, which now has become impossible. The witness was under oath, however, and he was cross-examined by the defendant with the same motivation and interest which would now govern him were cross-examination again possible. No unfairness is apparent in foreclosing him from complaint about his own prior conduct of the litigation. The former testimony is a second best of very high quality. The choice between using it and doing without is an easy one. The answer in favor of admissibility

is incorporated in the proposal, as is so in Uniform Rule 63(3)(b)(ii), California Evidence Code § 1291(a)(2), Kansas Code of Civil Procedure § 60-460(c)(2)(ii), and New Jersey Rule 63(3)(a)(ii).

In the example given, should the defendant now be allowed to introduce the former testimony of the witness who was originally called by plaintiff? The reversal of roles serves to make an answer somewhat more difficult. One possibility is to proceed somewhat along the line of adoptive admissions: by offering the testimony the proponent in effect adopts it. The theory is not entirely satisfactory, though perhaps less unsatisfactory in the case of a deposition offered in evidence than in the case of ordinary testimony, since counsel knows exactly what is in the deposition. The theory savors too much of discarded concepts of witnesses' belonging to one party or the other, of litigants' ability to pick and choose witnesses, and of vouching for one's own witness. Cf. McCORMICK § 246, pp. 526-527; 4 WIGMORE § 1075. In any event, this approach is based upon the theory of admissions rather than former testimony and must depend upon what inference can be drawn

from the circumstances. Admissibility under the theory of former testimony, however, must depend upon the acceptability of direct and redirect examination as the equivalent of cross-examination. Both Falknor and McCormick have described as "sensible" the decisions holding that it satisfies the hearsay rule. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U. L. Rev. 650, n.1 (1963); McCORMICK § 231, p. 483. See also 5 WIGMORE § 1389. Traditional restrictions upon direct examination, plus the possibility that the testimony of one's witness may take an unexpected turn, may suggest a contrary answer. Yet once the admissions aspect is set to one side and attention is directed to the question whether there has been full exploration, or opportunity therefor, the difficulties seem largely to disappear. Permissible techniques have developed for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses, which render largely unacceptable the claim that one did not sufficiently develop his own witness at the former hearing. This conclusion is the basis of California Evidence Code § 1291(a)(1),

Kansas Code of Civil Procedure § 60-460(c)(2)(i), and New Jersey Rule 63(3)(a)(i), and the proposal reaches the same result.

In the situation thus far assumed, the parties have been the same throughout and, since it is a re-trial of the same case, the issues are the same. As long as the party offering the former testimony was the one who called the now deceased witness, no hesitation was felt in requiring the adversary to be content with his own prior handling of cross-examination. Some doubt arose when the party against whom the former testimony is now offered was the one who called the now deceased witness in the first instance, but this doubt on consideration proved insufficient to demand exclusion. Departure from the simple pattern of the example, however, calls for further inquiry. This departure may take the form of substituting a different proceeding in place of a re-trial of the same case or of making a change in parties. The basic question in either case is whether it is equitable to compel the adverse party to accept the earlier handling of the witness.

The common law did not limit the admissibility of former testimony to that given in an earlier trial

of the same case. But it did require identity of issues, which under modern decisions needs only to be "substantial," as a means of insuring the equivalence of the former handling of the witness to what would now be done if the opportunity were presented. McCORMICK § 233. Since the substantial identity of issues is significant only in that it bears upon motive and interest in developing fully the testimony of the witness, whether on direct or on cross-examination, it seems better to express the matter in the latter terms. Ibid. Uniform Rule 63(3)(b) does this in part (ii), which is concerned with the adequacy of the cross-examination of the witness, but ignores the problem entirely in part (i), which is concerned with the adequacy of the exploration of the testimony on direct and redirect. Yet the same treatment seems to be called for unless part (i) is to be based wholly on a theory of admissions by a party-opponent. The draft here presented proceeds upon the theory that adequate motive to develop the witness must exist in both cases, and it does not invoke the admission-of-a-party-opponent theory at all.

The common law also insisted upon identity of parties, deviating only to the extent of allowing a change when the successor was in privity. This requirement of identity of parties, like identity of issues, also effectively served the interests of fairness in compelling a party to accept the former handling of the witness. However, it was unduly strict. The insistence that the parties be identical (mutuality) makes sense only when applied to the party against whom the former testimony is now offered, not when applied to the offering party except to the extent that it might have some effect on motive to develop the testimony. Mutuality as a requirement is now generally discredited, Falknor, op. cit., at 652; McCORMICK § 232, pp. 487-488, and the requirement of identity disappears pro tanto. This leaves the final question whether the party against whom the former testimony is now offered should be required to accept the former handling of the witness by anyone except himself or someone in privity with him. If his "stand-in" in the former hearing had the right and opportunity to cross-examine with the same interest and motive as the

party against whom the former testimony is now offered, Uniform Rule 63(3)(b)(ii) answers in the affirmative, as do California Evidence Code § 1292(a)(3), Kansas Code of Civil Procedure § 60-460(c)(2)(ii), and New Jersey Rule 63(3)(a)(ii). This is in accord with modern decisions. McCORMICK § 232, pp. 489-490; 5 WIGMORE § 1388.

In their comment to Uniform Rule 63(3), the draftsmen observed that a question may be raised whether the use of former testimony by the prosecution in a criminal case would violate the right of the accused to be confronted by the witnesses against him. The observation is a cautious one, as indeed it must be in view of the holding of Mattox v. United States, 156 U.S. 237 (1895), that the right of confrontation was not violated by the Government's use, on a re-trial, of testimony given at the first trial by two witnesses since deceased. Mattox does, however, leave open the questions (1) whether direct and redirect may be equated to cross-examination, (2) whether testimony given in a different proceeding is acceptable, (3) whether the accused must himself have been a party to the original proceeding or whether a similarly situated person will serve the purpose, and (4) whether unavailability may

be satisfied short of death. Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend confrontation. Falknor, op. cit., at 659. Nevertheless, these factors have led to various treatments by recent draftsmen. The Utah committee included a general rule 66A to the effect that no exception to the hearsay rule makes admissible any statement in violation of the right of confrontation. Utah Committee on Uniform Rules of Evidence, Preliminary Draft, 27 Utah Bar Bul. 5 (1957). Kansas in similar vein provided, but only with respect to former testimony, that the subsection "shall not apply in criminal actions if it denies to the accused the right to meet the witness face to face." Kansas Code of Civil Procedure § 60-460(c). These provisions may serve to run up a constitutional red flag and to that extent serve a useful purpose, but one may suspect that they tend to magnify the constitutional difficulties. Otherwise they can only be regarded as supererogatory. In contrast, California Evidence Code §§ 1291, 1292 and New Jersey Rule 63(3)

cautiously stay within narrow limits by excepting former testimony from the bar of hearsay when offered by the prosecution in criminal cases only if the accused himself offered the testimony originally (with which Mattox did not deal) or the accused was himself a party to the original proceeding with like interest and motive to cross-examine. The result may well be to confine admissibility within limits which are narrower than those imposed by the Sixth Amendment, a result which may be justified on policy though not on constitutional grounds.

This Committee ought not, of course, formulate a rule which violates a constitutional provision. On the other hand, the Committee decided at an early date that any attempt to define the limits of constitutional doctrine in the rules would be unwise as well as unseemly. See second draft Rule 5-01 on privileges. Hence the Reporter suggests that no provision on the subject be included. This is consistent with the tenor of the proposed rule, which purports to do no more than to say when the bar of hearsay is applicable, not when the evidence is in all events admissible. This is also the

position of the Uniform Rules draftsmen in their Comment to Uniform Rule 63(3).

Example (2)

The provision is, with very minor changes in wording, Uniform Rule 63(4)(c), perhaps the most controversial feature of the Uniform Rules. While it appears as Kansas Code of Civil Procedure § 60-460(d)(3), it was omitted from California Evidence Code § 1240 and New Jersey Rule 63(3).

Attention is directed to the following extract from the Comment to the Uniform Rule:

> "Clause (c) is new and represents a carefully considered middle ground between the liberal extreme of the A.L.I. Model Code of Evidence and the ultra conservative attitude opposing any liberalization in the exceptions to the rule against hearsay. In the tentative draft on hearsay presented at the 1951 meeting of the Conference an exception was included in the language of the 1938 recommendation of the American Bar Association, letting in hearsay statements of persons who are unavailable as witnesses because of death or insanity. A statute has existed in Massachusetts since 1898 recognizing death as the justifying factor. The committee after carefully reconsidering the problem has felt that there was no sound basis for recognizing necessity on account of death or insanity as distinguished from real unavailability for any cause. Consequently a solution was sought which would let in narrative statements not falling

> within the definition of (a) or (b), but still having substantial basis for trustworthiness. Thus Clause (c) was adopted and the American Bar recommendation rejected. Unavailability is here recognized as an essential justifying factor. Also the trial judge is necessarily given considerable discretion. Clause (c) is drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions. The fact remains that there is a vital need for a provision such as this to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available. 'Unavailability' is carefully defined in Rule 62 so as to give assurance against the planned or fraudulent absence of the declarant."

As with the other hearsay exceptions which require unavailability of the declarant as a condition precedent, the situation presents a choice. The choice is between (1) receiving evidence which is admittedly inferior because not given under the ideal conditions of testimony or other conditions regarded as sufficient justification for dispensing with them and (2) having no evidence at all from the particular source.

Some statutory precedent for the proposal is found. Several states have by statute authorized the admission in evidence of a decedent's statement in an action against his estate, on the theory of

offsetting in some measure any assumed inequity resulting from allowing a surviving opponent to testify. See, for example, Cal. Evidence Code § 1261, Conn. G.S. § 52-172, and others collected in 5 WIGMORE § 1576; also Va. Code § 8-286 (statements made when capable by party now incapable of testifying). The well known Massachusetts Act of 1898 goes substantially farther and allows the declaration of any deceased person if made in good faith before the commencement of the action and upon personal knowledge. Mass. G.L., c. 233, § 65. To the same effect is R.I.G.L., § 9-19-11. From this it is but a natural and logical next step to satisfy the unavailability requirement by something less definitive than death. The 1938 Report of the American Bar Association Committee on the Improvement of the Law of Evidence recommended such a statute. Notice should also be taken of the provisions of the English Evidence Act of 1938, allowing the use of written statements, made on personal knowledge, if declarant is deceased or otherwise unavailable or if the court is satisfied that undue delay or expense would otherwise be caused, unless declarant was an interested person in pending

or anticipated relevant proceedings. 1938, 1 & 2 Geo. 6. See discussion in Cross on Evidence 482 (3d ed. 1967).

Model Code of Evidence Rule 503(a) provided broadly for the admissibility of all hearsay declarations of unavailable declarants. No circumstantial guarantees of trustworthiness were required; necessity due to unavailability was in itself a sufficient reason to admit the statement. As would be expected, this proposal occasioned an extended and at times vehement discussion on the floor of the American Law Institute. The storm center, significantly, was not the general proposition of admitting the declarations of unavailable declarants but what should constitute unavailability, and in particular whether a showing of inability to take a deposition should be required. 18 A.L.I. Proceedings 90-134 (1941).

As indicated by their Comment, previously quoted, the Uniform Rules draftsmen took a more moderate position, bowing in the direction of convention by invoking several assurances of accuracy: recency of perception, clarity of recollection, good

faith, and antecedence to the commencement of the action. The result is in marked contrast to the solitary Model Code requirement of unavailability. Notwithstanding these assurances and a recommendation of approval, California Law Revision Commission Study, VIII. Hearsay 465 (1962), the California Commission reached a conclusion adverse to any provision of this character.

> "This paragraph would make the statements with which it is concerned admissible only when the declarant is unavailable as a witness; hence its rejection will doubtless exclude the only available evidence in some cases where, if admitted and believed, such evidence might have resulted in a different decision. The Commission recommends such rejection, however, for the reason that the paragraph would make routinely taken statements of witnesses in personal injury actions admissible whenever such witnesses are unavailable at the trial. Both the authorship (in the sense of reduction to writing) and the accuracy of such statements are open to considerable doubt. Moreover, as such litigation and preparation therefor is routinely handled, defendants are more often in possession of statements . . . than are plaintiffs; and it is undesirable thus to weight the scales in a type of action which is so predominant in our courts." Id., 318.

In New Jersey, the original Supreme Court Committee approved Uniform Rule 63(4)(c), but it was rejected by the Legislative Commission. The

later Supreme Court Committee recommended adoption but with deletion of the ante litem motam requirement, which was regarded as needlessly restrictive in view of the good faith provision. Report of New Jersey Supreme Court Committee on Evidence 148-153 (1963). However, as previously noted, the final decision was not to adopt the provision. See Rule 63(4) of New Jersey Rules of Evidence.

Two Illinois cases will serve to illustrate the need in this area. In People v. Jackson, 9 Ill. 2d 484, 138 N.E.2d 528 (1956), Louise was raped and stabbed by a man who climbed through her apartment window from a fire escape. Two prosecution witnesses testified to finding her naked and bleeding at the foot of the stairway an hour later and that she described her assailant in terms applicable to the accused. Her statement was concededly not a dying declaration. The admission of this hearsay evidence was held error, since it fell within no exception to the hearsay rule. The other case did not reach the Supreme Court of Illinois, since it was terminated at the trial court level by an acquittal. One McCarter was prosecuted for killing

a currency exchange employee. His defense was that Freddie, the chief prosecution witness, was in fact the killer. Freddie testified to a joint burglary venture which he abandoned when the safe proved invulnerable, leaving McCarter, who announced his intention of waiting to force the cashier to open the safe on arrival. On cross-examination Freddie stated that he had been wearing a dark blue sports shirt and dark pants and McCarter a white tee shirt and khaki pants. The defense then called a detective to prove a statement by the victim that he had been shot by a man wearing a dark blue shirt and dark pants, made some 40 minutes after the shooting and when there was no indication that the wound was other than minor. The prosecutor urged Jackson as authority, seemingly, with correctness. However, the trial judge refused to follow it and ruled in favor of admissibility. Moore, "Res Gestae" and Common Sense: Seeding the Dark Cloud, 50 Ill. Bar J. 930 (1962).

The issue is a clear-cut one, and the proposal here presented is drafted with the belief that the conclusion reached in California and New Jersey was wrong.

One further aspect to be noted is the confrontation problem. The statutes previously mentioned are limited in their application to civil cases. The draft proposal of the New Jersey Supreme Court Committee provided for admissibility only in civil cases. Report of New Jersey Supreme Court Committee on Evidence 146, 150-151 (1963). Some of the writers have questioned the constitutionality of applying the provision to criminal cases. Chadbourn, Bentham and the Hearsay Rule--A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932 (1962); Quick, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204 (1960). Quick raises further questions which boil down essentially to opening the gates to unscrupulous and overly zealous conduct by prosecutors. Op. cit., 219-220. As to the constitutional problem, the Reporter has previously suggested the unwisdom of placing on the hearsay rule the burden of giving effect to the constitutional right of confrontation. It is believed that the Sixth Amendment provision can more appropriately be given

effect by requiring prosecutors to produce witnesses when possible and by scrutinizing the sufficiency of evidence, rather than by suppressing evidence on the ground that it is hearsay. This view seems also to dispose of the unscrupulous and overly zealous prosecutors to the extent that rules of any kind are an effective control.

Rule 8-04. Hearsay exceptions: declarant unavailable.

* * * *

(b) Illustrations. By way of illustration and not by way of limitation, the following exemplify the application of this rule:

* * * *

(3) Dying declarations. A statement made by a dying person under consciousness of impending death and belief in the hopelessness of recovery.

(4) Declarations against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to

make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(5) Statements of personal or family history.

(i) Statements concerning the declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter declared;

(ii) statements concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood or marriage or was so intimately associated with the other's family as to be likely to have

accurate information concerning the matter declared; (iii) statements under (i) or (ii) hereof incorporating statements under (i) or (ii) hereof.

Comment

Example (3)

This example is the familiar dying declaration of the common law, with considerable expansion beyond its traditionally narrow limits. Before turning to an examination of the details of the proposed liberalization, attention should be directed to two basic preliminary questions: first, whether the theoretical basis of the rule continues to be acceptable, and second, whether there is left a sufficient scope of operation to justify a separate dying declaration provision.

As to the first question, the traditional justification of the admissibility of dying declarations has been the supposed unwillingness of declarants to take chances on their status in the hereafter by entering it with falsehoods on their lips. The classic statement is by Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789):

> "Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."

In modern times, however, there are those who are not so sure, either as to the effectiveness of the motivation, if it exists, or as to the existence of the motivation at all. And it must be admitted that something of trial by ordeal or compurgation does attend the exception. To quote Justice Musmanno, dissenting in Commonwealth v. Brown, 388 Pa. 613, 131 A.2d 367 (1957):

> "Despite history, general observation, and daily chronicles which record countless examples of evidence to the contrary, the fable persists that every person, including the worst villains of mankind, standing on the brink of eternity, allow only pearls of veracity to fall from their lips."

The Reporter is not prepared to say that the psychological overtones of the situation are not an acceptable substitute for the essentially religious basis of a simpler day. See 5 WIGMORE § 1443.

The second preliminary question is whether a sufficient scope of operation is left to justify a separate dying declaration provision. The excited utterances doctrine will take care of some situations, and the recent perception principle, Example (2) above, will take care of many more which now come in as dying declarations. However, as the California Study points out, there will remain dying declarations not made when the matter was recently perceived and recollection clear and those not made ante litem motam. As to these, the dying declaration theory would continue to serve a useful purpose.

As suggested above, the traditional doctrine embraces a number of restrictions which are proposed to be abandoned. The most generally accepted one is that the statement must by the victim, offered in a prosecution for criminal homicide. The result is to exclude declarations by victims in prosecutions for other crimes, e.g. declaration by rape victim who dies in childbirth, and to exclude all declarations in civil cases. An occasional statute has removed these restrictions, as in Colo. R.S. § 52-1-20, or has expanded the area of offenses to include abortions,

5 WIGMORE § 1432, p. 224, n.4, and Kansas by decision has allowed dying declarations in civil cases. Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625 (1914). While conceivably the need may be less chronically recurrent in non-homicide cases, certainly the theory of admissibility applies equally in civil cases and in criminal prosecutions for crimes other than homicide. Hence the proposal abandons this limitation, as do Uniform Rule 63(5) and California Evidence Code § 1242. The limitation in New Jersey Rule 63(4) to statements by the victim in a criminal prosecution is believed to be unjustified in reason.

The common law cases frequently, though not always, limited the statement to circumstances immediately attending the killing, with the result of excluding such valuable information as the happening of an earlier affray between the parties or occurrences casting light on motivation, ("He was after my wife.") The Uniform Rule, New Jersey Rule 63(5), and the proposal abandon this limitation. California Evidence Code § 1242 does not but confines the statements to those "respecting the cause and circumstances of his death," with some flavor of res gestae.

The Uniform Rule and New Jersey Rule 63(5) require that the statement have been made "voluntarily" and "in good faith." The involuntary aspect seems to be self-evident: an involuntary statement is no statement. Good faith seems to be taken care of by the dying declaration concept and requires no separate mention. If good faith is meant to take care of those cases in which the overriding motivation has been thought to be hatred or revenge, e.g. Tracy v. People, 97 Ill. 101 (1880), where decedent's exclamation, "I hope they hang the danged cuss," might better be classed as a not unnatural expression of indignation, the language is not apt for the purpose. Neither of the quoted expressions appears in the proposal or in California Evidence Code § 1242.

A good deal of difficulty has been experienced by the cases in dealing with declarations couched in terms of opinion. A reference to proposed Rule 7-01 seems to lay the matter at rest. Similar doubts as to first-hand knowledge are resolved by reference to proposed Rule 6-02. Hence no attempt is here made to deal with problems arising therefrom.

Example (4)

Declarations against interest have long been recognized as an exception to the hearsay rule. The circumstantial guaranty of reliability has been found in the assumption that persons do not make damaging statements against themselves unless satisfied that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in, of course, as an admission of a party-opponent, and there is no occasion to inquire whether it is against interest as a condition precedent to admissibility.

The exception as developed by common law decisions limited admissibility to situations in which the declaration was against a pecuniary or proprietary interest, but within these limits the judges displayed an ingenuity little less than astounding in discovering an against-interest aspect. For example, in the grandfather case of Higham v. Ridgway, 10 East 109 (1808), to prove the date of a child's birth, the court admitted from the books of a since deceased male midwife an entry showing

a charge for attendance upon the mother at the birth and a later entry showing payment thereof. The entry of payment, said Lord Ellenborough, was against interest and validated all related entries. See also the English poor laws cases allowing declarations of payment of annual rent of more than £10 as evidence of a rental at that rate, thus establishing parish responsibility, on the theory that possession was prima facie proof of ownership in fee and the declaration tended to rebut it. Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861).

The proposal, following Uniform Rule 63(10) removes the common law limits and expands the exception to its full logical limits. One result is to allow, in addition to declarations against a pecuniary or proprietary interest, those which tend to establish a tort claim against the declarant or to extinguish one which might be asserted by him. The common law as developed in England did not go so far but American cases in substantial number recognize this expansion, McCORMICK § 254, and it is difficult to justify stopping short of it.

In the same vein, the proposal follows the Uniform Rule in allowing statements tending to expose the declarant to hatred, ridicule, or social disapproval, on the assumption that the motivation to truth-telling under such circumstances furnishes sufficient assurance of accuracy. McCORMICK § 255, p. 551. California Evidence Code § 1230 and New Jersey Rule 63(10) incorporate this extension of the rule.

Another manifestation of breaking away from the narrowness of the common law rule is the recognition that exposure to criminal liability is sufficiently against interest to satisfy the requirements of the exception. While the common law's refusal to recognize an adequate against-interest aspect in this type of situation was totally indefensible in logic, see Holmes, J., dissenting, in Donnelly v. United States, 228 U.S. 243 (1913), one senses in the decisions a feeling by the courts that the pattern was a recurring one either of fabrication of the fact of making the declaration or of falsity in the declaration itself, enhanced in either instance by the requirement that declarant be unavailable. Nevertheless,

an increasing amount of decisional law recognizes penal interest as qualifying. People v. Spriggs, 36 Cal. Rptr. 841, 389 P.2d 377 (1964); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J. Super. 522, 163 A.2d 463 (1960); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); Annot. 162 A.L.R. 446. The Maryland court has been especially sensitive to the difference between crackpot and fabricated third-party confessions and those bearing substantial earmarks of genuineness, but the distinction seems to be an impossible one to incorporate in a rule. A further feature of declarations against penal interest which should be noted is that, while ordinarily the third-party confession is thought of in terms exculpating the accused, this is not necessarily so, as it may incorporate statements implicating him which would be admissible as related statements. This was the situation in Douglas v. Alabama, 380 U.S. 415 (1965). There petitioner and one Loyd, charged with the same crime, were tried separately. Loyd had been tried first and convicted. When called by the State,

however, he claimed the privilege against self-incrimination on the basis of a contemplated appeal and refused to testify, though ordered to do so. The judge then declared him hostile and gave the State the right to cross-examine. This the State did by producing a purported confession by Loyd, which implicated petitioner, reading it to the witness a part at a time and asking him if he made that statement. The procedure was ruled to be a denial of the right of confrontation. See Memorandum No. 19, p. 33. On its facts, Douglas is susceptible of being read as a rejection of third-party confessions when offered against an accused. However, the theory that Loyd's confession might have been admissible as a declaration against a penal interest is not considered or discussed. In any event, the opinion centers upon the manner of presenting the statement of an uncross-examinable declarant, i.e. placing him on the stand and effectively putting the words in his mouth, thereby generating a far greater impact than would have been occasioned by a simple offer of an out-of-court statement. It is believed that Douglas

does not preclude admitting a third-party confession against an accused when offered as such and nothing more. The weight which might be accorded it is another matter. New Jersey Rule 63(10) excludes declarations against interest when offered against an accused (except his own); California Evidence Code § 1230 does not.

The proposal follows the common law in requiring unavailability of the declarant, as does California Evidence Code § 1230. The Uniform Rule and New Jersey Rule 63(10) eliminate the requirement. It is true that unavailability adds nothing to the trustworthiness of the hearsay statement. Nevertheless, if unavailability is not continued as a requirement, declarations against interest would have to be moved out of the category of the present rule, i.e. concededly inferior evidence admitted in preference to no evidence, and transposed into the category embraced in proposed Rule 8-03, i.e. evidence as good as if given by declarant on the stand. This might be completely justifiable in some situations, but in many the against-interest motivation would seem scarcely to be that compelling.

The Reporter is of the view that a greater amount of needed evidence would be admitted by a combination of unavailability plus relaxation of against-interest concepts than by no unavailability requirement but a strict approach to what is against interest.

The common law requirement of first-hand knowledge (often spoken of as "competent knowledge") is expressly incorporated in California Evidence Code § 1230. It is not found in the Uniform Rule or in the present proposal, since it seems to be inherent in the against-interest concept and in the hearsay exceptions generally. In this respect, and also in respect to declarations couched in terms of opinion, see the last paragraph of the Comment under Example (3), supra.

Example (5)

This example combines, in the interest of brevity, the subject-matter of Uniform Rule 63(23), (24), and (25). The general common law requirement that the declaration have been made ante litem motam has in each instance been dropped, as more appropriately bearing on weight than admissibility. See 5 WIGMORE § 1483. To like effect are New Jersey Rule 63(23), (24), and (25),

and California Evidence Code §§ 1310 and 1311, although the latter contain provisions authorizing exclusion of a statement "made under circumstances such as to indicate its lack of trustworthiness," which may be read as resurrecting the requirement.

Item (i) covers declarations concerning declarant's own history. It makes clear that personal knowledge is not needed, since personal knowledge is in some cases self-evident (marriage), and in others impossible and not required (date of birth).

Item (ii) deals with declarations concerning the history of another person. Here, as at common law, declarant is qualified if related by blood or marriage. 5 WIGMORE § 1489. In addition, and contrary to the common law, a declarant becomes qualified by virtue of intimate association with the family, a wholly justifiable extension. Id., § 1487. If the subject of the declaration is the relationship between two other persons, some authority requires that declarant be qualified as to both (formerly by relationship, now extended to family associates). Wigmore effectively disposes of this view: relationship is always reciprocal. Id., § 1491.

Item (iii) is designed to insure admissibility of declarations by declarants qualified under (i) or (ii) which include declarations by other declarants which fall under those items. This provision falls short of Uniform Rule 63(25), which allows the two-stage hearsay to come in if the second stage qualifies, although the first stage does not. While the Uniform Rule approach is in this respect consistent with the Model Code provision broadly admitting any declaration by an unavailable declarant, it is believed that assurances should be demanded at each stage in multiple hearsay situations. While New Jersey Rule 63(25) adopts the Uniform Rule, no such provision is found in the California Evidence Code.