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THE UNIFORM RULES OF EVIDENCE:
A DEFENDANT'S VIEW

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AND

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Rules which lead to the exclusion of evidence are two-edged swords. They may greatly aid a party in one case and have a devastating effect in the next. Thus, while this article is written from the viewpoint of those attorneys who quite often find themselves on the side of the defense, it is almost impossible to generalize concerning the desirability or undesirability of any particular rule from the defense standpoint. This fact is even more apparent when comparison is made to the companion article in which the viewpoint of the plaintiff is set forth. Perhaps it is not too surprising that offensive and defensive interests coincide more often than collide — and rightly so, for one should not be so blinded by the exigencies of a particular situation that he cannot recognize the propriety and value of an evidentiary rule in different situations.

Also, the potential advantage a rule may have for a particular side is not of controlling importance by itself. The sole criterion should not be expediency. In any bona fide litigation, both parties *should* be engaged in a search for truth. Ideally, it is only where common experience teaches that a certain type of evidence is usually unreliable that it should not be considered. And it is only where the admission of testimony is contrary to public policy that the ideal of the search for truth should be temporarily abandoned. Consequently, while the following comments are made on an avowedly partisan basis, it is also intended that they express something more than a narrow bias born of selfish interests.

LIMITED ADMISSIBILITY

Rule 6¹ provides that where evidence is admissible as to one party and inadmissible as to the other parties, upon request the trial judge *shall* restrict the evidence to its proper scope and instruct the jury accordingly. This rule deals with the fairly common problem of evidence being used to the prejudice of a party concerning whom it is obviously inadmissible. Usually this party is a co-defendant. The excuse is that the evidence is admissible against another party

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1. Unless otherwise qualified, "Rule," as used herein, refers to the Uniform Rules of Evidence (U. R. E.).

to the suit. Often enough, this evidence is admitted on some technical basis and the real motive is not the avowed purpose, but to cause harm to the case of the adverse party against whom alone it could not be used. The rule does not strike at the evil directly but requires the trial judge to do his best to prevent the harm. The remedy is more fictional than real. The ideal juror may wipe from his mind incorrect inferences from such evidence upon proper instructions from the judge, but experience indicates that once a juror has heard damaging evidence he will retain the harmful impressions despite any so-called curative instructions.

The real danger in this rule is that it may be construed to permit, without regard to other available remedies, the admission of what should be inadmissible evidence.² The Rules of Civil Procedure permit almost unlimited joinder of claims and parties.³ Added to this are liberal provisions for counterclaims,⁴ cross-claims,⁵ impleader⁶ and intervention.⁷ Now, more than ever, there is an increased possibility of the technically correct admission of evidence which may be very harmful to other claims or parties involved in the same trial. It follows that this rule should not be considered as an alternative to Minn. R. Civ. P. 20.02 which grants the privilege of separate trials as to both claims or parties where injustice would result from a combined trial.

Rule 6 is subject to the further criticism that it does not require the trial judge to explain to the jury the reason for the admission of the evidence *at the time* it is presented to the jury. This requirement would provide better protection to the party harmed by the evidence. An instruction concerning this problem which is given for the first time during the court's charge to the jury is often lost in the welter of other instructions and possibly increases the confusion in the jury's mind.

PRESUMPTIONS

It is extremely difficult within the limited scope of this article to do more than scratch the surface of this involved and intricate problem. The main difficulty is one of definition. Once it is known exactly what kind of presumption is under discussion, the animal may be dissected and analyzed with comparative ease. The author who does this may always be subject to the criticism that he picked

2. In this connection, see Rule 45, discussed *infra*.

3. Minn. R. Civ. P. 18, 20.

4. *Id.*, 13.02.

5. *Id.*, 13.07.

6. *Id.*, 14.

7. *Id.*, 24.

too big, or too small, or too nebulous an animal for analysis. To avoid this problem, the "presumptions" discussed here are those defined by Rule 13,⁸ *i.e.*, the situation where a rule of law provides that a (presumed) fact may be assumed when another (basic) fact is found to exist. The basic fact may be established by a jury's finding, by judicial notice, by agreement of the parties, or by some other accepted method. If the basic fact is not established, then nothing may be presumed and the problem ceases to exist.

Rule 14 divides this type of presumption into two categories: (a) where the basic facts tend to prove the assumed fact, and (b) where the basic facts, in and of themselves, do not tend to prove the fact to be assumed therefrom. The rule provides that class (b) presumptions vanish from the case as soon as evidence is introduced contrary to the existence of the presumed fact. To this extent Rule 14 would preserve the doctrine of *Ryan v. Metropolitan Life Ins. Co.*⁹ However, the rule also provides that class (a) presumptions continue to exist despite contrary evidence, and the party against whom presumptions exist has the burden of establishing the non-existence of the presumed fact. In such situations the *Ryan* rule would be abolished as to a large class of presumptions. This distinction should not be made and the rule of the *Ryan* case should be retained in all situations whether or not basic facts have any probative value as evidence of the presumed fact.

First of all, the distinction is rather artificial and the courts constantly will have to determine which type of presumption is involved before the next step may be taken. This determination is often a perplexing matter. It is difficult to think of any recognized presumption which does not have some type of rational connection to the basic facts which gave it birth. This point is illustrated in the cases where it is claimed that statutory presumptions constitute a denial of due process, or some similar constitutional provision. One such case is *State v. Kelly*,¹⁰ where a divided court held unconstitutional a statute that possession of liquor in a dry county supported a presumption that defendant had the liquor for the purpose of illegal sale in the county. The court quoted with approval the

8. Rule 13 does not cover mere permissive inferences such as *res ipsa loquitur* (Minn. R. Civ. P. 43.06), or so-called conclusive or irrefutable presumptions.

9. 206 Minn. 562, 289 N. W. 557 (1939). An excellent review of the rather rough handling of the *Ryan* rule in subsequent cases may be found in *TePoel v. Larson*, 236 Minn. 482, 486-93, 53 N. W. 2d 468, 471-74 (1952). For a view opposing the *Ryan* rule see companion article by Gausewitz, p. 33.

-10. 218 Minn. 247, 15 N. W. 2d 554 (1944).

doctrine previously announced by the United States Supreme Court.¹¹

“Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.” 218 Minn. at 253-54, 15 N. W. 2d at 559 (Emphasis supplied by the Minnesota Court.)

In most of these cases, the courts have not had an easy time in deciding whether there exists the “rational connection” necessary for constitutionality. While this test is perhaps somewhat broader than the class (a) test of Rule 14 (*i.e.*, whether the basic facts “have any probative value as evidence of the existence of the presumed fact”), the two tests are similar enough to demonstrate the problems involved.

For example, take the presumption of due care on the part of a decedent.¹² Is this presumption a class (b) presumption which under Rule 14 vanishes from the case as soon as evidence is introduced that the decedent was negligent,¹³ or does it belong in class (a) and remain vital throughout the case? Usually, the basic facts prove the decedent got into an automobile and was killed while driving. They do not tend to prove anything at all about the conduct of the deceased driver.¹⁴ But it may be argued that this presumption is quite similar to the presumption against suicide. It is based upon the idea that decedent acted in accord with the natural law of self preservation and consequently he must have driven with due care. If an analogy may be drawn between the two presumptions, then

11. *Tot v. United States*, 319 U. S. 463, 467-68 (1943) (statute providing that possession of gun by one previously convicted of crime of violence gives rise to presumption that he obtained the gun in interstate commerce contrary to law, held unconstitutional).

12. See *TePoel v. Larson*, 236 Minn. 482, 53 N. W. 2d 468 (1952).

13. There is the interesting question of the constitutionality of common law or court-created “class (b)” presumptions. By definition, in this type of presumption there is no real connection between basic fact and presumed fact. Thus, such presumptions would be unconstitutional if created by the legislature.

14. If the due care presumption has no basis in human experience (as demonstrated by the fact that the surviving driver has no presumption to aid him in justifying conduct identical to that of a decedent), then the presumption must rest solely upon the inability of the decedent to testify. The trial court instructed the jury to that effect in *Bimberg v. Northern Pacific Ry.*, 217 Minn. 187, 197, 14 N. W. 2d 410, 419 (1944). However, in *State v. Kelly*, 218 Minn. 247, 15 N. W. 2d 554 (1944), the court held that a statutory presumption based solely upon convenience of producing evidence is not constitutional.

a real controversy may exist as to the proper classification of the due care presumption.¹⁵

Since the division of presumptions into troublesome categories undoubtedly will provide a fertile field for confusion and error, what prevailing policy reason exists in support of the division? The excuse usually offered is that the jury should be told that it can give special consideration to the general human experience upon which the presumption is based.¹⁶ If a presumption is truly the result of human learning and common experience, will not the jurors as adult humans share that knowledge without extra prompting? Will not express instructions on the point magnify the rational connection between the basic facts and presumed fact so that the probative force of the basic facts is emphasized far beyond the experience which gave root to the presumption?¹⁷

Suppose a written statement is taken from an injured person several days after an accident. When that statement later becomes material in a lawsuit, it is subject to Minn. Stat. § 602.01 (1953) which declares that it is "presumably fraudulent." This statute was supposedly passed to protect injured persons from investigation before they have made sufficient recovery to look after their own interests. Thus, the basic fact has some probative connection with the presumed fact. This statutory presumption would fall into class (a) under Rule 14. As a consequence, it would remain a factor in the case under the U. R. E. even though it was shown that the injury caused no discomfort, no drugs or opiates were involved, and no sharp practice was used to obtain the voluntary statement. Further, under Rule 14, the jury would be told of the presumption of fraud and also told that the party seeking to use the statement has the burden of proving good faith. It is quite probable that after this procedure the jury would no longer view the taking of this statement in the light of their common experience on such matters, but

15. In various decisions, the presumptions of due care and accidental death were treated as "class (a)" presumptions, the jury being told that the presumption stands until they are persuaded to the contrary. See, e.g., *Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 124 P. 2d 579 (1942); *Karp v. Herder*, 181 Wash. 583, 44 P. 2d 808 (1935).

16. Morgan, *Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906 (1931).

17. This point was recognized in *Ryan v. Metropolitan Life Insurance Co.*, 206 Minn. 562, 568-69, 289 N. W. 557, 560 (1939).

"It follows that if the case is one for the jurors the presumption should not be submitted as something to which they may attach probative force. The weight of the evidence is for them, *to be ascertained on the scales of their experience and judgment*, rather than those of the judge. It would be an intrusion into their field to suggest that they substitute for any real evidence, or any reasonable inference therefrom, the assumed weight of something which is not in evidence." (*Emphasis supplied.*)

would feel that there was something basically insidious about the whole affair regardless of the specific evidence of no fraud.¹⁸

The matter becomes worse when some of the common presumptions of the criminal law are involved. Consider the presumption that a person having the possession of stolen goods is the thief.¹⁹ Again, this would be a class (a) presumption because possession of loot does tend to prove a connection with the theft. Should this presumption remain in a case after defendant has offered considerable proof that he made a bona fide purchase of the property? Should the jury be told that there is a presumption that the defendant stole and that he has the burden of proving that he did not?²⁰

Minnesota recognizes many presumptions. The legislature is adding new ones unceasingly. Many of these obviously would belong in class (a) of Rule 14. Most others would be on the borderline between classes (a) and (b). Every time a borderline presumption is in issue the trial court will have to stop to construe Rule 14 in the light of the background of the presumption. The practitioner will not know the true status of these presumptions until the Minnesota Supreme Court has had an opportunity to rule on each of them. Since Minnesota,²¹ in accord with the great weight of authority,²² now treats all presumptions in the manner prescribed by Rule 14 for class (b) presumptions only, the adoption of this rule would work a real revolution in procedure and thinking. It would mark a sharp departure into a field of obvious difficulty, resulting in the overemphasis of most presumptions giving them an illogical and irrational importance far greater than the common sense which originally supported them. The distinction between class (a) and (b) presumptions should be deleted from Rule 14. The rule should treat all presumptions as class (b) matters. Once there is evidence in the case contrary to the presumed fact, that fact should be litigated as any other fact or issue unaided and unsupported by any shifting of the burden of proof or by any judicial pronouncements.

18. In *Koenigs v. Thome*, 226 Minn. 14, 31 N. W. 2d 534 (1948), and *Swanson v. Swanson*, 196 Minn. 298, 265 N. W. 39 (1936), both "fraudulent" statement cases, the court held that the presumption vanished as soon as there was evidence of no fraud. These cases would be overruled by Rule 14.

19. See *State v. Hutchison*, 121 Minn. 405, 141 N. W. 483 (1913).

20. In criminal proceedings, the conflict of presumptions with the obligation of the state to prove guilt beyond reasonable doubt is supposedly solved by Rule 16.

21. *E.g.*, *Shell Oil Co. v. Kapler*, 235 Minn. 292, 50 N. W. 2d 707 (1951) (presumption that purchaser is solvent and able to perform obligation), *Kath v. Kath*, 238 Minn. 120, 55 N. W. 2d 691 (1952) (presumption of gift between husband and wife), *TePoel v. Larson*, 236 Minn. 482, 53 N. W. 2d 468 (1952) (presumption of due care).

22. See 9 Wigmore, *Evidence* § 2491 (3d ed. 1940), Thayer, *Preliminary Treatise on Evidence* 313-52 (1898).

WITNESSES, CREDIBILITY AND IMPEACHMENT

Rule 17 provides that the judge may disqualify a witness if he finds that the witness cannot understand questions or answer them or if the witness does not understand the duty to tell the truth. This rule should contain a provision requiring the judge to investigate in private to determine the basic competency, as distinguished from credibility, of the witness. Especially in the case of young children, the examination in open court of the child's understanding often provides an unnecessary exhibition which may affect the jury's thinking beyond the testimony ultimately given by the witness.

Rule 19 is a poor attempt to codify the rule that it is necessary to lay a general foundation for testimony. At best, Rule 19 is superfluous and its deletion from the code would detract nothing. At worst, the last two sentences are somewhat ambiguous. They apparently give the trial court a greater right to interfere in such matters than is now commonly accepted. The last sentence is especially bad since it allows the introduction of testimony without foundation with the hope that the foundation will later be supplied. This rule could be used to get much unqualified and baseless testimony before the jury. Once the jury has heard this testimony, it may not be "stricken" from their minds by command of the trial judge. When the necessary foundation is not proved, the court's instruction to the jury to disregard testimony is of little value. If the jury should not have testimony, they should not hear it. It should not be admitted and then later supposedly forgotten. The best solution to the whole matter would be the elimination of Rule 19 in its entirety from the U. R. E.

Rules 20, 21 and 22 cover the subject of credibility and impeachment of a witness. It is difficult to determine what Rule 20 means. It provides that *either* party may cross-examine a witness concerning "any conduct by him and other matter" relevant to his credibility, in addition to the use of extrinsic evidence for such a purpose. To the extent that the rule means that a party is not "bound by the testimony" of a witness called by him, the rule is good and makes no change in present practice.²³ Beyond that point, some difficult problems arise. Suppose a witness is called and gives testimony adverse to the party calling him. If the witness is not hostile and the testimony is no surprise, should the door be opened for an attack on credibility? If so, Rule 20 would permit a very undesirable practice contrary to the restrictions of Minn. R. Civ. P. 43.02 and

23. *E.g.*, *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58 (1893).

prior Minnesota practice.²⁴ Also, may a party call a witness and by cross-examination go into the credibility of a witness before such credibility is in issue?²⁵ Further, what is meant by "extrinsic evidence" in connection with bolstering the witness? Rule 20 should be clarified and its scope expressly limited, especially in reference to the rehabilitation of a witness. Besides being unusually vague, the rule is much too broad. To accomplish the avowed purpose of the rule, the door is opened to all types of evidence and unlimited examination which may be used to defeat the purpose of the rule. The present practice is simple, clear, and well understood. It keeps the collateral issue of credibility within reasonable bounds and should be retained.

Rule 21 also modifies present practice. It provides that evidence of a conviction of a witness for a crime "not involving dishonesty or false statement" is inadmissible on the issue of the witness' credibility. Under present practice, conviction of any crime may be so used.²⁶ The distinction which the rule attempts to create is supposedly logical. However, the determination of what is a crime involving dishonesty is bound to be troublesome. The commission of statutory rape may involve as much dishonesty and lying as perjury or embezzlement or some similar crime. Will it be necessary to go into the facts of every conviction to determine whether "dishonesty" was involved? It would be better to preserve the present statutory rule. There should be no division of crimes into classes for this purpose. If a witness has done something which is criminally wrong, the jury should have the right to believe that the person might also be immoral when it comes to testifying.

Rule 22 is undesirable. Clause (a) provides that a witness need not be confronted with a prior inconsistent written statement before being questioned about the statement. Clause (b) apparently permits the introduction of a contradictory written statement even though the witness was not examined about it or its contents.

It is impossible, within the limited scope of this article, to discuss the various views concerning impeachment of a witness who is not a party.²⁷ While impeachment of this type is not considered substantive evidence and will not sustain the burden of proof,²⁸ the jury

24. In *State v. Gulbrandsen*, 238 Minn. 508, 57 N. W. 2d 419 (1953), mere adverse testimony held insufficient basis for attack on credibility.

25. Minn. R. Civ. P. 43.02 permits impeachment of a party or his employee *only* on "material matters."

26. Minn. Stat. § 610.49 (1953).

27. See 3 Wigmore, Evidence §§ 1025-39 (3d ed. 1940).

28. Compare *Williams v. Jayne*, 210 Minn. 594, 299 N. W. 853 (1941) (impeachment of party), with *In re Estate of Olson*, 227 Minn. 289, 35 N. W. 2d 439 (1948) (impeachment of witness not a party).

is likely to accept the impeachment as proof of the facts concerned regardless of the court's instructions. It follows that a complete foundation of the statement should be laid in order that all present, including the witness and the jury, will understand the matter. As soon as counsel in his own words attempts to paraphrase the alleged statement in the form of questions, the whole context and meaning of the statement may be varied. The witness should know exactly the statement he is being questioned about so that he may remember what he said, and how and where he said it. He should have the opportunity to deny the statement, or part thereof. If he wishes to affirm it, he should have the opportunity of *then* explaining what he meant by it. Counsel should not be allowed to hurl verbal innuendoes of former contradictory statements without tying the matter down to the actual contents and context of the statement involved.

Further, if the witness is not questioned about such a statement, this statement should not be subsequently used. If it is so used, the confusion and delay will result in no great advantage to either side. Suppose a witness is called and he testifies that it was raining at some material time. He previously wrote a letter stating that the day was clear. If on cross-examination he is asked whether he previously stated it was not raining, the witness may be completely at sea. If he is shown the letter, he may admit his error or point out why the letter is apparently inaccurate. If the letter or statement is not mentioned at all but is introduced by calling the recipient, then the "impeached" witness must be subsequently recalled and the letter explained. This may be days after the matter first arose. Either all value of the impeachment will be lost, or valid rehabilitation will be of no avail. The present practice of requiring a foundation for the impeachment of a witness, who is not a party, works well and is easily understood by the jury. It should not be changed.

While the following suggestion is not exactly in point, perhaps Rule 22 should also contain an express prohibition that on cross-examination purported oral or written statements may not be incorporated in questions of counsel unless it can be proved by independent, competent evidence that such statements were made. This abuse occurs in an extreme form where a cross-examining attorney asks a witness, "Did you not tell *me* thus and so?" The jury understands the question as a fact. The witness denies the statement. No further evidence is offered to prove the alleged statement. By this means, an unscrupulous attorney can cast great doubts on the veracity of a witness and can supply missing "facts" in the jurors' minds without proving them. It is felt that the phraseology of

Rule 22 will extend rather than curtail the use of this improper technique. No impeachment should be allowed unless an adequate foundation is laid beforehand and unless it can be proved by subsequent testimony

PHYSICIAN-PATIENT PRIVILEGE

Rules 23 through 40 deal with various privileges. Only one of these rules, Rule 27, is discussed here.²⁹ The rule concerns the physician-patient privilege which probably results in more litigation than any similar exclusionary rule. This privilege did not exist at common law³⁰ and the National Conference of Commissioners on Uniform State Laws, in reversing its 1950 decision to preserve the common law rule in the U. R. E.,³¹ did a great disservice to the law

Of all the privileges, this privilege has the least justification in logic and morals, and results in more questionable verdicts than any other rule of competency. Supposedly, the privilege was adopted to enable people to secure needed medical treatment and advice without fear or embarrassment. Thus, a person could obtain care without public disclosure of intimate facts. However, a brief reading of the decisions under the present Minnesota statute³² indicates that the privilege is never asserted to prevent embarrassment of the type described above. Rather, it is used to prevent the introduction of evidence contrary to the testimony of the privileged party or his chosen medical witness, concerning which the privileged party is singularly unembarrassed. Illustrative of these cases are *Palmer v. Order of United Commercial Travelers*,³³ *Stone v. Sigel*,³⁴ and *Ostrowski v. Mockridge*.³⁵

The *Palmer* case involved a suit on an accident policy which covered death not due to carbon monoxide poisoning. The decedent was found lying in a garage alongside an automobile with the motor running. Two physicians were summoned but were unable to revive him. It was not known whether he died before or after the physicians arrived. At the trial, plaintiff produced medical experts who gave the opinion, in answer to hypothetical questions, that decedent did not die from carbon monoxide asphyxiation. These opinions as-

29. For discussion of other privileges see companion article, Lousell and Crippin, p. ...

30. *Price v. Standard Life & Accident Insurance Co.*, 90 Minn. 264, 95 N. W. 1118 (1903)

31. Uniform Rules of Evidence, Rule 27, comment (National Conference of Commissioners on Uniform State Laws 1953)

32. Minn. Stat. § 595.02(4) (1953).

33. 187 Minn. 272, 245 N. W. 146 (1932).

34. 189 Minn. 47, 248 N. W. 285 (1933)

35. 65 N. W. 2d 185 (Minn. 1954).

sumed that the decedent's skin was not a cherry red, a symptom of carbon monoxide poisoning. Defendant sought to show by the testimony of the attending physicians that decedent was, in fact, cherry red. This testimony was ruled inadmissible as privileged even though the individual may have been dead.

In the *Stone* case, one of the elements of plaintiff's claim was a hernia allegedly received in the accident in issue. Plaintiff also testified that she had not seen a physician for treatment for a long time before the accident. After a verdict for plaintiff, it was discovered that plaintiff had received treatment for the same hernia prior to the accident. Defendant's motion for a new trial on the basis of plaintiff's alleged perjury was denied since the newly discovered evidence was privileged.

And in the *Ostrowski* case, plaintiff visited a physician the day after an accident. She testified concerning the treatment given her by this physician. Her medical expert gave his opinion concerning plaintiff's condition in answer to a hypothetical question based partly upon plaintiff's initial treatment. Yet, when defendant sought to show by the first physician that he found no visible sign of bodily injury the day following the accident, the testimony was excluded as privileged.

In case such as these, the statutory privilege does not prevent the forcible disclosure of personal medical affairs, for plaintiffs have blandly brought these matters to public notice by testimony in court. Rather, the statute operates only to prevent embarrassment of a different sort—the disconcerting fact that the physicians who are in the best position to know the truth disagree with plaintiff's claim.

Finally, this privilege may be used to prevent the physician from recounting admissions made to him by the patient concerning the cause of physical injuries. While the facts of the accident may be helpful or necessary to the physician, and while this disclosure may be embarrassing to a patient in a later personal injury suit based on different facts, there is no reason why public policy is served by allowing the privilege to become an instrument of fraud.

While the best rule would be the outright abolition of the privilege, Rule 27 is a marked improvement over the present statute. In effect, it adopts the reasoning rejected in *Marfia v. Great Northern Ry. Co.*,³⁶ that the privilege is waived when a lawsuit is started. Rule 27(4) declares that there is no privilege in an action where the

36. 124 Minn. 466, 145 N. W. 385 (1914).

“condition of the patient is an element or factor of the claim or defense of the patient.” Thus, if literally applied, when a person begins a lawsuit claiming damages for injuries, all privilege as to his physical condition ceases to operate. Thus, the worst evils of the privilege are destroyed and the jury is allowed full access to *all* the facts relevant to the claim.

OFFICIAL PRIVILEGE

One other privilege deserves mention. Rule 34 provides, in substance, that information given to an employee of the state may be privileged if the legislature *or* the presiding judge feels that the disclosure will be harmful to the interests of the government.³⁷ In the broader sense, this rule countenances the immunity, granted by statutes to various persons, from testifying to crucial facts. Illustrative of these acts is Minn. Stat. § 169.06 (1953) which declares that highway accident reports are privileged. The statute, in its present form, permits an officer to testify to information within his knowledge. In *Rockwood v. Pierce*,³⁸ it was held that the trial court committed prejudicial error in excluding information obtained by the officer while investigating the accident even though this information subsequently found its way into his reports. Even now, the exact extent of the privilege provided by this statute remains in doubt. The impact of Rule 34 will increase the difficulty of interpreting and applying this and similar statutes. The rule apparently gives the trial judge the power to exclude such testimony regardless of the language of the statute if *he* feels that the evidence will be “harmful to the interests” of the state, whatever that may mean. It may well be that the state has an interest in obtaining accurate statistics on many phases of human activity. Is all statistical information obtained for this purpose potentially incompetent depending upon the predilections of the trial judge? Official information should be freely admissible unless expressly prohibited by the legislature. The matter should not be decided by hurried court room rulings. Also, § 169.06, and similar legislation, should be repealed. It, like the physician-patient privilege, affords an avenue for inaccuracy, misunderstanding, and, on some occasions, outright perjury. As in the case of highway accident reports, the officer may lose his notes, or his recollection of the events may become hazy and inaccurate. Yet, he cannot refresh his recollection from the report which he himself made from information which he obtained. In effect, this statute imposes upon the official the sole burden of preserving accurate.

37. Rule 34 is almost identical to Minn. Stat. § 595.02(5) (1953)

38. 235 Minn. 519, 51 N. W. 2d 670 (1952)

verbal information of the matter concerning which he ultimately will be called to testify. Much valuable evidence is thereby lost upon the nebulous theory that vital statistics are being created.

DISCRETIONARY EXCLUSION OF EVIDENCE BY TRIAL JUDGE

Rule 45 allows the trial judge to exclude evidence if its probative value is outweighed by the risk of undue delay, prejudice, or confusion. The rule is an excellent codification of the present practice. It makes it clear that in the situation where there are numerous parties, certain evidence ought to be excluded because of obvious prejudice even though the evidence may be technically admissible against some other party. Inherent in the rule is the idea that the search for truth may be sometimes defeated by letting everything in.

The last clause of the rule also allows the exclusion of evidence if it "unfairly or harmfully" surprises a party. In most lawsuits, the proper remedy in this situation would be a short delay in the trial rather than exclusion of important though surprising evidence. Probably the scope of this clause will be limited to the failure to make discovery under the Rules of Civil Procedure.³⁹ Except perhaps in the case of willful refusal to make discovery,⁴⁰ if the surprise may be cured by a delay in the trial, then the harsher remedy of proceeding with the trial without the evidence should not be used.

INSURANCE

Rule 54 says that the existence of insurance is inadmissible to prove negligence or wrongdoing. The rule is fine as far as it goes, but it merely states an obvious matter. Insurance is "proof" of nothing in the ordinary personal injury action.⁴¹ Will the rule be interpreted as relaxing the present rule that insurance generally should not be mentioned?⁴² Rule 54 should be expanded to forbid expressly the mention of liability insurance at any stage of the proceeding except interrogation of the veniremen.

39. Minn. R. Civ. P. 26, 31, 33, 34 and 36.

40. See *Evtush v. The Hudson Bus Transportation Co.*, 7 N. J. 167, 81 A. 2d 6 (1951) (testimony of undisclosed witness excluded).

41. Cf. *Jeppesen v. Swanson*, 68 N. W. 2d 649 (Minn. 1955), 40 Minn. L. Rev. 183 (1956).

42. In Minnesota, the jurors may be interrogated concerning their insurance interests. *Viou v. Brooks-Scanlon Lumber Co.*, 99 Minn. 97, 108 N. W. 891 (1906); *Scholte v. Brabec*, 177 Minn. 13, 224 N. W. 259 (1929). But it is improper for a defendant to disclose that he has no insurance, *Brown v. Murphy Transfer & Storage Co.*, 190 Minn. 81, 251 N. W. 5 (1933), or that his insurer has denied coverage, *Rom v. Calhoun*, 227 Minn. 143, 34 N. W. 2d 359 (1948).

FOUNDATION FOR EXPERT TESTIMONY

Supposedly, Rule 58 abolishes the necessity of using a hypothetical question in order to obtain an expert witness' opinion.⁴³ Actually, the rule allows an expert witness to give an opinion without first going into the foundation of the opinion. The door is opened for *ipse dixit* conclusions, and the only remedy is subsequent cross-examination.

It is true that the hypothetical form of question occasionally becomes cumbersome and confusing. This rather limited evil is far outweighed by the evil of letting a witness give his opinion to the jury without anyone having the slightest idea of the reasoning of the expert. In most instances under Rule 58, the opinion could be given without objection. But, if it later develops that the opinion is baseless or valueless, it is still in the case subject to be stricken. As previously stated, things cannot really be stricken from the minds of jurors by a command of the trial judge. If the jurors should not consider an opinion, they should not hear it. In one form or another, the expert should be required to specify or affirm the various facts upon which his opinion is based before he is allowed to give it. If the data is inaccurate, not supported by the evidence, or otherwise defective, then the opinion should be excluded. Without some sort of preliminary protection, expert testimony can and will run wild.

COURT-APPOINTED EXPERTS

Rules 59 and 60 grant to the trial court the right to appoint an expert who may testify.⁴⁴ An elaborate procedure is set out. Counsel must attend a hearing on the matter and later participate in a conference with the court and the expert. If the parties cannot agree on the matter, the court can act by itself. This procedure, long advocated by academic attorneys, has found its way into Fed. R. Crim. P 28.

Perhaps something may be said for this rule in civil cases where the problem is within the purview of one of the more exact sciences such as chemistry or physics. But even there, good faith disputes may arise concerning analysis procedure and alternative theories. In the field of medicine and other associated sciences, often enough the problem is one upon which bona fide experts may properly reach different opinions. The conservative frame of the legal mind may be annoyed with the lack of exactitude in the natural sciences (just as the natural scientists become impatient with the "wool-

43. For further discussion of this rule see companion article, Ladd, p. 447.

44. *Id.* at 450.

spinning" of lawyers and judges), but that is no reason to pick some expert, give him a halo of judicial approval, and let him offer his opinions as superior pronouncements—which is the way the jury will accept a court-appointed expert's testimony.

The simple fact is that there is no reason to believe that the opinion of a court-appointed witness will be scientifically superior to that of any other expert. Yet, there is no doubt that the jury will give much greater weight to his opinions than those of other experts. Further, it is quite possible that the court-appointed expert will merely aggravate the problem by offering a third opinion on the matter in controversy, thus increasing the confusion rather than reconciling it.

The most common example of conflict on expert testimony occurs when physicians cannot agree concerning physical injuries. Often, the defendant does not call a physician because his expert substantially agrees with the plaintiff's medical witness.⁴⁵ If there is a substantial disagreement, it may be due to partisanship or even the dishonesty of the particular expert. It may also be due to honest, permissible differences of opinion. In most cases, these differences should be analyzed and compared, not compounded by additional honest and permissible differences of opinion. As for the dishonest expert, he should be disciplined or weeded out by his own professional association.

Rules 59 and 60 should be modified to the extent that the court may appoint an expert only if the parties agree on the need for it and upon the group from which the court may select the expert.

HEARSAY

Rules 62-66 deal with the hearsay rule, its numerous catalogued exceptions, and various other qualifications of the rule. It is beyond the scope of this article to discuss whether the hearsay rule should be abolished in its entirety or retained or modified. Probably the rule is here to stay, subject to a further relaxing of its application. For those who dislike the hearsay rule in any form, the U. R. E. will be undesirable since a codification tends to preserve and crystallize the matter. Likewise, for those who believe in the policy considerations behind the hearsay rule, this codification will be welcome. For the practitioner who is never quite certain whether a bit of hearsay is admissible or not, the list of thirty-one exceptions in Rule 63 will be helpful.

45. It is interesting to note that plaintiff may comment on defendant's failure to call his examining physician while defendant is foreclosed by our present privilege statute from demonstrating that physicians which plaintiff did not call did not agree with plaintiff.

It is the authors' belief that the hearsay rule should be retained. However, certain parts of the U R. E. on this point are contrary to existing practice in Minnesota and deserve comment.

Rule 63(4)(c) permits the introduction of a statement narrating or describing an event if the declarant made the statement while he still remembered the event well, and if the declarant is absent under circumstances that are not suspicious. This rule adds bona fide unavailability to death and insanity as a basis for the admission of hearsay testimony. In so doing, it adopts the theory of the Model Code of Evidence⁴⁶ that unavailability is the real basis for the admission of hearsay testimony. In most other situations, the U R. E. does not follow the Model Code on this matter, but keeps to the traditional idea that the circumstances of the statement are crucial concerning admissibility. However, Rule 63(4)(c), as limited by Rule 62(7), does not permit the unrestricted use of hearsay evidence upon the basis of absence. The statement must be made before the lawsuit was started. The declarant must be absent from the jurisdiction or cannot be found by due diligence. The absence must be through no activity of the party, and no reasonable opportunity of taking his deposition must have existed. Under these circumstances, the possibility of abuse in using this type of testimony is greatly reduced. With careful administration, the rule may prove to be a beneficial change in the law of evidence.

Rules 63(13)(14) concern business entries. In one important respect, these rules may make quite a change. In *Brown v St. Paul City Ry. Co.*⁴⁷ the court held inadmissible a portion of the history sheet of the hospital record of a patient. In so doing, it gave a special interpretation to the Uniform Business Records As Evidence Act⁴⁸ to the effect that hospital records, as business records, are admissible to prove diagnosis, treatment and medical history, but that hearsay and self-serving statements in the record are not admissible for other purposes even though obtained as a regular part of the business. The Uniform Business Records As Evidence Act contains no such qualification. Will the result be changed by Rules 63(13)(14) which specifically deal with hearsay and also contain no such qualification?

It is immaterial whether a business record, such as a hospital sheet, contains self-serving hearsay or impeaching matters. Both should be admissible because they were obtained and incorporated

46. A. L. I., Model Code of Evidence § 503(a).

47. 241 Minn. 15, 62 N. W. 2d 688 (1954).

48. Minn. Stat. §§ 600.01-600.26 (1953).

in a writing as a matter of regular business. If any business entry, so obtained, has a sufficient hallmark of truthfulness to be admissible hearsay, then all such entries should be admitted. They are no different than any other entry. Their truthfulness may be attacked, but as part of the regular record they should be admitted unless untrustworthy on their face. It is hoped that Rules 64(13) (14) will be interpreted as destroying the artificial rule of the *Brown* case.

Rule 64(31) would abolish the present Minnesota rule concerning the use of textbooks.⁴⁹ Under Rule 64(31), a treatise or writing may be admitted as substantive evidence if the judge recognizes it as authoritative or if an expert witness testifies that it is authoritative. Under this rule, an expert witness may be cross-examined concerning the contents of such a textbook if he could be so cross-examined concerning the court room testimony of the author of the book.

This rule is good insofar as it relaxes the restrictions on the use of books on cross-examination. An expert witness should be subject to cross-examination in reference to recognized authorities whether or not he relies upon them or recognizes them. The present Minnesota rule is much too limited. However, the use of books as substantive evidence under Rule 64(31) would be bad. If the writings of learned authors are material, they should be presented to the court only by the testimony of experts who vouch for and understand the treatise, who can explain and apply the information, and who can be cross-examined concerning discrepancies and conflicts. The rule easily could degenerate into both sides sitting and reading books to the enlightenment of no one and the confusion of everyone—no matter how “authoritative” the books may be.

CONCLUSION

There has long been a need for a clear, simple codification of the basic rules of evidence. The U. R. E. goes a long way in satisfying that need and marks a great advancement in the law. It is certain that no one could draft a set of evidentiary rules which would satisfy everyone. The U. R. E. is perhaps the closest approach to that ideal situation which has yet been made. Its adoption, with various modifications, should be seriously considered.

49. *Zubryski v. Minneapolis Street Ry. Co.*, 68 N. W. 2d 489 (Minn. 1955), *Briggs v. Chicago Great Western Ry. Co.*, 238 Minn. 472, 57 N. W. 2d 572 (1953); *Ruud v. Hendrickson*, 176 Minn. 138, 222 N. W. 904 (1929).

