A Primer of Practical Evidence

Charles Alan Wright
A PRIMER OF PRACTICAL EVIDENCE

CHARLES ALAN WRIGHT*

Last May the Committee on Continuing Legal Education of the Hennepin County Bar Association sponsored an Institute on Practical Evidence. A distinguished panel of experienced Minnesota attorneys and judges discussed practical aspects of certain questions about evidence. The moderator was the Hon. Gunnar H. Nordbye, Chief Judge of the United States District Court for the District of Minnesota. The panel included: Arthur B. Geer, Esq., a Minneapolis attorney who has tried many cases for defendants; Hon. Gustavus Loevinger, formerly Judge of Ramsey County District Court; Lee Loevinger, Esq., a Minneapolis attorney and frequent contributor to legal periodicals; Prof. David W. Louisell, of the University of Minnesota Law School; Hon. Harry H. Peterson, formerly Associate Justice of the Minnesota Supreme Court; and the present writer.

The wealth of experience which the members of the panel have had in the field of evidence made their answers uniquely valuable, and suggested the desirability of making these answers available in permanent form. Unfortunately no complete transcript of the proceedings was made. But with the thought that it might be useful to law students and young lawyers who have not yet often been in court, I have undertaken to set out here many of the questions which were discussed at that Institute, and to give rather brief answers with citations to a few leading cases and to secondary authorities which contain leads to other decisions. My answers are of course based in large measure on the answers given by my col-

*Member of the Minnesota Bar. Visiting Associate Professor of Law, University of Texas Law School. [Two points about the footnotes deserve mention. 1. I have occasionally cited cases in which I have been among the attorneys. Because my reading of these cases may not be entirely objective, though I have striven to make it so, I have noted my association with the case in the footnote in order to provide fair warning to the reader. 2. The footnotes give some hint of the great extent to which I have relied on the magnificent treatise on evidence by my colleague, Prof. Charles T. McCormick. But even the footnotes fail to show my indebtedness to Professor McCormick for his wise counsel and generous encouragement in my attempt to master the law of this fascinating subject.—C.A.W.]
leagues on the panel, as I have been able to reconstruct these from my own notes and from the fragmentary transcript. But I present these answers on my own responsibility, and have not hesitated to follow my own view in the few instances where it differed from that of others on the panel.

I. LEADING QUESTIONS—THEIR USE AND MISUSE

1. When are leading questions proper? Discretionary? Objectionable?

In theory it is always in the discretion of the trial judge whether to allow a leading question. But by rule a party is now given a right to ask leading questions of unwilling or hostile witnesses and of an opposing party, or his employee, called for adverse examination, and it is well settled that leading questions are usually proper on cross-examination of the opponent’s witnesses. Generally leading questions will be allowed as to preliminary matters or questions not substantially in dispute, and they frequently will be permitted to children and other witnesses of limited understanding, and to a witness whose memory has been "exhausted" but who is believed to know additional material facts.

Stated conversely, a question is properly objected to as leading where it will suggest to the witness the answer to a question on one of the main issues of the case. Nor is the question made unobjectionable by putting it in the supposedly neutral form, "State whether or not...", since such a form still indicates to the witness the answer desired.

2. Suppose a question is properly objected to as leading. Must the examiner drop the subject? Or can he put the question in a non-leading form even though the witness, who has heard the question in the form objected to, will now know what to answer?

It is almost always proper to put the question again in non-leading form, although the discretion of the court would seem broad enough to require the examiner to come back to it later or even drop it altogether. The sanction here is an ethical one. It is unethical deliberately to ask a leading question, knowing it will be objected to, in order to coach a witness for a non-leading question.

3. Can I ask the court to instruct the jury that leading questions are proper on cross-examination?

Such an instruction would be proper, and may be highly desirable in order to cure any impression the jury may have that the cross-examiner is putting words in the witness’ mouth.

II. HEAR Say—What Is It and How to Get It In

4. What is a verbal act?

The hearsay rule prohibits admission of out-of-court statements offered to prove the truth of the matter stated. Not all statements made out of court are hearsay. Some such statements are of importance, not to prove the truth of what they say, but merely to prove that the statement itself was made, where this is an operative fact. The simplest example is an action for slander, where witnesses may testify as to hearing the slanderous words. The utterance of the words is itself an operative fact in the lawsuit.

The leading Minnesota case on the “verbal act” doctrine is Hanson v. Johnson. In that case the issue was whether a tenant had apportioned a particular portion of his crop to his landlord. Evidence was held admissible that the tenant had pointed to the pile of corn in question and said, “Here is your share, this belongs to you.” The court held that three acts combined to make the corn the property of the landlord: husking the corn and putting it in separate cribs; telling the landlord which was his share; and the landlord’s acquiescence in the division. The verbal statement was admitted as being one of the operative acts.

5. A body is found, believed to be that of Jones, and his widow sues to collect his insurance. The insurance company believes Jones is not dead and that the claim is a fraud. Shortly before the time the body was found Jones wrote a letter saying he was leaving on a trip to a certain destination. The body was found at the place named in the letter as Jones’ destination. Is the letter admissible?

A reasonably well-understood exception to the hearsay rule allows statements, otherwise hearsay, which are offered to show

11. Tracy, Handbook of the Law of Evidence 223 (1952), argues that this is not a “verbal act” at all, saying that the act of pointing to the crib had nothing equivocal about it, and the statement did not aid in giving legal significance to the act but merely stated a past transaction. But McCormick describes the Hanson case in detail as “illustrating the principle” of the “verbal act.” McCormick, Evidence 404 (1954).
the declarant's then existing state of mind. From this the additional step has been taken of permitting admission of such statements in order to support the inference that an intent shown by the state of mind was subsequently carried out. The facts in the problem are a simplification of those in the famous case of Mutual Life Ins. Co. v. Hillmon, where a letter similar to that described in the problem was held admissible as supporting the inference that the letter writer went to the place he had intended to visit, and thus that the body was his. Justice Cardozo has described the ruling in the Hillmon case as "the high-water line beyond which courts have been unwilling to go." The Minnesota Supreme Court, however, has not been reluctant about going at least as far as the high water line. In a prosecution for first-degree murder the court held admissible a statement of the victim, made to a friend a few hours before the slaying, that she had an engagement that night with the defendant. The court referred to the statement as a "verbal act," but present day analysis would deem it rather a declaration of intention admissible to show that the intention was carried out.

6. What is res gestae?

Judge Nordbye remarked at the Institute on Practical Evidence that "definitions of res gestae are as numerous as prescriptions for the cure of rheumatism and generally about as useful." It would be feckless to venture a definition here. This doctrine, if doctrine it be, is the subject of a 200 page annotation in American Law Reports and of an unusually able analysis in this Review. The mouthfilling Latin term has been used as justification for admitting statements which are now seen to fall within four different exceptions to the hearsay rule: (1) declarations of present bodily conditions;
(2) declarations of present mental states;21 (3) excited utterances;22 and (4) declarations of present sense impressions.23

The tendency is surely toward broadening of these exceptions. In a Minnesota case which has attracted much attention, an unexcited statement 45 minutes after the event by the victim of a fall was held admissible in what the court called "a liberal interpretation of the res gestae rule."24

7. Is a statement by someone not a party to the case, which would otherwise be excluded as hearsay, admissible on the ground that it is an admission against interest?

The question contains a very common error in terminology which obscures clear thinking. Use of the phrase, "admissions against interest," confuses two separate exceptions to the hearsay rule.25 The admissions of a party and his privies are admissible against him without more, even though he is available as a witness and even though they may not—but usually will be—against his interest;26 statements of a person who is not a party, or privy to a party, may be admitted as declarations against interest only when the declarant is not available at the trial and the statement was against his interest when it was made.27

The leading Minnesota case in point contains dicta, frequently since repeated, that declarations against interest are admissible only where the declarant is dead and the statement was against his pecuniary interest.28 But the trend is to view more liberally the conditions on admissibility of declarations against interest. Thus the Uniform Rules of Evidence would not require that the declarant be dead, but would accept his unavailability for any reason, and would allow the statement if it would have subjected declarant to civil or criminal liability or risked making him an object of hatred, ridicule or social disapproval in the community.29 In an interesting

24. Jacobs v. Village of Buhl, 199 Minn. 572, 583, 273 N. W. 245, 250 (1937). As to whether the rule there laid down is applicable to all actions or only to workmen's compensation proceedings, see DeParcq, The Uniform Rules of Evidence: A Plaintiff's View, 40 Minn. L. Rev. 301, 343-4 (1956).
Minnesota case, a mother was prosecuted for manslaughter for throwing into the stove the new-born baby of her unmarried daughter. A majority of the court found insufficient proof that the baby had been born alive, and thus reversed the conviction, though they discussed no evidence questions. A persuasive dissent would have emphasized a statement out of court by the daughter which indicated the baby had been alive. This statement would not have met the test of the old Minnesota dicta, but would have met the test of the proposed Uniform Rule. The daughter, though alive, refused on fifth amendment grounds to answer questions about the incident, and thus was "unavailable." And since she was in fact herself convicted for concealing the birth of a child, her statement at the time it was made would have subjected her to criminal liability, as well as incurring the risk of "social disapproval in the community."

There do not seem to be any Minnesota holdings, as contrasted with dicta, that declarant must have been dead and the statement against his pecuniary interest, and the court itself has said that the latter requirement is contrary to modern thinking.

8. Can public opinion polls be used as evidence or would they be excluded as hearsay? If they are admissible at all, is it necessary to call the persons who actually asked the questions of the public, or is it enough to call the person who directed the making of the poll?

Use, or attempted use, of public opinion polls as evidence is a very recent development in the law, and doctrine has not yet fully crystallized. This technique can be helpful in a wide variety of cases. It can be used in a trademark action to show confusion or lack of confusion in the public mind, in an anti-trust case to show where the patrons of certain businesses come from, in a misbranding case to show the impression the public has as to the properties of the product, or in a criminal case to show whether there is prejudice in the community which will prevent a fair trial. Doubtless new uses of polls as evidence will be developed in the future.

Probably the results of such polls, when properly conducted, would be held admissible today, although there is no agreement as to the theory on which they are admitted. Some courts and writers have thought that these are not hearsay at all, since the answers of the persons interviewed are not being offered to prove the truth of the answer but merely that such an answer was given, a sort of

31. In re Forsythe's Estate, 221 Minn. 303, 312, 22 N. W. 2d 19, 25 (1946).
verbal act. Others have contended that these polls may be admitted as an exception to the hearsay rule, either as a declaration of a present state of mind or by analogy to the exception for trade reports. In a non-jury case in the local federal court, Judge Bell relied on such poll results without feeling it necessary to consider the hearsay question.

It seems to be usual to call the interviewers themselves to testify as to the results they obtained. But where a really large survey has been made, even this can be impracticable, and the lawyer may wish to put on the stand only the person who directed the survey. This would raise a further question of hearsay, because the supervisor would be testifying as to things he was told by the interviewers who worked under him. I have found no decisions on the propriety of such proof. A possible way to bring it in would be to qualify the supervisor as an expert, have him testify as to the care with which he chose his interviewers, instructed them in their work, and checked the end product to make sure that the results were scientifically reliable and valid in the light of the recognized principles applicable in this field. After laying this foundation, it might then be proper to ask for his expert opinion as to the state of public feeling on the particular question:

“Opinion testimony by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by any other means, is competent even though the firsthand sources from which the information came be not produced in court.”

Where the poll is being used in a criminal case on a motion for change of venue because of local prejudice, hearsay problems will be minimized since there is no requirement that the court on such a motion consider only such evidence as would be admissible at the trial of the case. Results of a poll in such situations have been pre-

38. See Note, 66 Harv. L. Rev. 498, 508-10 (1953).
sented by affidavit; but the court may hear oral testimony on a motion and on something as new and unfamiliar as opinion polls, use of live witnesses might well be more satisfying and impressive to the court.

There is no Minnesota decision on the problems here discussed, but a hint that the court will allow use of this kind of evidence may be found in *Hanson v. Robitshek-Schneider Co.* In a decision which goes to the verge of the law, workmen’s compensation was allowed for death of a man attacked by thugs after leaving his place of employment, in the warehouse district of Minneapolis. A sociological study which showed that area of Minneapolis to abound with criminals was held admissible to prove that decedent’s employment in the area subjected him to a danger, and that it was this danger which led to his death.

9. Where a witness is on the stand, and thus subject to cross-examination, can he testify as to previous statements he has made on the subject matter of the action?

The answer in Minnesota today is clearly “No.” Our court has held that if a statement would be hearsay from the lips of another witness it is no less hearsay because the witness happens to be the person who made the prior statement. If I have a witness on the stand and I ask him, “How fast were you going?” and he says, “Fifty miles an hour,” there is no hearsay problem. But suppose I then introduce a letter he wrote ten days after the accident in which he said he was going 50. The fact that he is both the witness and the person who made the prior statement does not prevent that earlier statement from being hearsay. The reasoning of Justice Stone in the famous case of *State v. Saporen* is that the real danger of hearsay is that it is not subject to cross-examination, and that the opportunity to cross-examine, to be meaningful, must be an opportunity to strike while the iron is hot, rather than months later.

Scholars reject this view. As Professor Louisell aptly put it at the Institute, “Wigmore would have laughed at that decision had he lived to see it.” And indeed Professor McCormick has persuasively rebutted point-by-point the argument stated by Justice Stone. The Uniform Rules of Evidence are contrary to Minnesota law on this question, and would allow introduction as posi-

40. 209 Minn. 596, 297 N. W. 19 (1941).
41. 205 Minn. 358, 285 N. W. 898 (1939).
tive evidence of written statements made prior to the action by a witness who is present and available for cross-examination.43

III. DEAD MEN TELL NO TALES

10. When is conversation with a deceased person admissible as of right?

The much criticized "Dead Man's Statute"44 prohibits a party to an action, or any person interested in its outcome, from testifying concerning any conversation with a dead person relative to the matter at issue in the case. Not any interest will disqualify the witness. Instead the interest must be legal, pecuniary, certain, direct, and immediate, and not an uncertain, contingent, remote, or merely possible interest.45 But a number of exceptions have been created to the rule set out in the statute. Thus it does not bar testimony: by the spouse of the plaintiff in a personal injury action46 or an action to set aside a mortgage;47 or by an agent or servant of a party;48 or by a nominal party;49 or by a party having no financial interest in the outcome of the case such as a trustee,50 an administrator,51 or an officer of a corporation.52 Further the conversation is admissible if it has been testified to at a prior trial by the deceased.53

11. In application of the "Dead Man's Statute," is it material that the testimony of the witness who had conversations with the dead person is adverse to the witness' own interests?

The "Dead Man's Statute" is the last remnant of the discredited common-law rule that disqualified as a witness anyone interested in

43. Thus see Uniform Rules of Evidence, Rule 63(1), approved by DeParco, The Uniform Rules of Evidence: A Plaintiff's View, 40 Minn. L. Rev. 301, 338-43 (1956). Of course the court would have to retain discretion to exclude such statements where they would be prejudicial in effect, as in giving extra, and improper, weight to identification testimony in a criminal case merely by showing that the witness made a similar identification at some earlier time. See Desmond, The Trowbridge Case: A Near Miscarriage of Justice, 41 A. B. A. J. 209 (1955).
44. Minn. Stat. § 595.04 (1953).
48. Boehne v. Guardian Life Ins. Co., 224 Minn. 57, 74, 28 N. W. 2d 54, 64 (1947); State v. Sweeney, 180 Minn. 450, 231 N. W. 225 (1930); Darwin v. Keigher, 45 Minn. 64, 47 N. W. 314 (1890).
49. Suter v. Page, 64 Minn. 444, 67 N. W. 67 (1896).
52. Sacred Heart Church v. Soklowski, 159 Minn. 531, 199 N. W. 81 (1924).
the outcome of the litigation. The basis of this rule was the likelihood of perjury. The "Dead Man's Statutes" were enacted, when the general common-law disqualification was abolished, on the theory that perjury is likely by an interested witness where the person with whom he talked is not alive to expose the lie. But there is hardly an incentive to lie in order to hurt one's own interests. Thus the reason for the statute does not apply where the testimony is adverse to the interest of the witness. On such an analysis as this the Minnesota Supreme Court, in a scholarly opinion, has refused to apply the statute to bar such testimony.54

12. May a party testify as to a conversation with a dead person if his opponent has opened up the subject by cross-examination?

Yes. The rights given by the "Dead Man's Statute" are waivable. If the court erroneously overrules an objection to testimony which should have been barred by the statute, the objecting party does not waive his rights by cross-examining on the same matters or offering direct evidence to meet that erroneously admitted. But if either on cross-examination or direct examination the adverse party goes beyond the scope of the inquiry to which his objection was properly made and as to which it should have been sustained, or if on his own he brings up the subject, and introduces evidence of other matters in regard to the conversation, he waives the benefit of the statute and any erroneous rulings of the courts.

"In other words, when a litigant thus voluntarily opens the door for the purpose of obtaining what he affirmatively desires, he thereby waives the right given by the statute to exclude such testimony and gives the interested party or witness the right to further testify in his own behalf and fully explain such transaction or conversation."

13. What is the future of the "Dead Man's Statute?"

Our court has noted, correctly, that "most commentators condemn dead man statutes."56 Yet in the same case in which it made that remark it gave a very strict reading to the statute, and indeed announced that it would enforce the statute to the full extent intended by the legislature. The Minnesota State Bar Association at its 1955 convention endorsed a proposal to abolish the disqualification of the "Dead Man's Statute" and leave it to the trier of fact, whether court or jury, to determine the credibility to be given to testimony of conversations with a dead person. The proposed statute is highly desirable and its chances of enactment seem good.

54. Ehmke v. Hill, 236 Minn. 60, 51 N. W. 2d 811 (1952).
IV. DOCUMENTS DON'T LIE

14. When may the plaintiff introduce his hospital records? How about his history, as given to an intern, or a nurse's report on her observations of plaintiff's actions? When may the defendant introduce plaintiff's hospital records?

Admission of the hospital record depends on what it contains. To the extent that the record shows facts it is admissible, but parts of it which reflect opinions are not admissible; instead the person who gave the opinion must be called as a witness and thus subjected to cross-examination. The following parts of the record are routinely admitted: nurse's notes taken during the progress of the patient's care; charts reflecting temperature, blood pressure, and pulse rate; and laboratory tests and records. But parts of the record which contain interpretations of x-rays or opinions of the attending physician as to the cause and prognosis of the condition are not admissible.\(^5\)

Defendant may introduce all proper parts of the hospital record except as the privilege objection may be made. Of course the privilege may have been waived by requesting and obtaining a copy of a report of a pre-trial physical examination made by the defendant\(^5\) or by introduction of evidence as to the physical condition. But mere introduction of the non-privileged part of the hospital record, such as nurse's notes and the like, would not waive the plaintiff's privilege as to the parts of the record to which the privilege applies.

The real dynamite in a hospital record is the history of how the condition developed. In personal injury cases the history frequently will refer in some detail to the manner in which the accident occurred that precipitated the hospitalization. Thus in a recent case there was a sharp issue as to whether plaintiff had been thrown from a streetcar as she was boarding it, or whether she fell while running across the street to the car. The history in the hospital record contained the statement: "Approx 3:45 PM 5/16/50 pt entering rear door of Selby-Lake streetcar when door closed throwing her to ground on to left side." The supreme court held it was error to permit the plaintiff to introduce this history, laying down the rule in unequivocal terms:

"We believe the better rule is that under M.S.A. c. 600 hospital records and charts, properly identified, are admissible when not privileged to prove diagnosis, treatment, or medical history of the patient to the medical and surgical aspects of the case but


that hearsay and self-serving statements contained therein are not admissible to prove how an injury occurred, at least when offered by the patient. Whether they are admissible for impeachment purposes or for some other purpose not here involved we need not now determine.\(^5\)

15. **Is an accident report made by the driver of a bus to the bus company admissible in evidence?**

Though the decisions are subject to criticism, such a report has been held not admissible under the Uniform Business Records as Evidence Act,\(^6\) even though it was made pursuant to an established routine of the company.\(^6\) The business of a bus company, so it is said, is carrying passengers rather than maiming them.\(^6\) Under proper circumstances the report may be used by an injured person to impeach the defendant or regarded as an admission, or it may be introduced by the defendant to show that its claims were not recently fabricated.\(^6\) If the report was prepared for some other purpose in addition to preparation for litigation, it is subject to discovery.\(^6\)

16. **Are income tax returns admissible to prove earnings?**

It is quite clear that defendant can introduce plaintiff's tax returns as admissions by plaintiff as to what his income was.\(^6\) The more difficult problem is whether plaintiff can introduce his own returns. There is no square holding on this point. In one recent case plaintiff was allowed to introduce audits made in order to prepare his returns, but the case turns partly on the fact that defendant, having failed to object to such an audit for one year, could not object to the audits for subsequent years.\(^6\) Also in that case plaintiff wanted to use the audits to show that his income since the accident was small.

I think that in the more usual case, where plaintiff offers returns showing his income before his injury as proof of what he was earning then, and thus how much his lost earning power is worth, such returns should be admitted. This course is actually followed

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60. Minn. Stat. §§ 600.1 et seq. (1953).
65. Wentz v. Guaranteed Sand & Gravel Co., 205 Minn. 611, 287 N. W. 113 (1939); Kregel v. Cirkler, 158 Minn. 175, 198 N. W. 664 (1924).
66. Dix v. Harris Machinery Co., 240 Minn. 218, 60 N. W. 2d 628 (1933).
in many cases, and is a convenient way of proving earnings. Further, the returns are trustworthy since there is a complete absence of motive on the part of plaintiff to overstate his income prior to the injury, and thus pay more tax than is necessary.67

Minnesota district courts have consistently held that a party's income tax returns are subject to discovery.68

17. In a case for property damage to an automobile, can I prove the damage by asking the owner what the repair cost, bolstering this with a receipted bill, or must I bring on a repairman to testify as to the "reasonable cost?" Suppose that some of the damage hasn't yet been repaired, but that the owner has had an estimate as to its cost. Can he testify as to the amount of this statement?

It is necessary to distinguish between the measure of damage and the evidence necessary to prove the damage. Normally the measure of damage where an automobile has been damaged will be the reasonable cost of restoring the car to its former condition. In Minnesota the actual cost of repair is always admissible as tending to show what the reasonable cost would be.69 Thus the plaintiff can testify as to the amount he has paid and the receipted bill is unnecessary.

The damage not yet repaired poses quite a different problem. There is no doubt of the plaintiff's right to collect for necessary repairs even though he has not had the repairs made.90 But I doubt if an estimate would be admissible to prove this anticipated cost. The estimate would be merely the conclusion of the garageman who made it, and would not be admissible unless he were present and subject to cross-examination.

Of course in the usual case the most convenient course is for counsel to stipulate as to the cost of repair.

18. How can I use the answers to interrogatories at the trial of a case? May they be referred to in argument without having been introduced in evidence?

Written interrogatories may only be addressed to an adverse party72 and thus are admissible in evidence at the instance of the

67. Cf. In re Lust, 186 Minn. 405, 412, 243 N. W. 443, 446 (1932).
69. Engholm v. Northland Transp. Co., 184 Minn. 349, 238 N. W. 795 (1931). See also Lehman v. Hansord Pontiac Co., 74 N. W. 2d 305 (Minn. 1955), holding that the owner of real or personal property may testify as to its value.
70. Hanson v. Hall, 202 Minn. 381, 279 N. W. 227 (1938).
interrogating party so far as the documents themselves go. But there may be other objections to their admission, such as that they contain hearsay or opinion or are not the best evidence. Most evidence problems will be obviated by the fact that, being by the adverse party, the answers are admissions and not themselves objectionable as hearsay, although they may quote remarks of other persons which would be hearsay. Because of the possible infirmity of some answers to interrogatories, they should be read into evidence or offered as exhibits, in order that objection may be made to portions of the answers not properly admissible.

19. What sort of foundation do I need to make before I can introduce photographs of plaintiff's injuries in a personal injury case?

It is necessary to demonstrate that the photographs accurately represent the injuries as of the time they were taken. Usually this will be done most conveniently by having the attending physician examine the photographs and so testify. The supreme court has recently noted that

"caution must be exercised in admitting colored photographs which may tend to exaggerate the seriousness and extent of wounds or burns. Where such photographs give false impressions of disability or of pain and suffering endured, the prejudicial effect might well outweigh their probative value."

20. Suppose that a document is still in existence but is without the jurisdiction of the court and not subject to control of either party. How do I lay a foundation to introduce secondary evidence as to its contents?

The witness should first be asked if he knows of the existence of the document. Then he should be asked where the document is. Presumably he will testify that it is in another state. In many jurisdictions that is the only showing required in order to introduce secondary evidence of its contents. But in Minnesota it is necessary to go further and prove that the proponent has made reasonable efforts without avail to secure the original or that there are circumstances which show that such efforts would have been fruitless. Thus the witness should be asked what his relation is with the person who has the document, and what efforts he has made to have it turned over to him. After this showing the witness can be

73. 4 Moore's Federal Practice 2342-43 (2d ed. 1950).
75. Id. at 73.
asked if he knows the contents of the document, and when he says
"Yes," can be asked to relate these contents.

Of course if the document is within the state it is necessary to
show that a subpoena duces tecum has been served on the possessor
before secondary evidence will be admitted.77

21. An Iowa resident assigns a claim to a Minnesota resident by
a written assignment notarized by an Iowa notary. Is the assign-
ment admissible without more? Will it be admissible if the assignee
can testify that he is familiar with the assignor's handwriting, and
identifies the signature on the assignment?

If the document was identified by the assignee as stated in the
latter part of the question, it would be admissible with or without
the notary's seal. Indeed it seems probable that notarization or
acknowledgment of an assignment of this sort is unnecessary in
any event, and that the mere signature will be enough.78 Where a
notarial seal is required, and a foreign notary is used, the notary's
authority must be certified by the clerk of a court of record.79

22. We interviewed witnesses to an accident, and recorded our
interview on a tape recorder. Is the tape recording admissible
either as evidence or for impeachment or to refresh the memory of
the witnesses? Can the other side get the tape recording before trial
by discovery or is it protected by Rule 26.02?

A number of recent appellate decisions have laid down the rule
that tape recordings can be played in court if they are properly
authenticated by a showing that they have not been edited and
that they are thus an actual recording of what the person said.80 The
recording is then regarded as the equivalent of a written statement
and is subject to the same rules of evidence as a written statement.
It cannot be used as substantive evidence unless it falls within one
of the exceptions to the hearsay rule. It can be used for purposes
of impeachment.

A tape recording should similarly be regarded as the equivalent
of a writing, and within the immunity from discovery created by
the final sentence of Rule 26.02.81

77. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357
(1913).
78. Minn. Stat. § 600.15 (1953).
79. Minn. Stat. § 600.09 (1953).
80. The cases are collected in Conrad, Magnetic Recordings in the
Courts, 40 Va. L. Rev. 23 (1954). That Minnesota will follow the lead of
other jurisdictions is indicated by recent dicta in which tape recordings were
analogized to written statements. See Price v. Grieuer, 70 N. W. 2d 421, 424
(Minn. 1955).
Dist., No. 280635, Dec. 23, 1953, quoted in extenso in Wright's Minnesota
Rules 166-68 (1954).
23. Suppose a witness looks at a paper while on the stand. Can opposing counsel examine the paper?

Anything inspected by a witness on the stand must be available for examination by adverse counsel, in order to protect the adversary’s right of cross examination. If the document is not shown in full to adverse counsel then he can have the testimony of the witness stricken just as if the witness had refused to submit to cross-examination, even though the document is not offered in evidence and even though the witness may have looked only at a small part of a large document.

V. HOW TO MAKE A WITNESS LOOK BAD—THE ART OF IMPEACHMENT

24. Is the rule that a party may not impeach his own witness being abandoned?

There are signs that it is. In a recent decision which has attracted much attention, Judge Goodrich said that the rule is “foolish,” that it is not supported “in logic or common sense or fairness,” and that “all the modern writers in the law of evidence speak to the same effect.” It does not apply to FELA death cases, whether they are tried in state or in federal court. An old Minnesota case indicated somewhat cryptically that perhaps it has never been the law in this state, and it will clearly not be the law if the Uniform Rules of Evidence are adopted.

25. Is there any real distinction between impeachment and positive evidence? Under what circumstances should the court instruct the jury that certain evidence or testimony was proper only to show the credibility of the witness and may not be regarded as evidence on the merits?

The one circumstance in which an instruction of the sort mentioned is proper is where the evidence is a prior inconsistent statement of a non-party witness. Of course if the Uniform Rules are adopted, such a statement will be admissible as positive evidence and such an instruction would no longer be used.

My answer to the first part of the question would be “No.” Though there is a vast distinction in theory between impeachment and positive evidence, there is none in practice. Professor McCor-
mick says that instructions telling the jury particular evidence was admitted only for impeachment are

"a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it. Trial judges seem to consider the instruction a futile gesture." 87

And he describes the distinction as demanding a "finical neutrality alien to the atmosphere of jury trial" and as "arbitrary and indiscriminate." 88 Most experienced lawyers would agree. 89

26. *Is a question which calls for the conclusion of a witness proper on cross-examination?*

Such a question is proper. It is also extremely dangerous. Where the witness is hostile, as he will normally be under cross-examination, he is likely to draw inferences and reach conclusions which will not be helpful to the cross-examiner.

**VI. Expert Use of Expert Testimony**

27. *A standard objection to a question calling for the conclusion of an expert witness is that it "usurps the function of the jury." When is this objection valid?*

This famous old objection does not amount to much anymore. Wigmore dismissed it as "empty rhetoric." 89 In a thorough consideration of the question, the Minnesota Supreme Court has said unequivocally:

"Experts are permitted to give their opinions upon the very issue which the jury will have to decide, but such opinions are not conclusive." 892

A somewhat different rule prevails in federal court, where the expert opinion is not allowed if it goes to the ultimate issue of the whole case, rather than merely a part of the case. 92

The valid objection, often confused with the objection set out in the question, is that the question put to the expert involves a matter which the jury can decide fully as well as could an expert, and thus there is no need for opinion testimony. 93

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88. Id. at 78.
91. Berg v. Ullevig, 244 Minn. 390, 395-6, 70 N. W. 2d 133, 139, noted 39 Marq. L. Rev. 173 (1955); Piche v. Halvorson, 199 Minn. 526, 530, 272 N. W. 591, 593 (1937).
28. Plaintiff's doctors all testify that she has been injured by applications of a certain liniment. The evidence in the record, not contradicted, is that plaintiff never used any liniment before. May defendant ask plaintiff's doctors a hypothetical question which requires them to assume that plaintiff used the liniment five times previously without injury, and asks whether, on these facts, they would conclude that the liniment caused the injury?

It would have seemed that the answer to this question would be governed by the principle laid down by Wigmore that

"it is obvious that the question must not include data which there is not a fair possibility of the jury accepting." 94

Such a rule has been applied in Minnesota. 95 And I think it is fair to say that the consensus of the panel was that the question described would be improper.

The supreme court, in a case which was under advisement at the time of the Institute, decided to the contrary. 96 It held the case governed by an exception to the stated rule which allows questions on cross-examination of an expert which, for the purpose of testing his skill and accuracy, assume facts having no foundation in the evidence. 97

29. What are the limitations on the use of medical texts in cross-examining expert witnesses?

Medical treatises are not admissible as substantive evidence because the authors are not under oath nor subject to cross-examination, 98 although this rule would be changed by a controversial provision of the proposed Uniform Rules of Evidence. 99 Under existing law, however, there are circumstances in which treatises can be used to test the qualifications and credibility of an expert witness. If the expert has assumed to base his opinion upon a particular medical book, he may be cross-examined with reference to it, and parts of the book which contradict him may be read into the record. 100 If he says generally that the authorities support his view, he may be questioned, on cross-examination, as to whether a medi-

94. 2 Wigmore, Evidence § 682 (3d ed. 1940).
95. State v. Hanley, 34 Minn. 430, 433 (1886); Kenney v. Chicago G. W. Ry., 71 N. W. 2d 669, 672 (Minn. 1955).
96. Randall v. Goodrich-Gamble Co., 70 N. W. 2d 261, 265 (Minn. 1955). The present writer was of counsel to the unsuccessful plaintiff.
97. Williams v. Great Northern Ry., 68 Minn. 55, 65, 70 N. W. 860, 864 (1897); 2 Wigmore, Evidence § 684 (3d ed. 1940).
100. See Briggs v. Chicago G. W. Ry., 238 Minn. 472, 494, 57 N. W. 2d 572, 583 (1953).
cal work, admitted by him to be a standard authority, does not express a contrary view.\textsuperscript{101} Passages from a work he concedes to be authoritative may be read by the cross-examiner, not as evidence of their truth but solely to discredit the expert.\textsuperscript{102} Probably such questions may be asked about works admittedly authoritative even though the expert, on direct examination, did not purport to rely on the authorities.\textsuperscript{103}

But the expert may not be cross-examined about treatises he does not accept as authoritative, nor may the views expressed in such treatises be indicated.\textsuperscript{104} And it has even been held to be reversible error to permit cross-examination about a book which the witness "reluctantly" accepts as reasonably authoritative.\textsuperscript{105}

30. \textit{Minnesota Rule 35.01 allows blood tests as a form of discovery in a paternity action. To what extent are the results of such tests admissible?}

There is no Minnesota decision in point, and answer to this question is necessarily a surmise based on what other courts have done.\textsuperscript{106} Even this is somewhat unsatisfactory for many aspects of this matter are still the subject of dispute among the courts. It is assumed here that the Minnesota court, which has made something of a reputation for itself by its scholarly interest in problems of evidence, will look to the latest and best decisions elsewhere as a guide.

Blood tests can never prove that a particular person is the father of the child. They can, however, positively exclude the possibility of paternity. In the present state of the science, an alleged father wrongly accused should be able to demonstrate his innocence by blood tests in about 55\% of the cases.\textsuperscript{107} Assuming an adequate foundation of expert testimony, vouching for the reliability of the technique and the correctness of its application in the particular case, expert testimony that the accused person is not the father of the child would now be generally received.\textsuperscript{108} Indeed most courts

\begin{footnotes}
\item[101] \textsuperscript{101} Landro \textit{v. Great Northern Ry.}, 117 Minn. 306, 309, 135 N. W. 991, 992 (1912); \textit{cf.} Reilly \textit{v. Pinkus}, 338 U. S. 269 (1949).
\item[102] \textsuperscript{102} Bowles \textit{v. Bourdon}, 148 Tex. 1, 219 S. W. 2d 779 (1949).
\item[103] \textsuperscript{103} Though the question is technically left open, the court seems to hint this is Briggs \textit{v. Chicago G. W. Ry.}, 238 Minn. 472, 491-92, 57 N. W. 2d 572, 582 (1953). This is the sounder rule. McCormick, Evidence 620 n. 3 (1954).
\item[104] \textsuperscript{104} Briggs \textit{v. Chicago G. W. Ry.}, \textit{supra} note 103.
\item[105] \textsuperscript{105} Zubryski \textit{v. Minneapolis St. Ry.}, 68 N. W. 2d 489 (Minn. 1955), 39 Minn. L. Rev. 905.
\item[106] \textsuperscript{106} There is a splendid discussion in McCormick, Evidence \S 178 (1954), and an exhaustive annotation at 163 A. L. R. 939 (1946).
\item[107] \textsuperscript{107} Keeffe and Bailey, \textit{"A Trial of Bastardy Is a Trial of the Blood"}, 34 Corn. L. Q. 72, 75 (1948).
\item[108] \textsuperscript{108} McCormick, Evidence 381 (1954).
\end{footnotes}
would allow it even to rebut the presumption of legitimacy where a husband wishes to show he is not the father.\textsuperscript{109}

Courts today do not allow the evidence where it shows that the accused person could have been the father of the child.\textsuperscript{110} Recognizing that such evidence is not conclusive, scholars have nevertheless argued that the possibility of paternity is relevant along with other identifying traits, and have urged that courts should have discretion to admit such evidence where they believe its relevance outweighs its possible prejudicial effect.\textsuperscript{111} These arguments seem persuasive.

Where the experts are agreed that the blood tests show the accused person could not have been the father, the popular view today is that this testimony should be given conclusive effect, and jury verdicts to the contrary set aside.\textsuperscript{112} Surely this is right if the purpose of the trial is to determine the fact question of whether accused fathered the child. I submit that is not the purpose of the trial; it is rather to determine whether the person named should provide financial support for the child. And I think an important truth is hidden in McCormick's happily phrased description of one case where eleven sets of blood tests proved defendant could not be the father, and where:

"The jury, as usual, found the defendant \textit{was} the father, probably on the doctrine of assumption of risk."\textsuperscript{113}

I think we have here one of those many areas where juries use their common sense to create a different rule of law than that announced by the courts. The courts say defendant must pay if he is the father: juries say defendant must pay if he had access at the proper season and thus could, but for the whims of chance, have been the father. The conflict between these rules should not be resolved by pretending it is a question of evidence, or by increasing the denigration of the jury and the glorification of appellate courts.

31. \textit{In a FELA case the employee's widow testifies that he was making, after taxes, $425 a month, that he always turned over his full pay check to his wife, and that she gave him $50 a month for his own expenses and used the rest for the family. Plaintiff calls an actuary and asks the actuary the present value of $375 a month for the employee's life expectancy. Is this question proper?}

\textsuperscript{109} E.g., Cortese v. Cortese, 10 N. J. Super. 152, 76 A. 2d 717 (1950).
\textsuperscript{110} E.g., State v. Morris, 156 Ohio St. 333, 102 N. E. 2d 450 (1951).
\textsuperscript{113} McCormick, Evidence 382 (1954).
The measure of damages in an FELA death action is the present value of decedent’s expected contribution to his family. The question here is whether the actuarial testimony would be useful to the jury in determining those damages. The Seventh Circuit seems to have held, in a remarkably unclear and cantankerous opinion, that it is error to permit actuarial testimony based on a measure of damages which the jury would not be free to adopt.114 In the case referred to the improper actuarial evidence related to decedent’s gross earnings rather than to his contributions.

On the facts presented, decision would turn on whether $375 a month can be regarded as decedent’s contributions to his family, or whether part of that $375 goes for his own food, housing, etc., and thus cannot be taken into account. I think the testimony proper.115 My analysis would be that plaintiff has made a prima facie showing of contributions in the amount of $375 a month, and that an actuary can testify as to the present worth of this sum for the husband’s life expectancy. Defendant is then free by evidence or argument to seek to persuade the jury that the contributions were some sum less than this. This argument turns on the settled principle that actuarial testimony may be admitted, if on the proper theory, even though the figure used by the actuary in his computations was one which the jury might not accept.116

32. Is it proper, in an injury case, to ask the jury to determine how much per day is a reasonable award for pain and suffering, and have an actuary testify as to the present value of this daily sum for plaintiff’s life expectancy?

The answer seemingly must be “No,” although the decisions are not entirely clearcut. Actually the testimony seems quite unnecessary, for in most jurisdictions it is held that damages for pain and suffering need not be reduced to present worth.117 The more interesting underlying question goes to the permissibility of the currently popular technique of asking for damages for such elements as pain and suffering on a daily basis. The court has expressed itself, some-

what unclearly, on this question in two decisions announced a week apart.

In the *Ahlstrom* case the court held damages of $275,000 excessive, and ordered a remittitur the amount above $175,000. In the course of the decision the court said:

"An award for pain, suffering, and disability on a per diem basis ignores the subjective basis of such damages. . . . Each day of suffering is a part of a whole and will vary and generally decrease as time goes on. To permit a per diem evaluation of pain, suffering, and disability would plunge the already subjective determination into absurdity by demanding accurate mathematical computation of the present worth of an amount reached by guesswork."

A week later, in the *Hallada* case, the court cut a verdict from $170,154.81 to $105,000. This time it took a more temperate view of the process of calculation here under consideration.

"The segmentation process of breaking the damage picture into fragments and then applying to each fragment a mathematical formula whereby damages are calculated at a fixed rate per day for the entire period of the injured person's life expectancy, though illuminating, may be misleading. . . . [P]ain and suffering which is subjective and which at its very worst usually varies from day to day cannot, with any finality, be estimated on a daily basis. . . . Whatever process is adopted in fixing an injured person's damages, the reasonableness of the lump sum awarded by the jury must, in the last analysis, also be tested from the unitary standpoint of what total financial benefits that lump sum will confer upon the injured person as a means of making him financially whole. No award can be sustained unless it stands the test of reasonableness in the light of its over-all effect."

Since the holdings of the court in the cases discussed are merely that the verdict in each case is excessive, we have no sure guide for the future, and must try and devise a rule by the hints in the dicta. My guess is that actuaries will not be permitted to testify as to the present worth of a daily sum for pain and suffering, and that the supreme court will hold such rulings a proper exercise of the trial court's power to exclude testimony where its confusing effect exceeds its probative value. Plaintiff's counsel will be permitted to

120. *Hallada v. Great Northern Ry.*, *supra* note 119 at 98, 99, 69 N. W. 2d at 687.
argue to the jury in terms of a daily sum. But where this method of argument is used, the supreme court will scrutinize the verdict with care, and will order a remittitur if it finds the verdict too liberal.

VII. The Standard Objections to Evidence and
How to Meet Them

33. The words "irrelevant, incompetent, and immaterial" come off my tongue quite easily. When do I use them properly?

In theory evidence is "material" if it is within the issues raised in the case, while it is "relevant" if it tends to establish the proposition for which it is offered. But this distinction is rarely observed in practice and the terms are frequently used interchangeably. Indeed even the additional term, "incompetent," is probably idiomatic, with the entire phrase meaning, as Judge Loevinger believes, "irrelevant," although strictly speaking "competency" refers to whether evidence falls within one of the exclusionary rules.

The stock objection set out here should be used only where the evidence is clearly inadmissible on grounds of relevancy, and even then the addition of two more words to the objection probably adds little to clarity of thought. The court has held repeatedly that this standard objection does not suffice as an attack on evidence which is hearsay or for some other reason subject to exclusion. Probably the best advice is to avoid use of this cliche, and state instead the specific ground of objection.

34. When an objection is made to a hypothetical question on the ground that it fails to include all pertinent evidence, should the judge ask the objector what omissions he has in mind? Is it proper for the objector to refuse to supply the information?

The principles applicable to this question have recently been restated by the court. The objecting lawyer is required to specify the grounds of his objection to a hypothetical question, not only to enable the court to rule intelligently thereon but also to afford opposing counsel an opportunity to amend and overcome the defect in his question if possible. If the lawyer asking the question is in

122. Cf. J. D. Wright & Son Truck Line v. Chandler, 231 S. W. 2d 786
doubt as to what was wrong with it, he has the right to ask the court and it is the court's duty to answer the inquiry, though this of course does not mean that the judge must frame the question for the lawyer.\textsuperscript{127}

35. \textit{In a suit against the owner of a building for permitting a dangerous condition to exist which resulted in personal injuries, is it competent evidence that, prior to the accident, the owner's liability insurer told him the condition was dangerous?}

Remedial measures taken after the accident are, of course, inadmissible by a well-settled rule.\textsuperscript{128} But this is quite different from knowledge of the dangerous condition before the accident. An element for recovery against the owner or possessor of land is that he knows the condition involves an unreasonable risk, and where a licensee is suing, it is also necessary to show that the owner knew of the existence of the condition.\textsuperscript{129} A statement by some third person to the owner prior to the accident has a direct bearing in showing realization of the risk, and is admissible for that purpose.\textsuperscript{130} Nor is the evidence made inadmissible because it incidentally reveals that defendant is insured. Evidence of insurance is not relevant to show negligence but otherwise proper evidence is still proper though it discloses the presence of insurance,\textsuperscript{131} subject to the power of the court to exclude otherwise admissible evidence where its prejudicial effect exceeds its probative value.\textsuperscript{132} Where the evidence is as directly useful as in the present question, it is hardly likely that that power should be exercised.

36. \textit{How much previous observation is necessary as a foundation to expressing an opinion as to the speed of a moving automobile?}

To make a witness competent to give such evidence no expert training is required. Any person of ordinary intelligence who can say that he is able to form an estimate as to the speed of the automobile, and that he saw it in motion, so that he had reasonable opportunity to observe its speed, can give such an opinion.\textsuperscript{133} The court has held, however, that where on his own testimony the wit-

\textsuperscript{127} State v. Quirk, 101 Minn. 334, 339, 112 N. W. 409, 412 (1907).
\textsuperscript{128} Morse v. Minneapolis & St. L. Ry., 30 Minn. 465, 16 N. W. 358 (1883); Uniform Rules of Evidence, Rule 51; McCormick, Evidence § 77 (1954).
\textsuperscript{129} Restatement, Torts §§ 342(a), 343(a) (1939).
\textsuperscript{130} Cf. Malmquist v. Leeds, 71 N. W. 2d 863, 868 (Minn. 1955), in which the present writer was of counsel for the successful plaintiff.
\textsuperscript{131} McCormick, Evidence § 168 (1954).
\textsuperscript{132} Uniform Rules of Evidence, Rule 45; State v. Haney, 219 Minn. 518, 520, 18 N. W. 2d 315, 316 (1945).
\textsuperscript{133} See Beecroft v. Great Northern Ry., 134 Minn. 86, 87 (1916), aff'd without opinion, 242 U. S. 618 (1916).
ness did not see the vehicle until it was upon him, he had no such reasonable opportunity, and should not have been allowed to estimate the speed. But this rule is being relaxed. Other jurisdictions have allowed expression of an opinion as to speed where the witness had only a momentary glimpse of the vehicle, and even where he never saw it but merely heard it. Our court has allowed an estimate of speed by one who never saw the vehicle, but merely relied on scientific data and on what others had told him, and has discussed with apparent approval a case from another state holding that even a non-expert who had not seen the car in motion could give an opinion as to the car's speed based on an examination of its skid marks.

37. Can radar evidence be used to show that a driver was speeding? What kind of foundation would be required?

Although there has been confusion and uncertainty among inferior courts, many of the questions involving use of radar are likely to be resolved along the lines suggested by the New Jersey Supreme Court in the first decision on this subject by a court of last resort. That court, after a very careful review of the authorities, lent its great prestige to a determination that the reliability of radar devices for telling the speed of a moving vehicle is sufficiently beyond question that courts should take judicial notice of this fact. If, as seems likely, the Minnesota Court follows this New Jersey decision, it will be necessary to show only that the radar device was properly set up and tested by the police officers, and was functioning properly at the particular time in question; it will not be necessary to introduce independent expert testimony by electrical engineers as to its general nature and trustworthiness.

The usual method of testing the radar instrument is to set it up in the position where it is to be used. One police officer then drives

134. Ibid.
137. Id. at 363-64, 16 N. W. 2d 295-96, discussing Heidner v. Gernscheid, 41 S. D. 430, 171 N. W. 208 (1919).
138. For a definitive discussion of the early cases, see Baer, Radar Goes to Court, 33 N. C. L. Rev. 355 (1955).
through the beam and calls over his radio the speed shown on his speedometer; another officer, in the car with the radar, calls back over his radio the speed indicated by the radar. If these coincide, the device is assumed to be operating properly. One court has refused to allow evidence of such a test, on the ground that the officer’s testimony as to what he heard over the radio is hearsay. This conclusion seems very doubtful. Each officer has firsthand knowledge that his mechanism showed the same speed as was called by the other. He is testifying, then, as to the fact of utterance of one meter reading and the actual reading of the other meter. The testing was a joint undertaking, and all the parties thereto can be present in court, put under oath, and thoroughly examined. It should be held that the hearsay rule does not apply.

38. What sort of showing must be made before the results of a drunkometer test can be admitted in evidence?

A 1955 statute provides that the court “may” admit evidence of the amount of alcohol in a driver’s blood taken voluntarily within two hours of his arrest as shown by a medical or chemical analysis of his breath, blood, urine or saliva. The statute provides that such evidence shall not be conclusive. It should be noted that this statute makes admission of the test results discretionary with the court. Such tests vary widely in their reliability. Thus the simple and popular breath test is much more likely to yield an erroneous result than is a blood test. Differences among the experts as to the reliability of any scientific technique should go to the weight of the evidence, rather than its admissibility. At the same time the trial judge should not hesitate to exclude the evidence if in the particular case its probative value is

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143. People v. Offerman, 204 Misc. 769, 125 N. Y. S. 179 (1953). Professor Baer apparently agrees, though he suggests another means to bring such tests into evidence without offending the hearsay rule. Baer, supra note 138, at 372.

144. Woodbridge, supra note 141, at 815; cf. State v. Dantonio, 18 N. J. 570, 115 A. 2d 35 (1955). In State v. Ryan, 293 P. 2d 399 (Wash. 1956), such a test was held unnecessary by a divided court.


146. The following able criticisms of these tests are useful preparation for cross-examination of the prosecution’s expert. Gardner, Breath Tests for Alcohol, 31 Tex. L. Rev. 289 (1953); Rabinowitch, Medico-Legal Aspects of Chemical Tests, 39 J. Crim. L. 225 (1948). Refusal of the driver to submit to such a test should not be admissible. State v. Severson, 75 N. W. 2d 316 (N.D. 1956).


outweighed by the possibility the jury may be misled or unduly prejudiced.\textsuperscript{149}

The Minnesota statute does not provide that the court may take judicial notice of the reliability of tests for drunkenness, and scientific opinion is sufficiently divided about such tests that a court would hardly wish to take judicial notice on its own. Thus in the present state of the science the proponent of such evidence should show the underlying theory and operation of the test used, the accuracy of the method in general and the machine in particular, administration of the test of the particular defendant by qualified persons, and the medical interpretation of the results.\textsuperscript{150}

VIII. HIDING THE TRUTH BEHIND A PRIVILEGE

39. What practical effect is there to the statute which makes highway accident reports of police officers confidential? Can the police officer be called and required to testify as to statements made to him at the time of the accident? Can he use the report to refresh his recollection?

The statute\textsuperscript{151} provides that no accident report shall be used as evidence in any trial, but a 1947 amendment adds that this does not bar a person who has made such a report from testifying "as to facts within his knowledge." The amendment has been said to have overruled earlier decisions, and to permit the officer to refer to his report to refresh his recollection as to facts which he gathered during his investigation of the accident.\textsuperscript{152} In a controversial reading of the statute, the court has said that things told to the officer by the parties to the accident are "facts within his knowledge" and that he may testify as to these admissions.\textsuperscript{153}

40. Does the last sentence of Rule 26.02, which makes the work product of an attorney immune from discovery, affect the admissibility of evidence at the trial?

The rules specifically provide that information may be obtained by discovery though it would be inadmissible at the trial.\textsuperscript{154} And

\textsuperscript{149} Uniform Rules of Evidence, Rule 45; McCormick, Evidence 377 (1954).
\textsuperscript{151} Minn. Stat. § 169.09(13) (1953).
\textsuperscript{152} See Garey v. Michelsen, 227 Minn. 468, 475, 35 N. W. 2d 750, 775 (1949).
\textsuperscript{153} Rockwood v. Pierce, 235 Minn. 519, 51 N. W. 2d 670 (1952), criticized 36 Minn. L. Rev. 546.
\textsuperscript{154} Minn. R. Civ. P. 26.02; Wright's Minnesota Rules 156-57 (1954).
absent a specific rule creating immunity from discovery, anything which is admissible in evidence at the trial is, *ipso facto*, subject to discovery. The question is whether the converse of this is true, whether a rule creating immunity from discovery creates an immunity also from use at the trial.

Though there is no clear authority, on principle the answer should be “No.” The work product concept of Rule 26.02 goes beyond the attorney-client privilege as that has been understood. It does not by its terms relate to admissibility in evidence. The rule on that latter subject provides that evidence shall be admitted which is admissible “under the rules of evidence heretofore applied in the trials of actions in the courts of this state.” Again different rules govern subpoena for taking depositions and subpoena for hearing or trial. The first is specifically limited by the scope of examination permitted in Rule 26.02; the latter is not so limited. With the rules in this posture, the fair conclusion is that Rule 26.02 was not intended to change the rules of evidence at the trial, and a party may compel production at the trial, by a subpoena *duces tecum*, of documents which are immune from discovery. Though the court does not discuss this particular problem, the leading case of *Brown v. St. Paul City Ry. Co.* supports these conclusions by discussing quite independently, and in terms of different criteria, the questions of whether the document there in question is subject to discovery and whether it is admissible at the trial.

41. *I represent the plaintiff in a negligence case in which the defendant impleaded his insurance company, which had refused to defend him. An agent of the insurer, while he was on the stand, made reference to the file on the insurer's investigation. Am I entitled to see that file?*

It was pointed out earlier that the adverse party has a right to inspect any document consulted by a witness on the stand. Thus if the agent actually looked at the file while on the stand, defendant, who is surely adverse to the company, has a right to inspect the file. On the better view, plaintiff and third-party defendant are ad-

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155. “It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case.” Jackson, J., concurring in *Hickman v. Taylor*, 329 U. S. 495, 515 (1947).
158. Minn. R. Civ. P. 45.04, 45.05.
159. 241 Minn. 15, 62 N. W. 2d 688 (1954).
160. P. 650 supra.
verse parties,161 and plaintiff in the situation here described would have a similar right to look at the document. If the agent merely mentions that the company has a file but does not actually consult it, neither plaintiff nor defendant has any right to inspect it.

42. Can defendant use a statement which he has taken from an injured person if he has not provided the injured person with a copy?

The statement of an injured person may not be used in evidence unless a copy is given the injured person within 30 days after the statement was made; if the statement was taken within 30 days of the accident, it is presumably fraudulent.162 If a statement falls within the statute it may not be used to impeach the plaintiff. Everyone agreed that the statute barred use of the typical longhand statement signed by the plaintiff, but some defendants' lawyers contended that the statute did not reach situations where a court reporter had taken a verbatim account of the conversation between the injured person and an investigator for defendant, and the reporter then used the transcript to refresh her recollection as to what was said in that conversation. The court has rejected this contention, and held that the statute, intended to prevent unfair practices in the procurement of statements from injured parties, should be construed liberally:

"It does not specify that such statements be signed, and it would seem that if the obvious purpose of this statute is to be fulfilled any written statement or memorandum taken under the circumstances described, whether in shorthand, longhand, or typed, or any statement recorded by tape, wire, or otherwise would be encompassed within its terms. The rejection of a transcription of shorthand notes of such a statement would afford no statutory protection if the contents thereof are nevertheless received by the simple device of having the witness refresh her memory from the shorthand notes and thereafter relate plaintiff's responses as contained therein."

43. Does the doctor-patient privilege provide an opportunity for working a fraud on the court and jury?

Probably most professional opinion is that it does. The panel at our Institute expressed such a view, and abolition of the privilege has been a popular goal of reform groups. Scholars are seem-

ingly as one in their criticism of the privilege. The measured conclusion of a fair-minded critic is that:

"More than a century of experience with the statutes has demonstrated that the privilege in the main operates not as the shield of privacy but as the protector of fraud. Consequently the abandonment of the privilege seems the best solution."

These critics have in mind that the privilege enables a patient to tell a story of his injuries without fear of contradiction from a physician who knows this story to be untrue. And it may even permit an injured person to consult several physicians independently and put on the stand only that doctor whose testimony will be favorable, claiming the privilege as to other doctors.

Without wishing to dissent from an opinion so widely held, I should like to express a faint doubt as to its implications. Many of the abuses which the privilege permits elsewhere are not possible in Minnesota. An old and familiar practice permits the defendant to make his own physical examination. By requesting and obtaining a copy of the report of this examination, plaintiff waives his privilege with regard to any other person who has examined him with respect to the same physical condition. These procedures surely minimize, at least, the possibility of fraud.

Further, the absolute nature of other privileges can hardly survive critical analysis; the desirable solution, for the physician-patient privilege and for others, seems to me to be to give the trial court discretion to compel disclosure where the interests of justice so require. Piecemeal reform in procedure is a dangerous thing, which often saps the reform movement and prevents the sweeping reforms which are necessary. Thus I should oppose abolition of the physician-patient privilege, in the hope that dissatisfaction with that privilege could be channeled in support of the broader proposals outlined above.

164. 8 Wigmore, Evidence § 2380(a) (3d ed. 1940); Note, 12 Minn. L. Rev. 390 (1928); and other writings cited at McCormick, Evidence 220 n. 1 (1954).
165. Id. at 224.
166. Id. at 219. If the doctors are consulted jointly, putting one of them on the stand waives the privilege as to the other. Doll v. Scandrett, 201 Minn. 316, 276 N. W. 281 (1937), 22 Minn. L. Rev. 580 (1938).
167. Minn. R. Civ. P. 35.01.
168. Minn. R. Civ. P. 35.02(2); Wright's Minnesota Rules 217-18 (1954), quoting a fine opinion by Judge Flinn in the 13th District on the extent of the waiver.
169. Such a proposal is persuasively presented at McCormick, Evidence § 81 (1954).
IX. LAWYERMANSHP

44. Is it ever proper to argue offers and objections to evidence in the hearing of the jury?

Judge Loevinger, during his many years on the trial bench, strenuously objected to lawyers arguing offers of proof or objections in the hearing of the jury. He reasoned that if the objection is argued then the jury will be hearing a discussion which very often goes to the merits. Further the argument of an offer of proof will disclose the evidence as it is offered and the purpose of making the objection may be lost. The one exception which Judge Loevinger would allow is where the lawyer has asked an improper question of the sort where the question itself is the offense and not the answer. In such a circumstance the damage has been done by asking the question and the objector may be allowed to argue his objection in the hearing of the jury in order to offset that damage by his argument.

45. What preventive tactics are available to prevent the asking of a question, which I can certainly object to, but which I don't want the jury even to hear being asked?

The difficult task is to anticipate the improper question which may be asked. If this can be done, it would then be proper to go to the judge in chambers — with opposing counsel of course present — and ask for a ruling in advance. If the court is reluctant to rule on an objection not yet made to a question not yet asked, he may well order the opposing attorney, if he should decide to offer such evidence, to do so first out of the hearing of the jury. Even if the motion is denied in situations like this, it will at least serve the purpose of advance notice to the court and the opposing attorney of the objector's feeling that the matter is so prejudicial that the mere asking of a question about it will cause irreparable harm. This will be of value on appeal to meet the claim that injection of the improper question was inadvertent or harmless error.

46. What steps should be taken to protect the record for appeal?

The rules no longer require exceptions to rulings of the court. Fundamentally what is required is to have the record show clearly the grounds of objections and of rulings. This means that the objector should state specifically the basis for his objection.

171. Minn. R. Civ. P. 46.
173. See p. 657 above.
objection is sustained, the party who asked the question should request the court, if necessary, to specify the ground on which he sustained the objection. An offer of proof should always be made when an objection has been sustained. In a jury action the court will usually require the offer to be made out of the hearing of the jury; in a non-jury action the court is normally expected to take and report the evidence to which it has sustained the objection. An error in instructions must be objected to before the jury retires unless the error goes to fundamental law or controlling principle, and even then may not be considered on appeal if it is not raised in the motion for new trial. Other devices for protecting the record are set out in Judge Loevinger's monograph.

X. JUSTICE TRIUMPHS—THE ROLE OF THE JUDGE

47. In a recent case my opponent objected to a certain document I wished to introduce as "immaterial." The judge said, "Well, it's certainly material. The proper objection is that no foundation has been laid." My opponent, of course, hastily said, "I meant to include want of foundation as part of my objection." The court then sustained the objection. Was this proper? If the other side doesn't know what objection to make, why should the court help them out?

Where a lawyer by reason of inexperience or timidity in court is unable to think of the proper objection, there is no reason why the judge should not help him so long as in doing so he does not give the jury the idea he favors one side or the other. Thus Judge Loevinger told the Institute:

"I have frequently said in overruling a question, 'THAT objection is overruled,' assuming that counsel would be alert and realize that he has made the wrong objection and proceed to make the right one. I have been disappointed many times."

At the same time, our rules of evidence are at least in part the product of the adversary system, and thus with experienced attorneys a judge would hardly wish to be astute and to suggest to one side or the other objections which have not occurred to them.

48. To what extent may the judge call witnesses of his own, or examine witnesses called by the parties?

The usual view is that the judge may properly do both of the

175. Minn. R. Civ. P. 43.03; Wright's Minnesota Rules 262 (1954).
things specified in the question.278 As Chief Judge Charles E. Clark puts it, the trial judge

"enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to the clear presenta-
tion of the issues."279

There seem to be no Minnesota decisions on the power of the judge to call his own witnesses; the court has upheld the right of the judge to examine witnesses called by the parties, both in civil280 and in criminal281 cases. Because of our tradition that the judge may not comment on the evidence, care must be taken that the questions are fair, show no bias, do not impress any view or opinion of the court, and tend to clarify the record. Thus a conviction has been reversed where the trial judge asked questions of an impeaching nature of defendant’s witness.282 And the supreme court has said that usually any extensive questioning by the judge should not take place until counsel have completed their examina-
tion.283

49. Do the usual exclusionary rules of evidence apply in a case
tried to the court rather than to a jury?

Probably such rules as those of privilege do; but rules which were spawned, in whole or in part, by the jury system, such as the hearsay rule, the “best evidence” rule, the rule against opinions, and the like, have no logical place in a court trial. Thus while the rules retain a theoretical validity284 in practice they are of little effect. This result is partly dictated by the Rules of Civil Procedure which call upon the judge to hear and report even evidence to which he has sustained an objection except where privilege is claimed or where “it clearly appears that the evidence is not admissible on any ground.”285 Partly it is a combination of the tendency of trial judges to “admit it for what it is worth” and of appellate courts to indulge the gracious presumption that the trial judge relied only on the

179. 9 Wigmore, Evidence § 2484 (3d ed. 1940); McCormick, Evidence § 8 (1954); R. C., 13 Minn. L. Rev. 258 (1929), 15 Minn. L. Rev. 350 (1931).
186. Minn. R. Civ. P. 43.03.
evidence which was properly admitted. The attitude now governing has been strongly stated by Judge Sanborn:

"In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. . . . On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to but which, on review, the appellate court believes should have been admitted."

50. What rules of evidence apply in proceedings before administrative agencies?

Section 7(c) of the federal Administrative Procedure Act provides that "any oral or documentary evidence may be received;" it goes on, however, to permit exclusion as a matter of policy of irrelevant, immaterial, or unduly repetitious evidence, and requires findings to be based on "reliable, probative, and substantial evidence." This mandate, codifying earlier law, has led to great liberality in the admission of evidence by administrative agencies: evidence is admitted and relied on if it is practically helpful to the commission in understanding the matter without regard to the niceties of the rules of evidence. A famous statement of the usual attitude is contained in an opinion by the Second Circuit which, while technically a per curiam, bears unmistakable marks of having been written by Judge Learned Hand:

"Why either he or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a

188. Builders Steel Co. v. Commissioner, 179 F. 2d 377, 379 (8th Cir. 1950).
proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy."™

The practice is not quite so liberal in proceedings before state agencies. Although the statute regulating the particular proceeding must be consulted, the typical rule, as contained variously in statutes and decisions, is that which governs the Industrial Commission in workmen's compensation proceedings. It is not bound by the common law or statutory rules of evidence, but "findings of fact shall be based upon competent evidence only."™™ "Competent evidence" apparently means evidence which would be admissible in courts of law.™™ Thus Minnesota preserves the discredited™™ rule that there must be a "residuum" of legal evidence to support the agency's decision.

It is possible that even privileges need not be recognized by federal administrative agencies to the extent they are recognized in court.™™ But Minnesota agencies seem bound by the statutory privileges fully as much as are courts.™

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193. See In re Nash, 147 Minn. 383, 393, 181 N. W. 570, 574 (1920) (dissenting opinion).
196. Minn. Stat. § 593.02 (1953).
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