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THE UNIFORM RULES OF EVIDENCE:
A PLAINTIFF'S VIEW
WILLIAM H. DEPARCO*

The predominant feature of the rules of evidence now in force in Minnesota, whether they are outgrowths of the ancient principles of the common law or are inventions of recent legislatures, is that they are exclusionary in nature. Rules, doctrines, and concepts limiting and prohibiting evidence are far more numerous than are those which allow evidence to be admitted. Judge Loevinger's valuable monograph takes 24 pages to state the exclusionary rules in the most summary fashion.¹ Very few pages, indeed, would be needed to state the rules, doctrines, and concepts permitting evidence to be admitted.

All of us—even lawyers—are creatures of environment and heredity. Thus it is not surprising that lawyers who consistently represent injured persons should develop different attitudes toward questions of evidence than lawyers who represent the insurance companies, the railroads, and the other vast corporate enterprises who may be legally responsible for the injury. All of us would agree that the goal of evidence rules should be the reliable and expeditious ascertainment of the truth. Our experience and our professional concerns lead us to disagreement as to which policies will best effectuate this goal.

The plaintiff has the burden of proof; he who makes the claim must prove it. Normally, therefore, the plaintiff has the affirmative of the issue and must establish it with proof. If there is no evidence, the defendant wins. If there is evidence but plaintiff is not able to have it admitted, the defendant wins. And the defendant, if he is thus successful in blocking and frustrating the plaintiff's attempt to prove his case, wins quite regardless of what the merits of the claim may be. For this reason it is only natural that plaintiff's lawyers should be more liberal in their attitudes toward the admission of evidence.

Of course this question is not all black or all white. There are times when a plaintiff's lawyer is glad to use indirection rather than direct evidence. That which you suggest is frequently more potent than that which you prove. A woman fully clothed, but with her

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thigh accidentally exposed, is far more alluring than the same female in a bikini. This subtle power of suggestion, or this power of subtle suggestion, also pervades the field of evidence. Perhaps that is why so many lawsuits are said to hinge upon the “intangibles” or the “imponderables.” Verdicts and awards in states which allow the direct joinder of insurance companies, as in Louisiana and Wisconsin, are notoriously low compared to states where this information trickles through to the jury only through the power of suggestion, as indirectly during the voir dire. Likewise I would not now repeat my youthful mistake of jeopardizing a verdict by asking plaintiff in a personal injury action if he has a family. It is better psychology, as well as sounder law, to have him remain silent on the stand but sit down with his wife and children in the courtroom when he has finished his testimony.

And again there are some circumstances in which defendant wants to get evidence in, and the plaintiff would like to exclude it. In proving contributory negligence or establishing a counterclaim the defendant’s counsel finds himself clothed with the attributes and the duties of a plaintiff’s lawyer. Twenty-five years ago the Minnesota Supreme Court overruled its extraordinary earlier decisions and adopted the common sense rule that the same requirements exist in establishing the contributory negligence of plaintiff as in establishing the negligence of the defendant. There may well have been occasions when a plaintiff’s lawyer, seeking to confound proof of contributory negligence, has been every bit as technical in his objections to evidence as was counsel for the defendant during the presentation of plaintiff’s case.

The same thing is true of counterclaims. But the overwhelming majority of defendants’ lawyers today have insurance companies for their real clients. Their primary interest and loyalty is to the real client who butters their parsnips. Their main concern is to defeat plaintiff’s claim, and the outmoded and overtechnical rules of evidence still frequently applied are important weapons in their arsenal.

For these reasons the average plaintiff’s lawyer is a disciple of Wigmore who condemned most of the rules of evidence about which

2. Thomson v. Boles, 123 F. 2d 487, 494-495 (8th Cir. 1941).
3. Mechler v. McMahon, 184 Minn. 476, 239 N. W. 605 (1931). In Wojtowicz v. Belden, 211 Minn. 461, 1 N. W. 2d 409 (1942), Justice Stone carried this to what seems to me an indefensible extreme by holding that defendant is entitled to a directed verdict on the issue of contributory negligence if plaintiff fails to show a sufficient convincing reason for his violation of some trivial detail of the Highway Safety Act.
he wrote so learnedly, and who was shocked by the number of reversals on evidentiary rulings, saying:

“... the rules to a large extent fail of their professed purpose. They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict.”

And plaintiff's lawyers applaud, as a hope for the future even if not an accurate statement of the state of affairs today, the statement that,

"the modern tendency is to give as wide a scope as possible to the investigation of facts—to admit evidence freely, leaving it to the jury to determine its weight."

The Uniform Rules of Evidence should be welcomed by plaintiff's attorneys. By their very existence they provide a stimulus to reexamination and change in the law of evidence, and it is hard to believe that any change can help but be for the good. And the Uniform Rules themselves are, on the whole, in line with what the plaintiff's lawyer thinks the modern tendency should be. They make important advances in the direction of liberality in admission of evidence. And, much like the Federal and Minnesota Rules of Civil Procedure, they seek to mitigate the inexcusable flood of reversals on evidentiary points by leaving many things to the discretion of the trial judge, rather than setting out a detailed and inflexible rule.

But the Uniform Rules do not need to be swallowed whole or rejected entirely. In commercial law a principal objective of uniform laws is uniformity. A business transaction may have incidents in several different states, or a company may operate in different jurisdictions. It is desirable that the same law should govern in each state, and there is a strong presumption that any tinkering by the legislature is unwise and undesirable when adopting such a uniform law. But procedural codes, such as the Uniform Rules of Evidence, are a different matter. Their effect is confined exclusively to an event, the trial of a lawsuit, which occurs in but one state. There is no inherent advantage in having the same rules of evidence in Minnesota as in Wisconsin or North Dakota. And so a state such as Minnesota, if and when it considers adoption of the Uniform


5. 7 Dunnell's Digest § 3251.

6. For a caveat as to this 'trend by an able practicing attorney now distinguished also as a scholar, see Louisell, Book Review, 37 Minn. L. Rev. 643, 645-646 (1953). Professor Louisell argues that if trial judges are to be given the wide discretion contemplated by modern procedure, there is a heavy obligation on the bar to improve the caliber of the trial bench.
Rules, is free to consider whether certain changes in them would not be desirable in order to preserve satisfactory Minnesota practices or settled Minnesota policies. Of course the ability and industry of the distinguished committee which drafted the Uniform Rules compels respect. And we must avoid the danger, so common in state procedural reform, of mistaking mere habit for proof of merit. But where there is a clear showing that a provision of the Uniform Rules is less desirable, for Minnesota, than the present Minnesota practice, there need be no reluctance in making an appropriate change in the Uniform Rules prior to their adoption here.

The adoption of the Rules in Minnesota faces but one serious obstacle. It seems clear enough that the supreme court is empowered to prescribe rules of evidence under the enabling act of 1947 which authorized the court to regulate practice and procedure in civil actions. But the court has no rulemaking power for criminal actions. The Uniform Rules of Evidence are intended to apply both to civil and criminal actions, and it would be most confusing if any other course were followed. Legislative action, authorizing the court to make rules of evidence in criminal cases, seems, therefore, needed.

In the light of these general comments, let us turn now to an examination of those rules which are of greatest interest to a plain-tiff's lawyer. My discussion is divided into eight topics identical with those into which the Uniform Rules are themselves divided.

**General Provisions (Rules 1 to 8)**

Perhaps most important of the eight introductory rules is Rule 7, which in sweeping terms abolishes all disqualifications of witnesses, all privileges, and provides that "all relevant evidence is admissible." The importance of this rule is illustrated by the fact that it puts an end to the dead man's statute; Rule 7 declares that every per-

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son is qualified to be a witness and no person is disqualified to testify to any matter and none of the other rules restore the disqualification which the dead man's statute formerly granted.

Of course, Rule 7 is limited by the seemingly innocuous statement, "except as otherwise provided in these Rules." And the remaining rules do restore many of the privileges, disqualifications, and inadmissibility which Rule 7 purports to abolish. Nevertheless Rule 7 does express the general philosophy of this whole set of rules, and in a leisurely system of jurisprudence where time and expense are immaterial it might be that no other rule would be necessary. Then we could determine the exclusionary rules by defining the words used in Rule 7. This makes relevancy the whole test. Who can object to this? Modern methods of education and communication have made the average juror far more knowledgeable than he ever has been in the past, and the theory that the judge must protect him from baleful influences is much less tenable. Rule 7, embodying something of this thinking, points accusingly to every claimed limitation on admissibility and discretion, and places on these limitations the burden of justifying their existence.

Rules 4 and 5 state in somewhat detailed form that there are to be no reversals because of erroneous admission or exclusion of evidence, except where timely objection was made showing specifically the reasons for objecting, and where the error "probably had a substantial influence in bringing about the verdict or finding." Though these rules are desirable, it is doubtful if they will produce any important difference in appellate attitudes from those already required by the "harmless error" doctrine, and it might have been better, if only in the interest of verbal purity, to use the same terminology as in the Rules of Civil Procedure.

The only provision in this section of the rules about which I have doubts is Rule 1(13), which gives "writing" a sufficiently broad definition to include plats, X-rays, photographs, or even Egyptian hieroglyphics "or combinations thereof." The rule is unobjectionable so long as it stands as a definition to be used only when interpreting the Uniform Rules of Evidence. My fear is this: Minn. R. Civ. P. 26.02 creates complete immunity from discovery

\[11. \text{Minn. R. Civ. P. 61, which continues the policy of Minn. Stat. § 544.33. See Wright, Minnesota Rules 354 (1954); 3 Youngquist & Blacik, Minnesota Rules Practice 309-433 (1953). The doctrine of "harmless error" was carried to an extreme in one of those curiosities which make law such a delightful profession. See State v. Corey, 182 Minn. 48, 233 N.W. 590 (1930), where it was held error to direct a verdict of guilty in a criminal case, but only "harmless error" since, in the view of the Supreme Court, the defendant was guilty!} \]
for any "writing" prepared in anticipation of litigation or in preparation for trial. The Rules of Civil Procedure do not define "writing." If the Supreme Court should adopt the Uniform Rules of Evidence, what would be more natural than to apply to the word "writing" in Minn. R. Civ P 26.02 the definition which the same Court has promulgated in the Uniform Rules of Evidence. This would be extremely undesirable. Plaintiff's lawyers—and many unbiased scholars—would be happiest if the immunity from discovery created by Minn. R. Civ P 26.02 were completely abolished. Any such restriction on discovery is at war with great policies of modern procedure to avoid surprise and get to the truth. The United States Supreme Court has found it possible to preserve the adversary system by a restriction on discovery far less sweeping than that which Minnesota has chosen.

Of course Minn. R. Civ P 26.02 should be dealt with on its own merits, and not limited by indirection. But no more should it be expanded by indirection. The definition of "writing" in Rule 1(13) of the evidence rules is far broader than that which courts have applied in reading the same word in Rule 26.02 of the Rules of Civil Procedure. Specifically, and most important, photographs can be obtained by discovery at the present time under the civil rules. They will not be subject to discovery if this definition of

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12. E.g., Louisell, Discovery and Pre-Trial Under the Minnesota Rules, 36 Minn. L. Rev. 633, 635-639 (1952).


15. Judge Haering's opinion in Williams v. Chicago G.W Ry., Rules Comm. Op. No. 212, that photographs are "writings" within the meaning of Minn. R. Civ. P 26.02, and that therefore defendant need not answer an interroga-
“writing” now proposed should be read into the civil rules. Rule 1(13), if adopted, should be specifically limited in its application to the evidence rules.

Judicial Notice (Rules 9 to 12)

In an earlier draft of this article, it was said of this section of the rules: "These rules seem entirely unobjectionable. . . . [They] wisely and properly set out a workable procedure by which common knowledge can be taken into account in the trial of a lawsuit." I was wrong. The error resulted from the uncontroversial sound of these rules, and by their resemblance to the similar provisions in the Uniform Judicial Notice of Foreign Law Act and in the Model Code of Evidence. Though I had a stomach reaction that judges take into account a good many more facts than settled doctrines of judicial notice would allow, it did not occur to me that the rules might not reflect this.

Fortunately before finishing the article I read the masterful discussion of this subject by Professor Davis. His conclusion is that Rules 9 to 12 "are seriously and fundamentally unsound." He persuades me entirely.

It would serve no purpose for me to restate the arguments Professor Davis makes so well. But one of my own cases would be affected by one of the proposed rules. In Lilly v. Grand Trunk Western R. Co. the United States Supreme Court reversed an Illinois court which had refused to take judicial notice of regulations of the Interstate Commerce Commission, made pursuant to the Boiler Inspection Act and having the force of law in FELA actions. This result would be overturned by the Uniform Rules. They permit judicial notice of "duly published regulations of governmental subdivisions or agencies of this state," but they do not authorize judicial notice of regulations by federal agencies, and indeed they prohibit the judge from taking judicial notice of material other than that listed. The Lilly case was right and the rule is wrong. This is perhaps an oversight in the rules, but they contain other errors asking if he has any photographs of plaintiff, does not discuss these cases. And in carrying the protection back from the photographs themselves to the mere question of whether they exist, it ignores the settled rule that 26.02, and the corresponding federal doctrine, apply only to the documents themselves, and do not protect information contained in the documents. 4 Moore's Federal Practice 1146-47 (2d ed. 1950), Wright, Minnesota Rules 170 (1954).

19. See also Davis, supra note 15, at 947.
of a more fundamental nature which should be corrected before they are adopted.

**Presumptions (Rules 13 to 16)**

A leading authority on evidence is guilty of understatement when he suggests that "'presumption' is the slipperiest member of the family of legal terms." A penalty should be imposed on all judges, legal scholars and lawyers who utter this confused and confusing word. Dictionaries containing it ought to be burned. While this may seem a facetious comment, newsprint would be cheaper and printer's ink more available if some English monarch had so decreed centuries ago—also jurisprudence would have been richer and more sensible.

Early in professional life I had an experience with presumptions that perhaps is responsible for my destructive urge and has prejudiced me in favor of their abolition. In searching for an applicable presumption and one that would solve my problem, I became lost in an impenetrable fog (from which some may suggest I have not yet emerged.) The facts of my case were about midnight on a May evening in 1935, Dr. Marvin Miller, the son of a prominent doctor in a rural Minnesota community, was driving north from Bovey, Minnesota. With him was his wife Florence, whom he had met while interning in a hospital where she worked as a nurse. Florence had a young daughter by a previous marriage. As the couple drove north from Bovey on the night in question, the young doctor failed to negotiate a curve successfully. The car plunged over an abutment to a bridge, turned a somersault, and landed top down in the waist-high Prairie River. When the tragic scene was discovered the next morning, Marvin's body was in a crouching position in the back part of the car, his hair showing above the water. Florence was found some 500 feet downstream, her clothing caught in a snag, with face down and knees flexed. General rigor mortis had set in both bodies.

This tragic occurrence soon was the subject of litigation, for Marvin had a $5000 insurance policy in which Florence was named as beneficiary. If Florence died before Marvin, the money would go to Marvin's estate and thus be inherited by his father. But if Florence survived Marvin, her right to the money would have vested, and it would pass in turn to her small daughter.

The fact is that no one knew, or could have known, whether Marvin or Florence died first. It may be that one person was

killed instantly by the crash and the other drowned, but there was no proof as to this. The autopsies were inconclusive. The court held that the burden was on the wife's estate to prove that she survived her husband, and that in the absence of proof either way the money would go to Marvin's father. As counsel for Florence's estate, I floundered around in the field of presumptions, searching for one which would make up for the non-existent evidence. But the court seemed to have no difficulty in following the majority rule that where two persons perish in a common disaster, there is no presumption that because of age, health, sex, or strength the one survived the other, and it held for the father.21

Subsequent to this decision the legislature occupied the field by the enactment in 1943 of the Uniform Simultaneous Death Act.22 In common catastrophes the gibberish of presumptions, whether of law or fact, whether mandatory or permissive, has now vanished. It is fortunate that in one area of Minnesota law confusion about presumptions has been ended since 1943, for in other areas this confusion is enjoying its finest hour.

There was a day when Minnesota lawyers and judges had no particular difficulty with the two most common presumptions. We knew that it was proper to instruct the jury that there is a strong presumption against suicide,23 and we knew also that in death cases, the jury should be instructed that there is a presumption that the deceased exercised due care and was not contributorily negligent.24 Little did we realize how well off we were in those halcyon days.

In 1939 Justice Royal Stone undertook to "clarify" the law on presumptions. In doing so he dealt Minnesota jurisprudence a grievous blow from which it has not yet recovered. The case, of course, is Ryan v. Metropolitan Life Insurance Co.25 Justice Stone adopted, lock, stock and barrel the Thayer-Wigmore view that a presumption vanishes as soon as any contrary evidence has been introduced. Earlier decisions were overruled right and left to hold that a presumption is not evidence, and that under usual circumstances it is error to mention a presumption to the jury where any evidence contrary to the presumed fact has been introduced.

25. 206 Minn. 562, 289 N. W. 557 (1939).
A law review commentator, peering into a somewhat clouded crystal ball, hailed the decision as producing "a tremendous simplification of the presumption problem, thus performing a service of incalculable value to members of both the bench and bar as well as future jurors." This "tremendous simplification" has produced 22 subsequent decisions explaining what is meant, very few of which are to be regarded as consistent with any of the others. In 1940 it was held technically incorrect to instruct the jury that decedent enjoyed the presumption of due care, which had to be overcome by the greater weight of the evidence before contributory negligence could be found. But this was said to be harmless error since the court didn't think decedent had been contributorily negligent. Three years later we were told that to allow the jury to be instructed as to a presumption would be an elimination of the rule laid down in the Ryan case, and that no rebuttable presumption should be given to the jury.

But in 1944 the instruction about a presumption, held never permissible only a year before, became discretionary with the trial court. In a FELA death case the court said:

"Conceding that in the instant case there may have been some evidence to justify the submission of the issue of contributory negligence, yet the giving of the instruction [that there is a presumption of due care] was not reversible error. It is common practice for trial courts to state propositions of law to a jury, and not uncommon for them to refer to the presumption of due care on the part of a party charged with negligence. Granted that under the rule of the Ryan case a trial court, in its discretion, may decline to refer to the presumption of due care on the part of a decedent because it is a presumption of law rather than one of fact, the giving of such instruction without objection on the part of either party cannot taint the jury's verdict with error."

When the defendant hastily petitioned for rehearing, showing that he had taken a proper exception to the charge, the court said there was still

"[N]o reversible error, for, as pointed out in our original opinion, there is nothing improper in a charge stating the presumption of law—exception or no exception."

26. Note, 24 Minn. L. Rev. 651, 660 (1940). For another view as to the clarity of the Ryan opinion, see companion article by Gausewitz.
30. Id. at 206, 14 N. W 2d at 419.
The same result was reached by a unanimous court in an action under the state wrongful death act.\textsuperscript{31} A few years later the court held that it is not error to refuse to instruct that there is a presumption of due care.\textsuperscript{32} Although the holding is consistent with the two cases just cited, which had said such an instruction is discretionary with the trial court, the court relied on a somewhat different line of reasoning. It pointed out that the Ryan case had said the presumption vanishes when there is creditable evidence to the contrary. And it explained the two cases just considered on the bizarre ground that the jury had shown by its verdict that it did not believe defendant's eyewitness, and thus there was no credible evidence to dispel the presumption!

The last word—until the next time the court gets a chance to go off on a new tangent—is Te Poel v. Larson,\textsuperscript{33} where a verdict for plaintiff was reversed, and a new trial ordered, because the trial court had instructed that the deceased is presumed to have exercised due care. In what Professor McCormick calls an "able opinion,"\textsuperscript{34} the court announced that it was overruling many of its post-Ryan decisions, though conveniently it did not list just which ones are to be taken as overruled.\textsuperscript{35} The court made this amazing observation:

"It would seem from an examination of our cases since the Ryan case that it is neither error to give nor to refuse to instruct the jury that there is a presumption of due care."\textsuperscript{36}

The Ryan case in 1939 overruled prior decisions. The Te Poel case in 1952 overruled various of the decisions purporting to follow

\begin{itemize}
\item 31. Moeller v. St. Paul City Ry., 218 Minn. 353, 16 N. W. 2d 289 (1944).
\item 32. Amundson v. Falk, 228 Minn. 115, 36 N. W. 2d 521 (1949).
\item 33. 236 Minn. 482, 53 N. W. 2d 468 (1952). The case is followed in Knuth v. Murphy, 237 Minn. 225, 54 N. W. 2d 771 (1952).
\item 34. McCormick, Evidence 664 n. 4 (1954).
\item 35. 236 Minn. at 493, 53 N. W. 2d at 473. It is interesting to speculate why the court refrained from listing which opinions it was overruling. I reject as unworthy the suggestion of some lawyers that the court just enjoys keeping the bar guessing, and suggest instead this explanation. If the court was going to overrule any case, it surely wanted to overrule Bimberg v. Northern Pac. Ry. Co., notes 29 and 30 supra, since it was the first and most outspoken post-Ryan case holding that the court has discretion to instruct on presumptions. But the court perhaps realized that it was confronted with an embarrassing situation, since the Bimberg case, however wrong it might seem by Minnesota standards, was rightly decided. It was a FELA case, and in such a case federal decisions, rather than local rules, are decisive as to presumptions affecting negligence. New Orleans & N.E. R.R. v. Harris, 247 U. S. 367 (1918); Note, 37 Cornell L. Q. 799, 801 (1952). And it is well settled by the federal decisions that there is a presumption of due care which does not vanish upon introduction of evidence to the contrary. Tennant v. Peoria & P.U. R.R., 321 U. S. 29 (1944); Stanford v. Pennsylvania R.R., 171 F. 2d 632, 635 (7th Cir. 1948); Chicago & N.W. Ry. v. Grauel, 160 F. 2d 820, 825 (8th Cir. 1947); Parga v. Pacific Elec. Ry., 103 Cal. App. 2d 840, 843-44, 230 P. 2d 364, 366 (1951).
\item 36. 236 Minn. at 490, 53 N. W. 2d at 473.
\end{itemize}
Ryan. What will tomorrow bring? In the Te Poel opinion the court ventures the observation that presumption “is a subject on which text writers, teachers of law, and authors of legal articles have written much and clarified little.” Perhaps a mere practitioner can be excused for suggesting that the court might well have included “judges” in that list.

The Uniform Rules on this subject are perhaps not a model of clarity, but they furnish a more satisfactory standard than have court decisions. And they would repudiate the absurd rule that presumptions are not to be mentioned in instructions to the jury. Rule 14 abandons the long-discredited Thayer-Wigmore doctrine and turns instead to the more realistic and workable views of Professors Morgan and McCormick. It provides that where the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates.”

In simpler language, what this means is that if the presumption is based on probability—as are nearly all presumptions—the jury is to be told that they may consider the distillation of human experience which the presumption sums up.

It is overwhelmingly likely that a letter, properly stamped and addressed and deposited in a mail box, will be delivered to the addressee. The Post Office may err, but they do so very rarely. The “presumption” that such a letter has reached the addressee is merely a statement in legal form of this obvious truth. Suppose the addressee takes the stand and says he never received the letter, and that there is nothing to contradict directly this testimony. Under the doctrine momentarily in vogue in Minnesota, the judge may not mention the presumption to the jury, and it is left without the help of knowing that normal experience is contrary to the addressee’s claim. Why in a rational system, devoted to seeking out the truth, should we deprive the jury of this help, and leave them instead to argue their own experiences with the mails, if indeed they realize at all that they may reject as inherently improbable the addressee’s story?

“A presumption is a rule which has the effect that from certain circumstances a certain inference may be drawn. Persons unaccustomed to weighing evidence and particularly persons of limited intelligence are notoriously suspicious of circumstantial inferences. Such persons, on the other hand, are prone to be

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37 Id. at 485, 53 N. W. 2d at 470.
38 For a similar view see companion title by Gausewitz.
overcredulous of direct testimony. If a party having the burden of persuasion, then, must rest upon circumstantial evidence to prove an issuable fact, there is danger that the jury reading the burden-of-proof charge will mistakenly suppose that the circumstantial inference, especially if countered by direct testimony, could not be 'a preponderance of the evidence.' If the counsel can find a presumption upon which to rely, and can secure a charge upon it, he can use it in his argument as a basis for an explanation which may prevent the case from being decided upon this mistaken notion."

These propositions are illustrated by a case decided during our court's Ryan phase, Donea v. Massachusetts Mutual Life Insurance Co. A seemingly happy husband left his wife one day, leaving the following note on the kitchen table:

"Dear Kor,

I am leaving for the mountains because I want to be a forest ranger and I can't seem to get down to brass tacks here. I know you won't let me go so I am taking this way out. But will write you and let you know where I am and how I am getting along. Better move in with ma for the winter.

Love,

Bill."

He was never seen or heard of again. His wife, and the company which wrote his life insurance, each searched for him. He never transferred the title to his car, nor took out registration on it in any other state. He did not register with Selective Service nor with Social Security. The insurer's missing persons investigators were unable to locate any trace of him. Seven years after his disappearance the wife sued for the amount of his life insurance policy. In order to recover it was necessary for his wife to prove that her husband was dead on August 15, 1943, seven years from the date of his disappearance. There is a mandatory presumption, based on probability and the social policy of enforcing family security provisions such as life insurance and settling estates, that an unexplained absence for seven years and failure to find the person on diligent inquiry establishes that the person died at some time during the seven year period.

But in this case the insurer claimed that the disappearance was not "unexplained." It pointed to his note as showing that he had left because he was unhappy with his wife. And it made much of the fact that a year after his disappearance his wife had obtained a default divorce claiming cruel and inhuman treatment. It intro-

40. 220 Minn, 204, 19 N. W. 2d 377 (1945).
duced a mortality table to show that most men the husband's age would not yet be dead.

On this state of the record the supreme court said it was error to mention the presumption in the charge to the jury. Fortunately it was able to save the verdict by an adroit argument that defendant had not made a timely objection to the charge. But could anything be more absurd than giving this case to a jury which has not been informed about the presumption. One can imagine now the likely conversation in the jury room.

"She ought to wait a little longer. I remember reading in the paper about a guy who was missing for ten years and then came back."

"Maybe he's in South America. Then he wouldn't have to sign up for the draft or for social security"

"Didn't you see that ad in the Saturday Evening Post, about how jurors that bring in big verdicts are raising the price of their own insurance? I don't want to do that."

I have a deep faith in the good sense of the American jury. But we do no service to the jury system by compelling jurors to grope in the dark, unaided by the wealth of experience the law has accumulated over the centuries, and unmindful of the policies which the law seeks to advance. I believe a jury should be instructed about presumptions, and that the rules on this subject in the Uniform Rules of Evidence are desirable and should be adopted.

Only one caveat is necessary. It should be made clear that these rules on presumptions do not affect res ipsa loquitur. Our decisions have told us that this doctrine is nothing more than one form of circumstantial evidence from which an inference of negligence is permissible, and that it creates no presumption. This view is codified by Rule 43.06 of the Rules of Civil Procedure. Thus it would not seem to be affected by the Uniform Rules of Evidence, since Rule 13 of those rules apparently defines "presumption" as including only what we would call compulsory presumptions, such as the seven years' absence rule. But there is still danger that res ipsa might be regarded as a presumption within Rule 14(b), which concerns those presumptions not based on probability, and which, under the Uniform Rules, do vanish on the introduction of evidence to the contrary. The Ryan case casts doubt on the distinction between "inference" and "presumption." Professor McCormick deals with res ipsa loquitur as a presumption. Perhaps most important,
the official Comment to Rule 14 of the Uniform Rules cites a res ipsa case as an example of a recent decision involving presumptions. This case is enough to send a cold chill through a plaintiff's lawyer. In the case in question, a bridge maintained by a railroad company collapsed. The court, applying Virginia law, held that when the defendant offers uncontradicted evidence explaining the accident and tending to show that it was not due to negligence on the defendant's part, the presumption known as res ipsa loquitur vanishes and defendant is entitled to a directed verdict.

This would work a revolutionary, and thoroughly undesirable, change in Minnesota law. Several years ago I represented the plaintiff in *Still v. 7 Up Bottling Co.*, a case tried in District Court in Hennepin County. Wynn Still, a 42 year old painter, entered a tavern in search of his partner to discuss a business deal. While Still was standing next to his partner in front of the bar discussing business affairs, a bottle of 7 Up on the back bar exploded. The bottle, which was there for advertising purposes, was in a glass block which imitated a piece of ice. The explosion threw glass all around. A piece of glass hit Still and caused him to lose an eye. Still sued the bar owner and the manufacturer of the beverage.

At the trial all the employees of the bar testified as to the usual custom and practice as well as the procedure with reference to this specific bottle. The manufacturer would make deliveries through his employees and would part with physical control of the cases of 7 Up when they were stacked in the basement. From there the bartenders would carry the cases up a stairway into the back bar, deposit them in the refrigerator, and every few weeks change the bottle in the advertising display. The bottles were not subjected to any sort of injury or agitation or extremes of temperature.

Chemists testified from an examination of the remaining fragments of glass and from the nature of the "cone of percussion" and other facts hypothetically assumed that the explosion resulted from internal combustion. Officials of the bottler described the process of manufacture, inspection, bottling and delivery with emphasis on the impeccable care they employed. The trial court submitted the case to the jury as against both defendants under the doctrine of res ipsa loquitur, and the jury awarded Wynn Still $28,403.50.

45. The case was settled while appeal was pending for almost the full amount of the verdict. Defendant's wisdom in settling was indicated shortly thereafter when the court held, on very similar facts, that it was error to refuse to charge the jury as to res ipsa loquitur in an exploding bottle case. *Johnson v. Willmar Coca-Cola Bottling Co.*, 235 Minn. 471, 51 N. W. 2d 573 (1952).
If the federal case from Virginia, cited with approval in the Comment to the Uniform Rule, were the law here, defendants could have had a directed verdict. And if res ipsa loquitur can be brought within Rule 14(b), the same result will be achieved.

The exploding bottle case is not the only kind of case in which plaintiffs can recover under existing law but could not recover if Rule 14(b) governed. I have had occasion to try several derailment cases for railroad passengers and employees where success was dependent wholly on res ipsa loquitur. A frequent cause of such an accident is a fissure in the rail. In such a case typically the defendant will produce evidence showing that the rail was bought from a reputable manufacturer, that it was made of the very best steel, that the section crews had maintained the tracks and roadbed with great assiduity, and that all told defendant had exercised more care than was necessary. On such a record today's law is that the jury must judge whether the showing of care negatives the inference of negligence arising from the otherwise unexplainable mishap. And this is what the law should remain.

I believe that the bar generally of Minnesota would vigorously oppose the adoption of any rule of evidence which might allow a trial court to direct a verdict for the defendant merely because the defendant had produced evidence of due care. The weight and credibility of such evidence should remain for the jury. Directed verdicts in a case of this character lead to such curiosities as Swenson v. Purity Baking Co., where there were dead larvae in bread purchased by plaintiff which had been manufactured, labeled, and sealed by the defendant. The defendant won a directed verdict by proving that its precautions were so excellent as to prevent anything of this kind occurring! The Supreme Court held that the reason the larvae became imbedded in the loaf of bread was a mystery, ergo, it could not have happened as a result of defendant's negligence. The court did have the good sense to write a very brief opinion, stating that further discussion would serve no useful purpose, which was certainly true enough. It is decisions of this kind which from time to time confirm and reinvigorate my confidence in the wisdom and common sense of the jury.

Witnesses (Rules 17 to 22)

The most important rule concerning witnesses is Rule 20, which puts an end to old notions that a party is bound by the testimony of a witness he has called, and may not attack the credibility of such witness.

46. 183 Minn. 289, 236 N. W 310 (1931).
An example of application of the old notions is a recent Missouri case in which the plaintiff introduced in evidence depositions of two doctors who had examined plaintiff immediately after the accident. The testimony of the doctors helped plaintiff's case but not as much as he would have liked. But plaintiff was not allowed to introduce that part of the depositions which showed that the doctors had been hired by the defendant, evidence which might have led the jury to suspect bias.47

Minnesota has applied this rule even to an extreme fact situation. A young girl was injured when her date drove the car in which she was riding into a viaduct. In her suit for the resulting injuries the answer denied negligence and claimed the girl was contributorily negligent in riding with him when she knew he was drunk. When the young man took the stand he was more interested in rehabilitating his romance than in safeguarding the finances of his insurance company. His testimony showed his negligence so clearly that defense counsel conceded that issue, but they wished to introduce evidence of his drunkenness. Defendant had testified.

"I was not strictly sober, but nobody could tell I was under the influence of liquor."

An objection to evidence purporting to show that defendant had been intoxicated was sustained on the ground that his testimony could not be impeached or disputed, and this ruling was upheld by the Supreme Court.48

Though I am glad the girl got her verdict in the case just discussed, the rule applied by the court seems to me utterly senseless. It has been denounced by every reformer from Jeremy Bentham to the present time, and is referred to in such scathing terms as "the remnant of a primitive notion,"49 "no place in any rational system of investigation in modern society,"50 "nonsense—most regrettably not simple nonsense, but very complex nonsense,"51 and simply "foolish."52

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49. 3 Wigmore, Evidence § 899 (3d ed. 1940).
50. 1 Morgan, Basic Problems of Evidence 64 (1954).
52. Goodrich, J., in Johnson v. Baltimore & O. R. R., 208 F. 2d 633, 635 (1953). To the same general effect, in addition to the works cited, see 2 Bentham, Rationale of Judicial Evidence 59 (1827); Tracy, Evidence 193 (1952); Ladd, Impeachment of One's Own Witness—New Developments, 4 U. Chi. L. Rev. 69, 96 (1936); Note, Impeachment and Rehabilitation of Witnesses in Minnesota, 36 Minn. L. Rev. 724, 738-42 (1952).
This archaic rule has been rejected in an important recent decision by Judge Goodrich. A railroad was sued under a wrongful death act for the death of a person shot by one of its watchmen. Since there were no living witnesses except the watchman, he was called by the plaintiff on the judge’s suggestion that without his testimony there was not a sufficient case made out on which the plaintiff could recover. The watchman admitted the killing but said that the dead man had attacked him, and that he shot in self-defense. Defendant claimed that plaintiff should be bound by this uncorroborated story of a witness (with an obvious motive to lie), and that the verdict for plaintiff should be set aside. But the court refused to do this, saying in part

“When witnesses were called by a party from among his friends to act as compurgators it was completely rational that the party calling them would have to stand by what they said. After all he chose his friends. But when witnesses are called, in some stranger’s lawsuit, to tell about things they saw, heard, or did, there is no reason in logic or common sense or fairness why the party who calls them should have to vouch for everything they say.

What could be more human than that [Hall] would make his story show the propriety of his own conduct and the wrongfulness of that of his opponent in the fight. And what would be sillier than to insist that the jury is compelled to believe all that testimony which the witness offered in explanation of an intentional killing on his part?”

The rule that a party is bound by witnesses he calls no longer applies in suits under the Federal Employers’ Liability Act where the witnesses are employees of the defendant and must be called by the plaintiff. It should be repudiated generally, and Rule 20, in this regard, makes a much needed improvement in Minnesota law.

The Comment to Rule 20 says that the rule is intended to permit a party to impeach his own witness, but the text of the rule is not so limited. It would allow examination and extrinsic evidence “for

53. Johnson v. Baltimore & O. R. R., 208 F.2d 633, 635-36 (1953). A great judge has recently reminded us that demeanor evidence “may satisfy the tribunal, not only that the witness’ testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.” L. Hand, J., in Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952). And Frank, J., concurring, says that the plaintiff may satisfy his burden of proof merely by so persuading the jury that the witnesses were lying and that the truth must be the opposite of what they said it was.

the purpose of impairing or supporting the credibility of a witness." The present law in Minnesota is that a party may not support his witness by introducing prior consistent statements although in certain rather ill-defined circumstances he can endeavor to support the credibility of the witness. There perhaps can be legitimate doubt as to the wisdom of allowing the party to support the witness generally, but under the Uniform Rules the trial judge will have a broad discretion to regulate such evidence and examination. The discretion of the judge is likely to be a more satisfactory guide than the present rather confused rules, and on the whole in the vast majority of instances this new concept will not prove harmful but may indeed be helpful in the ascertainment of truth.

Rule 17 gives the judge power to determine whether a witness is qualified to testify. It is far better to leave this to the judge than to attempt to lay down fixed rules regulating qualifications. It is also discretionary with the judge whether the preliminary examination of the witness for the purpose of determining his qualification should be in or out of the hearing of the jury.

The first sentence of Rule 21 would make a major change in present Minnesota law and practice. The proposed rule permits evidence of the criminal conviction of a witness to attack his credibility only where the crime involved "dishonesty or false statement." To take a specific example, kissing a married woman is mighty poor evidence of dishonesty or false statement, and indeed some might claim that it should not be classified as a criminal offense at all. It would not be admissible under the proposed rule. But a Minnesota statute has been construed as allowing any crime, whether a great felony or a petty misdemeanor, to be shown to attack credibility, and the court allowed a witness to be attacked on this ground where he had once been convicted of criminal assault because of such an attempted kiss. The court held that it makes no difference whether the crime is one which affects the weight of the witness' testimony, though it conceded that conviction of some crimes will reflect more

59. Minn. Stat. § 610.49.
on credibility than would conviction of others, and thus it allowed
the nature of the offense to be shown.61

The commentator is right who said that the present Minnesota
rules on this subject,

“have the advantage of being clear and well settled, but the
serious disadvantage of being founded on no clear and con-
vincing principle.”62

The simplicity and familiarity of the present law on this point should
not, however, be abandoned merely because another scheme has
more abstract logic to commend it. But perhaps my views are be-
coming settled and hardened along with my arteries.

The second sentence of Rule 21 would also change Minnesota
law by prohibiting the introduction of previous convictions to attack
the credibility of a criminal defendant unless he has first introduced
evidence of his own in support of credibility.63 My friends who are
experienced in this kind of litigation advise me that this seems
a desirable change.64

Rule 22 makes an important change by rejecting, at least in
part, the notorious rule of Queen Caroline’s Case.65 The ne’er-do-
well George IV had long since become bored with his wife, and upon
becoming king sought to get rid of her by charging her with
adultery. The case, which the Queen finally won, caused a tremen-
dous sensation. But today it would be of interest only to the
prurient66 save for a famous rule of evidence which was invented
during the course of it. The judges of England, in answer to an
inquiry from the House of Lords which was trying the case, ruled
that a witness may not be cross-examined about a prior inconsistent

61. To the same effect is Brase v. Williams Sanatorium, 192 Minn. 304,
256 N. W 176 (1934), where the conviction had been for practicing medicine
without license. The court has also held that the witness can not be asked if
he has been indicted, State v. Ronk, 91 Minn. 419, 98 N. W 334 (1904), or
arrested, State v. Bryant, 97 Minn. 8, 105 N. W 974 (1905) and State v.
Renswick, 85 Minn. 19, 88 N. W 22 (1901), or imprisoned, Harding v. G. N.
Ry., 77 Minn. 417, 80 N. W 358 (1899).

62. Note, Impeachment and Rehabilitation of Witnesses in Minnesota,
a similar criticism.

63. For the existing law see State v. Silvers, 230 Minn. 12, 40 N. W
Note, Evidence of Defendant’s Other Crimes: Admissibility in Minnesota,
37 Minn. L. Rev. 608, 616-617 (1953).

64. For this, as for the discussion on the accused’s failure to take the
stand, I am indebted to a memorandum prepared for me by Joseph M.
Donahue, of the St. Paul bar, who is experienced in this field.


66. Such persons, if any there be among the readers of this Review, may
well be interested in the several records of and books about this trial which
the University of Minnesota Law Library has among its extensive collection
of famous cases.
statement unless the witness has first been shown the statement. Frequently this constitutes an undue and serious limitation on "the greatest legal engine ever invented for the discovery of truth," frequently cross-examination. On the other hand, the investigator may have acquired the written statement by slippery means, leaving the witness no copy, and may have shaded and distorted its meaning; it is the investigator, first on the scene and usually from a corporate source, who has the best opportunity to do this. Frequently fair play may require that the witness be permitted to read the entire statement. Hence, as in most evidentiary matters, no inflexible rule should shackel judicial discretion.

Wigmore, who is better qualified to rank the various absurdities of the subject of evidence than are most, says of the rule in the Queen's Case that "for unsoundness of principle, impropriety of policy, and practical inconvenience in trials" it is "the most notable mistake that can be found among the rulings upon the present subject." The great barristers of Victoria's time would not allow themselves to be so hobbled in getting at the truth, and forced through a statute repudiating this rule.

But American jurisdictions accepted the rule unquestioningly, and none with more zest than Minnesota. Our court reversed a case where the rule had not been followed, and the lie exposed without forewarning. Apparently unmindful of the deficiencies of the rule in the Queen's Case, it referred to the cross-examination as "inquisitorial!"

Very properly, Rule 22 does not go the whole way in abolishing this rigid and arbitrary rule. Instead it builds on the middle course suggested by Learned Hand and provides that the witness need not be shown the statement but must, if feasible, be told the time and place of the writing and the name of the person addressed. Normally the witness must be given an opportunity while testifying to identify, explain or deny the statement, but the judge is given discretion to waive even this requirement, thus taking care of the

67. 5 Wigmore, Evidence § 1367 (3d ed. 1940).
68. 4 Wigmore, Evidence § 1259 (3d ed. 1940). Wigmore's exhaustive analysis of this case, id. at §§ 1259-1264, is the classic treatment of the problem. McCormick, Evidence § 28 (1954) is pithier but just as outspoken.
70. McDonald v. Bayha, 93 Minn. 139, 142, 100 N. W. 679, 680 (1904). This is still good law in Minnesota. See Milliren v. Federal Life Ins. Co., 186 Minn. 115, 242 N. W. 546 (1932); Note, Impeachment and Rehabilitation of Witnesses in Minnesota, 36 Minn. L. Rev. 724, 728 (1952).
71. United States v. Dilliard, 101 F. 2d 829, 837 (2d Cir. 1938).
72. Uniform Rules of Evidence, Rule 22(b).
unusual case where the contradictory statement is not discovered until after the witness has left the stand and cannot be recalled.

These proposed rules on witnesses, on the whole, give the witness assurance of fair play and at the same time recognize that the purpose of evidence rules is to get at the truth, rather than to protect liars. They should constitute a desirable improvement.

PRIVILEGES (Rules 23 to 40)

These rules preserve substantially unchanged those privileges against testifying which traditionally have been recognized in Minnesota. Self-incrimination, lawyer-client, physician-patient, husband-wife, priest-penitent, and the lesser privileges as to religious belief, political votes, trade and state secrets, official information, communications to a grand jury, and identity of informer. The codification is well done and minor questions which may have been troublesome before are settled.

But on the whole this chapter of the Uniform Rules is disappointing. Here, as in the chapter on hearsay, the draftsmen of the rules have been content with codification, and have refused to exercise leadership in reform of the law. It is unlikely that anyone will object to the Uniform Rules on privilege, and the unanimity with which they will be received is the measure of their failure. The movement to adopt Uniform Rules of Evidence is a magnificent opportunity to put an end to absurdities which have no better justification than long usage to commend them. The direction in which the law of privilege should move is quite well recognized, and by no one more clearly than Professor McCormick, a member of the drafting committee:

"The manifest destiny of evidence law is a progressive lowering of the barriers to truth. Seeing this tendency, the commentators who take a wide view, whether from the bench, the bar, or the schools, seem generally to advocate a narrowing of the field of privilege. One may hazard a guess, however, that in a secular sense privileges are on the way out."

I agree that privileges in civil actions are on the way out and think this entirely desirable. This view has two bases. 1. Privileges are not logically justifiable. 2. From a practical, technical and strategic standpoint their exercise is harmful to the one claiming them.

Because more learned commentators have discussed the matter so well, I shall state summarily the first of these arguments against privilege. If a privilege is justifiable, it can only be because it protects an interest which is of greater importance to society than ascer-

tainment of the truth in judicial proceedings. The assumption that these interests require protection at so high a price is unproved; the value judgment that these interests are of greater importance than justice is extremely questionable.

In recent years twelve states have passed statutes giving newspapermen a privilege not to disclose the sources of their information. The desire of reporters to preserve these confidences does them honor, but is their sense of honor—or even the putative hampering of a free press which disclosure is claimed to cause—so important that we should protect it when to do so may lead to different results in our courts than would be reached if all the relevant facts were known? The draftsmen of the Uniform Rules did not think so, and did not create such a privilege, nor has the privilege been recognized in Minnesota.

Because privilege for newspapermen is a new idea, we see the conflicting interests involved, but most jurisdictions have decided truth and justice are the more important. However with regard to the traditional privileges, the origins of which are lost in the mists of antiquity, we do not make such a balancing. We accept them because they exist, and never stop to ask whether they can be defended. In my judgment the privileges we know could hardly withstand rational analysis.

This is not to say that we must now turn every secret of the confessional or the wedding bed into common gossip. It does suggest that we should end the absolute character of privilege, and leave it to the discretion of the trial judge whether disclosure should be required. In McCormick's happy phrase.

74. "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." L. Hand, in McMann v. Securities and Exchange Commission, 87 F. 2d 377, 378 (2d Cir. 1937). And see 8 Wigmore, Evidence §§ 2192, 2197 (3d ed. 1940).

75. For contrary view see companion article, Louisell and Crippen.


77. There is as yet no proof that the New York Times, published in a state where the privilege is not recognized, is less successful in getting news than are, say, the newspapers of Montana, where it is.

78. This failure to criticize and analyze rules which have persisted for a long time is hardly confined to the doctrines of evidence. How many people really believe that domestic felicity is served by applying an ancient rule to deny a wife recovery for personal injuries from her husband's insurance company? Compare American Automobile Ins. Co. v. Molling, 239 Minn. 74, 57 N. W. 2d 847 (1955); Lund v. Olson, 183 Minn. 515, 237 N. W. 188 (1931); Wolfman v. Wolfman, 153 Minn. 217, 189 N. W. 1022 (1922), with Prosser, Torts 673-74, 677-78 (2d ed. 1955).

79. McCormick, Evidence 166 (1954), citing numerous precedent supporting such discretion.
"If the trial judge is permitted a lee-way, he can prevent those disclosures of marital or professional secrets which needlessly shock our feelings of delicacy, but at the same time he can override these minor amenities when it appears necessary in order to secure the facts essential to do justice in the case before him." 

I am speaking, of course, only of civil actions. In criminal proceedings we are confronted by the constitutional privilege against self-incrimination, which is but one instance of the sound general attitude that in a free society it is better to allow truth to suffer, and thus to let the guilty go free on occasions, than it would be to adopt the degrading inquisitorial tactics of the police state. Thus it seems to me highly undesirable to permit adverse comment on and inferences from the failure of the accused in a criminal case to take the stand, as the Uniform Rules propose, while prohibiting comment or inferences where any other privilege is claimed.

It is a truism that a man is presumed innocent until proven guilty. If in defendant's opinion, or that of his counsel, the prosecution has failed to prove the defendant guilty, there is no need or reason for him to take the stand, and his failure to do so should not be the subject of derogatory comment. In some cases comment by the county attorney might mean the difference between a just acquittal and an unjustified conviction. Reports of the Attorney General of Minnesota show that in the years 1951-1953 there were 5749 criminal prosecutions in this state. In 5337 of these defendant pleaded guilty and in 279 was found guilty after trial. In only 133 cases was defendant acquitted. In other words, in 98% of the criminal cases in this state in that three year period, defendant was convicted. Even on the obviously false assumption that each of the 2% of criminal defendants who were acquitted was in fact guilty, the loss of 2% of criminal cases seems to me a small enough price to pay for the great constitutional rights which our present practice safeguards. The recommended change would be unnecessary in the light of these safeguards.

To a certain extent many defendants' lawyers would agree with my hostility to privileges. They, too, are willing to sing the praises of truth, and denounce the irrationality of privilege. But their song is directed at only one privilege, that between physician and patient. The insurance companies and corporations generally do not have occasion to go to a doctor, while those who are sued do so all too often. The physician-patient privilege may be detrimental to

the defendant and can never be helpful. But when any other privilege is mentioned, defendants’ lawyers fall back to their usual position of favoring all exclusionary rules which may bar the plaintiff from sustaining his burden of proof.

There are obvious weaknesses in the arguments offered in support of the physician-patient privilege—although I wonder if the present vogue for psychiatry would not have induced Wigmore to modify his view that what we tell our doctor we also tell all our friends. In a good many years of trying cases no client of mine has ever claimed this privilege. But evidence reform should depend on more than whose ox is being gored. The arguments against the physician-patient privilege differ perhaps in degree but certainly not in kind from those which can be made against all privileges. We should abolish all absolute privilege, and not merely that one privilege which defendants find objectionable.

I have said that a claim of privilege is harmful, from a practical, technical and strategical standpoint, to the party making the claim. This is confirmed by the fact that in my experience there is only one case where a claim of privilege was ever involved. This was a suit under FELA for a switchman who died as a result of a leg amputation. Plaintiff claimed that he had slipped and fallen on snow and ice on a footboard of a moving locomotive. He was taken immediately to the office of the railroad doctor for first aid before removal to the hospital. A priest was summoned, and as he entered the doctor’s office he asked the injured man, “Ray, what happened?” The defense objected when the priest testified that Ray said he had slipped on ice and snow on the footboard. Their rather fantastic claim of privilege was, of course, promptly overruled.

The trouble with claiming privilege is that jurors will inevitably draw adverse inferences from the claim, no matter how much legal theory there may be to the effect that such inferences are improper. There have been many cases where I could have claimed privilege, especially several that I tried where the plaintiff had syphilis which was not claimed to be of traumatic origin. Rather than attempt futilely to hide this fact, I inquired on voir dire whether the potential jurors would be prejudiced against plaintiff for this reason, and I referred to it again in the opening statement. In one case, tried in

82. 8 Wigmore, Evidence § 2380a (3d ed. 1940).
83. The case is McGivern v. Northern Pac. Ry., 132 F. 2d 213 (8th Cir. 1942), the only FELA case in my career in which the plaintiff has ended up getting nothing. The evidence question discussed in the text was not raised on appeal.
Minnesota and affirmed by the supreme court, the testimony between the plaintiff's doctor and the railroad doctor as to whether there was visible and palpable muscle spasm in the plaintiff's back was sharply conflicting. With the opposing doctors aligned beside him, I had the plaintiff, who had active syphilis, strip to the waist and back up to the jury, and I took the calculated risk of requesting that some of the male jurors feel his back. When three of them did so, I felt much relieved, and neither the syphilis, nor the motion pictures which defendant showed of my plaintiff's activities, had any prejudicial effect.

There were cases in which I would have claimed privilege had the need arisen. In one the plaintiff's family, people of some prominence, did not know her venereal background. Telltale spots showed up on some X-rays because she had been given mercury and bismuth in the old days when that was standard syphilitic treatment. Fearing that the defendants' doctors would become suspicious of the spots in the pelvic X-rays they had taken, I did not call plaintiff's family doctor. Had he been called against me, I would have been forced to claim privilege. But my feeling about this case is not inconsistent with my general views on privilege. In the case just discussed, the fact of syphilis years before was of no significance to the result, while its disclosure would have been immensely embarrassing to plaintiff. Under these circumstances a judge, exercising the discretion it is suggested he be given, might be expected to sustain a claim of privilege.

The physician-patient privilege is insignificant in Minnesota in personal injury cases, for defendant has a right to a physical examination of plaintiff, and plaintiff waives his privilege by requesting a copy of the report of that examination. In Illinois state courts the defendant is not entitled to a medical examination. Yet I have never refused such an examination of a plaintiff I represented, and upon mere request will allow defendants to have my client examined by any and all doctors of their selection at any time or place convenient to them. It is far better to allow the defendant unlimited medical examinations than to endure the slings and arrows of out-

84. I refrain from giving the name of the case for obvious reasons.
85. This accords with my usual experience that motion pictures taken by a defendant of the plaintiff's activities are helpful to the plaintiff's case and enhance his verdict. Fortunately defendants' lawyers apparently persist in the opposite view. See the example discussed in Wright, *Recent Trends in the Practical Use of Discovery*, 16 NACCA L. J. 409, 423-24 (1956).
86. Minn. R. Civ. P 35.01, 35.02(2). See 2 Youngquist & Black, Minnesota Rules Practice 222 (1953). An excellent opinion discussing this waiver of privilege by Judge Finn of the 13th Judicial District is quoted in Wright, Minnesota Rules 217-18 (1954).
A PLAINTIFF'S VIEW

rageous cross-examination or jury argument by the defense. And this proposition may well stand as my general conclusion on privilege.

**Extrinsic Policies Affecting Admissibility (Rules 41 to 55)**

Easily the most important of the rules in this section is Rule 45, which gives broad discretion to the trial judge to exclude otherwise admissible evidence if it will (1) take undue time, or (2) create undue prejudice or confusion, or (3) unfairly surprise a party who had no reasonable opportunity to anticipate it. My first reaction on studying this rule was one of outrage. It seemed to me that the lawyers are well able to determine whether evidence is sufficiently valuable to justify its presentation. When they have decided that it is valuable and the evidence does not violate any of the exclusionary rules, it may be thought no business of the judge to overrule that decision and disallow the evidence.

My reaction was not an unusual one. A principal reason why the Model Code of Evidence received such a chilly reception from the profession was that it confided too much to the discretion of the trial judge. Rule 45, which seemed to me so distasteful, is essentially identical with Rule 303 of the Model Code.

On further reflection I have modified my views somewhat about Rule 45. Applied with proper caution it may prove helpful. After all, it only gives pious and formal expression to what judges have been doing anyway by calling such proffered evidence irrelevant or cumulative and repetitious—or "prejudicial." Further, it seems to me already the rule in Minnesota. In *State v. Haney,* the Court cited Rule 303 of the Model Code with approval, and relied on it, as well as on earlier Minnesota decisions, for a holding that the trial court has discretion to exclude otherwise admissible evidence if it is too remote or if its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise the opposing party when he has not had reasonable ground to antici-

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87. While cross-examination and jury argument are prohibited, Mattice v. Klawans, 312 Ill. 299, 143 N. E. 866 (1924), experienced trial counsel will always find a way to let the jury know that plaintiff has claimed the privilege. See also 21 Chicago-Kent L. Rev. 181; Harsh v. Ill. Terminal R. R., 351 Ill. App. 272, 114 N. E. 2d 901 (1953), holding that Federal Rule 35 allowing a physical examination does not apply in a FELA case in State Court; and Chicago R. I. & P. Ry. v. Benson, 352 Ill. 195, 185 N. E. 244 (1933).

88. This history is traced in McCormick, Some High Lights of the Uniform Evidence Rules, 33 Texas L. Rev. 559 (1955), and Chadbourn, The "Uniform Rules" and the California Law of Evidence, 2 U. C. L. A. L. Rev. 1, 2-4 (1954).

89. 219 Minn. 518, 520, 18 N. W. 2d 315, 316 (1945).
pate that such evidence would be offered. This is nothing more than a paraphrase of what is now Rule 45.

It is true that the Haney case was a criminal action—but it would be highly unusual to allow the judge more discretion in a criminal case than in a civil action. While the Haney case has not since been cited on this specific point, perhaps that shows only how sparingly the power has been used and how rarely it will need to be used where the parties are represented by capable and experienced trial counsel.

If procedural law is to be modernized it must be on the assumption that the trial judge will not be incompetent. The comment to this uniform rule offers "assurance that the result of rare and harmful abuse of discretion will be readily corrected on appeal." This is a sorry remedy, which furnishes to the practitioner but small and cold comfort, but it would appear to be a calculated risk of the judicial process, which is unavoidable. The power of a trial judge seems drastic when given verbal expression but it actually exists today, and so is not novel. One winces, however, in finding what can happen under the guise of this power to regulate evidence, for example, the Pennsylvania court affirmed the trial court in forbidding the introduction of mortality tables, on the ground that such tables would confuse and mislead the jury. Juries are not so weak, so readily led astray, that in the name of "protecting" the jury we should deprive it of useful evidence.

Rule 41 prohibits the receipt of evidence to show the effect of any statement or similar matter upon the mind of a juror as influencing his verdict. The Comment to this rule says that it adopts what is "almost universally the law," and it is probably a fair codification of the law today in Minnesota.

Without taking serious issue with this rule, it is noted that in one of my recent cases a contrary doctrine was applied and its application was essential to secure approximate justice. On January 29, 1948, Richard Motley was standing beside a slowly moving freight train near Heavener, Oklahoma, when a tie became dislodged from a gondola car loaded with ties and came through the side of the car because of its defective condition, striking Motley in the head, and throwing him under the wheels. He lost his arm between the elbow and the wrist. Suit was filed under the Federal Employers' Liability Act in the state court in Chicago. The action was dismissed on the ground of forum non conveniens. A new action was then filed in federal court in Kansas City where the company has its principal

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office and place of business and where the president and Board of Directors meet and where the general counsel and general claim agent are located. The federal judge in Kansas City, like a lumber dealer with too many products on hand, transferred the case to Muskogee, Oklahoma, under Section 1404(a) of the Federal Judicial Code. Plaintiff was handicapped at the trial because the defendant refused to produce its original photographs and statements of witnesses on the ground that they were in Kansas City and thus not available in a suit in Oklahoma. The verdict for plaintiff was for $15,000, a woefully insufficient verdict in view of the clear liability and serious injuries.

The jurors were then interviewed. Some jurors refused to discuss the matter and others refused to sign statements. Five or six of the jurors, however, gave affidavits on the basis of which plaintiff moved for a new trial. These affidavits, and the testimony of three jurors who were subpoenaed for the hearing on the motion, showed that in the jury room the foreman of the jury, a local automobile dealer, had told the jurors:

1. The case had already been tried once and a jury had turned the plaintiff down in Chicago so why should the Oklahoma jurors give him another chance;
2. The railway union had gone up North and hired a shyster to come down and try the case;
3. The railroad had been fair and made the fellow a good offer and he should have taken it.

The only offer of settlement had been for $12,000 but this did not appear in evidence, nor did it appear in evidence how the foreman of the jury learned of the settlement offer. After hearing this testimony the very able trial judge granted a new trial on the ground of misconduct of jurors as well as other grounds. The case was tried again and a verdict of $30,000 was obtained. Although even this verdict may properly be regarded as inadequate, the consideration of the affidavits and the testimony of the jurors as to what occurred in the jury room did permit a closer approximation to justice than the first verdict would have provided.

Rules 46 to 50 deal with evidence tending to prove "character" or "habit and custom." In general they provide that a person's "character with respect to care or skill" is not admissible as tending to prove the quality of his conduct on a specified occasion, but

91. Examination of jurors as to what occurred in the jury room has long been proper in the Tenth Circuit, Southern Pac. Co. v. Klinge, 65 F. 2d 85 (1933).
that proof of a "habit or custom" may be received for this purpose.\textsuperscript{93} These rules deal with "traits," "habits," and "custom" and they are confused and jumbled and completely unintelligible. The impact which these rules will make on Minnesota law is very unclear. One of the difficulties would stem from a leading case in which defendant's lawyer asked his client if he had ever been in a collision before. An objection to the question was sustained. The supreme court affirmed this ruling, saying

"Evidence that a person is of a careful and prudent habit is inadmissible to prove that he was not negligent upon a particular occasion."\textsuperscript{94}

To the extent that the distinction scholars offer between "character" and "habit" is understandable,\textsuperscript{95} it would seem that the defendant was endeavoring to show a character trait of carefulness rather than a habit of not getting into collisions. If this be correct then the Uniform Rules do not conflict with the decision referred to, but the case does highlight the murkiness of the distinction and suggests it would be unworkable in practice. Whether regarded as a trait, character, or a habit, the evidence should be excluded.

The latest decision of the Minnesota Supreme Court on this subject involved an action under FELA in which the railroad company was charged with negligence in adopting the custom of carrying mail in the cabs of its engines.\textsuperscript{96} Plaintiff, while attempting to carry such mail and dismount from the cab at the same time, was injured. The defendant offered to show that over a period of many years the custom had been in effect and no accidents had been caused thereby. The trial court excluded the evidence, but was reversed by the supreme court. That court held that evidence of absence of similar accidents from the same inanimate cause or same customary practice, was admissible to show that the cause was not dangerous.

\textsuperscript{93} Uniform Rules of Evidence, Rule 49.

\textsuperscript{94} Ryan v. International Harvester Co., 204 Minn. 177, 182, 283 N. W 129, 131 (1938).

\textsuperscript{95} See 1 Wigmore, Evidence §§ 92-97 (3d ed. 1940), McCormick, Evidence § 162 (1954). The official Comment to Rule 50 notes that "it is sometimes difficult to distinguish" between the two. McCormick supra, at 326 cites this case as excluding "character" evidence.

\textsuperscript{96} Albertson v. Chicago M. St. P & P Ry., 64 N. W 2d 175 (Minn. 1954), anno. 42 ALR 2d 1044. See also Nubbe v. Hardy Continental Hotel System, 225 Minn. 496, 31 N. W 2d 332 (1948), and Henderson v. Bjork Monument Co., 222 Minn. 241, 24 N. W 2d 42 (1946), holding evidence of absence of other accidents discretionary with the trial judge. The bald statement in Schillie v. Atcheson, T. & S. F Ry., 222 F 2d 810, 817 (1955) that Minnesota is among the states which admit evidence of this nature, was not wholly accurate prior to the Albertson case.
or the customary practice not likely to cause accidents.\textsuperscript{97} There was no reference to traits, character, or habits as such, but the evidence involved the absence of accidents from a custom and practice followed by an industry. This provokes some interesting speculation with reference to the mescegenation of the words "habits" and "custom" in Rules 49 and 50.

Trial lawyers are far more familiar with the terms "custom and practice" or "custom and usage."\textsuperscript{98} The admission of such evidence in negligence cases harks back to the oft-quoted principle graphically expressed by Justice Holmes:

"What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence whether it usually is complied with or not."\textsuperscript{99}

Here again the rules of evidence should not depend upon whose baby gets the measles. The fact that the defendant, whether through luck or skill, has avoided any accidents in the past, falls far short of showing or tending to show that he was not careless on the present occasion. Likewise, the fact that the plaintiff, whether through bad luck or negligence, has been involved in an accident or accidents in the past, furnishes no safe or proper guide to what happened on the particular occasion. The subject of "accident proneness" should remain in the field of psychology for the time being.\textsuperscript{100}

Rule 51 states the well settled common law rule that remedial measures taken after an accident may not be shown to prove negligence in connection with the accident. Of course, this is subject to the usual exceptions that they may be introduced in order to show the feasibility of preventive measures, where this is an issue, or to explain a photograph made or view had after the repairs, or to show that the injurious effects disappeared after the change.\textsuperscript{101}

\textsuperscript{97} It is settled that evidence of other accidents from the same inanimate cause is admissible. The latest case is Mockler v. City of Stillwater, 74 N. W. 2d 118 (Minn. 1955).
\textsuperscript{98} A late Minnesota case approving such evidence is Ahlstrom v. Minneapolis, St. P., S. S. Marie Ry. Co., 68 N. W. 2d 873 (Minn. 1955).
\textsuperscript{99} Texas & P. Ry. v. Behymer, 189 U. S. 468, 470 (1903) ; Terminal R. R. Ass'n of St. Louis v. Schorb, 151 F. 2d 361 (8th Cir. 1946), holding that custom or practice, where merely evidentiary, of the presence or absence of negligence, may be admitted and need not be pleaded. Cases are there cited distinguishing this situation from those where custom is relied on in the law merchant as a binding rule or as constituting a part of the contractual obligation.
\textsuperscript{101} These are ably discussed in McCormick, Evidence § 252 (1954).
Expert and Other Opinion Testimony (Rules 56 to 61)

Before a witness may give an opinion as an expert, under Uniform Rule 56(2), as under present Minnesota practice, the judge must find, among other things, that the opinion requested is within the scope of the special knowledge, skill, experience or training of the witness. This is substantially the definition given by most authorities, but that of my worthy opponent from St. Paul is more expressive. In the usual case this is a matter for the trial judge. But here, as elsewhere, it is possible for the trial court to abuse its discretion by applying erroneous standards. Thus a trial judge who refused to allow expert testimony except on the part of those who have scholastic standing in the particular field would be guilty of an abuse of the discretion confided to him by this rule. As an eminent court has pointed out,

"Testimony of a country doctor concerning the sanity of his patient is as readily admissible as the testimony of the most renowned psychiatrist."

Rule 58 takes note of the persistent, and justified, criticisms of misuse of hypothetical questions by leaving it to the discretion of the judge whether to require questions calling for the opinion of an expert witness to be stated in hypothetical form. Where the judge has not so required, the expert can give his opinion without specifying the data on which he bases it, although he may be required to specify this data on cross-examination.

There is nothing novel about this rule so long as it is applied to

102. For further treatment of this rule, see companion article by Ladd, p. 441.
103. Ray A. Cummins of St. Paul. Although it was years ago, I acutely remember the definition he used against me in jury argument.

"An expert is one who testifies,
And who then registers mild surprise
When everything he said was true
Is found to have been otherwise,
But nonchalantly files his claim
And collects his fee just the same."

104. Bratt v. Western Airlines, 155 F.2d 850, 854 (10th Cir. 1946) The subject of utilizing modern science in reconstructing accident causes, particularly with reference to vehicle collisions, is discussed by the author with appropriate citation of authority, Law, Science and the Expert Witness, 24 Tenn. L. Rev. 166 (1956).

105. Learned Hand, with his usual vividness, refers to the hypothetical question as "the most horrific and grotesque wen on the fair face of justice." New York Bar Association, Lectures on Legal Topics 1921-22 (1926). Wigmore finds it "so obstructive and nauseous that no remedy short of extirpation will suffice." 2 Wigmore, Evidence § 686 (3d ed. 1940). And McCormick calls it "a failure in practice and an obstruction to the administration of justice." McCormick, Evidence § 16 (1954). Numerous other comments, in the same complimentary vein, are quoted by Wigmore and McCormick at the place cited. For future treatment of this rule see companion article by Ladd, p. 447
A PLAIN'TIFF'S VIEW

experts who have examined the plaintiff, or the land in question, or who otherwise have first-hand knowledge of the subject matter on which they are asked for an opinion. But hypothetical questions are today required in Minnesota where the expert has no such first-hand knowledge, unless he has heard the evidence. These doctrines were laid down in Independent School District No. 35 v. A. Hedenberg & Co.:

"...[T]he rule requiring the statement of hypothetical facts to an expert witness has no application to questions calling for the conclusion of one who has personal knowledge of the subject of the inquiry. If the witness is acquainted with the facts of the case—that is, if he has personal knowledge or has made personal observations—he may give his opinion upon the basis of his knowledge and observation in response to direct interrogation."

The present rule seems to be unobjectionable, and it covers most, though far from all, expert testimony in personal injury cases, where the experts are usually doctors who have examined the injured person. And there is no objection to permitting examination of other experts without using the hypothetical form. It would seem reasonable to permit examination of the following kind:

"Do you have an opinion as to ....?"
"On what data have you based this opinion?"
"What is the opinion?"
"What are the reasons for your opinion?"

Careful lawyers would disclose the basis for the opinion even if Rule 58 were to be adopted. Otherwise the jury will wonder how the expert reached his conclusion, and the wise attorney will not be content with a mere statement of an opinion unsupported by an indication of the facts on which it rests. The most skeptical juror is the one who is asked to accept something on faith or authority without having the process of reasoning explained to him whereby the conclusion was reached.

Thus the permission to defer any specification of the basis for an opinion until cross-examination would not often be used. If it were attempted, the judge would usually intervene and require statement of the supporting data which the rule permits him to do. But on the whole this seems to be a proposal which cannot be useful, and which might conceivably be dangerous. The rule should be changed by limiting it to its opening provision which dispenses with the requirement that the question be hypothetical in form.

106. Of course where the expert has heard the testimony of other witnesses he may be asked a hypothetical which merely requires him to assume that testimony to be true rather than setting out in detail the assumed facts.

107. 214 Minn. 82, 97, 7 N. W. 2d 511, 520 (1943).
Rules 59 to 61 would allow the trial judge to appoint an expert of his own, with the fee of this expert to be borne by the parties.108 These are the only provisions of the Uniform Rules to which I am unalterably opposed. No experienced person can doubt that there has been much abuse in the employment of expert witnesses. And the remedy here suggested has had considerable support in scholarly circles.109 Nevertheless it is contrary to basic principles about the adversary nature of litigation.

These rules provide that the judge may tell the jury that he has appointed the expert "as relevant to the credibility of such witness and the weight of his testimony."110 The effect this would have was well summarized by the Michigan Supreme Court in holding unconstitutional a similar, though more limited, statute which would have permitted the court to appoint experts in homicide cases.

"[I]n the face of the certificate of character, fitness, and ability given to the court experts by the court, experts summoned by either side would receive but scant consideration at the hands of the jury, their testimony would be swept aside in a breath."111

This is but a particular example of the fundamental truth that any indication of the

"attitude of a judge can, and almost universally does, effectively influence and guide a jury's verdict."112

Although the rules purport to allow the parties to call other experts of their own,113 they might just as well save their money. The testimony of the court-appointed expert will be accepted as gospel, while any other expert testimony will be sound and fury, signifying nothing.

Here we are confronted with an anomaly. One of the principal

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108. For further treatment of this rule see companion article by Ladd, p. 450.
111. People v. Dickerson, 164 Mich. 148, 154, 129 N. W. 199, 201 (1910). Similarly strong statements are made in an opinion finding it reversible error for the court to appoint a witness. People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927). The constitutionality of a statute allowing the court to appoint experts in criminal cases was sustained in Jessner v. State, 202 Wis. 184, 231 N. W. 634 (1930).
supporters of the scheme which these rules would codify is Wigmore. Yet even Wigmore would not support proposals that only court appointed experts could testify:

"...first, because it interferes with the constitutional and traditional right of the parties to adduce such evidence as they think useful; and secondly, because it would commit the fate of such issues completely to a body of men who, under certain local political conditions, would be wholly unreliable, and the new state of things would often be worse than the old."\(^{114}\)

If it would be unconstitutional and undesirable to allow testimony only by the court-appointed expert, can it be permissible to allow testimony by this expert and others, when everyone realizes that the testimony of the other experts will be ignored by the jury? This comes dangerously close to suggesting that we are free to strip away the substance of constitutional rights so long as we are careful to preserve the empty forms. As a practical matter trial judges are not equipped to select experts of superior integrity and wisdom, although the jury would not know this.

There is a tendency in all human thought for outsiders to credit a profession with more precision and certainty than it in fact possesses. We are all well acquainted with the fickleness and the vagaries of the law, but when someone comes along and states what purports to be a "finding" of science or medicine, we accept it uncritically. In the trial of lawsuits we frequently find experts from these fields lined up on either side in sharp conflict. Undoubtedly some of these conflicts come from the willingness of certain "experts" to tailor their conclusions to the needs of the side that has hired them. Doctors and scientists, no less than lesser men, too often adhere to the principle that he who pays the piper calls the tune. But surely we cannot suppose that all experts are dishonest. In the great bulk of cases the disagreement among experts comes from an honest difference of opinion on matters about which science or medicine cannot be sure.

Perhaps the jury is not ideally equipped to resolve scientific controversies. Possibly a panel of scientists would be a more appropriate forum to hear such disputes. But if the idea were presented to us in that form, we would reject it unhesitatingly. For by the same token, a judge or a group of trained fact-finders might do a better job in evaluating credibility of lay witnesses, and in passing on such questions as negligence and causation. Yet our people have preferred, rightly I think, to entrust themselves to the common sense of a

\(^{114}\) 2 Wigmore, Evidence 648 (3d ed. 1940).
cross-section of the community. And even science should not be immune from an occasional application of common sense.

"Trial by jury is no litmus test for finding what is true or false but it is the system which we have." 5 Unless we are prepared to abandon the jury system entirely 116 we can hardly justify stripping it of a part of its historic function by turning to a court-appointed "expert" the solution of issues which have hitherto been for the jury.

HEARSAY EVIDENCE ( Rules 62 to 66)

It would be a waste of time for me to say much on the general theory of our rules about hearsay. All three of the great modern masters of evidence have examined this problem in infinite detail, and they are fairly well agreed on the analysis which should be made. 117 First-hand testimony, properly subjected to cross-examination, is the best kind of evidence we can have, and is always to be preferred. But our preference for the best should not lead us always to exclude the second-best if that is all we can get. Thus we cannot say—and indeed our law never has said—that all hearsay is to be excluded. Whether or not to allow hearsay must depend upon how badly we need the evidence and on how trustworthy it seems. The 31 exceptions to the hearsay rule recognized in the Uniform Rules 118 are merely the hardening of common sense judg-


116. "I think it more than mere coincidence that one of the earliest articles to propose court appointment of expert witnesses also suggested for its ideal scheme: "Cases will be heard not before a lay jury which may or may not be swayed by the lawyer's bag of emotional tricks, but by a tribunal of two or in some cases three judges." Elliott and Spillman, Medical Testimony in Personal Injury Cases, 2 L. & Contemp. Prob. 466, 467 (1935). More recent authors have not been so frank to concede that their proposal is inconsistent with the jury system.


118. Uniform Rules of Evidence, Rule 63 (1)-31. The Uniform Rules on hearsay are searchingly examined by Falknor, The Hearsay Rule and Its Exceptions, 2 U. C. L. A. L. Rev. 43 (1954). Except as discussed in the text the highlights are: the use of depositions taken in the present suit, without showing that the deponent is unavailable; admission of declarations made while the declarant was actually perceiving the event or condition described; extension of the use of dying declarations, made while the declarant is conscious of impending death, to all kinds of actions; the admission of declarations against interest without showing unavailability, and embracing declarations, not only against material interest, but also those acknowledging civil or criminal liability or affecting interests of price or prestige, admission of a patient's declaration of his past pain or symptoms when made to a doctor employed with a view to treatment; the use of business records without proving that the employees participating in the making of the record are unavailable. The
ments over the years that in those 31 particular situations the need and the trustworthiness of the kind of testimony offered was sufficient to justify its admission. But with hearsay, as with other questions of procedure, these questions of need and trustworthiness are much better gauged by the trial judge, in the stark light of the realities of the particular case, than they are by a committee or a legislature setting out fixed rules. A simple example will show the truth of Professor McCormick’s observation that:

“Much worthless evidence will fit the categories, much that is vitally needed will be left out.”

A railroad switchman lies dying beside a track. From the nature of his injuries it is impossible to tell whether he was struck by a mail hook protruding from a passing train, or whether he was assaulted by criminals. The railroad is liable for his death only if the first explanation is true. Suppose that before he expired the switchman said: “I was hit by a mail hook.” Will someone who heard this statement be permitted to testify as to it? The statement will be admissible as a dying declaration if it was made “while the declarant was conscious of his impending death and believed that there was no hope of his recovery.” Or it will be admissible if it was made soon enough after the accident to be part of the res gestae, a wonderful Latin tag which has done marvels in confusing the law. But are these really all that we should consider in determining the need and the trustworthiness of the statement?

Suppose four other men on the switching crew saw the switchman receive his injuries. Do we then have the same showing of need that we would have if he was hurt while off by himself? Or suppose a litigation-wise fellow worker had prefaced the dying switchman’s statement by saying to him, “You know, Jim, your wife and children won’t collect a thing from the railroad if you were slugged by some crooks; they can only recover if you were hit by a mail hook.” Wouldn’t this bear on the trustworthiness of the statement?

From this it should be clear that I disagree with the traditional approach to hearsay which says broadly that it is inadmissible and then sets up a number of iron-bound exceptions. Under the ill-fated

admission of official reports made by officers who did not observe the facts but who had a duty to investigate the facts and report their findings; and the use of a judgment of conviction of a felony to prove any fact essential to sustain the judgment. (Rule 63.)

120. Though the facts are based on the celebrated case of Lavender v. Kurn, 327 U. S. 645 (1946), in that case there was no statement by the deceased.
121. Uniform Rules of Evidence, Rule 63(5).
Model Code of Evidence hearsay was admissible if the person who said it was unavailable at the trial, or if he was present for cross-examination, but this was subject to the power of the judge to exclude the evidence if its probative value was outweighed by its potential to confuse or mislead the jury. And of course when hearsay was admissible under this rule it was for the jury to decide how much weight to give it.

This extremely liberal hearsay rule is thought to have been responsible for much of the opposition to the Model Code, and the Uniform Rules have chosen to take a more conservative course. They have preserved the traditional pattern of a hearsay rule with specific exceptions, although the exceptions are much liberalized over those now in force. Perhaps this will enhance the chances for adoption of the Uniform Rules, although I somewhat wonder if traditional codifications which fail to offend anyone do not also fail to arouse any very enthusiastic support from anyone. Procedural reforms can lose out just as readily from the disinterest of their friends as from the disagreements of their enemies.

Turning now to the specific provisions of Rule 63, which is the key rule on hearsay, perhaps the most interesting of the exceptions is the first one. This incorporates Wigmore's view that a previous statement made by a person who is present at the trial and available for cross-examination should be admissible. Probably there is not a court in the land which today would admit such a statement. And our court disagreed with Wigmore in a famous opinion by Justice Stone in which he sought to demonstrate the unsoundness of Wigmore's arguments.

My support of this proposal is tempered by the realization of how unreliable some of these prior statements by the witness are. It is also conditioned that the proponent of the statement be required to call the witness, if available, cross-examination being thus

122. American Law Institute, Model Code of Evidence, Rule 503 (1942), and see the discussion, id. at pages 217-24.
123. Model Code of Evidence, Rule 303. Rule 45 of the Uniform Rules is substantially identical.
124. 3 Wigmore, Evidence § 1018 n. 2 (3d ed. 1940), "The orthodox view was approved in the first edition of this Treatise. Further reflection, however, has shown the present writer that the natural and correct solution is the one set forth in the text above." Other writers have accepted this view. McCormick, Evidence § 39 (1954), Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 192-96 (1948). Falknor, The Hearsay Rule and Its Exceptions, 2 U. C. L. A. L. Rev. 43, 49-55 (1954), accepts the principle but would limit it more stringently than do the Uniform Rules.
guaranteed to the adversary, and that the trial judge be given
discretion to withhold written statements from the jury room. The
claim agent for an insurance company or a railroad does not enjoy
a very high reputation for the accuracy of the statements which he
produces. Thus Judge Guy K. Bard, a federal district judge, says:

...[T]here seems to be an assumption by most of the bar that
any statement made or taken down immediately after the acci-
dent occurs is, of course, a true statement. I am a great admirer
of the Federal Bureau of Investigation. When those special
agents take down any statement from any witness or party, and
give a report in court, I generally find it to be correct. I am sorry
I cannot say the same for the claim agents of certain corpora-
tions."

And McCormick quotes what he calls an “able and experienced
Texas district judge” for the proposition that often persons who are
not accustomed to being witnesses

“are taken advantage of by hardened and experienced claim
agents of insurance companies and other concerns, and are
caus ed to sign written statements that really do not represent
their true notions of the occurrence about which they have made
statements. When there is an issue in court as to whether or not
this has happened, then we have to take all the facts and circum-
cstances of the particular matter under consideration, and more
often than not the subsequent statement of the witness is more
reliable.”

With this recognition of the unreliability of such statements, which
could be documented with a hundred examples from my experience,
why should we change the law of evidence to make such statements
admissible?

As distinguished from official reports, business records, news
bulletins, etc., statements taken by claim agents are notoriously un-
reliable; they should never be allowed to be introduced as substan-
tive evidence merely because the witness has been produced in the
court room but not called to the stand by the proponent or merely
because the witness is “unavailable.” Recent perception by the
witness is an absurd guarantee of trustworthiness.

The answer, it seems to me, is first to make such statements sub-
ject to pre-trial discovery as a matter of absolute right; second, to
guarantee the right of cross-examination, and third, to prohibit
them from becoming exhibits which can be taken to the jury room.
Then their admissibility with these conditions might well be left
to the trial judge who, in the limited area remaining, should be the

126. Symposium: The Practical Operation of Federal Discovery, 12
Let's imagine an example in order to see the possible effect of the rule. At 2:30 on a dark and snowy morning a young railroad switchman, working in the yards, is killed when a train working on the next lead track backs into him. By 3:30 the railroad claim agent is there and has photographed the scene and taken statements from the witnesses. As the issue later develops, the railroad is liable if the engine on the next track failed to have its backup light on, as required by rules of the Interstate Commerce Commission. When the engineer on that other train testifies at the trial, he says he did not have his backup light on. If the proposed Rule 63(1) were the law, the railroad could then introduce as substantive evidence the statement it took from him immediately after the accident in which he says, in writing, "The backup light was on."

The statement by the engineer was taken much closer to the time of the accident than his testimony in court, and undoubtedly the defense attorney would argue to the jury that it is for that reason a more reliable account. But consider some of the possible explanations for the variance between statement and testimony. An hour after the accident takes place the engineer is still shocked with the realization that he has killed a man. His natural instinct is to try to persuade himself and others that it was not his fault. But if the backup light was not on, it would have been his fault. Isn't this going to induce him to say that the light was on? Again, failure to have the light on would violate ICC rules and might cost the engineer his job. Is he likely to admit this failure to the claim agent or his employer?

If the statement is untrue for either of these reasons, we may be much more likely to have the truth at the trial, where the engineer knows he will be cross-examined severely if he lies, where he may subject himself to a perjury prosecution, and where there is the administration of an oath with whatever effect that may have on sensitive people. The stern visage of the judge and the wary eye of the cross-examiner may produce truth from a witness who will lie to a claim agent. But statements taken by claim agents are unreliable even where there has been no deliberate lying. The persuasive powers of claim agents are very great. Imagine the following colloquy in the small hours of the tragic night.

128. Though the facts of this example, and the prompt appearance on the scene of the claim agent, are taken from the record of one of my recent cases, the statement supposed in the text is purely imaginary.
"John, was your back-up light on?"
"I don't think so. I don't remember turning it on."
"Well, it's important that we find out. You usually have your back-up light on, don't you?"
"Yes."
"And you know that the rule requires you to have it on, don't you?"
"Yes, I know about that."
"Well, then, you must have had it on tonight, mustn't you?"
"Gee, I can't remember turning it on."
"But even if you can't remember, John, since you do usually have it on, you probably turned it on tonight, didn't you?"
"Yes, I guess I did."
Claim agents' statements do not treat us to such revealing questions and answers. Instead the claim agent will write out the statement with the flat assertion, "The backup light was on." And John will sign the statement.

But while this may sound like very dubious evidence to be admitted, the remedy is for plaintiffs' lawyers to show by examination of the engineer and by argument why the early statement was inaccurate. There are risks here, but they are risks which are present today. For even under today's rules, the statement could be used by the railroad to impeach the engineer. Use in this way makes it just as necessary for plaintiffs' lawyer to show that the witness is telling the truth now and that the statement is inaccurate as he would have to do if the statement were admitted in evidence. So long as the engineer testifies on the stand that the backup light was out, plaintiff has made a sufficient case to go to the jury. Trial lawyers know that juries rarely heed instruction that they are to use the extra-judicial statement only as bearing on the credibility of the witness and not as substantive evidence. Where an inconsistent statement is used for impeachment, we must explain or demolish it, and the proposed rule will make no great practical change.

There may be times when the early statement will be of real value, and the rule is sound in allowing it in for such cases. Suppose that the engineer doesn't mention the backup light to the claim agent, but that in a fair and honest statement to my investigator, made without duress of any kind, he says he didn't have the light on. By the time of trial the railroad has made it clear that testimony that the light was off will not be viewed favorably by the engineer's employers. I call him expecting him to testify honestly in accord with his statement, but his fear of the company induces him to say that the light was on. There is no other evidence that the light was off. Under today's rules plaintiff would not be entitled to go to the
jury, but under the proposed rule, the early statement would be
substantive evidence in my favor, and it would then be for the good
sense of the jurors, aided by examination of the engineer by both
sides, to decide which time he was telling the truth.\textsuperscript{129}

There is an interesting aspect to this Rule 63(1) which the
scholars seem to have overlooked. The notorious doctrine of Hick-
man \textit{v} Taylor,\textsuperscript{130} and its codification in more drastic form in the
Minnesota Rules,\textsuperscript{131} make statements obtained by witnesses in
preparation for trial immune from discovery. And it has been held,
under the Federal Rules where this question is relevant, that the
fact that the statement was taken close to the time of the accident
and that the opportunity to talk to the witnesses or to take their
depositions does not arise until many months later when the plain-
tiff has secured an attorney, is not "good cause" for allowing plain-
tiff to inspect these statements.\textsuperscript{132} If the statements are now to be
usable as evidence rather than merely for purposes of impeach-
ment, can their immunity from discovery any longer be justified?\textsuperscript{133}
And if we premise an evidence rule on the teachings of psychologists
and of common sense that the statement nearest in time to the event
is likely to be the more truthful,\textsuperscript{134} can we preserve a discovery rule
which rejects this premise? I am for adoption of Rule 63(1) of the
Uniform Rules of Evidence as above explained and limited and also

\textsuperscript{129} An example of a case in which allowing substantive weight to the
prior inconsistent statements of a witness aided a court in permitting a jury
to reach a just verdict on the fourth trial of the case is Kulp \textit{v} Chicago, St.
P., M. \& O. Ry., 102 F 2d 352 (8th Cir. 1939).

Robert J. McDonald first tried this case in 1936. At that time the children,
some of them little tots, were in the court room. When the author finally col-
lected the last verdict, after the Supreme Court of the United States denied
certiorari fifteen years later, the "little tots" were in the Navy! Are courts
really slow and do they really need to be reformed?

130. 329 U. S. 495 (1947). In Hudalla \textit{v} Chicago, M., St. P \& P R. R.,
10. F R. D. 363 (D. Minn. 1950), it was held that plaintiff in a FELA action
may not examine statements given by him to the defendant railroad or state-
ments obtained by the railroad from other of its employees, in the absence
of a showing of "special or exceptional circumstances." \textit{Id.} at 365. This decision
seemingly overrules the earlier rule in the district as laid down in Blank \textit{v}.
Great Northern Ry., 4 F R. D. 213 (D. Minn. 1943).

131. Minn. R. Civ. P 26.02, criticized in Louisell, \textit{Discovery and Pre-

132. Allmont \textit{v} United States, 177 F 2d 971 (3d Cir. 1949), and cases
418-20 (1956).

133. "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.,

134. McCormick, \textit{Evidence} 75-76 (1954), cites numerous cases and
psychological writings in support of this view.
for deletion of the final sentence of Rule 26.02 of the Minnesota Rules of Civil Procedure.

Rule 63(4)(c) is all that remains of the Model Code's permission of hearsay whenever the person who made the statement is unavailable as a witness. It allows statements by unavailable witnesses if they (1) narrate, describe or explain an event or condition, and (2) were made when the person had "recently perceived" the event and while his recollection was clear, and (3) were made in good faith prior to the commencement of the action. This rule would seem to adopt for all cases the principles laid down by our Court in Jacobs v. Village of Buhl.135 A policeman returning from his rounds told another officer that about 45 minutes earlier he had fallen on the steps of the public library. At that time the policeman did not seem to be excited, nor did anyone realize the injuries were serious. But in fact the fall aggravated a pre-existing condition and caused his death. The Court held that his statement about the fall was admissible for workmen's compensation:

"A consideration not to be disregarded in passing upon this case is the fact that there was an entire lack of motive for the deceased to misrepresent at the time he told of having received the injuries. His injuries did not appear at that time to be serious. Death from his injuries was probably the last thing he was thinking about. It is doubtful if at that time he had the least thought in his mind that his injuries would even require an application for compensation.

"It is natural that an injured person would be occupied and absorbed by the experience of his recent injury and that he would make a statement relative thereto to the first fellow employee that he happened to meet. Such a declaration would, in the ordinary run of life, be accepted as a true statement of what occurred. We should not set up technical rules to exclude as evidence what would be accepted as true in the ordinary run of life."

The opinion could have been interpreted either as liberalizing the rules of evidence generally or as laying down a special rule for workmen's compensation cases.137 It has never since been relied on by the Supreme Court as authority for this point except in workmen's compensation cases, and the Court's latest mention of it

135. 199 Minn. 572, 273 N. W. 245 (1937).
136. Id. at 577, 579-80, 581-82, 273 N. W. at 247-48, 249, 250. The case is criticized at Note, 22 Minn. L. Rev. 391, 405 (1938), on the ground that the court should have left this reform to the legislature. It is praised by McCormick, Evidence 584 (1954), as "the kind of judicial enlargement of existing evidence law to meet emerging needs that offers the best promise of survival of the common law system."
137. Note, 22 Minn. L. Rev. 391 (1938) sets forth arguments on both views.
seems to explain it on this basis. But the principles laid down by the Court are as persuasive for common-law actions as for workmen's compensation, and Rule 63(4)(c), extending these principles to all actions, would be a desirable advance.

If all of these situations in which the Uniform Rules would allow statements to be introduced as substantive evidence were where the witness is unavailable under Rule 63(4)(c), or where the witness is present and available for cross-examination under Rule 63(1), the judge should have power—and should frequently exercise the power—to prohibit taking these statements into the jury room. If these statements are regarded as exhibits which the jury may take with them they will have an effect much greater than the same testimony would have were it given on the stand. Thus, for example, if a witness resides outside the state and is, therefore, not subject to subpoena, the lawyer who obtained a favorable statement from him could introduce the statement and show that the witness was unavailable and introduce the statement if it otherwise met the test of Rule 63(4)(c). Four other witnesses might testify orally contrary to this witness' statement, yet their testimony would not be taken to the jury room and might well be forgotten by the jury. And every lawyer knows that having the statement in the jury room is just like having the witness in the jury room talking to the jurors, with the additional advantage that he cannot be cross-examined. The statement, if it were regarded as an exhibit, could go to the room and have great effect with the jurors. For this reason a safeguard in this respect is recommended.

Indeed the only provision of Rule 63 to which I have serious objections is 63(31) which allows treatises, periodicals, or pamphlets on history, science or art as substantive evidence of their contents if the court takes judicial notice or an expert witness testifies that the publication is a "reliable authority in the subject." This would change Minnesota law considerably. Like every other state except Alabama, Minnesota refuses to allow learned treatises to prove the truth of the statements they relate, and even prohibits

139. Stoudenmeier v. Williamson, 29 Ala. 558 (1857). Alabama experience with this rule, which apparently has been favorable, is relied on in support of the proposed rule by Dana, Admission of Learned Treatises in Evidence, [1945] Wis. L. Rev. 455. A Massachusetts statute permits this use of learned treatises in malpractice cases, apparently on the theory that this is the only way plaintiff can get any evidence to support his cause. Mass. Ann. Laws, c. 233, § 79C, discussed in Note, 35 B. U. L. Rev. 542, 550-52 (1955).
140. The latest expression is in Briggs v. Chicago, G. W Ry., 238 Minn. 472, 491, 57 N. W 2d 572, 582 (1953).
their use on cross-examination of an expert if he accepts the work as an authority only "reluctantly." No gain and much loss might arise from this proposed change in our settled practice. On this point I am going to agree with an experienced railroad attorney, since appointed a federal judge, who wrote:

"Those in the profession who have been actively engaged in the trial of personal injury cases of various kinds have learned that the generally accepted ideas and beliefs of the medical profession change rapidly from time to time. Concepts which have been accepted for years are suddenly disproved or new theories are adopted. Doctors are as prolific with writings as rabbits are with young. Some of their treatises seem to be as hastily conceived."

There is no point in converting a lawsuit into a battle of treatises.

CONCLUSION

An interesting and provocative discussion of the need for law reform may be found in the recent book by Chief Justice Arthur T. Vanderbilt. This need has been highlighted by recent articles written by prominent judges advocating abolition of the jury system in negligence cases. Absent reform we may drive litigants to arbitration or administrative tribunals, or the professors may win in their program to commit accident cases to some form of social "loss" insurance in lieu of the orthodox judicial process.

Procedural reform was instituted in this state by the adoption of the Rules of Civil Procedure. The Uniform Code continues the trend to endow the trial judge with broad discretionary powers so necessary if we are to avoid the stupid flood of reversals for evidentiary rulings and errors in the court's instructions. Each of the proposed rules must be studied and evaluated by two criteria:

(1) Does it aid in the discovery and establishment of truth?
(2) Does it simplify and clarify the law?

The Uniform Rules of Evidence seem generally desirable. In some places it would be better to preserve a well-understood Minnesota practice rather than accept change merely for the sake of change or an "illusory" uniformity with other states. The principal section which adopts a policy with which I do not agree authorizes the court to appoint its own expert witnesses, which seems to me undesirable in policy so long as we retain the adversary system. On the whole, modified to Minnesota needs by a discriminating committee, these rules could greatly improve the calibre of our courts as instruments for ascertaining the truth. We have such an agency in the Supreme Court's Advisory Committee. But even after the Advisory Committee has done its job and the Rules in perfected form are adopted, we will not have completed the necessary reform in the evidence law of Minnesota. The ultimate change which is necessary is for the courts, in their application of these rules, to follow the principle laid down years ago by the Eighth Circuit Court of Appeals:

"In viewing a trial as a sporting event in which only the parties have any interest, the rule might be adhered to, like one of the rules of any game. The purpose of a trial, however, is to seek for and, if possible, find the truth and to do justice between the parties according to the actual facts and the law, and any rule which stands in the way of ascertaining the truth and thus hampers the administration of justice must give way."

146. London Guarantee & Accident Co. v. Woelfle, 83 F. 2d 325, 332 (8th Cir. 1936), quoted with approval in Chicago, St. P., M. & O. Ry. v. Kulp, 102 F. 2d 352, 358 (8th Cir. 1939).