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PROBLEM OF PRESERVING EXCLUDED EVIDENCE IN THE APPELLATE RECORD

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BEFORE any present-day appellate court will consider an assignment of error complaining of the erroneous exclusion of evidence, it will, in practically all cases, insist on having before it the evidence complained of. The reasons are obvious. In those cases where the appellate court has power to rehear the evidence it must consider any erroneously excluded evidence in determining what judgment should be entered. In cases where the appellate court does not have power to rehear the evidence, it must decide whether the error, if any, is sufficiently prejudicial to justify reversal. To perform properly either of these functions the court must have access to the evidence in question.

In deciding whether prejudice has resulted from the erroneous exclusion of evidence three questions should be answered.

1. Could the complaining party actually have produced the evidence, if permitted?

2. If admitted, could the evidence properly have changed the result below?[1]

3. After adding the evidence does the truth seem identical with the finding or the verdict?[2]

If the complaining party could not actually have produced the evidence complained of, or if it could not properly have led to a different result below, or if, after such evidence has been added, the truth seems identical with the finding or the verdict, certainly there is no prejudice that will justify reversal. In cases where the appellate court has power to rehear the evidence, if prejudicial error does appear, a fourth question must be answered, viz.,

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[1]State v. Beaudet, (1885) 53 Conn. 536, 539.

[2]1 Wigmore, Evidence, 2d ed., p. 205.

4. With the rejected evidence added what judgment should be rendered?

Before an appellate court can answer adequately the above questions, it must have before it not only the rejected evidence, but all the evidence in the case, or at least all bearing on the matter in dispute. Furthermore, the rejected evidence must be in such form that the appellate court may determine its materiality and judge its value. To answer the first question the court must have definite assurance that the offered evidence would have been forthcoming

The chief difficulty connected with the preservation of rejected evidence centers around the offer of oral testimony where the witness is ruled incompetent or where answers to questions are not admitted. No difficulty arises where written evidence is rejected, the documents are in court and may be easily marked for identification and incorporated in the record. Where depositions or particular answers to questions in depositions are excluded they also may easily be made a part of the appellate record. The same is true where answers to oral questions have been admitted and later stricken from the shorthand record. But where a witness is declared incompetent and not allowed to testify at all, or where a question is asked and no answer is permitted, a perplexing problem is presented.

Presumed Prejudice

Before examining some of the attempted solutions of the problem of how rejected testimony may be preserved in the appellate record, it may be well to notice a rather curious survival of the old doctrine of presumed prejudice. In a fairly recent case it was held by an Ohio court of appeals that where a witness has been improperly rejected by the trial court as incompetent to testify in the case, a reviewing court will hold that the party offering the witness has been prejudiced by his exclusion even though the facts he was expected to prove are not shown by the appellate record.[3] Similar rulings have been made in recent years

[3]Schlarman v. Heyne, (1923) 19 Ohio App. Rep. 64, 66 quoting from syllabus of Wolf v. Powner, Ex'r, (1876) 30 Ohio St. 472. In the latter case it was said. "It is not shown by the record in this case what the plaintiffs expected to prove by the witness, Louis Wolf, and it may be that the plaintiffs were not, in fact, prejudiced by his rejection. Will such prejudice be presumed? In Hollister v. Regnow, (1858) 9 Ohio St. 1, the rule on this subject is thus stated, and supported by authority· 'Where the witness offered is rejected, *as incompetent to testify,* the court will

by other courts, but it is uncertain whether the intention was to presume prejudice, or whether the courts overlooked the problem of prejudice and were thinking only of the admissibility of the evidence. In such a case the supreme court of Arkansas held that it is unnecessary to preserve the evidence "because it must be presumed the court would have excluded the evidence however material it may have been."[4] Contra, the supreme court of Georgia has remarked that "no matter how competent a witness might be, a court will not grant a new trial merely because he was not allowed to testify. It must appear that the excluded testimony was material."[5]

Of course, if a witness is said to be incompetent as to any and all matters, e.g. that a child is too young to be a witness, neither the questions asked nor the answers expected are of any importance in passing on the question of competency, but questions (1) as to whether there is error and (2) whether the error is prejudicial, are entirely different questions. Although it may happen that the trial court is not interested in knowing whether offered evidence is 'material' in passing on the question of admissibility, it does not follow that the appellate court is not interested in its 'materiality' in passing on the question of prejudice, or in proceeding to a final hearing of the case.

Preserving Only the Questions

In a number of opinions the Supreme Court of the United States has emphasized the principle that a party complaining of the erroneous exclusion of evidence must show that he has been injured by the ruling. As early as 1871 the court rules provided that:

"When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions."[6]

Under this rule, as modified in 1872,[7] it was said that the

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hold that the party offering the witness has been prejudiced by his exclusion, though the facts he was expected to prove are not stated—the ground of the exclusion being wholly irrespective of the *subject-matter* of his testimony. Approving this rule, as we do, the judgment of the court below must, for the improper exclusion of the witness offered, be reversed."

[4] Shepard v. Mendenhall, (1917) 127 Ark. 44, 48, 191 So. 209.

[5] Griffin v. Henderson, (1903) 117 Ga. 382, 383, 43 S. E. 712.

[6] 11 Wallace, ix.

[7] 14 Wallace, xii. Rule 21, Sec. 6. "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected."

bill of exceptions must make it appear that if the evidence had been admitted it might have led the jury to a different verdict,[8] or, as stated in another case decided in 1874, "it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case."[9] In 1875 it was held that in equity cases rejected evidence must be taken down, or its substance stated in writing, and made a part of the record, so that, in case the ruling upon the exceptions be reversed, the appellate court might still proceed to hearing without remanding the cause in order that the proof be taken. A written offer of proposed testimony was held to be insufficient.[10]

The above requirement for equity cases has been retained,[11] but in law cases the usefulness of the old court rule was largely destroyed *first,* by holding that when an offer of testimony is made and rejected, if there is nothing to indicate bad faith, the "appellate court must assume that the proof could have been made,"[12] and *second,* by holding that the "rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing him."[13] The rule itself has been omitted from the latest Supreme Court rules, but appears still to be a requirement of most of the circuit courts of appeal.[14] Interpreting the requirement in light of the Supreme Court's holdings, the circuit court of appeals, second circuit, in a fairly recent case pointed out that where the evidence rejected is documentary, the documents must be embodied in the assignment of the error, "But where a question is asked, and no answer is permitted, there is no evidence to 'quote,' and the question for the reviewing court is whether the excluded question was 'so framed as to clearly admit of an answer favorable to the claim or defense' of the interrogating party"[15] The courts of the District of Columbia

[8]Packet Co. v. Clough, (1874) 87 U. S. 528, 542, 22 L. Ed. 406.
[9]Railroad Co. v. Smith, (1874) 88 U. S. 255, 261, 22 L. Ed. 513.
[10]Blease v. Garlington, (1875) 92 U. S. 1, 3, 7-8, 23 L. Ed. 521.
[11]Federal Equity Rule 46, quoted in note 26, infra.
[12]Scotland County v. Hill, (1884) 112 U. S. 183, 186, 5 Sup. Ct. 93, 28 L. Ed. 692. Also see Mo. Pac. Ry. v. Castle, (C.C.A. 8th Cir. 1909) 172 Fed. 841, 844.
[13]Buckstaff v. Russell, (1894) 151 U. S. 626, 636, 14 Sup. Ct. 448, 38 L. Ed. 292.
[14]Williams, Federal Practice 710. See case cited in note 15, infra.
[15]Victor Talking Machine Co. v. Straus, (C.C.A. 2d Cir. 1921) 280 Fed. 717, 718.

and of various states, notably Maryland, have also held that it is sufficient to preserve only the question where it admits of an answer relevant to the issues and favorable to the party calling the witness.[16]

With only the offer or question preserved in the record it is necessary for the appellate court to presume that the witness knew something to answer and would have answered favorably to the interrogating party. Attacking this presumption in a vigorous dissenting opinion Mr. Justice Salinger of the Iowa supreme court declared that:

"It would be a judicial scandal to promulgate a judicial announcement that a witness is under a species of implied contract to furnish a memory adequate to the needs of the party calling him, and to answer questions in such way only as will benefit that party"[17]

Stating the Expected Answer

The most commonly employed method of preserving rejected testimony is for the interrogating lawyer to state for the purposes of the record the testimony expected from the witness. This method has been condemned on various grounds. In *Buckstaff v. Russell* the Supreme Court of the United States remarked that the practice might be very inconvenient and would often be the means of leading or instructing the witness.[18] The supreme court of Georgia, while favoring the practice, was "well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or, by forcing their constant withdrawal to retard the trial."[19] On this point it has been said

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[16]United States v. Chichester Chemical Co., (D.C. App. 1924) 298 Fed. 829, 831. The court said. "This rule prevails also in many state courts, notably Maryland, (citing Maryland, Massachusetts, Vermont U. S. cases). We regard the foregoing rule of practice as authoritative, and as especially applicable to this case, since the prior testimony of the witness herein made it apparent what answer the interrogating counsel expected from him. 3 Corpus Juris, p. 827 'Appeal and Error.'"

[17]American Express Co. v. Des Moines Natl. Bank, (1916) 177 Iowa 478, 509, 152 N. W 625. In this case the court followed Mitchell v. Hercourt, (1883) 62 Iowa 349, 17 N. W 581, where it was said. "The true rule, we think, is that, when it is apparent on the face of the question asked the witness what the evidence sought to be introduced is, and that it is material, this is sufficient." In a fifteen-page dissenting opinion Salinger, J., pointed out various objections to the rule followed by the majority, maintaining that the correct practice is to require a statement of the expected evidence.

[18](1894) 151 U. S. 626, 636, 637, 14 Sup. Ct. 448, 38 L. Ed. 292.

[19]Griffin v. Henderson, (1903) 117 Ga. 382, 384, 43 S. E. 712.

"In stating offers to prove, counsel often get a matter before the jury in a stronger and more harmful form than they could if allowed to elicit the facts from the witness. The effort to keep out the evidence arouses the attention of the jury, and they give heed to all that passes with lively interest, so that the offered evidence is almost sure to find a lodgment in their minds, notwithstanding the fact that they may be instructed to disregard the statements, and consider only the evidence delivered to them. These statements blend themselves with the legitimate facts, and influence the minds of the jurors in spite of all that can be done. An impressive statement of an offer to prove is a very dangerous thing."[20]

In addition to the above objections to the statement method of preserving rejected testimony, there is still another that should be noticed. Although the lawyer offering a witness has stated what he expects to prove by him, what assurance has the reviewing court that the witness would have made good the offer? The The New York court of appeals has said.

"It may be that, had their offer been admitted, they would have produced in fact no evidence to sustain it or prevent a recovery, but in considering the validity of their exception to the exclusion, we must assume that the evidence would have fully covered the propositions contained in the offer."[21]

It is easy to make such an assumption, but is an appellate court justified in doing so? Courts must be able to rely on the statements of lawyers who practice before them, but it is common knowledge that answers given in court under oath often vary greatly from those indicated before the trial. It also often happens that matters must be gone into on the trial which were not discussed in the pre-trial interviews with the witness, and it may be that the witness knows nothing of the matter. Although the interrogating lawyer may be willing to hazard a guess as to what the witness would have said if permitted to testify, should an appellate court be willing to reverse a case and order a new trial so the witness may have an opportunity to say, "I do not know?"

"That this is not unlikely to occur is shown by the experience of all practicing lawyers, who have often seen a long and heated argument, as to the right to ask a question, followed by the laughter of all bystanders when the court held it competent, and the witness replied that he knew nothing about the matter."[22]

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[20]2 Elliott, General Practice, (1894) Sec. 587
[21]Hays v. Hathorn, (1878)74 N. Y. 486, 488.
[22]Griffin v. Henderson, (1905) 117 Ga. 382, 384, 43 S. E. 712.

TAKING THE TESTIMONY

According to the supreme court of Tennessee the 'most approved practice' is to have the testimony given in court in the absence of the jury [23] This practice is simple and meets all the needs of the reviewing court. The question of whether a rejection is prejudicially erroneous can be passed on without resort to uncertain presumptions. The chief objection to the practice is its drain on the time of the trial courts. The practice requires judge and jury to sit idly by while counsel put into the record an endless amount of testimony which has been declared by the trial judge to be, and most likely is, inadmissible. Such practice is, to say the least, not conducive to a speeding up of the wheels of justice. The force of this objection is apparent when, as in a recent Tennessee case,[24] the number of witnesses has been limited for the very purpose of hurrying along the proceedings of the trial.

In cases where a rehearing of the evidence in the appellate court is permitted, if rebutting evidence is allowed to be taken along with the rejected testimony, the reviewing court can make final disposition of the case without reference or delay As stated by the supreme court of Michigan

"In this way the case is disposed of without the necessity of sending it back in case it should appear that competent evidence was excluded. . The effect of a contrary practice can very easily be imagined."[25]

In Oregon and other states statutes have been adopted providing that where testimony is excluded in chancery cases the offering party shall be entitled to have it taken down in like manner as testimony admitted, but specially marked and separately preserved in the appellate record.[26] The use of this method is

[23]Truslow v. State, (1895) 95 Tenn. 189, 198, 31 S. W 987. The court said. "Of course it was not the duty of the court to permit counsel, in the presence of the jury, to detail testimony which it had pronounced immaterial or incompetent. The most approved practice in such cases is for the jury to retire and the witness to testify in respect of the excluded evidence in the presence of the court. Another mode of preserving the exception is for counsel to write out at the time what is expected to be proved by the witness, and hand it to opposing counsel, since adversary counsel may not agree that the witness would answer as stated, and may wish the witness interrogated." Also see Conlee v. Taylor, (1926) 153 Tenn. 507, 285 S. W 35.

[24]Conlee v. Taylor, (1926) 153 Tenn. 507, 285 S. W 35.

[25]Bilz v. Bilz, (1877) 37 Mich. 116, 118.

[26]Oregon, Laws, 1925, ch. 80. (*Testimony, How and When Taken in Equity Cases*) Where evidence is offered by any of the parties, and excluded by the ruling of the court, the party so offering the testimony shall be entitled to have the same taken down in like manner as the testimony admitted, but the same shall be marked and designated as

not as objectionable in non-jury as in jury cases, yet it renders the trial judge powerless to cut off the flow of testimony, no matter how immaterial, and takes his time, no matter how pressed with business.[27]

AFFIDAVITS OR DEPOSITIONS

In Kansas a statute regulating motions for new trials provides that

"In all cases where the ground of the motion is error in the exclusion of evidence, such evidence shall be produced at the hearing of the motion by affidavit, deposition or oral testimony of the witnesses, and the opposite party may rebut the same in like manner."[28]

The courts hold that a ruling excluding evidence is not open to review unless such evidence is thus produced at the hearing of a motion for new trial.[29]

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evidence offered, excluded and excepted to. The party offering said testimony shall be required to pay for taking such testimony so excluded, unless the court on appeal may hold the same was competent."

Michigan Judicature Act 1915, Compiled Laws, 1915, sec. 12493. "In all chancery cases, the court shall rule upon all objections to the competency, relevancy or materiality of testimony, or evidence offered, the same as in suits at law and in all cases where the court is of the opinion that any testimony offered is incompetent, irrelevant, or immaterial, the same shall be excluded from the record. *Provided, however* That if the testimony so offered and excluded is brief, the court may in its discretion permit the same to be taken down by the stenographer separate and apart from the testimony received in the case; and in case of appeal, such excluded testimony may be returned to the appellate court under the certificate of the trial court. *Provided further* That where such excluded testimony is not taken and returned to the supreme court on appeal, if upon the hearing of such appeal, the supreme court shall be of the opinion that any such testimony is competent and material, it may order the same to be taken by deposition, or under a reference, and returned to said court."

Cf. Federal Equity Rule 46. "When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objections made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require."

[27]Fayerweather v. Ritch, (C.C.N.Y 1898) 89 Fed. 529. Syllabus: "Under the rules governing appeals in equity, requiring all the evidence, though excluded by the trial court, to be incorporated in the record on appeal, a circuit court has no authority to deny a party the right to take testimony because it deems such testimony irrelevant." In the opinion the court remarked that the continued taking of testimony would have been a hardship on defendant were it not for a stipulation relieving him of the necessity of being present to object, etc.

[28]Kansas, Rev. St. 1923, Sec. 60-3004.

[29]See Clark v. Morris, (1913) 88 Kan. 752, 757 129 Pac. 1195, and

Where rejected evidence has been taken by affidavit or deposition and thus preserved in the appellate record the reviewing court has before it all that is necessary for a determination of the question of prejudice. The court can determine whether the rejected evidence is 'material' and may feel reasonably sure if the case is reversed the complaining party can actually produce it. One purpose of the Kansas statute was "to prevent the defeated party from seeking a reversal for error in the exclusion of evidence which, had the ruling been in his favor, he might not have been able to produce."[30]

For cases in which the reviewing court may rehear the evidence, preservation of rejected testimony by affidavit would not be sufficient even though the opposite party may rebut the same in like manner, as the safeguard of cross-examination would be absent. Depositions, however, are not open to this objection, and where rejected testimony is thus presented to the reviewing court the court has before it all that is necessary for the so-called trial de novo.

Where excluded testimony is presented by affidavit or deposition the time of the trial court is not consumed with the taking of testimony which in the opinion of the trial judge is inadmissible, and which very likely will not be needed by the appellate court.

It would seem that the practice of preserving rejected testimony by affidavit and or deposition is subject to fewer objections than any other practice noticed, but the problem is not solved. Even if rejected testimony is preserved by affidavit or deposition should it be allowed to go into the record without limit? And who is to bear the expense? If questions on cross-examination are excluded because they call for irrelevant matters, must the witness bare the secrets of his life for preservation in the appellate record on the chance that the evidence might be admissible? The matter of cost may be taken care of by providing that the party putting in the rejected evidence must pay the cost unless it be held by the reviewing court that it was erroneously rejected. Where thus paid for the quantity is immaterial, except as it flattens the appellant's purse, as the reviewing court need not look at it unless it should have been admitted. The question of preservation where

cases cited in note following sec. 60-3004 of the Revised Statutes of 1923.

[30]Treiber v. McCormack, (1913) 90 Kan. 675, 680, 136 Pac. 268.

answers are excluded on cross-examination is not so easy, and really raises the further question of whether the general rule requiring rejected evidence to be preserved should be applied to such answers. The impossibility of stating what a hostile witness would have said, if permitted to answer a given question, is apparent. To assume that such an answer would be favorable is absurd. It would be impossible in most cases to get such an answer in an affidavit, and while it is possible to compel an answer in a deposition or in oral testimony for the purpose of a motion for new trial, would it be safe to permit such compulsion without control on the part of the trial judge? A number of courts have recognized the difficulties and have held that the general rule requiring the preservation of rejected testimony does not apply to answers excluded on cross-examination.[31] The supreme court of Kansas takes this view[32] A number of courts, however, insist that such evidence be preserved.[33]

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[31]Griffin v. Henderson, (1903) 117 Ga. 382, 383, 43 S. F 712. "In a few instances there may be an exception—as in cross-examination where the examining counsel may not know what the answer will be, or in exercising a right to test the witness." Also see Cunningham v. A. & N. W Ry., (1895) 88 Tex. 534, 538, 31 S. W 629, where it is said: "The general rule is, that in order to entitle a party to a revision of the ruling of the lower court in refusing to allow him to propound a question to a witness, he must show what answer he expected to elicit, in order that the court may see that he has been deprived of legitimate evidence. This rule applies mainly to a case where a party is seeking to introduce original evidence, the nature of which he should be expected to know before he offers the same, and is not applicable to a case where the party is cross-examining the witness of his adversary, with whose knowledge of the case he is not supposed to be familiar. In this class of cases we think the better rule is, that if the question appears on its face to be calculated to elicit competent testimony, it is error to refuse the same, although counsel may not be able to state to the court the answer intended or expected to be elicited. To exact such a statement would be to require counsel either to speculate upon the answer of an adverse witness, or deal unfairly with the court. Harness v. The State, (1877) 57 Ind. 1, Hutts v. Hutts, (1878) 62 Ind. 225; O'Donnell v. Segar, (1872) 25 Mich. 367, 1 Thompson, Trials, sec. 680."

[32]McIntosh v. The Standard Oil Co., (1913) 89 Kan. 289, 291, 293, 131 Pac. 151 Leavens v. Hoover, (1915) 93 Kan. 661, 665, 145 Pac. 877

[33]Holladay v. Moore, (1913) 115 Va. 66, 70, 78 S. E. 551, citing American Bonding and Trust Co. v. Milstead, (1904) 102 Va. 683, 691, 47 S. E. 853. In the latter case it was said: "It is true counsel explained the object of the question, which goes alone to its materiality, but fails to show what was expected to be proved by the witness, and its materiality to the issue in the case. 'Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party offering the witness expected or proposed to prove by him. And the same rule applies where a question is asked on cross-examination, which the witness is not permitted to answer." Also see:

TAKING EVIDENCE IN APPELLATE COURTS

A cursory check of law cases decided by the supreme court of Michigan between December 8, 1926, and April 1, 1927, shows that in sixty-five assignments of error complaint was made of the erroneous exclusion of evidence. Of these assignments only five were sustained as showing prejudicial error; all the rest were either not considered or were specifically overruled. It is not suggested that any conclusion can be drawn from these few figures, yet they tend to confirm what is generally known to be true, viz., that only a few of the many assignments complaining of the erroneous rejection of evidence are sustained by our appellate courts. Whether the excluded evidence be taken in the court below, added by deposition, or only stated in the record, if it be extensive—as where a witness has been excluded or a whole line of evidence rejected—much time, labor and expense is necessary so to prepare the appellate record that the reviewing court may proceed to a hearing or decide the question of prejudice. In cases where witnesses have been rejected as incompetent, or whole lines of evidence have been excluded, it is apparent that to require the preservation of all of such evidence to be used by the appellate court only if the rejection is found to be erroneous, is to require entirely too much in view of the remoteness of the contingency. In such cases it would seem that the only way out is for appellate courts to be willing to have the evidence taken during the course of the review, *after* error has been found.[34] Such a practice would not be desirable where mere bits of evidence have been rejected, but where entire blocks have been excluded a substantial saving both to the state and to the parties could be effected.

A PRESCRIBED PRACTICE NEEDED

In the realm of procedure it is surprising to find a practice as indefinite as that employed in the preservation of rejected

Walker v. Rogers, (1925) 209 Ky. 619, 621, 273 S. W 439; Green v. Freeman, (1921) 148 Ark. 654, 227 S. W 982, 984; Steeley v. Lumber Co., (1914) 165 N. C. 27, 30, 80 S. E. 963.

[34]Rhode Island, Gen. L. 1923, Equity Causes (4963) "No new testimony shall be presented to the supreme court on appeal, but in case of accident or mistake, or erroneous ruling excluding evidence in the superior court, the supreme court may grant leave to parties to present further evidence, and may provide by general rule or special order for the taking of such evidence." For an illustration of practice under this statute see case discussed in Shepard v. Springfield F & M. Ins. Co., (1919) 42 R. I. 174, 180, 105 Atl. 576.

See Michigan Judicature Act, 1915, (12493) quoted in note 26, supra.

evidence. The courts all say that such evidence must be preserved but are usually vague as to the method that should be used. Statutes and court rules in most jurisdictions have consistently failed to prescribe the practice. In one breath courts will speak of several methods without stating which is the one desired. This lack of system is no doubt largely due to the fact that no one method is free from difficulty and objection, and no one is superior to the others in all situations. Flexibility in procedure is greatly to be desired, but there must be sufficient rigidity for the practice to be workable. While it may not be desirable to prescribe one method of preserving rejected evidence to be employed in all situations, it is desirable to have the situations classified and the method best suited to a particular kind of situation prescribed therefor.