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The Uniform Rules of Evidence as Affected by the Federal Constitution, and as Adopted by One State

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ARTICLES

THE UNIFORM RULES OF EVIDENCE AS AFFECTED BY THE FEDERAL CONSTITUTION, AND AS ADOPTED BY ONE STATE

by William F. Harvey*

In 1961 the State of Kansas celebrated its centennial year. It was the centennial year of her code of civil procedure which had changed very little, and then by legislative enactment, since 1861.

Effective January 1, 1964, a complete procedural change occurred with the enactment of the new Kansas Code of Civil Procedure.[1] It contained twenty-six separate articles, of which one article was the Federal Rules of Civil Procedure, including the 1964 amendments to the Federal Rules.[2] Another article was a long-arm statute which may surpass any other state in its extension of jurisdictional power.[3] Another article enacts, ver-

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[1]Fowks and Harvey, *The New Kansas Code of Civil Procedure,* 36 F.D.R. 51, 52 (1964).

> It was a break from the past so complete and so sharp that . . . a litigant can probably receive a better trial procedure in the state courts of Kansas than in the United States District Court sitting in the State.

This statement, made by the author, along with others such as former Governor Anderson's, "[the code of procedure] adopted [in Kansas] is the most modern Code of Civil Procedure in the United States," 1 KANSAS STATUTES ANNOTATED v (Vernon 1964) says far too much. It was made with heady optimism but in disregard of the rule making authority of the local trial courts of general jurisdiction, which may go far in denying a uniform code of civil procedure in the State of Kansas. *See* note, *Kansas District Rules—Anomolies of the Code of Civil Procedure,* 6 WASHBURN L. J. 113 (1967).

[2]Subsequent Federal Rule amendments, such as the 1966 rules, have not been incorporated into the Kansas Rules. Thus the uniform state and federal civil practice was short-lived.

[3]KANSAS STATUTES ANNOTATED (hereafter "K.S.A.") 60-308(b) (1964):

> Submitting to jurisdiction—process. Any person whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (1) The transaction of any business within this state;
>
> (2) The commission of a tortious act within this state;
>
> (3) The ownership, use, or possession of any real estate situated in this state;
>
> (4) Contracting to insure any person, property or risk located within this state at the time of contracting;
>
> (5) Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided in addition, that at the time of the injury either (i) the defendant was engaged in solicitation or service activities within this state; or (ii) products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of trade or use;

batim, 28 U.S.C. 2255 into Kansas state law. Among the other articles are major changes in divorce and alimony, injunctions, exemptions, executions and orders of sale, statutes of limitations, appeals, and changes of name. One quickly notes that much more is present than is usually associated with a code of civil procedure. Finally, in Article 4, the Kansas legislature adopted the Uniform Rules of Evidence, as they were promulgated in 1953, almost without change.[4]

The purpose of this discussion is to highlight some of the major rules of the Uniform Rules of Evidence, hereafter referred to as the "Rules," or "Uniform Rules," and attempt to determine whether they are now adequate. This is done because a standing committee of the Judicial Conference of the United States, the Advisory Committee on Rules of Evidence, is considering a body of rules for the United States District Courts, and because other state jurisdictions may use the Uniform Rules as a basis for revision. It is believed that such a discussion may be pertinent to those considerations, and observations on the adequacy of the Uniform Rules as of today will be attempted in the hope that other states or the federal committee will be benefited.

I. Adoption of the Uniform Rules in Kansas

When the original advisory committee on the Federal Rules of Civil Procedure considered its task it felt that the work of "formulating civil rules would be unduly delayed if it tried to deal comprehensively with the subject of evidence."[5] Two reasons were assigned. First, it was said, the subject was too extensive for the committee's purpose, and, secondly, it would be necessary to conduct an original study because no independent studies then existed.

Obviously the second problem was solved for Kansas by the Uniform Rules of Evidence. The first problem, whether such a legislative effort would embrace too many factors and what interruption would occur in the Kansas law of evidence, was solved by simply not considering it in any extended way. The action taken was, regardless of the consequences, adopt the Uniform Rules!

Perhaps it was felt that the courts would solve arising problems in evidence, at the moment. If so, to radically redefine the law of evidence

(6) Living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations arising for alimony, child support, or property settlement under article 16 [on Divorce and Alimony and the grounds for each] if the other party to the marital relationship continues to reside in the state.
* * *

[4]The Uniform Rules were approved by the National Conference of Commissioners on Uniform State Laws at its annual conference in Boston, Massachusetts, in August 1953.

[5]*Preliminary Study of the Advisibility and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 81, 89 (1962).

used in the trial courts, and then leave the solution of problems caused to the courts affected would not appear to be an endorsement of procedural change by legislative decree. In such a legislative-judicial relationship, one might anticipate that a court would strive to find that the codified law of evidence only restates existing decisional law—thus, the court may proceed essentially as it did before the enactment. Such has been the case in Kansas, and its Supreme Court has said in several decisions that the legislated rule is but the decisional rule of long-standing.[6] However this may be, the principal Uniform Rules must be examined.

II Abolotion if Disqualification, Privileges and Exclusionary Rules. Admissibility of Relevant Evidence.

Rule 7 is as follows:

> Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.[7]

Part (f) is very significant. According to the Commissioner's comment, this rule was intended to make all relevant evidence admissible.[8] The meaning is that if a piece of information is shown to be relevant, then it is admissible as evidence, and as such can be excluded only by a specific rule of exclusion or privilege. Further, "relevant evidence" is defined as "evidence having *any* tendency in reason to prove *any* material fact."[9]

Clearly this rule is the keystone for the Uniform Rules. If heresay is relevant, it is admissible unless specifically excluded by a rule disallowing heresay, unless admitted under an exception to it.[10]

Under this rule if there is any other common law rule of exclusion not made the subject of a new statutory rule of exclusion, or a possible statutory rule of exclusion, such as the so-called "Dead Man's Statute," not made the subject of an exclusionary rule in the code, then those rules of exclusion fall and the evidence comes in.

It appears that Rule 7 was written that way, and the entire Uniform

[6] *See e.g.*, Kincaid v. Wade, 196 Kan. 174, 410 P.2d 333 (1966); State v. Wright, 194 Kan. 271, 398 P.2d 339 (1965). *But compare,* Thompson v. Norman, 198 Kan. 436, 424 P.2d 593 (1967).

[7] K.S.A. § 60-407 (1964).

[8] *See* note 15, *infra.*

[9] Uniform Rule 1(2); K.S.A. § 60-401(b) (1964) (emphasis added). Under this rule and definition, it is not necessary that evidence shall make a material fact more probably than it would be without that evidence, it is only necessary that it have any tendency to do so. Clearly, it is not necessary that evidence, to be relevant, tend to show by a preponderance one inference over any other.

[10] *See* the discussion of hearsay, part IV, *infra.*

Rules thus framed, out of a great concern for what the "Dead Man's Statute" represented, and the asserted injustice which came from silencing a party who claimed an interest against the deceased's estate. Thus the case is put of a doctor who could not testify in a suit against the estate which is brought to collect his fee for services rendered. The theory of the silencing statute or rule was that the danger resulting from possible fraud overcame the injustice done in barring people from testifying. Under Rule 7, and the Uniform Rules, the theory is that false testimony can be exposed by cross-examination and by honest witnesses.

Therefore, abolish the "Dead Man's Statute," by declaring all relevant evidence admissible. This is supplemented, as Professor McCormick pointed out,[11] by Rule 63(4)(c)[12] under which a statement made by a declarant, now deceased, is admissible, as an exception to the heresay proscription if the statement was made at a time when the matter had been perceived by him and when his recollection was clear if it narrates or explains the event. Further, it is noted, that a dying declaration[13] is admissible under the Rules in a civil case.[14] What was not acknowledged, it seems, is the fact that the deceased may have been just as mistaken, or fraudulent, as any other witness or party. Nevertheless, his testimony, if relevant, comes in with no opportunity to test its accuracy by cross-examination.

The substantial question is now raised, whether with this theory of admissibility the Rules should apply in a criminal case? Under Rule 2, and the Kansas Rule, they do apply in a criminal case.[15] This of course answers the immediate questions, but solves few resulting problems because the Uniform Rules do not recognize rules of Constitutional exclusion and privilege.

In fact the Commissioners' comment on this Rule states that illegally acquired evidence may be inadmissible on Constitutional grounds—but not because it is irrelevant—and that such Constitutional questions are independent of the Uniform Rules.[16] Two points come immediately. First, under the Rules, illegally obtained relevant evidence is admissible if the ground of illegality is other than the Federal Constitution or a state

[11] *See generally*, McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEX. L. REV. 559 (1955).

[12] K.S.A. § 60-460(d) (3) (1964).

[13] Rule 63(5); K.S.A. § 60-460(e) (1964).

[14] Rule 2 of the Uniform Rules is as follows:

> Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

K.S.A. § 60-402 (1964).

[15] This means that in Kansas if one seeks rules of evidence in a criminal case, he turns to the Code of Civil Procedure. On a possible state constitutional objection to this kind of legislative writing, see State v. Taylor, 198 Kan. 290, 296, 424 P.2d 612, 617 (1967).

[16] The Commissioner's comment on Rule 7 was as follows:

constitution.[17] Secondly, at the time the Commissioners wrote the Uniform Rules about the only Constitutional exclusionary rules applied to the states, were those found in *Wolfe v. Colorado*,[18] and *Rochin v. California*.[19] Perhaps this explains the Commissioners absence of concern about them, and their total disregard of whether any such rules should be placed in a state code of evidence. Further it is apparent that such an absence of awareness and concern in the Uniform Rules would encourage state evidence writers to continue to disregard those developments which resulted in the United States Supreme Court extending the Constitution into rules of exclusion of evidence in state courts. Whether the "state's failure to act" is ever justification for a Constitutional expansion is quite another question. The fact remains that it did happen.

So it was that the criminal case was substantially affected by the civil docket's concern over lost but relevant testimony. If another jurisdiction is to adopt these rules, surely great thought should be given to rules of Constitutional exclusion in criminal cases. This was not done in Kansas. In short, Kansas adopted the Uniform Rules of Evidence as written in 1953, effective in Kansas in 1964, and apparently no thought was given to the cases from the United States Supreme Court which directly related to the entire spectrum of evidence in a criminal case, and the obtaining of that evidence before trial. It was as if those cases did not control, outside of sporadic discussions in state bar association seminars.[20]

This rule is essential to the general policy and plan of this work. It wipes the slate clean of all disqualifications of witnesses, priveleges and limitations on the admissibility of relevant evidence. Then harmony and uniformity are achieved by writing back onto the slate the limitations and exceptions desired. All of the other rules, except the very few touching upon related matters of procedure, revolve around and are limitations on and modifications of Rule 7. This is not a new approach. It follows the pattern of the A.L.I. Model Code of Evidence, which in turn was based on the concept of Professor Thayer and others that all things relevant or logically probative are prima facie admissible unless limitations are imposed by another rule.

Thus all relevant hearsay would be admissible under this rule but for Rule 63 which bars hearsay generally, with carefully specified exceptions.

Illegally acquired evidence may be inadmissible on constitutional grounds—not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule.

[17]That this is the common law rule is recognized, see GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254(a) (6th ed. 1850).

[18]338 U.S. 25 (1949).

[19]342 U.S. 165 (1952).

[20]Reference is here made to Escobedo v. Illinois, 378 U.S. 478 (1964); Jackson v. Denno, 378 U.S. 368 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); and Rogers v. Richmond, 365 U.S. 534 (1961), all of which were either decided or in the decisional process when the Rules were adopted in Kansas. Since then the Kansas Supreme Court has often filled the gap, in such cases as State v. Dearman, 198 Kan. 44, 442 P.2d 573 (1967), in which the court held that it was reversible error to permit the prosecution to comment on the fact that defendant, after arrest, refused to speak in exercise of his constitutional right to remain silent prior to consultation with an attorney.

It is not sufficient to say that rules of Constitutional exclusion can be acknowledged and known in case-by-case practice. They simply are not that well-known or understood by either the practitioner or the average trial judge, and if not included in an evidence codification then of course they are not immediately present as should be the case in actual practice. These thoughts lead to the interim conclusion that the full set of Uniform Rules should not today be applied to the criminal case and that a separate code of evidence, perhaps, should be written for the criminal law practice, from arrest to appeal.

Certainly it cannot be gainsaid that Rule 7 is, as stated, the main rule of the Uniform Rules, and the rule where one must commence in examining those Rules. In addition to the Rules cited before,[21] which support the Rule 7 sweep of admissibility, at least one more should here be noted. It is Rule 3,[22] providing that if there is no bona fide dispute between the parties on a material fact, then any relavent evidence may be admitted to prove the fact, and the exclusionary rules *shall not apply,* subject to a claim of privilege. The gist of this rule is that if at trial there is a matter not disputed but not proved due to some sort of technical requirement, rather than a real dispute between parties, the trial judge may admit any relevant evidence proving the undisputed question. The predecessor to this rule was strongly criticized by Professor McCormick because, he felt, it would shift the balance of power of the judge, jury and counsel and would require that the entire emphasis of the process of proof be altered. McCormick stated this example applicable to this rule:

> Thus, I take it that, if in a suit for the price of goods shipped it were material to prove the date of shipment, and the defendant had merely stated that he had no information sufficient to form a belief as to the correctness of the plaintiff's allegation as to date, the plaintiff would be allowed to prove the fact informally by offering what purports to be a letter from the railway company stating the time of shipment.[23]

If the purpose of this rule was to confine issues at trial to those actually disputed, then it would seem that if a jurisdiction has a discovery system such as the Federal Rules[24] this rule may be unnecessary. The purpose it would serve is much like Rule 36 of the Federal Rules, and the admissions possible under that rule.

If this is correct it suggests that the Uniform Rules should be care-

[21] *See* notes 11 and 12, *supra.*

[22] Uniform Rule 3; K.S.A. § 60-403 (1964), is as follows:
> If upon the hearing there is no bonafide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to section [60-445] 45 and any valid claim of privilege.

[23] McCormick, *The New Code of Evidence,* 20 TEX. L. REV. 661, 672 (1942).

[24] In Article 2 of the Code of Civil Procedure, Kansas adopted all of the federal discovery rules.

fully examined for intergration with other procedural discovery rules in the jurisdiction.

III. WITNESSES

A. Qualifications

Rule 7 of the Rules states that, except as provided, "Every person is qualified to be a witness." Accordingly, a witness is deemed competent to testify, and his competency must be challenged with the burden placed on the party or person making the challange. Under Rule 17[25] there are two disqualifications: the witness is not capable of expressing himself so as to be understood by the judge or jury, or the witness is not capable of understanding the duty to tell the truth.

There is no provision here that the witness is disqualified on the grounds of inability to observe or recollect. The witness's capacity to perceive is for the fact finder to determine in weighing the believability of the testimony, but it is not a basis for exclusion.

Under Rule 19[26] the lay witness must have personal knowledge of the event or condition about which he will testify, and the party offering the witness must satisfy this foundation requirement. It is here that the court may exercise control over allowing the witness to speak. That is, if the court finds that the testimony on the foundation is not believable "beacuse, no trier of fact could reasonably believe that the witness did perceive the matter . . .", then the judge may reject the testimony. Rule 19 also speaks to the qualifications of the expert witness, requiring "personal knowledge thereof, or experience, training or education if such be required . . .", and here too the judge can disqualify the witness if he is not satisfied as to the foundation.[27]

The manner of giving testimony and the kind which is allowed is

[25]K.S.A. § 60-417 (1964).
A person is disqualified to be a witness if the judge finds that (a) the proposed witness is in capable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of this article relating to witnesses.

[26]K.S.A. § 60-419 (1964).
As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being latter supplied in the course of the trial.

[27]In the Kansas case of State v. Elder, 199 Kan. 607, 433 P.2d 464 (1967), the court held that an expert witness, called to the stand to testify for the defense in another criminal prosecution, could be charged and convicted of perjury when he lied about his qualifications and training and educational background.

governed by Rule 56 of the Rules.[28] This rule governs both the expert and other opinion testimony.

Under Rule 56 a lay witness can render an opinion, and there is no requirement that the lay witness speak only from facts. Basically, the Rule, in part (1), recognizes that the decisional rule proscribing opinions was one which at best stated a preference for the specific rather than the general when possible. Specifically in part (1), the lay witness may express an opinion when it is rationally based on perception—thus a rational connection between the two. The gist of this was put years ago by Judge Hand in *Central R. Co. of New Jersey v. Monahan,*[29] where he said, "The line between opinion and fact is at best only one of degree, and ought to depend solely upon practical considerations, as, for example, the saving of time and the mentality of the witness."[30]

The second requirement is that the opinion or inference is helpful in understanding his testimony.

Once an expert's qualifications are established under Rule 19, he may express opinions and inferences on facts or data made known to him, *or personally known by him,* and within his scope of special knowledge, or skill or training. Under Rule 58,[31] the expert may give his opinion without first specifying the data on which it is based, except that on cross-examination he may be required to state that data.

The case of *Casey v. Phillips Pipeline Company,*[32] arose because, plaintiff alleged, defendant Pipeline Company had caused the destruction of plaintiff's crop of zoysia grass, among other things.

[28]K.S.A. § 60-456 (1964) has changed Rule 56(1) (b) slightly.

> Testimony in Form of Opinion.
>
> (1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.
>
> (2) If the witness is testifying as an expert testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.
>
> (3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.
>
> (4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

[29]11 F.2d 212 (2nd Cir. 1926).

[30]*Id.* at 214. *See also* United States v. Petrone, 185 F.2d 334 (2nd Cir. 1950).

[31]K.S.A. § 60-458 (1964).

> Hypothesis for Expert Opinion Not Necessary. Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but on cross-examination he may be required to specify such data.

[32]199 Kan. 538, 431 P.2d 518 (1967).

At trial plaintiff called two expert witnesses. They were to testify on the value of the grass and objection was made to the testimony of one on the ground that, conceding he was an expert, he was not qualified to testify on the value of the destroyed grass, in that he referred to trade journals not admitted into evidence. The trial court sustained the objection holding that the testimony was founded on heresay. On appeal the Kansas Supreme Court reversed, ordering a new trial.

The court held that when an expert witness testifies as to value, relying in part on research data and trade journals, such data and journals do not have to be admitted in evidence before his testimony is admissible. This holding was an interpretation of Rule 56.

Thus the Kansas court construed Rule 56 to permit an expert to testify and render an opinion or make inferences even though the basis of the opinion is not "in evidence". It is enough, it seems, that the basis for the expert's opinion can be ascertained on cross-examination, and that the data is "personally known" by the expert.

The court said that an expert can give an opinion even if not founded on personal observation, but upon knowledge gained from books and treatises, and the court held that in any event trade journals and market reports are admissible as an exception to the heresay rule.

This case would seem to permit the testimony of a physician based upon a factual report made to him by another physician, or nurse, which is not in evidence in the case, but is available for use on cross-examination.

Finally under part (d) of Rule 56, there is no objection on the ground that the expert's opinions contain an ultimate fact in issue in the case.

B. Impeachment

Rule 20[33] of the Uniform Rules swills the decks clean as to impeachment. It provides that a party may impeach or support any witness, using any evidence relevant to credibility, subject to Rules 21 and 22, which write in the limitations on this rule.

Under this rule, a party may impeach the witness he calls, and is not "bound" by the testimony of such a witness.

An example is given in the Kansas case of *Taylor v. Maxwell,*[34] which arose from an intersectional collision of automobiles. In the trial the plaintiff testified that after the collision the defendant leaned over plaintiff and plaintiff smelled liquor on defendant's breath. Plaintiff

[33]K.S.A. § 60-420 (1964).
> Subject to [60-421] Rule 21 and [60-422] Rule 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

[34]197 Kan. 509, 419 P.2d 822 (1966).

then called another witness and asked whether that witness observed any drinking at a private club on the day of the event, to which the witness said no. On cross-examination the defense elicited the fact that the witness had never seen defendant drink or smelled liquor on his breath. On redirect the plaintiff was allowed to impeach his witness by showing that the witness made statements to two other persons about defendant's drinking on the day of the accident. The procedure was sustained on appeal as consistent with this rule.[35] Finally, this rule permits supporting the witness by prior consistent statements, or another witness supporting the credibility of the witness to the event, or by evidence on the character of the witness.

As stated, Rules 21[36] and 22[37] of the Rules are limitations on Rule 20. Rule 21 speaks directly to the kind of impeachment and cross-examination available. First it states that a witness can be impeached for crime on cross-examination to the extent that a prior conviction involves dishonesty or false statement. Thus larceny, for example, not involving fraud or trick or deceit would not be available for impeachment.[38] Secondly, not even this can be shown if the witness is the accused in a criminal case, on the stand but who has not admitted evidence solely for supporting his credibility. Hence the availability of cross-examination of an accused is less than a witness.

[35] *See also*, Johnson v. Baltimore & O.R.R., 208 F.2d 633 (3rd Cir. 1953), *cert. denied*, 347 U.S. 943 (1964).

[36] K.S.A. § 60-421 (1964).

> Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused ina criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

[37] As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait or his character, shall be inadmissible.

[38] *Contra*, Tucker v. Lower, 200 Kan. 1, 434 P.2d 320 (1967). The case of Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), has an outstanding opinion by Judge Burger on these points. He there states, at page 940:

> In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on *dishonest conduct* relate to credibility whereas those of violent or assaultive crime generally do not; traffic violations, however serious, are in the same category . . . (Emphasis added).

This is shown in the recent Kansas case under this rule.[39] The following cross-examination occurred:

> Q. Mr. Motley, you're from Chicago, right?
> A. Right.
> Q. How long have you been down in this area?
> A. About five years.
> Q. Now, you've been in court before, is that right?
> A. Yes sir.
> Q. And you were convicted of forgery and uttering prior to this time?
> Mr. Pyles: Your Honor, I'm going to object to this. . . . They don't show a pattern.
> Mr. Dugan:—it shows the man's credibility.
> Trial Court: The objection is overruled.

On appeal the Kansas Supreme Court held that the evidence was obviously intended to impair the defendant's credibility, and that

> prior to the enactment of the . . . rules of evidence . . . a defendant in a criminal prosecution who took the stand subjected himself to inquiry concerning his previous criminal record, . . . but such inquiry is now specifically prohibited unless the defendant has first introduced evidence admissible solely for the purpose of supporting his credibility. . . .[40]

Rule 22,[41] divided among four parts, relates to other methods of impeachment, and credibility. Under part (a) the rule in the *Queen's Case*,[42] is rejected and it is not necessary to show a witness a prior writing before examining him on the contents, except that the judge may require that the time and place and addressee should be indicated to the witness. Part (b) supplements the court's discretion in part (a), except that a prior contradictory statement may be admitted to impeach even though the witness is not now on the stand, and was not able

[39]State v. Motley, 199 Kan. 335, 430 P.2d 264 (1967).

[40]*Id.* at 338, 430 P.2d at 267.

[41]*See* note 36, *supra.*

[42]129 Eng. Rep. 976, 11 Eng. Rul. C. 183 (1820). The rule in the *Queen's Case* came from the trial of her Majesty Queen Caroline, wife of George the IV, begun by virtue of a bill introduced in the British Parliament, charging that the Queen had been guilty of licentious, disgraceful and adulterous intercourse with one Bartolomo Bergami. During the cross-examination of witness Louisa Demont, the following question of law arose:

> Whether, in the Courts below, a party on cross-examination would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?

In answer Lord Chief Justice Abbott said:

> The Judges are of the opinion that the question must be answered by them in the negative . . . that . . . the contents of every written paper are, according to the ordinary and well-established rules . . . of evidence, to be proved by the paper itself . . . and that . . . the proper course . . . is to ask the witness whether or no that letter is of the handwriting of the witness . . . .

CORNELIUS, CROSS-EXAMINATION OF WITNESSES 369-70 (1929).

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to deny the statement, because the statement may not have been known until after his testimony.

Part (c) provides that only two character traits can be used for attacking credibility: honesty and veracity.

Under part (d) specific instances of conduct may not be used to prove a provable trait of character. In the case of *State v. Taylor*,[43] the following cross-examination resulted:

> Q. I believe you told Mr. Olander, your attorney, that you told the police that you didn't think much of their identification because the line-up wasn't any good. Is that right?
> A. That's right.
> Q. How do you know the line-up wasn't any good?
> A. Nobody could tell the difference between the dress of the people.
> Q. You have been in a line-up before?
> A. Yes. I have.
> Q. On how many occasions have you been in a line-up?
> A. I say three or four.
> Q. Is that all?
> A. Yes, sir.

Discussing this form of examination the Kansas Supreme Court said:

> Patently, this was an attempt to discredit the defendant by showing or insinuating that he had appeared in a succession of police line-ups. The evidence thus sought to be adduced could be relevant only as showing the defendant's bad character. We think it was inadmissible for that purpose, under the proscription of Rule 22 22 (d).[44]

Superimposed on the rules affecting credibility are the cases of *Pointer v. Texas*,[45] and *Douglas v. Alabama*.[46] Those cases seem to require that if a statement is to be used to impeach an accused, which statement is made by another person, or is made by the accused and recorded by another person, or is made by the accused and recorded by another person and which statement incriminates the accused as well as impeaches, that person mus tbe available for cross-examination by the accused, and his counsel. If cross-examination is not available either at the time the statement is made or at the time it is used, then the statement can not be used to impeach, and this even though the statement may not qualify as "substantive" evidence in the case, which would support a finding.

Of course the Uniform Rules in no way reflect this substantial Constitutional interdiction.

[43]198 Kan. 290, 424 P.2d 612 (1967).

[44]198 Kan. at 294, 424 P.2d at 616 (1967).

[45]380 U.S. 400 (1965).

[46]380 U.S. 415 (1965).

IV. HERESAY

The Uniform Rules define and exclude heresay in the following statement:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is heresay evidence and inadmissible except:[47]

The policy of the Commissioners was to make all heresay inadmissible, except to the extent that heresay statements are admissible under an exception to this rule. In this rule, the word "statement" is defined to mean oral and written expressions and "nonverbal conduct of a person intended by him as a substitute for words expressing the matter stated."[48]

It follows from the definition that behavior or non-verbal conduct is not heresay unless the actor-declarant uses such conduct as an assertion. That is, assertive conduct intended as a substitute for words.

The famous case of *Wright v. Dee d. Tatham,*[49] serves as an example. In it letters written to the testator, admitted as evidence showing by inference the writer's opinions of the mental competency of the testator, were said to be heresay because they constituted an implied assertion that the testator was competent.

Under the Uniform Rules that evidence would not fall within the definition of heresay because the writer did not intend the letter to be a substitute for the words, "Testator, you are mentally competent," when the letters were written.

If an accused were to flee from the scene of a crime, evidence of that fact would be admissible as relevant evidence showing his state of mind, but not heresay because the accused would not intend that his conduct be a substitute for the words, "I committed a criminal act," or the like.

On the contrary if a person is asked to identify the man who attacked him, and points his finger at that man, or if, in another situation, a person is asked to identify a stack of No. 1 grade lumber, and points to that stack of lumber, such action would be heresay. In those cases the conduct is a substitute for the words, "That is the man," and, "There is the No. 1 grade lumber."

A. Some Heresay Exceptions

Probably the innovative exception to the rule proscribing heresay is as follows:

> (1) Previous Statements of Persons Present and Subject to Cross Examination. A statement previously made by a person who

[47]Uniform Rule 63; K.S.A. § 60-460 (1964).
[48]Uniform Rule 62(1); K.S.A. § 60-459(a) (1964).
[49]112 Eng. Rep. 488 (Ex. 1937), *aff'd.* 7 Eng. Rep. 559 (H.L. 1838).

> is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness (is admissible).[50]

The meaning of this rule is that prior inconsistent statements are admissible as substantive evidence if the declarant is present and available for cross-examination, and prior consistent statements are also admissible at least in so far as heresay is concerned. The gist of admissibility here is that because rights of confrontation and cross-examination are not impaired (in the opinion of the Commissioners), admit the statement for the full value. Wigmore, McCormick and Morgan have argued, in short, that this evidence should come in, and not be considered heresay if cross-examination is available, or if the declarant was once subject to oath and the threat of perjury. Further, in the case of *United States v. De Sisto,*[51] the court held that the identification testimony of an accusing witness, given earlier and consistent with the direct examination of the witness, should be admitted as substantive evidence, especially when such testimony has been vouched for, subsequently, under oath before a grand jury and at a former trial.[52]

That considerable doubt may be present about this exception must be acknowledged.

It is submitted that the value of cross-examination is that it comes when the statement is made, or immediately thereafter. Surely cross-examination can be of little consequence if conducted of a witness who is not now speaking or testifying, but from whom comes evidence in the case.

Additionally, whether such a statement as this is admissible in a criminal trial, and if so under what circumstances, should receive careful attention. That is, after *Pointer* and *Douglas* does an accused enjoy the right to be confronted with a witness against him when the witness does not now speak in the court, although his testimony comes in?

If it is said that an accused does confront his accuser because he may now conduct an examination of the "declarant", and it is of no moment when the statement was made, or under what conditions—a more mechanical thing—then the bare right of cross-examination is protected, it would seem, but its meaning is denied.

In short, is there a complete and adequate opportunity for cross-examination of this evidence? It is suggested that there may not be,

[50]Uniform Rule 63(1); K.S.A. § 60-460(a) (1964).

[51]329 F.2d 929 (2nd Cir. 1964).

[52]*See also,* Di Carlo v. United States, 6 F.2d 364, 366 (2nd Cir.), *cert. denied,* 268 U.S. 706 (1925); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 193 (1948); 3 WIGMORE, EVIDENCE § 1018 (3rd ed. 1940); MCCORMICK, EVIDENCE § 39 (1954). *But compare, Tentative Recommendations and a Study Relating to the Uniform Rules of Evidence* (Article VIII. Hearsay Evidence), 4CAL. LAW REVISION COMMISSION REP. REC. & STUDIES, 301 313 (1963).

certainly not under all the conditions where evidence under this exception would come in. One might interrogate a witness based on his former statement, which is being admitted as substantive evidence, but there is a difference between simply directing questions and cross-examination. To effectively cross-examine is to attempt to discover whether a statement is accurate or true, among many other things, and a most important part of this process is to observe the witness making the statement at the moment it is spoken. From this comes a "feel" for the cross-examination. It is an important part of that thing which is present in having *counsel* cross-examine a witness against you. And this is the very thing which is denied by this exception, and of course by those authorities who argue for the adoption of such a theory of heresay admissibility.[53]

The effect of these evidence writers can be seen also in the Uniform Rules, and in the notes of the Commissioners on the Uniform Rules, which said, in part: "When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against heresay."[54]

The absence in the Commissioners' comment of any clear analysis concerning this rule, and the use of such pregnant words as "sentiment" and "enlightened modification" is very disappointing. Surely one may have doubt about the admissibility of this evidence in a criminal case which is based upon a rationale other than sentimentalism, which the Commissioners viewed as a human emotion worthy of condemnation.

And one can also speculate with Judge Friendly in *De Sisto,* that

[53]United States v. Kelly, 349 F.2d 720, 770 (2nd Cir. 1965), *cert. denied,* 384 U.S. 947 (1966).

> We see no reason to overrule these authorites or to question the soundness of their reason and the policy that underlies them. The application of this doctrine, like the principles relating to dying declarations, prior testimony of deceased witnesses, and indeed virtually all of the exceptions to the hearsay rule, does not involve any deprivation of the right of confrontation as the Sixth Amendment has been interpreted and construed. (Citations ommitted.)

But the cases of United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967), teach that it is possible to find still new meaning in the Sixth Amendment, not seen in the *Kelly* case. Speaking generally, those cases held inadmissible testimony founded upon observations made during a police lineup, and they held that statements made in identification at the lineup were inadmissible, because counsel was not present at this "critical" stage of the criminal proceeding, but that this new rule was not retroactive.

The testimony of the manager of the apartment house, in *Gilbert,* is crucial in determing the validity of prior consistent statements. That witness testified to her prior lineup identification, absent the present defense counsel, and the Court held as to that testimony that a per se exclusionary rule required that the testimony not be admitted, in order to assure that the law enforcement authorities respect an accused's constitutional right to the presence of counsel. The case would seem to squarely contradict the admissibility of some of the identification testimony in *De Sisto,* supra.

Unless the Cupreme Court intends that the attorney shall now be in the business of ordering the proper police procedure in regard to lineups and the like, his purpose at this "critical" stage must be to attempt to ascertain whether the witness made a correct identification and thus afford an opportunity for examination of that witness at that time. If this is correct then it would seem that the prior consistent statement is constitutionally inadmissible if obtained under the *De Sisto* facts.

[54]Comment on Rule 63(1) of the Uniform Rules of Evidence (1953).

a former case in the United States Supreme Court, *Bridges v. Wixon*,[55] will not "survive the attacks of the scholars," and that prior consistent or inconsistent statements will be readily admissible as substantive evidence. Certainly it is true that questionable comments of the Commissioners on the Uniform Rules of Evidence have found their way into an opinion coming from the Supreme Court before,[56] and no doubt this kind of question may one day arise in that Court. This is so because of the ramifications of *Pointer* and *Douglas*, even though the Court has from time to time insisted that it is "not the best forum for developing rules of evidence."[57]

It comes with a sense of trepidation, because of the thought of being classified as a scholar who will not attack, or if not willing to attack of being declassified as a scholar, to say that there is great merit in the "orthodox" and "sentimental" rule of excluding prior consistent or inconsistent statements as substantive evidence. The reason is, in a sentence, that there is a rather large difference between actually conducting a cross-examination, and the analytical purity which admits that evidence.

However this may be, under the Rules, and the Kansas Rule, it is admissible and this means that in a civil case an issue of fact is created by one witness, if his prior statement is inconsistent with that spoken on the stand.

Two other hearsay exceptions will be noted here. The first concerns the problem of vicarious admissions. If an agent or employee makes a statement concerning an event which gives rise to a suit against a principal or master, is the statement admissible against the principal or master? The rule has been, speaking generally, that the statement is not admissible unless authorized in the scope of employment or in the agent's authority.

Some cases, not relying on the Uniform Rules, did not adhere to that principle.[58] The position of the Uniform Rules is to admit the statement against the employer or master or principal if it relates to a matter within the scope of the agency or employment.[59]

[55]326 U.S. 135 (1945).

[56]*See* the concurring opinion of Mr. Justice Stewart in Hawkins v. United States, 358 U.S. 74, 81 (1958), where he refers to the hortative language in another comment of the Commissioners on the Uniform Rules.

[57]Spencer v. Texas, 17 L. Ed. 2d 606, 613 (1967).

[58]*See, e.g.*, Martin v. Savage Truck Line, 121 F.Supp. 417 (D.D.C. 1954).

[59]Uniform Rule 63(9) K;.S.A. § 60-460(i) (1964).

> *Vicarious Admissions.* As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the delcarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) one of the issues between the party and the proponent of the evidence of the

For example, if the employee-driver of a motor vehicle runs a stop sign and collides with the plaintiff, and then says, "I regret the accident which would not have happened, if I had observed the stop sign;" the statement is admissible against the employer-defendant. It is admissible under this exception as a vicarious admission because the statement relates to a matter within the scope of the employee-driver's employment, which is driving the automobile.

There is, however, no exception here for a vicarious admission based upon successive property interests. That is, an admission made against the property interest or title is not admissible against a successor in title, on the theory that the chattel or property is taken, "clogged with admissions."

Morgan argued against this kind of admission and his argument is reflected in the Rule.[60]

Even though there are over thirty exceptions to the heresay exclusion, the one other here discussed is the "declaration against interest."[61]

Under this exception there is no requirement that the declarant be unavailable, and the declaration may be against the penal interest,[62] or the declarant's pecuniary or proprietary interest. Further, if the declaration subjects the declarant to "hatred, ridicule or social disapproval in the community", that too is against his interest. The thought here is that the social disapproval arising from the statement will compel truthfulness in the expression.

The focus is that a "reasonable man in his position would not have made the statement unless he believed it to be true". Thus the actual awareness of the declarant that he spoke against his interest would seem not to control.

Here again *Douglas v. Alabama*,[63] is to be noted. In that case Douglas and one Loyd were separately tried on charges of assault with intent to murder, and Loyd was first tried and convicted.

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statement is a legal liability of the declarant, and the statement tends to establish that liability; [such statements are admissible as exceptions to the hearsay rule].

[60] *See* Morgan, *The Rational of Vicarious Admissions*, 42 HAR. L. REV. 461, 480 (1929).

[61] Uniform Rule 63(10); K.S.A. § 60-460(j) (1964).

Declarations against Interest. Subject to the limitations of exceptions (6), a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, redicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true; [such statements are admissible as exceptions to the hearsay rule].

[62] *Contra*, Donnelly v. United States, 228 U.S. 243 (1913).

[63] *Supra* note 44.

In the trial of Douglas, Loyd was called as a witness but, because he intended to appeal his conviction, he refused to answer questions on the ground that he would incriminate himself. The state then produced Loyd's confession and the prosecutor read it to Loyd in the presence of the jury, asking Loyd whether he made the statement, pausing often for Loyd's answer. Each time Loyd asserted his privilege not to incriminate himself.

The statement of the witness Loyd said that Douglas fired the gun.

Loyd's statement would of course qualify as a declaration against interest under the Uniform Rules, which also inculpates another person—the present defendant Douglas.[64]

The Supreme Court held that using the statement of Loyd in that way plainly denied Douglas his right of cross-examination secured under the Sixth Amendment's right of confrontation, and that this was true even though the statement was not testimony in the case which would support the jury's verdict because the state only wanted to refresh Loyd's recollection as a witness.

In this way does a rule of evidence receive Constitutional interdiction which is not shown in any sentence of the Uniform Rules, and which would require recognition of it before the evidence, seemingly admissible, could come in?

V. Some Other Questions and Cases

The thought is of course that the Uniform Rules have been greatly affected since their writing and promulgation by the cases coming from the United States Supreme Court, and especially has the result fallen on the heresay exceptions. One more example is the "Dying Declaration" under the Uniform Rules[65] which, according to the exception, is admissible in both the civil and criminal case. If the declarant is now deceased, and if the statement is being offered in a criminal case against the defendant, the question of course arises, how is the defendant granted his right of cross-examination, and if not then is the statement still admissible? It would seem that the answer is in the negative.[66]

Further, if evidence admissible under the Uniform Rules is offered and admitted, and if the evidence is Constitutionally inadmissible, then is there such a denial of a Constitutional right which would permit the conviction to be impeached on direct attack, or by collateral attack either in the state or federal court? If so, can the attack be made when there is substantial other evidence supporting the conviction, and what find-

[64]In the Federal Court, the affect of Douglas on the thoughts and principles expressed in Delli Paoli v. United States, 352 U.S. 232 (1957), must be considered by the Federal Advisory Committee on Rules of Evidence.

[65]Uniform Rule 63(5); K.S.A. § 60-460(e) (1964).

[66]*Compare* United States v. Kelly, *supra* note 49.

ings are required in the court of the original trial or in the court where the attack on the conviction is made?

Additionally what are the obligations of the trial court in following the state evidence rule, which may conflict with the Constitutional rule, in the sense of being aware of the admissibility vel non of the evidence even though it may not be objected to by counsel who is less than effective?

And there is of course the question of the ethical responsibility of both the prosecuting and defense attorney. May that prosecuting attorney offer evidence admissible under a uniform rule, or the codified rule of evidence, according to the state statute which may not be admissible according to the Constitutional exclusion? The answer would seem to be in the negative, but what, precisely, is his ethical responsibility in relation to the offer of evidence and in relation to his duty to the state and to the defendant? Further, if the defendant did not object is it the duty of the prosecution, or court, to raise the issue knowing that its admissibility may be doubtful. And of course can a defense counsel remain silent in such a situation on the knowledge that possibly he can upset a conviction in a subsequent proceeding.[67]

Some of these questions must be presented for consideration by any committee which may be considering the adoption or writing of a system of uniform rules of evidence. It is beyond the scope of this article to attempt an answer to these several questions, but some other cases and principles remain for observation.

A. Post-Conviction Remedies

It is put that a state must adopt a post-conviction remedy to entertain claims of or relating to federal Constitutional rights,[68] and this would

[67]Post-Conviction Remedies 36 (American Bar Association, Tentative Draft, 1967).
> Frequently confused with the forfeiture of a remedy for an otherwise valid claim discussed in the preceding paragraph, is the concept of waiver. A defendant in a criminal case is not obligated to take advantage of all rights afforded him. There are some protections that an accused cannot waive (e.g., the right not to be subjected to cruel and unusual punishment or the right to competent tribunal), but in many instances he can forego an established right. For example, a defendant is allowed to waive defense counsel, indictment, jury trial, or, by pleading guilty, even trial itself. Where a right was understood and intelligently relinquished, the right is never violated and a claim that the defendant had been unlawfully deprived of that right, no matter when made, is unmeritorious. What constitutes waiver will vary necessarily with the particular right in question. It is thus wholly unappropriate to attempt a single general definition of waiver for all claims. Indeed the only proper source of definition is the law creating the particular right or privilege in question. [In most instances that will be the Federal or State Constitution.] Denial of relief on the ground of valid waiver is a decision on the merits and is thus essentially different from denial of relief on the ground that the applicant at one time had, but no longer has, a meritorious claim, as in the case of abuse of process.

[68]*See* Case v. Nebraska, 381 U.S. 336 (1965). In that case the question was raised whether the Fourteenth Amendment requires a state post-conviction remedy, which question was avoided because Nebraska adopted a post-conviction statut. See K.S.A. § 60-1507 (1964), which, as stated, enacted 28 U.S.C. 2255 into state law.

include the Constitutional right not to have evidence admitted without the opportunity to cross-examine, effectively, the declarant.

It is also put that when a substantial question is raised showing an alleged violation of the petitioner's Constitutional right, the state court must hold an evidentiary hearing, either at trial or in the state post-conviction proceeding, and render findings of fact—or the federal court will do so.[69] And it is stated that the traditional concepts of waiver are unavailable to the state's attorney defending the conviction.[70] And it is asserted that a state should not adopt a code of evidence which does not give full treatment to the evidence-type problems (discovery, waiver, hearing, findings, and what kind of each) presented in a post-conviction *civil* proceeding.

To do so is to invite a peculiar reality. That would be that the most substantial change being made in the state's law of evidence in criminal cases, and made on a continuing basis, is not the result of either the state judiciary or legislature but of the United States Supreme Court and the inferior federal courts.[71] This change has occurred and continues without regard to whether the Uniform Rules are adopted or not, and this is true because the rules in no way reflect the tremendous development in the law of evidence, done under the Constitution, since they were written.

B. Self-Incrimination

Another major development comes from the rationale of the *Malloy*[72]-*Albertson*[73] doctrine. *Malloy* held that the self-incrimination clause of the

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> I know of no competent person who has studied the precise question presented . . . who would ever dream of suggesting that . . . the . . . Supreme Court of the United States will fail to answer the question posed in that case in the affirmative.

Oliver, *Post-conviction Applications Viewed by a Federal Judge,* 39 F.R.D. 281, 283 (1966).

[69]Townsend v. Sain, 372 U.S. 293 (1963). There is nothing in the Congressional amendment of the 28 U.S.C. 2254 (1964), 80 Stat. 1104 (1966), contrary to the *Townsend* decision or requirements, in this respect. Dean Foust's statement that, "the legal profession appears to have lost interest in the post-verdict administration of criminal justice. . . ." Foust, *Some Thoughts on Criminal Code Revision,* 1IND. LEGAL F. 4, 30 (1967), is correct, and especially in this part of post-verdict administration.

[70]*Compare* Uniform Rule 4,

> A verdict . . . shall not be set aside, nor . . . judgment . . . reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed. . . .

K.S.A. § 60-404 (1964), with, Fay v. Noia, 372 U.S. 391 (1963), on waiver generally in criminal proceedings and whether that will prevent subsequent review or collateral attack on the conviction in the federal habeas court, and thus, because of *Townsend v. Sain, supra,* and the amended statute in 28 U.S.C. 2254 (1964), in the state court also. That is, the state court must follow the waiver and review rules set out by these authorities, or lose control of the case, ultimately, to the federal habeas court.

[71]Perhaps no case shows more clearly this development than Judge Oliver's excellent opinion in White v. Swenson, 261 F.Supp. 42 (W.D.Mo. 1966).

[72]Malloy v. Hogan, 378 U.S. 1 (1964).

[73]Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

Fifth Amendment was applicable to the states, and it follows that the interpretation given to it also applies.[74]

In *Albertson* the Attorney General of the United States brought proceedings under section 13 of the Subversive Activities Control Act,[75] before the Subversive Activities Control Board, to obtain an order that petitioners must register as members of the Communist Party. The Board ordered them to register which was upheld by the Court of Appeals.

The Supreme Court reversed holding that the order directing petitioners to so register, and file a registration statement, violated their privilege not to incriminate themselves.

The Uniform Rule 25(e) stating that:

> A public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it;[76]

would seem inconsistent with the *Albertson* holding on disclosure of possible incriminating information.[77]

Further, on the question when does a statement tend to incriminate, the Court's test in *Hoffman v. United States*,[78] that the "privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embrace those which would furnish a link in

[74]*See* Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1957); Schmerber v. California, 384 U.S. 757 (1966); Griffin v. California, 380 U.S. 609 (1965); and Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

[75]50 U.S.C. § 792 (1964).

[76]K.S.A. § 60-425 (1964), did not follow the Uniform Rule in this instance. The Kansas enactment is as follows:

> . . . every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or the United States or any other state or any governmental agency or division thereof any matter that will incriminate him.

[77]Mansfield, *The Albertson Cases Conflict Between the Privilege Against Self- Incrimination and the Government's Need for Information*, 1966 SUPREME COURT REVIEW 103, 121.

> Another situation in which it is sometimes suggested that there is no incrimination are prosecutions under statutes making it a criminal offense for the driver of a motor vehicle involved in an accident to fail to report the accident. *Commonwealth v. Joyce*, 326 Mass. 751 (1951), is a well-known decision that adopts this rationale. It is clear, however, at least under the *Hoffman-Malloy* test of what constitutes incrimination, that a driver's compliance with these statutes will frequently incriminate him and that a prosecution for failing to report an accident constitutes punishment for refusal to incriminate oneself. If state tests of what constitutes incrimination differ from the *Hoffman* test, they must now, according to *Malloy v. Hogan*, give way before that test.
>
> That the privilege against self-incrimination extends to other disclosure and reporting statutes and regulations, see *Marchetti v. United States*, 88 S.Ct. 697 (1968); *Grosso v. United States*, 88 S.Ct. 709 (1968); and *Haynes v. United States*, 88 S.Ct. 722 (1968).

[78]341 U.S. 479, 486 (1951).

a chain of evidence needed to prosecute. . . .", would appear to be more expansive than Uniform Rule 24,[79] on what does incriminate.

It is quite apparent that the Uniform Rules', definition of, and exceptions to, self-incrimination are not adequate and that significant attention must be given to this area when a jurisdiction statutorily defines them.

Conclusion

How can such a discussion conclude without reference to *Mapp,*[80] *Miranda,*[81] or *Sheppard,*[82] among many others? A fair question, but further discussion of those cases would be cumulative.

The principal point is that the Uniform Rules of Evidence have been greatly affected by cases decided by the United States Supreme Court, and that the result of this is that those Rules no longer accurately state the law of evidence in criminal cases, and that a jurisdiction, such as Kansas, which uses them will find its attorneys and judges being guided by principles the validity of which are very doubtful.

It is suggested that a separate code of evidence be written for the criminal docket, and that it be integrated with pretrial proceedings in the criminal cases. It should have adequate and expansive guides for post-conviction findings and disputes.

The principal benefit of integrating such a code with criminal pretrial proceedings would be to avoid the segmented approach to the administration of the criminal law. If this were done it would develop a functional-evidential relationship among the police officer, the court, and the attorney, of benefit to all, including the accused.

On the civil side, the Uniform Rules serve as a guide, and the question here is whether a jurisdiction would want to adopt the basic theory of admissibility, and then exclude by specific rule.

It is believed that an approach such as this would begin to return control to the state jurisdiction and return to the state legislature the primary responsibility of the supervision and development of its courts.

Mr. Justice Holmes once said that the legislature is the ultimate guardian of the liberties and welfare of the people in quite as great a degree as the courts.

[79]K.S.A. § 60-424 (1964).

Definition of Incrimination.

A matter will incriminate a person within the meaning of this article if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such violation of the laws of this state as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation.

[80]Mapp v. Ohio, 376 U.S. 643 (1961).

[81]Miranda v. Arizona, 384 U.S. 436 (1966).

[82]Sheppard v. Maxwell, 384 U.S. 333 (1966).

Certainly it is that the cutting edge of the law is the evidence on which a decision is based, and thus it deserves the assiduous attention of the legislature, the courts, and the bar.

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