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DRAFTING UNIFORM FEDERAL RULES OF EVIDENCE

Thomas F. Green, Jr.[†]

The author discusses previous efforts to bring about comprehensive improvement in the law of evidence and the impact these attempts may have on the development of uniform rules of evidence for the federal courts. Also discussed are the problems involved in drafting such uniform rules and their possible solutions. The author concludes that several apparent problems, such as the Erie doctrine, actually present no major obstacles to the promulgation by the Supreme Court, under its rule-making power, of rules of evidence, where they may be rationally classified as rules of procedure.

On March 8, 1965, the Chief Justice of the United States announced the appointment of a committee of federal judges, law professors, and leading trial lawyers to formulate uniform rules to govern the admissibility of evidence and the competency of witnesses in civil and criminal trials in the United States district courts.¹ The resulting draft will be considered and possibly promulgated by the Supreme Court. The word "uniform" as used in the announcement carries at least two special connotations. The first arises from the fact that the rules now applied in civil actions in the district courts are derived from a source different from that of the criminal evidence rules in the same courts.² This situation was not present at common law and is not present today in the state courts. It exists in the federal courts from purely fortuitous circumstances. The proposal is to have "uniform" rules which in general will be the same for civil and criminal trials. The second connotation of "uniform" is that the precepts will be the same throughout the United States and will not vary from state to state or circuit to circuit to the extent that they do in some instances today.³ The

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¹ The committee is composed of 15 members—3 federal judges, 8 trial lawyers, a government attorney, and 3 law school faculty members. Albert E. Jenner, Jr. of Chicago is the Chairman, and Professor Edward W. Cleary of the University of Illinois College of Law is the Reporter. See 36 F.R.D. 128 (1965).

² See text preceding note 133 *infra*.

³ Fed. R. Civ. P. 43(a) provides in part: "All evidence shall be admitted which is admissible . . . under the rules of evidence . . . of the state in which the United States court is held." As to the tendency for conflicts between the circuits under Fed. R. Crim. P. 26 to remain unresolved, see text accompanying notes 135-37 *infra*.

language of the promulgated rules will be determined by the Supreme Court, but the interpretation of the rules by the lower courts will doubtless vary to some extent.

It is the purpose of this article first to discuss what may be done to satisfy the widely recognized need for improvement in evidence law in general, and second to consider the special problems of the federal courts. The treatment under the latter topic will be divided into two parts: the need for change arising from present conditions peculiar to the United States district courts, and the problems created by limitations upon the existing rule-making power of the Supreme Court.

GENERAL NEED FOR IMPROVEMENT IN EVIDENCE LAW AND HOW IT MAY BE MET

In addition to problems peculiar to the federal courts, the committee no doubt will deal with those which are common to a great many Anglo-American jurisdictions. The need for reform of our law of evidence is apparent. Though Jeremy Bentham's criticisms of common-law procedure⁴ initiated reforms in procedural law generally, the reforms in evidence were meager in comparison to those in pleading. Through the ensuing years this contrast has continued; while pleading and trial practice have been modernized, evidence doctrines have lagged behind.⁵

Function and Content of Rules

In a recent concurring opinion Judge Fuld of the New York Court of Appeals said: "Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts in civil cases."⁶ Professor Weinstein, however, points out that truth-finding is only one of several goals to be achieved. He sees the task of the draftsman as that of devising evidentiary rules which recognize and capitalize upon the changes in the climate of our society and courts, and at the same time remain faithful to the jury trial and the adversarial system.⁷

Once these broad goals are acknowledged, the draftsman must determine the general structure of the rules directed toward their fulfillment.

⁴ See Bentham, *Rationale of the Law of Evidence* (Mill ed. 1827). Wigmore has commented: "No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings." 1 Wigmore, *Evidence* § 8, at 239 (3d ed. 1940).

⁵ See Morgan & Maguire, "Looking Backward and Forward at Evidence," 50 *Harv. L. Rev.* 909, 910 (1937); McCormick, "Tomorrow's Law of Evidence," 24 *A.B.A.J.* 507, 508 (1938); McCormick, *Evidence* xi (1954).

⁶ *Fleury v. Edwards*, 14 *N.Y.2d* 334, 341, 200 *N.E.2d* 550, 554, 251 *N.Y.S.2d* 647, 653 (1964) (concurring opinion).

⁷ Weinstein, "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials," 66 *Colum. L. Rev.* 223, 225, 228-29, 241 (1966).

He must decide among *first*, a lengthy, detailed statement based upon a listing of the matters previously ruled upon by the courts and upon an effort to anticipate other applications of the same rulings; *second*, a statement of a few broad general principles; and *third*, a set of rules dealing in general terms with the larger categories and subdivisions of evidence law. The first method would present an almost impossible task and would result in a rigid, unwieldy set of regulations that would tend to interfere with the future development of the law. The product of the second method would be so vague that it would encourage appeals from the trial judge's rulings. The American Law Institute's Model Code,⁸ the Uniform Rules,⁹ the New Jersey Rules,¹⁰ and the four codes of evidence recently adopted by statute¹¹ illustrate the third method, which seems to be the best choice.

Among the general reasons given by the commentators for advocating improvement in the law of evidence are the needs for clarification, simplification,¹² modernization,¹³ and flexibility. In addition, it is felt that the present rules lead to the magnification of details and to overemphasis by appellate courts of errors made at the trial level.¹⁴ The shortcomings have been attributed to (a) a belief that exclusionary rules can prevent perjury, (b) a failure to realize that our jurors are better qualified today than in the past, (c) the failure to realize that it is in the interest of justice for a witness to be permitted to disclose all relevant information so long as the triers of fact are able to evaluate what they hear, and (d) the failure to recognize the superior value of statements made by a witness near the time of the event described by him, as compared with his testimony given months or years later.¹⁵

Attempts To Revise the Law of Evidence Through Rules of Court

Near the end of the last century James Bradley Thayer proposed that the mass of detailed, conflicting, and confusing rules of evidence be modernized by rules of court. He pointed out the special qualifications of the judges for this task and discussed the opportunity they would have to

⁸ ALI Model Code of Evidence (1942).

⁹ Uniform Rules of Evidence, 9A U.L.A. 589 (1965).

¹⁰ N.J. Rules of Evidence, N.J. Stat. Ann. §§ 2A:84A-1-32 (Supp. 1965) (a codification of statutory and court-adopted rules [hereinafter cited as N.J. Rules of Evidence]).

¹¹ See note 18 *infra*.

¹² Ladd, "A Modern Code of Evidence," 27 Iowa L. Rev. 213, 214 (1942); Gard, "Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence," 37 Ore. L. Rev. 287, 298 (1958); Morgan, "Foreword," ALI Model Code of Evidence 5-6 (1942). See McCormick, Evidence xi (1954); 1 Wigmore, *supra* note 4, at xiv.

¹³ "To put it another way, the law of evidence is now where the law of forms of action and common law pleading was in the early part of the nineteenth century." Morgan, *supra* note 12, at 5. McCormick, *supra* note 12; Weinstein, *supra* note 7, at 226-27.

¹⁴ 1 Wigmore, *supra* note 4, § 8c, at 264, 267, 271.

¹⁵ Morgan, *supra* note 12, at 6; Weinstein, *supra* note 7, at 225; Moscowitz, "Trends in Federal Law and Procedure," 5 F.R.D. 361, 367-68 (1946); McCormick, *supra* note 12.

improve the law by giving effect to fundamental principles and by recognizing the subordinate, auxiliary character and aim of the exceptional and special rules. Two of the fundamental principles which he mentioned were (1) that nothing is to be received which is not relevant and (2) that everything which is relevant should be admitted, unless a clear ground of policy or law excludes it.¹⁶ Since Thayer wrote, the practice of using advisory committees of practicing lawyers and law professors to aid the judges in supervising the research and the original drafting has developed into an established technique. The courts' burden of rule-making is thus reduced.

However, the courts have not followed Thayer's suggestion. Although the total of all evidence regulations adopted under their rule-making power by the several courts in this country is considerable,¹⁷ only the New Jersey Supreme Court has adopted an extensive revision of its evidence law.¹⁸ The federal courts also lack a complete set of court rules. Rules of court dealing with evidence for the district courts of the United States have long been in existence. They were a part of the Federal Equity, Bankruptcy, and Admiralty Rules as well as the Federal Rules of Civil and Criminal Procedure.¹⁹ None of these, however, furnished a comprehensive codification.

¹⁶ Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898). Thayer's suggestion still retains vitality. A 1958 resolution of the House of Delegates of the American Bar Association recognized the need for clarifying and improving the evidence rules of this country and indicated that piecemeal changes are not enough. This resolution was directed specifically to evidence in the federal courts and proposed the use of court to codify evidence law. 44 A.B.A.J. 1113 (1958).

¹⁷ See Green, "To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?" 26 A.B.A.J. 482, 487-88 (1940).

¹⁸ N.J. Rules of Evidence 3-14, 17-20, 41-71, adopted pursuant to N.J. Stat. Ann. § 2A:84-33 (Supp. 1965). Aside from this revision through rules of court, New Jersey has to some extent codified its law of evidence by statute. E.g., N.J. Stat. Ann. §§ 2A:84A-17-32 (Supp. 1965) (privilege). Several other jurisdictions have adopted evidence codes by statute. Cal. Evid. Code (effective Jan. 1, 1967); Kan. Gen. Stat. Ann. §§ 60-401-470 (1964); C.Z. Code tit. 5, §§ 2731-2996 (1963); V.I. Code Ann. tit. 5, §§ 771-956 (1957). In Utah and Missouri, elaborate studies have been made and rules drafted, but apparently never promulgated. See "Preliminary Draft of the Rules of Evidence," 27 Utah B. Bull. 5 (1957); Morgan, "Practical Difficulties Impeding Reform in the Law of Evidence," 14 Vand. L. Rev. 725 (1961).

In England evidence has been regulated to some extent by exercise of the rule-making power. Tidd's Practice cites two ancient rules of court dealing with the form and content of affidavits and proof of documents. Tidd's Practice 497, 799 (4th Am. ed. 1856). The present English rules contain several orders dealing with similar subjects. E.g., The Annual Practice, Ord. 37 (1954). In India, in some of the British colonies and protectorates, and in Israel, the legislative bodies have adopted evidence codes. Nokes, "Codification of the Law of Evidence in Common Law Jurisdictions," 5 Int'l & Comp. L.Q. 347, 350, 352 (1956). In England evidence reform currently is under study. Two groups known as "working parties" were established by the Law Society at the request of the Home Secretary's Criminal Law Revision Committee and the Lord Chancellor's Law Reform Committee to consider the law of evidence in criminal and civil matters respectively. 62 Law Society's Gazette 143 (March 1965); Cross, "Criminal Evidence Act, 1965," 28 Modern L. Rev. 571, 572 (1965). Thus the English groups and, in the United States, the Advisory Committee on Rules of Evidence have been reviewing the same field of the law at the same time. This may be only a coincidence but on the other hand may be significant as a simultaneous awakening in the two countries.

¹⁹ Equity Rules of 1912, R. 46, 226 U.S. 661; General Orders in Bankruptcy, Gen. Order

During the years 1937-38 the late Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit was Chairman of the Section of Judicial Administration of the American Bar Association. He appointed seven committees to deal with needed reforms in as many subdivisions of the field of procedure, the general objective being improvement in the administration of justice. The committee in charge of the subject of evidence was headed by Dean Wigmore.²⁰ One matter which this committee considered was the possibility of simplifying the great mass of evidence law and organizing it into a code.²¹ The need for some such systematizing was obvious to anyone who gave a little study to the problem. Even today the huge number of statutes, decisions, and doctrines in a single jurisdiction is simply staggering. The material is so large in amount and so unorganized that appellate courts find it extremely difficult to handle. They continue to decide the same questions again and again, many of the decisions being unsound or conflicting.²² Due to these conditions, a trial judge cannot deal adequately with the problems which arise during the trial and which must be disposed of in haste.²³

Of the many recommendations made by the Wigmore Committee, six are already in effect in the federal district courts. The federal district judge is permitted to comment on the evidence;²⁴ he takes judicial notice of the laws of all the states of the Union;²⁵ counsels' exceptions to rulings have been abolished;²⁶ the Model Business Entries Statute has been adopted by Congress;²⁷ and the recommendations for certified copies and discovery before trial are satisfied by the Federal Rules.²⁸ Some of the other recommendations of the Wigmore Committee, such as a change in the attitude of appellate courts and the adoption of a canon of ethics on the subject of frequent objections to trivial evidence, may be unsuitable to be dealt with by rules of court.

36, in 11 U.S.C.A. following § 53 (1964); Rules of Practice in Admiralty and Maritime Cases, 28 U.S.C.A. R 29-33, 45-46B (1964); Fed. R. Civ. P. 26-37, 41(b), 43, 44, 45, 50, 59(a), 60(b), 61, 68, 80(c); Fed. R. Crim. P. 5, 6(e), 15, 16, 17, 26, 27, 28, 33, 41(e), 51, 52.

²⁰ The committee also included Robert G. Dodge and Judges Ernest A. Inglis, Merrill E. Otis, and Walter E. Treanor. The committee made some two dozen recommendations for reform or for further study. Report of the Section of Judicial Administration, 63 A.B.A. Rep. 522, 525, 570-601 (1938).

²¹ *Id.* at 576.

²² See Section of Judicial Administration, A.B.A., Handbook 73, 75 (1961).

²³ See Report of the Section of Judicial Administration, *supra* note 20, at 576; Estes, "The Need for Uniform Rules of Evidence in the Federal Courts," 24 F.R.D. 331, 332 (1959).

²⁴ *Capital Traction Co. v. Hof*, 174 U.S. 1, 14 (1899); Chesnut, "Instructions to the Jury," 3 F.R.D. 113, 117 (1943).

²⁵ *Lamar v. Micou*, 114 U.S. 218 (1885); *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537 (2d Cir. 1962).

²⁶ Fed. R. Civ. P. 46.

²⁷ 28 U.S.C. § 1732 (1964).

²⁸ Fed. R. Civ. P. 44, 26-37.

The Uniform Rules of Evidence as a Foundation for Reform

A dozen of the other recommendations of the Wigmore Committee would be given effect in the federal courts by an adoption of the Uniform Rules of Evidence proposed by the Commissioners on Uniform State Laws.²⁹ These rules have been approved by the American Bar Association and the American Law Institute,³⁰ and have been adopted with some modification in Kansas,³¹ the Panama Canal Zone,³² and the Virgin Islands.³³ California and New Jersey have promulgated considerably modified versions.³⁴ Of course the use of the Uniform Rules as a basis for a draft of evidence rules for the United States district courts would not prevent modifications by the Supreme Court or Advisory Committee; changes have been made in all of the states which have adopted the Rules. But, whether the Uniform Rules are heavily relied upon or whether, as Professor E. M. Morgan advocates, the draftsmen should adopt a combination of the best features of the Uniform Rules and the American Law Institute's Model Code,³⁵ it seems certain that the great amount of work and discussion which resulted in the Uniform Rules and the Model Code will not be ignored. The discussion below is limited largely (1) to those provisions of the Uniform Rules which wholly or partially follow the recommendations of the Wigmore Committee and are not already a part of federal law and (2) to those recommendations of the Wigmore Committee which move in the same general direction as the Uniform Rules.³⁶

Procedure and the Harmless Error Rule

Rules 4 and 5 of the Uniform Rules³⁷ provide that a verdict or finding or the judgment based thereon shall not be set aside or reversed except

²⁹ 9A U.L.A. 589 (1965). The committee which drafted the Rules consisted of a trial judge, four active practitioners, and two law school faculty members. Handbook of the National Conference of Commissioners on Uniform State Laws 17 (1950).

³⁰ Gard, "The Uniform Rules of Evidence," 31 Tul. L. Rev. 19 n.1 (1956).

³¹ Kan. Stat. Ann. §§ 60-401-470 (1964).

³² C.Z. Code tit. 5, §§ 2731-2996 (1963).

³³ V.I. Code Ann. tit. 5, §§ 771-956 (1957).

³⁴ Cal. Evid. Code (effective Jan. 1, 1967); N.J. Rules of Evidence, N.J. Stat. Ann. §§ 2A:84A-1-32 (Supp. 1965) (a codification of statutory and court-adopted rules). The California Code is to a large extent a restatement of existing California law, but the draftsmen studied carefully the Uniform Rules and used a number of their provisions.

³⁵ Professor Morgan has indicated that such a combination would be an improvement over both formulations. Morgan, "The Uniform Rules and the Model Code," 31 Tul. L. Rev. 145, 151-52 (1956).

³⁶ Of course, the Uniform Rules as a whole attempt to simplify the law of evidence by formulating what is in effect a short code, thus adopting the following recommendation of the Wigmore Committee: "We recommend . . . the formulation of a simplified code of evidence rules for use in jury trials." Report of the Committee on Improvements in the Law of Evidence, Section of Judicial Administration, 63 A.B.A. Rep. 570, 577 (1938) [hereinafter cited as Evidence Committee Report].

³⁷ Uniform Rule 4 relates to the effect of error in the admission of evidence and rule 5, in the exclusion of evidence.

under the following circumstances: (a) the record must show timely, clear, and specific objection to error in the receipt of evidence, or, if the error is in exclusion of evidence, the record must show that the proponent either made an offer approved by the judge or indicated the substance of the expected evidence by leading questions; (b) the court passing upon the effect of error must be of the opinion that the *admitted* evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding, or that the *excluded* evidence should have been admitted and would probably have had a substantial influence in bringing about a different verdict or finding. Part (b) of this requirement adopts proposal II, 3 of the Wigmore Committee regarding regulation of the attitude of appellate courts.³⁸

The California Evidence Code adopts Uniform Rules 4 and 5,³⁹ but substitutes for the last phrase in part (b) of each a requirement that, in order to be grounds for setting aside or reversal, the error or errors must result in a miscarriage of justice.⁴⁰ The concept comes from the California Constitution.⁴¹ Because of its abstract terms, similar language has been called "futile" by the Wigmore Committee.⁴² The New Jersey Rules of Evidence omit the provisions of Uniform Rules 4 and 5, but their substance is partially contained in previously existing rules of court.⁴³ The Kansas statute based on the Uniform Rules of Evidence omits part (b) of both rules 4 and 5.⁴⁴ Perhaps the legislature felt that the general harmless error provision,⁴⁵ relating to civil procedure but mentioning errors in the admission or exclusion of evidence, was sufficient. Although rule 5 is included in the evidence provisions of the Canal Zone Code,⁴⁶ rule 4 is omitted. In lieu of the (b) part of rule 4, a reference is made to Rule 61 of the Federal Rules of Civil Procedure which uses "substantial justice" and "substantial rights" as the tests for determining whether an error in the admission of evidence is reversible.⁴⁷ These expressions, like the California language,⁴⁸ merely present abstract terms. Thus, among the

³⁸ The committee recommended:

[T]he improper rejection or admission of evidence shall not be ground of itself for directing a new trial if it appears to the reviewing court that *independently of the evidence objected to and admitted there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision.*

Evidence Committee Report 573.

³⁹ Cal. Evid. Code §§ 353-54 (effective Jan. 1, 1967).

⁴⁰ Cal. Evid. Code § 353(b) (effective Jan. 1, 1967).

⁴¹ See Cal. Const. art. 6, § 4 1/2.

⁴² Evidence Committee Report 574.

⁴³ N.J. Rules of Evidence 4-5.

⁴⁴ Kan. Stat. Ann. §§ 60-404-405 (1964).

⁴⁵ Kan. Stat. Ann. § 60-261 (1964).

⁴⁶ C.Z. Code tit. 5, § 2735 (1963).

⁴⁷ C.Z. Code tit. 5, § 2734 (1963).

⁴⁸ See text preceding note 40 *supra*.

recent codifiers, only the Virgin Islands has followed the Wigmore Committee's recommendation that the test be specific enough to prevent an automatic reversal for erroneous admission or exclusion of evidence.⁴⁹ Nevertheless, the Committee recommendations still seem to be sound.

Interspousal Immunity

Recommendation III, 17 of the Wigmore Committee advocated the abolition of the doctrine (referred to as a privilege by Wigmore) used to prevent one spouse from testifying against the other.⁵⁰ The Uniform Rules accomplish this through rule 7, which includes a provision abolishing all privileges and disqualifications not otherwise provided for in the Rules. There is no provision covering antisposual testimony except rule 28, which grants a privilege for confidential marital communications. Thus the Wigmore recommendation was adopted by the Commissioners on Uniform State Laws. New Jersey,⁵¹ the Canal Zone,⁵² and the Virgin Islands⁵³ seem to have followed the Uniform Rules,⁵⁴ but California and Kansas have not. Their codifications retain provisions which preserve a privilege not to testify against one's spouse.⁵⁵ In Kansas this privilege is limited to criminal cases.

Attorney-Client Privilege

Proposal III, 11 of the Wigmore Committee was that an attempt be made to draft a statute which would make it clear that the attorney-client privilege for confidential communications is to be denied where the attorney had knowledge or ground to believe that the client was contemplating the commission of a crime (or fraud) or was attempting to suppress the discovery of such an act already committed.⁵⁶ The language of Uniform Rule 26(2)(a) seems to cover this situation, but uses the word "tort" instead of "fraud."⁵⁷ This language was adopted in Kansas,⁵⁸ the Canal

⁴⁹ See V.I. Code tit. 5, §§ 774-75 (1957).

⁵⁰ Evidence Committee Report 594-96.

⁵¹ N.J. Rule of Evidence 7.

⁵² C.Z. Code tit. 5, § 2737 (1963).

⁵³ V.I. Code tit. 5, § 777 (1957).

⁵⁴ The Canal Zone and the Virgin Islands use the language of Uniform Rule 7, which begins, "Except as otherwise provided in these Rules . . ." and goes on, with that exception, to abolish all disqualifications of witnesses and privileges and to make all relevant evidence admissible. The language of Rule 7 of the New Jersey Rules of Evidence begins, "Except as otherwise provided in these rules or by other law of this State . . ." None of the three sets of rules grants any intersposual privilege except for communications.

⁵⁵ Cal. Evid. Code § 970 (effective Jan. 1, 1967); Kan. Stat. Ann. §§ 60-407, 62-1420 (1964).

⁵⁶ Evidence Committee Report 589.

⁵⁷ Rule 26(2)(a) provides in part that the attorney-client privilege:

[S]hall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort

Aside from the broadening of the exception to the attorney-client privilege by the use of

Zone,⁵⁹ and the Virgin Islands.⁶⁰ Different language was used in California⁶¹ and New Jersey.⁶² The provisions in those two states are not exactly alike, but they have in common four differences from Uniform Rule 26(2)(a). *First*, they describe the exception to the privilege in fewer words;⁶³ *second*, they omit the requirement for evidence, *aside from the communication*, sufficient to warrant a finding;⁶⁴ *third*, they seem to require a finding by the judge that legal services with the designated relation to the commission of a crime or fraud actually were sought or obtained, rather than merely a finding that sufficient evidence was introduced to warrant invoking the exception to the attorney-client privilege; *fourth*, they substitute Wigmore's word "fraud" for the "tort" of the Uniform Rule.⁶⁵

"Dead-Man" Statutes

The effect of Rules 7 and 17 of the Uniform Rules would be to abolish the disqualification of the survivor under the Dead-Man Statutes.⁶⁶ This step would carry out recommendation III, 1 of the Wigmore Committee⁶⁷ and would bring the law into line with that of England, Connecticut, Louisiana, Massachusetts, Oregon, Rhode Island, and South Dakota, where the disqualification is not in effect.⁶⁸ In these jurisdictions unscrupulous survivors have not been noticeably successful in raiding the estates of deceased persons.⁶⁹ Consequently a change in the law in the other jurisdictions should not prove unfair to the estates of decedents. At the same time the change would give relief to honest survivors who find themselves unable to establish their valid claims against an estate.⁷⁰ It is clear that Dead-Man Statutes do not accomplish their purpose, which is to prevent dishonest claimants from fleecing estates. The reason they cannot be successful is that a person who would through his own testi-

"tort," the exception may also be broadened because of the use of the word "obtained" in the Uniform Rule. See *Clark v. State*, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953) (advice to get rid of murder weapon seemingly volunteered).

⁵⁹ Kan. Stat. Ann. § 60-426(b)(1) (1964).

⁶⁰ C.Z. Code tit. 5, § 2854(b)(1) (1963).

⁶¹ V.I. Code tit. 5, § 854(2)(a) (1957).

⁶² See Cal. Evid. Code §§ 954, 956 (effective Jan. 1, 1967).

⁶³ See N.J. Rule of Evidence 26(2)(a).

⁶⁴ Compare rule 26(2)(a), quoted in note 57 *supra*, with Cal. Evid. Code § 956 (effective Jan. 1, 1967): "There is no privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud."

⁶⁵ Compare N.J. Rule of Evidence 26(2)(a) with Uniform Rule of Evidence 26(2)(a), quoted in part in note 63 *supra*.

⁶⁶ N.J. Rule of Evidence 26(2)(a); Cal. Evid. Code § 956 (effective Jan. 1, 1967), quoted in part in note 63 *supra*.

⁶⁷ See Ladd, "Witnesses," 10 Rutgers L. Rev. 523, 525 (1956).

⁶⁸ Evidence Committee Report 581-82.

⁶⁹ Vanderbilt, Minimum Standards of Judicial Administration 334, 338 (1949).

⁷⁰ See Morgan et al., the Law of Evidence, Some Proposals for its Reform ch. III (1927).

⁷¹ See ALI Model Code of Evidence rule 101, comment b at 31-34 (1942).

mony falsify a claim would not hesitate to suborn perjury. The statutes do not and cannot prevent the survivor from obtaining others who will bear false witness against the estate. It is, therefore, the honest survivor rather than the dishonest one who is defeated by this type of legislation.⁷¹

Judicial Notice of Foreign Country Law

Judicial notice of the law of foreign countries is authorized by Uniform Rules 9(2)(b) and 9(3). One commentator has called this the most objectionable feature of the judicial notice provisions.⁷² He implies that this is a new feature by saying: "In this respect the Rules 'expand into virgin territory.'"⁷³ Actually four states already require their courts to take notice of the law of foreign countries without evidence,⁷⁴ two permit them to do so,⁷⁵ and another state requires notice to be taken of the law of foreign common-law jurisdictions.⁷⁶ In addition, writers approve the noticing of the law of foreign countries.⁷⁷

The Opinion Rule

The opinion rule is made somewhat less restrictive by the Uniform Rules—*first*, by substituting the requirement that the opinion be helpful⁷⁸ for the orthodox requirement of necessity, and *second*, by abolishing the prohibition of opinions on the ultimate issue.⁷⁹ These provisions move in the direction of recommendation III, 3 of the Wigmore Committee.⁸⁰ Rule 57 provides that the judge may first require the witness to be examined concerning the data upon which the opinion or inference is based. The leading authorities have approved the principles underlying these

⁷¹ See McCormick, Evidence § 65, at 143 (1954).

⁷² Stopher, "The Uniform Rules of Evidence: Government by Man Instead of by Law," 29 Ins. Counsel J. 405, 409 (1962).

⁷³ *Ibid.*

⁷⁴ Mass. Gen. Laws Ann. ch. 233, § 70 (1956); Miss. Code Ann. § 1761 (1957); N.C. Gen. Stat. § 8-4 (1953); W. Va. Code Ann. § 5711 (1961).

⁷⁵ N.Y. Civ. Prac. Law § 4511(b) (formerly N.Y. Civ. Prac. Act § 344(a)); Mich. Comp. Laws §§ 617.25, 617.27 (1948).

⁷⁶ Md. Ann. Code art. 35, § 47 (1965).

⁷⁷ See McCormick, Evidence § 326, at 699 (1954); Keefe et al., "Sense and Nonsense about Judicial Notice," 2 Stan. L. Rev. 664, 689 (1950); Nussbaum, "Proving the Law of Foreign Countries," 3 Am. J. Comp. Law 60 (1954).

Professor Davis suggests that the judicial notice provisions of the Uniform Rules could be improved. He proposes a formula which he says more nearly describes what the courts actually do in practice. Davis, "Judicial Notice," 55 Colum. L. Rev. 945 (1955).

⁷⁸ Uniform Rule of Evidence 56:

(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.

⁷⁹ Uniform Rule of Evidence 56(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 fact."

⁸⁰ Evidence Committee Report 583.

rules dealing with opinion,⁸¹ and a number of the jurisdictions which recently codified their evidence laws have adopted Uniform Rules 56 and 57.⁸²

The Hearsay Doctrine

The Uniform Rules adopt several changes concerning hearsay. At least six are important. The first is a simplified definition involving a narrower scope than under older approaches. According to rule 63 hearsay evidence consists 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"⁸³ As indicated, the meaning seems to be narrower than that presently adopted by some courts. There is authority which treats as hearsay non-assertive conduct offered to prove the truth of the actor's or declarant's belief concerning a certain fact.⁸⁴ The leading decision among the authorities which treat this conduct as hearsay is the English case of *Wright v. Tatham*.⁸⁵ In that case letters treating a testator as competent to transact business and able to understand the ordinary affairs of daily life were held inadmissible on the issue of competency to make a will. The letters contained no statement as to the testator's mental capacity and were written to him under circumstances indicating that they were not intended as assertions on that subject. Nevertheless the letters were held to be hearsay and inadmissible. Under Uniform Rules 62 and 63 conduct which the circumstances do not show was intended as an assertion apparently would not be hearsay even though offered to prove the belief of the actor. This would follow because the fact is not stated by the declarant, but his belief of the fact is to be inferred from his conduct. Such evidence probably will simply be considered circumstantial evidence. Safeguards against its improper use will be furnished by rule 45.⁸⁶ In many instances the probative value of the

⁸¹ E.g., McCormick, Evidence §§ 11-12, at 23, 24, 26 (1954); 7 Wigmore, Evidence § 1918 (3d ed. 1940).

⁸² Kan. Stat. Ann. §§ 60-456-457 (1964); N.J. Rules of Evidence 56-57 (omitting Rule 56(3) of the Uniform Rules which provides that by admitting evidence the judge "shall be deemed to have made the finding requisite to its admission"); C.Z. Code tit. 5, §§ 2931-32 (1963); V.I. Code tit. 5, §§ 911-12 (1957). But see Cal. Evid. Code § 800 (effective Jan. 1, 1967) (apparently codifying pre-existing law as to the "ultimate issue" rule, while at the same time requiring that evidence be "helpful" rather than necessary).

⁸³ Uniform Rule of Evidence 63.

⁸⁴ *Thompson v. Manhattan Ry.*, 11 App. Div. 182, 42 N.Y. Supp. 896 (2d Dep't 1896); McCormick, Evidence § 229, at 470-74 (1954); cf. *Hanson v. State*, 160 Ark. 329, 254 S.W. 691 (1923); *Matter of Estate of Loucks*, 160 Cal. 551, 558, 117 Pac. 673, 676 (1911).

⁸⁵ 5 Cl. & Fin. 670, 7 Eng. Rep. 559 (H.L. 1838).

⁸⁶ Uniform Rule of Evidence 45:

Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

evidence would be increased by the fact that the conduct was important or significant to the actor and thus verifies his belief. This simplification and clarification of the concept of hearsay is desirable.

The second change made by the Uniform Rules in the hearsay area is the creation of a new exception for evidence of statements made out of court by a person present at the hearing and available for cross-examination, provided the statement would be admissible if made by the declarant while testifying as a witness.⁸⁷ According to the Commissioners' Note accompanying this provision,⁸⁸ this exception will make admissible prior consistent or inconsistent statements as evidence of the truth of the facts stated. The justifications for the change are that prior statements are nearer in time to the occurrence than is the testimony, and that the opportunity to cross-examine, the very thing that the hearsay rule is designed to provide, is preserved. Because the Note makes it clear, by mentioning consistent and inconsistent statements, that the prior statement of the witness is to be admissible when the declarant's testimony at trial purports to cover the same subject matter as the declaration previously made, a "record of past recollection" also should be held to be within the exception.⁸⁹ By the better view such a record is admissible under current law even though the declarant-witness has a present recollection of the facts previously written down.⁹⁰ If he testifies to these facts from the witness stand, the written statement is clearly covered by the language of the prior-statement exception. If he has no present memory of the facts previously written, the statement is still probably covered. The language "available for cross examination with respect to the statement and its subject matter"⁹¹ seems to be intended to require that the declarant be available for cross-examination after the opponent knows that the prior statement will be offered in evidence, and not intended to require that the declarant-witness have a memory of any particular facts.

Aside from the requirements that the declarant-witness be available

⁸⁷ Uniform Rule of Evidence 63(1) specifically excepts from the hearsay exclusion: A statement previously made by a person who 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

⁸⁸ Commissioners' Note to Uniform Rule of Evidence 63(1), 9A U.L.A. 640, 641 (1965).

⁸⁹ The argument as to "records of past recollection," based on the Commissioners' Note to rule 63(1), may not be accepted by the federal courts if rule 63(1) is adopted for the United States district courts, since the Supreme Court has held that a memorandum should not be admitted if the writer who is the witness presenting the memorandum has a present memory of the facts recorded. *Vicksburg & M.R.R. v. O'Brien*, 119 U.S. 99, 102 (1886). McCormick thought that records of past recollection should be admissible under 63(1) because its language is broad enough and no other provision of the Rules covers them. McCormick, "Hearsay," 10 Rutgers L. Rev. 620, 622 (1956).

⁹⁰ See *Fisher v. Kyle*, 27 Mich. 454 (1873).

⁹¹ See note 87 *supra*.

for cross-examination and that he have no present recollection of the facts recorded, common law imposed three other conditions on the admission of records of past recollection.⁹² The first of these, namely that the declarant have first-hand knowledge of the facts declared, is preserved by rule 63(1) ("provided the statement would be admissible if made by declarant while testifying as a witness"). Two other requirements, *first* that the writing be made or checked at a time not too long after the events recorded, and *second* that the witness must in his testimony vouch for the correctness of the writing, are not mentioned by the rule. Since 63(1) certainly appears to cover records of past recollection by including them in the statements referred to, these two requirements apparently have been abolished. No other part of the rule deals with the admissibility of these records, and rule 7 makes all relevant evidence admissible except as otherwise provided.⁹³ It is submitted, however, that a new requirement should be added to 63(1). It would appear that the provision would be improved by adding at the end, "and the judge finds that the statement was not made for the purpose of having it introduced in litigation."

A dictum by the United States Supreme Court in *Bridges v. Wixon*,⁹⁴ a habeas corpus case, raises a question as to the constitutionality of the prosecution's use of a witness' prior inconsistent statements to prove the truth of the facts stated. At the trial the witness had repudiated his previous unsworn statement, and in its opinion the Court used language which suggests that a conviction based on unsworn testimony may violate the due process clause.⁹⁵ Even though this dictum does not seem to affect the admissibility of consistent statements, it nevertheless is an unfortunate suggestion.⁹⁶ The hearsay rule with all its peculiarities should not be given the status of constitutional doctrine.⁹⁷

The Uniform Rule's third important change concerning hearsay alters and clarifies doctrines relating to depositions and former testimony. These

⁹² See McCormick, Evidence § 277 (1954).

⁹³ McCormick, without disclosing his reasons, took the opposite position as to the effect of rule 63(1) on the common-law requirements. McCormick, *supra* note 89, at 622.

⁹⁴ 326 U.S. 135, 153 (1945).

⁹⁵ The Court said of prior inconsistent statements:

But they certainly would not be admissible in any criminal case as substantive evidence So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded.

Id. at 153-54. [Citations omitted.]

⁹⁶ See Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 *Harv. L. Rev.* 177, 194-95 (1948).

⁹⁷ The *Wixon* case was distinguished in a case in which an out-of-court identification, although unsworn at the time it was originally made, was confirmed as to accuracy by the witness at the trial. Sworn testimony by the identifier as to his prior identification was held to be admissible. *United States v. De Sisto*, 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964).

are treated by the Rules as hearsay when offered to prove the truth of the statements contained therein. Therefore an exception to the hearsay rule is necessary if any such testimony or deposition is to be admitted. Rule 63(3) provides the exception. A deposition taken for use in the trial of the action in which it is offered is admissible even though the deponent is available at the trial. This liberalization of the permitted use of depositions is sound and points in the same direction as a provision in Rule 26 of the Federal Rules of Civil Procedure.⁹⁸ Uniform Rule 63(3)(a) is the more liberal provision, but it deserves approval. It is absurd to require unavailability of the deponent even though he made his statement under oath and subject to cross-examination when no such requirement is made for "spontaneous declarations," statements of bodily condition made to physicians to obtain treatment, or admissions, which have neither safeguard.⁹⁹

With regard to depositions and testimony taken in a different case, rule 63(3) substitutes, for the orthodox requirement of identity of issues and parties, the provision that the issue be such that the former adverse party had the opportunity for cross-examination with an interest and motive similar to those of the adverse party in the later action.¹⁰⁰ The effect of this provision is to abolish the senseless requirement of "reciprocity"¹⁰¹ (also called "mutuality") which is still in force in some jurisdictions.¹⁰²

Uniform Rule 63(3) does not make admissible depositions taken for the purpose of discovery. This is contrary to the result under the Federal Rules of Civil Procedure which provide liberally for the use of depositions as evidence.¹⁰³ Even in a jurisdiction where the Uniform Rules of Evidence are not in force, discovery depositions probably are admissible for

⁹⁸ Fed. R. Civ. P. 26(d). See note 103 *infra*.

⁹⁹ See Uniform Rule of Evidence 63(1), (4), (7), (12).

¹⁰⁰ Uniform Rule of Evidence 63(3)(b)(ii).

¹⁰¹ The doctrine of reciprocity requires both that the party against whom the evidence is offered be either the same in each case or in privity, and that the offering party be either the same in both actions or in privity, so that the evidence would have been admissible if offered against the offeror. For criticism of the doctrine, see Morgan, "The Law of Evidence 1941-1945," 59 Harv. L. Rev. 481, 551 (1946); Falknor, "Former Testimony and the Uniform Rules: A Comment," 38 N.Y.U.L. Rev. 651, 653 (1963). Professor Falknor considers the abolition of the first requirement—identity of opponent—to be of debatable soundness. *Id.* at 655.

¹⁰² See *McInturff v. Insurance Co. of No. America*, 248 Ill. 92, 93 N.E. 369 (1910); *Citizens Bank & Trust Co. v. Reid Motor Co.*, 216 N.C. 432, 5 S.E.2d 318 (1939); see *McCormick*, Evidence § 232, at 488 (1954).

¹⁰³ Fed. R. Civ. P. 26(d) provides for the admission of depositions (1) where the deposition will be used to contradict or impeach "the testimony of the deponent as a witness;" (2) where the deposition is that of a party who at time of deposing was an officer, director, or managing agent of a corporation, partnership, or association; or (3) under other exceptional circumstances such as the inability to bring the deponent into court.

non-hearsay purposes, or when they come within some exception to the hearsay rule other than the one for depositions.¹⁰⁴

The fourth important change in the Uniform Rules helps to round out the exceptions to the hearsay rule. Subdivision (4)(c) makes admissible:

[I]f the declarant is unavailable as a witness, a statement narrating, describing, or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.¹⁰⁵

Professor McCormick points out that this extension is most needed when a claim for workman's compensation or for accident-insurance benefits rests upon a mortal injury observed only by the person injured.¹⁰⁶ Although the details differ the thrust of 63(4)(c) is the same as the Massachusetts Hearsay Statute of 1898,¹⁰⁷ which was generally well-received by the legal profession in that state.¹⁰⁸

In the criminal area, the constitutionality of 63(4)(c) has been questioned because of the accused's sixth amendment right to be confronted with the witnesses against him.¹⁰⁹ But hearsay exceptions have been recognized as exceptions to the right of confrontation; in some instances extension of a common-law exception has been approved despite this constitutional attack.¹¹⁰ Although the possibility of unconstitutionality of subdivision (c) is speculative and should not prevent its adoption, there are other objections. The limitations in the provision appear because of the unwillingness of the Conference of Commissioners to recognize fully that hearsay has probative value and should be received whenever better evidence from the same source is not obtainable because the declarant is unavailable as a witness.¹¹¹ The effort was to lay down prerequisites which would distinguish the evidence from ordinary hearsay. Phrases like "good faith" and the one relating to the time of making the statement,

¹⁰⁴ Illinois law expressly provides for use of depositions for impeachment, for admissions, and for the general exceptions to the hearsay rule. Ill. Rev. Stat. ch. 110, § 101.19-10. See Fitzpatrick & Goff, "Discovery and Depositions," 50 Nw. U.L. Rev. 628, 632-35 (1955).

¹⁰⁵ Uniform Rule of Evidence 63(4)(c).

¹⁰⁶ McCormick, *supra* note 89, at 624.

¹⁰⁷ Mass. Acts 1898 ch. 535, Mass. Gen. Laws Ann. ch. 233, § 65 (1956). A similar statute is in force in Rhode Island. R.I. Gen. Laws Ann. § 9-19-11 (1956).

¹⁰⁸ After this act had been in effect for more than 25 years, the Commonwealth Fund Committee conducted a survey of lawyers and judges in Massachusetts to determine their views concerning it. Replies were received from 638 of those questioned. Of the ones who had had experience with the provision, 71% thought well of it while only 19% criticized it. See Morgan et al., *supra* note 69, at 31-32 (1927).

¹⁰⁹ See Stopher, *supra* note 72, at 413; Slovenko, "Constitutional Limitations on the Rules of Evidence," 26 U. Cinc. L. Rev. 493, 505-06 (1957).

¹¹⁰ Snyder v. Massachusetts, 291 U.S. 97 (1934). See 5 Wigmore, *supra* note 81, § 1397, at 127; Comment, 113 U. Pa. L. Rev. 741, 746 (1965).

¹¹¹ See Commissioners' Note to Uniform Rule of Evidence 63, 9A U.L.A. 640, 643 (1965).

however, are ambiguous and may cause trouble. A simple provision, such as "Evidence of a hearsay declaration is admissible if the judge finds that the declarant is unavailable as a witness,"¹¹² would have its advantages.

Professor Chadbourn criticizes Uniform Rule 63(4)(c) on the ground that, contrary to our established mores with regard to the functions of the judge and the jury, the judge is authorized by the rule to exclude the evidence covered by the rule on the ground that he disbelieves it.¹¹³ According to Chadbourn's interpretation of the rule, the trial judge must find that the statement "was made," and that it was made in good faith.¹¹⁴ If he decides against the truthfulness of the testimony concerning the fact of the making of the statement, he is to exclude it, and if the judge decides that the declarant was lying, he may also exclude the evidence. We are accustomed to think that credibility in the second situation is for the jury and not the judge, unless he is trying the facts himself. Chadbourn also suggests that under the present form of 63(4)(c) the possibility exists of a statement being inadmissible when an out-of-court declaration is the only evidence of perception by the declarant and of the statement's recency. If the hearsay rule applies to data offered on the preliminary question of admissibility, the judge would be considering hearsay which has not yet been shown to be within an exception. Whether the rule does apply in connection with the determination of admissibility is not clear from the authorities.¹¹⁵

In reply to Professor Chadbourn's objections to Uniform Rule 63(4)(c), it could be argued that similar language is contained in the Massachusetts Hearsay Statute of 1898, which seems to have worked satisfactorily for nearly seventy years.¹¹⁶ In addition, in 1938 the American Bar Association recommended the adoption by the states of a statute similar to the Massachusetts act. This provision apparently covered criminal cases and declarations of insane persons as well as decedents.¹¹⁷

¹¹² Model Code of Evidence rule 503(a) (1942).

¹¹³ Chadbourn, "Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence," 75 Harv. L. Rev. 932 (1962). Professor Chadbourn prefers the simpler more liberal provision of Rule 503 of the Model Code, quoted in part in the text accompanying note 112 *supra*. He suggests, however, that if rule 503 is too advanced for general application, it could be limited to civil cases. Chadbourn, *supra* at 950-51.

¹¹⁴ *Id.* at 947.

¹¹⁵ See Chadbourn, *supra* note 113, at 948-49; McCormick, Evidence § 53, at 123-24 n.8 (1954); Maguire & Epstein, "Rules of Evidence in Preliminary Controversies as to Admissibility," 36 Yale L.J. 1101 (1927).

¹¹⁶ See notes 107-08 *supra* and accompanying text.

¹¹⁷ 63 A.B.A. Rep. 154, 525 (1938). The California Evidence Code and the New Jersey Rules of Evidence omit rule 63(4)(c). But compare this rule with Cal. Evid. Code §§ 1240, 1261, and N.J. Rule of Evidence 63(32).

It would appear that some acceptable form of a broad exception to the hearsay rule, based on the unavailability of the declarant, should be developed to give the proponent a chance in the situation where there is a lack of other evidence from the declarant on a vital point. The trier of fact may still disbelieve the evidence. A proposal along the lines of Rule 503 of the Model Code of Evidence may be a desirable solution. Rule 503 provides for the admissibility of declarations whenever the declarant is "(a) unavailable as a witness"¹¹⁸ The unsettled question is whether the constitutional right to confrontation would make it necessary to limit the provision to civil cases.¹¹⁹

The fifth change adopted by the Uniform Rules relates to vicarious admissions. Under rule 63(9)(a) the statement of an agent, in order to be admissible against his principal as an admission, would no longer be required to have been made in the scope of the agent's duty. Clause (a) requires only that the agent's statement concern a matter within the scope of the agent's duty and be made before the termination of the agency.¹²⁰ There is some authority in the cases for this doctrine.¹²¹ Clause (b) of rule 63(9) makes a comparable extension with regard to declarations of conspirators.¹²² These declarations, in order to be received as admissions against other members of the conspiracy, would not have to be in furtherance of the conspiracy if they relate to the subject matter of the conspiracy and were made before its completion or termination. An eminent authority has expressed hesitation over acceptance of the rationale of the two types of admissions, raising the question of whether authority to act should be accepted as authority to speak.¹²³ In the Rules of Evidence issued by the Supreme Court of New Jersey, briefer language is used in clause (a) but the coverage is at least as broad, and a statement which concerns a matter within the scope of an agency or employment relationship is made admissible.¹²⁴ On the other hand, clause (b) of the

¹¹⁸ Model Code of Evidence rule 503(a) (1942).

¹¹⁹ See McCormick, Evidence § 231, at 483-87 (1954). Uniform Rule 63(4)(c) requires a finding of circumstances arguably showing special trustworthiness. This is not required by Model Code rule 503. Consequently 63(4)(c) might be constitutional even if 503 would not be.

¹²⁰ Uniform Rules of Evidence 63(9)(a).

¹²¹ Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958); Martin v. Savage Truck Line, Inc., 121 F. Supp. 417 (D.D.C. 1954).

¹²² Rule 63(9)(b) makes vicarious statements admissible against a party if:

[T]he party and the declarant 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

¹²³ Falknor, "Vicarious Admissions and the Uniform Rules," 14 Vand. L. Rev. 855, 856-57 (1961).

¹²⁴ N.J. Rule of Evidence 63(9)(a).

New Jersey rule preserves the requirement that a conspirator's statement be in furtherance of the conspiracy.¹²⁵

The sixth of the more important changes of the Uniform Rules concerning the admissibility of hearsay is accomplished by subdivision (15) of rule 63. It makes admissible the findings of a public official who has the duty of making an investigation of fact.¹²⁶ Personal knowledge on the part of the official is not required. McCormick approved this type of extension of the exception for official written statements.¹²⁷

SPECIAL PROBLEMS OF FEDERAL COURTS

Both the Uniform Rules and the proposals of the Wigmore Committee display progressiveness, but they are not radical. These rules and proposals, as well as the studies and drafts of rules based on the Uniform Rules, should be useful sources in the drafting of federal rules. The committee should consider all of these, but it may naturally be expected to develop some ideas of its own.

Matters Not Covered by Uniform Rules

Even if the Federal Rules of Evidence are based on the Uniform Rules of the Commissioners on Uniform State Laws, it is very probable that alterations will be made. In addition to efforts to improve the Commissioners' draft and to eliminate provisions not suitable for constitutional or other reasons, there is a need to add rules on subjects not covered by the draft. Some of these additions should deal with federal doctrines which ought to be changed. For example, many authorities favor a "wide-open" scope of cross-examination.¹²⁸ The present federal practice is to limit cross-questioning to matters about which testimony was given on direct examination.¹²⁹ A more liberal rule would present little if any opportunity for argument over its administration. On the other hand, in the federal courts and in the states following the restrictive practice, the restrictive rule gives rise to frequent disputes over its application to the

¹²⁵ N.J. Rule of Evidence 63(9)(b) makes a statement admissible against a party if "at the time the statement was made the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan."

¹²⁶ Uniform Rule of Evidence 63(15) makes admissible: Subject to Rule 64 [relating to prevention of surprise] written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, or condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation.

¹²⁷ McCormick, *supra* note 89, at 626.

¹²⁸ See McCormick, Evidence § 27, at 50-52 (1954).

¹²⁹ See, e.g., *Branch v. United States*, 171 F.2d 337 (D.C. Cir. 1948).

use of particular questions. Thus the adoption of the unrestrictive practice would result in a great saving of time and energy.¹³⁰

There also seem to be restrictions in the federal courts on the use of writings to refresh the recollection of a witness. These restrictions are not followed in the majority of jurisdictions.¹³¹ Perhaps they should be abandoned or at least clarified through inclusion in the proposed rules.

Sources of Federal Evidentiary Rules

The existing Federal Rules of Civil Procedure and of Criminal Procedure contain evidence rules which present peculiar difficulties. In part, the problem stems from the fact that the Civil and Criminal Rules treat evidence differently, with the result that federal judges must look to two different sources for evidence doctrines. In another sense, four sources are actually involved, because under Rule 43(a) of the Rules of Civil Procedure, the courts must look to three different sources for the rules on admissibility and on competency of witnesses. All evidence is to be admitted "which is admissible under the statutes of the United States, or under the rules of evidence [applied prior to 1938 in the federal courts] . . . on the hearing of suits in equity or . . . applied in the courts of general jurisdiction of the state in which the United States court is held."¹³² The necessity for prompt trial rulings on objections makes it impossible for a district court judge to apply such a complicated formula literally.¹³³ He can only use his knowledge of general principles. This is especially true when he has been temporarily assigned to a district in a state where he is unfamiliar with local law. Though the result is not necessarily bad, the language of rule 43(a) is obviously unrealistic.¹³⁴ An important aim of the new rules will be to minimize the sources of evidence law.

Rule 26 of the Federal Rules of Criminal Procedure, unlike Civil Rule 43(a), as usually interpreted frees the federal court from closely following precedent by providing that the admissibility of evidence and the competency and privileges of witnesses are to be governed, in general,

¹³⁰ England and a minority of states retain the traditional "wide-open" rule of cross-examination. McCormick, *Evidence* § 21, at 43 (1954).

¹³¹ Compare cases in 3 Wigmore, *supra* note 81, § 761, at 106-07 n.4 with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 236 (1940) and *Putnam v. United States*, 162 U.S. 687, 694-707 (1896).

¹³² Fed. R. Civ. P. 43(a); cf. Fed. R. Crim. P. 26.

¹³³ Rule 43 has been called a "hodge-podge . . . that creates . . . a very great difficulty of application for the judges." Joiner, "Uniform Rules of Evidence for the Federal Courts," 20 F.R.D. 429, 436 (1958). See also Estes, "The Need for Uniform Rules of Evidence in the Federal Courts," 24 F.R.D. 331 (1960).

¹³⁴ See Special Committee on Evidence, Judicial Conference of the United States, "Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts," 30 F.R.D. 79, 95-98 (1962).

"by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹³⁵ This gives the courts an opportunity to modernize, clarify, and simplify the rules of evidence for criminal cases. Yet the Supreme Court said in a criminal case in 1948 that it had contributed little to any phase of the law of evidence.¹³⁶ This was because it had rarely had occasion to decide such issues; a court which decides so few cases in the field "cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be."¹³⁷ The Court described the law of evidence as archaic, paradoxical, and full of compromises and irrational compensations, but added: "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."¹³⁸ Since the Supreme Court is obviously reluctant, in fact unwilling, to seize the opportunity granted by rule 26 to improve criminal evidence rules by decision, the courts of appeals seem to be left with the task. But it is clearly too much for them, since there is bound to be some conflict among the eleven circuits.

Applicability of New Rules to Admiralty

In the opinion of the writer, the new rules should be made applicable in admiralty, and as a result some special exceptions and additional provisions may be needed. In admiralty there has traditionally been a distinction, regarding rules of evidence, between prize cases and other cases. In prize cases the usual rules of evidence are not enforced;¹³⁹ in other admiralty cases they seem to be applicable,¹⁴⁰ although courts sitting in admiralty are not bound as strictly by the rules of exclusion as are other courts.¹⁴¹ This result is in line with the general doctrine that the law of evidence is relaxed in cases tried without a jury.¹⁴²

By a recent amendment, the Rules of Civil Procedure have been made

¹³⁵ Fed. R. Crim. P. 26.

¹³⁶ *Michelson v. United States*, 335 U.S. 469, 486 (1948).

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ 1 Wigmore, *Evidence* § 4d, at 96 (3d ed. 1940).

¹⁴⁰ See *The Conqueror*, 166 U.S. 110, 131 (1897); *Kemsley, Millbourn & Co. v. United States*, 19 F.2d 441, 442 (2d Cir. 1927); *Archawski v. Hanioti*, 239 F.2d 806 (2d Cir.), *rev'd* on other grounds, 350 U.S. 532 (1956).

¹⁴¹ *Clarke S.S. Co. v. Munson S.S. Line*, 59 F.2d 423, 428 (E.D.N.Y. 1932); *Swift & Co. v. Compania Transmaritima Colombiana*, 83 F. Supp. 273, 279 (D.C.Z. 1948), *aff'd*, 175 F.2d 513 (5th Cir. 1949), *rev'd* on other grounds, 339 U.S. 684 (1950); 3 Greenleaf, *Evidence* 389 n.(a) (14th ed. 1883). Cf. *Taylor v. Crain*, 224 F.2d 237, 240 (3d Cir. 1955).

¹⁴² On the general principle see *Bommarito v. Southern Canning Co.*, 208 F.2d 56, 61 (8th Cir. 1953); Note, 79 *Harv. L. Rev.* 407 (1965). But see *Wong Sun v. United States*, 371 U.S. 471, 492-93 (1963). The Note, *supra*, at 414-15, suggests that special rules of evidence for nonjury trials be developed on the basis of a distinction (assumed to exist) between evidence which a trial judge is and is not better qualified than a jury to evaluate.

applicable in admiralty, except in prize proceedings.¹⁴³ Therefore, rule 43 now governs the admissibility of evidence and the competency of witnesses in some actions in admiralty, and the Rules of Practice in Admiralty and Maritime Cases in effect since March 7, 1921, are to that extent superseded.¹⁴⁴ This continuing distinction between types of admiralty cases will call for some difficult decisions on the part of a drafting committee, but certainly there are no insurmountable obstacles.

Applicability of New Rules to Bankruptcy and Copyright Proceedings

The uniform federal rules of evidence should also apply to bankruptcy and copyright proceedings. The Federal Rules of Civil Procedure are not applicable to bankruptcy or copyright proceedings except as made applicable thereto by rules promulgated by the Supreme Court.¹⁴⁵ After adoption of the Federal Rules, General Order 37 was amended¹⁴⁶ so as to provide that in proceedings under the Bankruptcy Act the Rules of Civil Procedure "shall, in so far as they are not inconsistent with the Act or with [the General Orders] . . . be followed as nearly as may be."¹⁴⁷ The Rules of Practice for copyright infringement proceedings were also amended to provide that such proceedings shall be governed by the Rules of Civil Procedure insofar as they are not inconsistent with the Rules of Practice.¹⁴⁸ Thus the rules of evidence in these two types of proceedings are determined, generally speaking, by rule 43(a),¹⁴⁹ and it would therefore follow that in this area, too, a body of uniform federal rules can be substituted for 43(a).

CONSTITUTIONAL LIMITATIONS ON FEDERAL RULES OF EVIDENCE

Rights of the Accused

The possible scope of federal evidentiary rules is limited by a number of constitutional proscriptions designed to protect the accused. The rule excluding from evidence the fruits of unlawful searches or seizures is implied from the fourth and fifth amendments.¹⁵⁰ The protections furnished by the due process clause of the fourteenth amendment against

¹⁴³ Fed. R. Civ. P. 1 and 81(a)(1), as amended Feb. 28, 1966, 39 F.R.D. 213, 251 (1966) (effective July 1, 1966).

¹⁴⁴ Order of Supreme Court amending Fed. R. Civ. P., 39 F.R.D. 213, 251 (1966).

¹⁴⁵ Fed. R. Civ. P. 81(a)(1), as amended, 39 F.R.D. 251 (1966).

¹⁴⁶ General Orders in Bankruptcy, as amended 305 U.S. 698 (1939).

¹⁴⁷ *Ibid.* See also General Order 36, *id.* at 698; *Matter of Steinberg*, 138 F. Supp. 462, 470 (S.D. Cal. 1956); *In re C & P Co.*, 63 F. Supp. 400, 408 (S.D. Cal. 1945).

¹⁴⁸ Copyright Rule 1, as amended 307 U.S. 652 (1939). *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523 (D. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947).

¹⁴⁹ See text accompanying note 132 *supra*.

¹⁵⁰ *Weeks v. United States*, 232 U.S. 383 (1914); *Collins v. United States*, 289 F.2d 129 (5th Cir. 1961).

the use of "coerced" confessions¹⁵¹ and against the use of evidence obtained through brutality which offends a sense of justice,¹⁵² are made available by the fifth amendment to the accused on trial in a federal court.¹⁵³ There is no doubt that the fifth amendment would also be violated by the federal government's knowing use of false testimony in gaining a conviction.¹⁵⁴

In addition, there are four rules of evidence expressly set forth in the Constitution. These are *first*, the provision that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court,¹⁵⁵ *second*, the privilege against self-incrimination,¹⁵⁶ *third*, the accused's right to confrontation,¹⁵⁷ and *fourth*, the right of the accused to have compulsory process for obtaining witnesses.¹⁵⁸ In regard to the second of these rules, the present view is that the fifth amendment not only protects the accused from being compelled to testify but also forbids adverse comment by federal prosecutors and judges on the failure of the accused to take the stand.¹⁵⁹ Uniform Rule 23(4) was drafted to allow such comment and the drawing of all reasonable inferences arising from the failure to testify.¹⁶⁰ Therefore it would not be suitable for adoption by either the federal or state courts because of its unconstitutionality.¹⁶¹

¹⁵¹ *Brown v. Mississippi*, 297 U.S. 278 (1936); see McCormick, Evidence § 117 (1954), George, Constitutional Limitations on Evidence in Criminal Cases 90 (1966).

¹⁵² *Rochin v. California*, 342 U.S. 165 (1952). Cf. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (dictum) (blood test could deprive accused of due process).

¹⁵³ *Lane v. United States*, 321 F.2d 573, 576 (5th Cir. 1963) (dictum), cert. denied, 377 U.S. 936 (1964); *Blackford v. United States*, 247 F.2d 745, 753 (9th Cir. 1957) (dictum), cert. denied, 356 U.S. 914 (1958); *United States v. Morales*, 233 F. Supp. 160 (D. Mont. 1964).

¹⁵⁴ *Kiger v. United States*, 315 F.2d 778 (7th Cir.) (dictum), cert. denied, 375 U.S. 924 (1963).

¹⁵⁵ U.S. Const. art. III, § 3.

¹⁵⁶ U.S. Const. amend. V.

¹⁵⁷ U.S. Const. amend. VI. For a state limitation on evidence rules in deference to the right to confrontation see, e.g., N.J. Rule of Evidence 63(1) and Comment on Uniform Rule 63(4)(c) in Report of the New Jersey Supreme Court Committee on Evidence 148-53 (1963). Compare N.J. Rule 63(3)(a)(ii). The necessity of such a limitation is debatable since Uniform Rule 63(4)(c) attempts to make a statement admissible only under condition of necessity and special trustworthiness. See notes 110 and 119 *supra*; Falknor, "Former Testimony and the Uniform Rules: A Comment," 38 N.Y.U.L. Rev. 651, 655-60 (1963); Note, 113 U. Pa. L. Rev. 741 (1965). The New Jersey Report, *supra*, gives other reasons for limiting the rule to civil cases, citing, at 151, Quick, "Hearsay, Excitement, Necessity, and the Uniform Rules: A Reappraisal of Rule 63(4)," 6 Wayne L. Rev. 204, 219-24 (1960).

¹⁵⁸ U.S. Const. amend. VI.

¹⁵⁹ See *Griffin v. California*, 380 U.S. 609, 613-14 (1965) (applying fourteenth amendment to comment by prosecution with acquiescence of judge in state proceeding). Cf. U.S. Criminal Code, 18 U.S.C. § 3481 (1964); *Wilson v. United States*, 149 U.S. 60 (1893).

¹⁶⁰ Rule 23(4) provides: "If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom."

¹⁶¹ *Griffin v. California*, *supra* note 159, held the California constitutional provision permitting comment invalid under the fourteenth amendment. The New Jersey version of 23(4) differs from the language of the Uniform Rule, N.J. Stat. Ann. 2A:84A-17 (Supp. 1965), but the underlying principle is the same as that of the California provision.

The recent case of *Miranda v. Arizona*¹⁶² clarifies and extends the holding in *Escobedo v. Illinois*¹⁶³ which held inadmissible against a defendant in a criminal case incriminating statements made by him under circumstances where he was not afforded his constitutional right to counsel. *Miranda* decided that the privilege against self-incrimination and the right to counsel are applicable to interrogation by law enforcement officials while the accused is in custody or otherwise deprived of his freedom in any significant way. The opinion in *Miranda* states:

As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.¹⁶⁴

The problem of the federal draftsman is to determine the extent to which constitutional provisions should be taken into account in drafting the rules. With regard to the preparation of the Uniform Rules of Evidence, the Committee which acted for the National Conference of Commissioners on Uniform State Laws said in its Prefatory Note to the Rules: "no special effort has been made to relate the rules of admissibility to all possible limitations arising out of constitutional requirements of due process, personal security and the like."¹⁶⁵ The Note adds that a rule would be inoperative where it would invade constitutional rights.¹⁶⁶ The Kansas Evidence Code,¹⁶⁷ which largely follows the Uniform Rules, has been characterized as incomplete because no consideration was given in its preparation to important recent decisions of the United States Supreme Court on self-incrimination, the admissibility of confessions, the function

¹⁶² 384 U.S. 436 (1966).

¹⁶³ 378 U.S. 478 (1964).

¹⁶⁴ *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). *Escobedo* stresses the right to counsel; *Miranda* refers expressly to the fifth amendment and self-incrimination.

¹⁶⁵ Handbook of the National Conference of Commissioners on Uniform State Laws 163 (1953).

¹⁶⁶ *Ibid.*

¹⁶⁷ Kan. Stat. Ann. §§ 60-401-470 (1964).

of the judge concerning the admissibility of confessions, and the scope and effect of the right to counsel.¹⁶⁸

At least three possible approaches to the draftsman's problem come to mind: *First*, the Advisory Committee might follow the plan of the Uniform Rules.¹⁶⁹ This would make it necessary to consult both the Rules and the decisions interpreting the Constitution when evidence questions arise. The same thing might be necessary, however, under any approach. *Second*, the federal rules of evidence might omit unconstitutional provisions so far as feasible (*e.g.*, leave out permission to comment on the accused's failure to testify¹⁷⁰) and set forth constitutional requirements at the appropriate places (*e.g.*, describe and prescribe the federal standard as to the compulsion which will exclude a confession¹⁷¹). *Third*, the plan of the California Evidence Code might be adopted. This is illustrated by the following section of the Code:

To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.¹⁷²

The difficulties with the second alternative, so far as the listing of constitutional requirements is concerned, are that some of the decisions cannot easily be put into formal rules and that this field of the law seems to be characterized at present by constant change. The third method would avoid these difficulties.

The Erie Doctrine and Federal Evidence Rules

The doctrine stemming from *Erie R.R. v. Tompkins*¹⁷³ has been said to have a constitutional basis.¹⁷⁴ This doctrine, in the language of the Court, is that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."¹⁷⁵ The decision has been taken to apply to substance but not to procedure.¹⁷⁶ In *Guaranty Trust Co. v. York*¹⁷⁷ the doctrine was redefined by announcing the "outcome-determination" test for distinguishing in a given case

¹⁶⁸ Fowks & Harvey, "The New Kansas Code of Civil Procedure," 36 F.R.D. 51, 63 (1964). The decisions referred to were rendered after the approval of the Uniform Rules but before passage of the Kansas statute.

¹⁶⁹ See text accompanying note 165 *supra*.

¹⁷⁰ But see notes 159-61 *supra* and accompanying text.

¹⁷¹ See *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

¹⁷² Cal. Evid. Code § 930. Other examples are found in sections 940 and 1204.

¹⁷³ 304 U.S. 64 (1938).

¹⁷⁴ Hart & Wechsler, *The Federal Courts and the Federal System* 616-17 (1953); Hill, "The Erie Doctrine and the Constitution," 53 Nw. U.L. Rev. 427 (1958).

¹⁷⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹⁷⁶ *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940); Cook, *Logical and Legal Bases of the Conflicts of Laws* 189-92 (1949).

¹⁷⁷ 326 U.S. 99 (1945).

between substance and procedure. Taken literally, the test would leave the federal courts with very little control over their procedure, since almost any procedural rule could have a substantial effect on the outcome of a case. However, the outcome test was modified by *Byrd v. Blue Ridge Rural Elec. Co-op.*,¹⁷⁸ which stated that the outcome test does not govern where there are countervailing considerations of sufficient importance. It was held in *Byrd* that such considerations were present, since the strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts outweighed the policy against a different result being reached by state and federal courts sitting in the same state.¹⁷⁹ Thus the *Byrd* case involved a weighing of state and federal interests.

The Court of Appeals for the Fifth Circuit in *Monarch Ins. Co. v. Spach*¹⁸⁰ relied upon *Byrd* in holding that a United States district court sitting in Florida in a diversity case was not required to follow a Florida statute making certain evidence inadmissible. The court gave two reasons for its decision: *first*, that the federal court in exercising its judicial power has a duty to hear and adjudicate and consequently has capacity to prescribe rules which will enable the courts to fulfill these constitutional demands;¹⁸¹ *second*, that the historical purpose of the Federal Rules was to substitute uniformity for the former partial conformity to state procedure.¹⁸² Both of these reasons are countervailing considerations in the *Byrd* sense.

Until 1965 the test to be used to determine the validity of federal rules of court remained uncertain. The outcome-determination test seemed well established. Yet if applied literally, practically all of the Federal Rules of Civil Procedure would be invalid because the application of, or failure to apply, them could affect the result of the litigation. In addition, there was disagreement as to the nature of the modification established by *Byrd*.¹⁸³ Mr. Justice Harlan described the situation as follows: "It is unquestionably true that up to now *Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions."¹⁸⁴

¹⁷⁸ 356 U.S. 525 (1958).

¹⁷⁹ *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 538 (1958).

¹⁸⁰ 281 F.2d 401 (5th Cir. 1960).

¹⁸¹ *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 407 (5th Cir. 1960). The case is susceptible of a narrower interpretation, but it has been construed as establishing that *Erie* does not require exclusion of evidence otherwise admissible. *Hope v. Hearst Consol. Publications, Inc.*, 294 F.2d 681, 685-86 (2d Cir. 1961), cert. denied, 368 U.S. 956 (1962). See Wright, *Federal Courts* 358-59 (1963).

¹⁸² *Monarch Ins. Co. v. Spach*, supra note 181, at 407-08.

¹⁸³ Compare *Monarch Ins. Co. v. Spach*, id. at 408; *Iovino v. Waterson*, 274 F.2d 41, 48 (2d Cir. 1959), cert. denied, 362 U.S. 949 (1960); 1965 U. Ill. L.F. 934, 937-38, with Degan, "The Law of Federal Evidence Reform," 76 *Harv. L. Rev.* 275, 291 (1962).

¹⁸⁴ *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (concurring opinion).

Observe that he said "up to now." He was concurring in the case of *Hanna v. Plumer*,¹⁸⁵ which did clarify the relation of *Erie* to the rule-making power of the Supreme Court. In *Hanna* subject-matter jurisdiction was based on diversity of citizenship, and service was made on the defendant executor by leaving copies of the summons and the complaint with defendant's wife at his residence. The district court sustained defendant's attack on the adequacy of the service because of a lack of compliance with a Massachusetts statute governing service on executors. Plaintiff admitted noncompliance with the statute but relied on Federal Civil Procedure Rule 4(d)(1).¹⁸⁶ Defendant conceded that the service complied with the rule and thus raised the issue of whether service in a diversity case is governed by the Federal Rule or by the state statute. The ruling of the trial court against the sufficiency of the service was affirmed by the Court of Appeals for the First Circuit.¹⁸⁷ The Supreme Court reversed, deciding that the federal court was not compelled to use the method of service required by Massachusetts law. The majority held that the rule of *Erie R.R. v. Tompkins*¹⁸⁸ does not constitute the appropriate test of the validity of a Federal Rule of Civil Procedure.

For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.¹⁸⁹

This sudden development probably surprised some students of the subject.¹⁹⁰ One of them, prior to *Hanna*, had considered whether the diversity clause in the constitutional provision for federal judicial power could be a source of law which would justify outcome differences, and

¹⁸⁵ 380 U.S. 460 (1965). As to the effect of the *Hanna* case see *Moore Co. v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921, 923 (8th Cir. 1965), cert. denied, 383 U.S. 925 (1966); Holtzoff, "A Landmark in Federal Procedural Reform," 10 Vill. L. Rev. 701 (1965).

¹⁸⁶ Fed. R. Civ. P. 4(d)(1) provides for service of summons and complaint as follows: Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein

¹⁸⁷ *Hanna v. Plumer*, 331 F.2d 157 (1st Cir. 1964).

¹⁸⁸ 304 U.S. 64 (1938). See text accompanying notes 175-76 supra.

¹⁸⁹ *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). The Court states that *Erie* has never been used to void a Federal Rule, explaining that where state rules have been held to apply in the face of an argument that a Federal Rule governed, the actual holding in each case was that the Federal Rule did not apply. *Id.* at 470, citing, among other cases, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). See *Sylvestri v. Warner & Swasey Co.*, 244 F. Supp. 524, 527 (S.D.N.Y. 1965).

¹⁹⁰ See Degnan, supra note 183, at 289, 291-92; Keeffe et al., "Weary *Erie*," 34 Cornell L.Q. 494, 525 (1949); Kurland, "Mr. Justice Frankfurter, the Supreme Court and the *Erie* Doctrine in Diversity Cases," 67 Yale L.J. 187, 187-88 (1957); McCoid, "*Hanna v. Plumer*: the *Erie* Doctrine Changes Shape," 51 Va. L. Rev. 884 (1965).

concluded that there was such doubt concerning the answer that an evidence advisory committee should not venture "to probe the periphery of Supreme Court doctrine."¹⁹¹ But that doubt has now been dispelled. Congress has the power to prescribe housekeeping rules for federal courts or to authorize the Court to prescribe them, even though they differ from comparable state rules and may affect the "outcome" of litigation.

Although the *Hanna* case did not involve a rule of evidence, it certainly throws light on the present subject. Chief Justice Warren, writing for the Court, distinguished the case where a given matter is not covered by a federal rule of court from the case where it is so covered. In the former situation the *Erie* doctrine applies, although the outcome-determination test is not absolutely controlling; choices between state and federal law are to be made not by any automatic criterion but by reference to the policies underlying the *Erie* rule. These policies were described as "discouragement of forum-shopping and avoidance of inequitable administration of the laws."¹⁹² But on the other hand, the *Erie* doctrine is not the appropriate test of the validity of a given exercise of the Supreme Court's rule-making power. The validity of rules of court issued under this power is to be decided with reference to the scope of the Enabling Act¹⁹³ and the distinction between substance and procedure drawn in *Sibbach v. Wilson & Co.*¹⁹⁴ This case indicated that if the classification of a matter as substance or procedure is uncertain and the matter might rationally be classified as either, the subject may be regulated by Congress.¹⁹⁵ It follows that Congress may exercise the power to regulate by delegating to the Supreme Court authority to make rules for the district courts.¹⁹⁶

¹⁹¹ Degan, *supra* note 183, at 292 n.76.

¹⁹² *Hanna v. Plumer*, *supra* note 189, at 468.

¹⁹³ 28 U.S.C. § 2072 (1964) provides in pertinent part:

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury

¹⁹⁴ 312 U.S. 1, 14 (1941).

¹⁹⁵ *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). This decision makes it clear that *Sibbach* would have been decided the same way if it had arisen after the case of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). In *Hanna* the Court stated that the validity of the Federal Rules as issued by the Supreme Court is to be judged in the light of the substance-procedure distinction set forth in *Sibbach*. *Hanna v. Plumer*, *supra* at 470-71. The Court quotes and uses the *Sibbach* test based on this distinction. *Id.* at 464. Moreover, *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958), discussed at text accompanying notes 178-83 *supra*, is cited by the majority in *Hanna* for the general proposition that the outcome-determination analysis was never intended to serve as a talisman. *Hanna v. Plumer*, *supra*, at 466-67. In other words, the outcome-determination test was not meant to determine the rule of decision in every instance without reference to other considerations.

¹⁹⁶ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1940). Even if the Court has inherent rule-making authority, it is probably limited to prescribing procedural rules. See *Washington-Southern Nav. Co. v. Baltimore Co.*, 263 U.S. 629, 635 (1924); *Shannon v. Cross*, 245 Mich. 220, 222 N.W. 168 (1928); *State v. Pavelich*, 153 Wash. 379, 382-83, 279 Pac. 1102, 1103 (1929).

Hanna v. Plumer recognizes the existence of constitutional restrictions applicable to precepts promulgated under the rule-making authority. These restrictions arise from the fact that the federal government is one of delegated powers. A substance-procedure dichotomy is relevant to both the restrictions and the *Erie* doctrine, but the line between substance and procedure is not always the same in different legal contexts. We have examined the tests which determine the application of *Erie*. For the purposes of determining compliance with the Enabling Act and related constitutional restrictions, the *Hanna* case declares that the question is to be decided "in light of the distinction set forth in *Sibbach*."¹⁹⁷ The distinction adopted by the *Sibbach* case is that "the test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."¹⁹⁸

By issuing a rule which is within the authority of the Enabling Act because it can rationally be classified as procedure, the Supreme Court exercises a power delegated to Congress by "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)"¹⁹⁹ and passed on to the Court by Congress. If the matter covered by the particular rule also rationally can be classified as substantive, and a state does so, the federal classification prevails in the event of conflict because of the supremacy clause.²⁰⁰

It follows that since the *Erie* doctrine does not apply to the Federal Rules, the distinction between substance and procedure which should govern the Advisory Committee, the Standing Committee, and the Judicial Conference in recommending, and the Supreme Court in adopting,²⁰¹ rules of evidence is the traditional one of the *Sibbach* case.

Effect of Limiting Language of the Enabling Acts

The Supreme Court of the United States and the highest court in many of the states issue rules of court regulating procedure in the trial courts

¹⁹⁷ *Hanna v. Plumer*, supra note 195, at 470-71.

¹⁹⁸ *Sibbach v. Wilson & Co.*, supra note 196, at 14. The majority opinion in *Hanna v. Plumer*, supra note 195, at 471-72, implies that a federal rule of decision which clearly is not procedural in view of the *Sibbach* distinction would be unconstitutional, because such a rule would not be supported by any grant of authority contained in the Constitution.

¹⁹⁹ *Id.* at 472.

²⁰⁰ U.S. Const. art. VI, § 2. See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

²⁰¹ The adoption procedure is set forth in the enabling statutes for the rules of admiralty, 28 U.S.C. § 2073 (1964), for bankruptcy, 28 U.S.C. § 2075 (1964), for civil procedure, 28 U.S.C. § 2072 (1964), and for criminal procedure prior to and including verdict, 18 U.S.C. § 3771 (1964), under which the rules do not take effect until 90 days after they have been reported to Congress by the Chief Justice. They are required to be reported during a regular session and not later than May 1. See Maris, "Federal Procedural Rule-Making: The Program of the Judicial Conference," 47 A.B.A.J. 772, 773 (1961). Bankruptcy is omitted

of the territorial jurisdiction of the issuing court.²⁰² There is disagreement as to the source of the power to promulgate such rules. It seems clear that trial and appellate judges alike have inherent power to issue rules for details of practice in the courts in which they preside.²⁰³ Whether there is inherent power in the highest court to prescribe rules of practice and procedure for lower courts, or whether the power must be conferred by constitution or statute, is a disputed question.²⁰⁴ Yet by the better view this inherent power does exist,²⁰⁵ although it is usually treated as being subject to legislative regulation.²⁰⁶ The legislature may restrict the rule-making power of the courts either by defining the extent of the power or by itself enacting rules of practice and procedure and thereby partially or wholly pre-empting the field. If the legislature does neither, the highest court in the state or nation has the power customarily exercised by those judicial tribunals which have exercised the power.

Apparently the Supreme Court has not decided whether it would have the power, without a grant from Congress, to issue rules of court governing the district courts.²⁰⁷ The Court has been authorized by Congress to promulgate rules of court for civil actions in the United States district courts, for criminal cases and proceedings to punish for criminal contempt, for bankruptcy proceedings, and for admiralty and maritime cases.²⁰⁸ These statutes grant authority to issue rules of procedure which abrogate earlier acts of Congress in conflict with the rules. Since several Supreme

from his list because the statute affecting those proceedings was not amended until after the article was published.

²⁰² See Joiner & Miller, "Rules of Practice and Procedure: A Study of Judicial Rule-Making," 55 Mich. L. Rev. 623, 624 (1957).

²⁰³ Burney v. Lee, 59 Ariz. 360, 367, 129 P.2d 308, 311 (1942); People v. Brown, 238 Mich. 298, 300, 212 N.W. 968 (1927); see Annots., 110 A.L.R. 22 (1937), 158 A.L.R. 705 (1945).

²⁰⁴ Joiner & Miller, *supra* note 202, at 625-26.

²⁰⁵ Burney v. Lee, *supra* note 203; People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934); State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936); Green, "To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?" 26 A.B.A.J. 482 (1940).

²⁰⁶ Cooley, *Constitutional Law* 49 (4th ed. 1931); Levin & Amsterdam, "Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision," 107 U. Pa. L. Rev. 1, 3-4, 24 (1958); Morgan, "Judicial Regulation of Court Procedure," 2 Minn. L. Rev. 81, 92 (1918). But see Winberry v. Salisbury, 5 N.J. 240, 245, 74 A.2d 406, 409 (1950). The legislature nevertheless may not unreasonably limit or hamper the courts in the performance of the duties imposed upon them by constitutions. Burney v. Lee, *supra* note 203, at 364, 129 P.2d at 310.

²⁰⁷ See Memorandum of Mr. Justice Frankfurter, 323 U.S. 821 (1944). If the Court has an inherent power, the acts of Congress undertaking to grant the power may still have the effect of limiting the inherent power. See notes 205-06 *supra* and accompanying text. There may be an implication in *Hanna v. Plumer*, 380 U.S. 460 (1965), that the rule-making power is in Congress and can be exercised by the Court only if delegated to it. In any case, both *Hanna v. Plumer*, *supra*, and *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) seem to recognize the congressional power to regulate the Court's authority over procedure.

²⁰⁸ 28 U.S.C. § 2072 (1964) (civil); 18 U.S.C. § 3771 (1964) (criminal); 28 U.S.C. § 2075 (1964) (bankruptcy); 28 U.S.C. § 2073 (1964) (admiralty).

Court cases have held evidence rules to be procedural,²⁰⁹ and commentators have reached the same conclusion,²¹⁰ the Court's authority under the statute appears to extend to the formulation of rules of evidence. In addition, the authority of the Supreme Court to issue rules of evidence for the district courts is supported not only by the Court's decisions but also by its actual issuance of the Equity Rules which regulated evidence to some extent²¹¹ and by its issuance of Federal Civil Rule 43,²¹² Federal Criminal Rule 26,²¹³ Bankruptcy General Order 37,²¹⁴ and former Admiralty Rules 46A and 46B.²¹⁵

There is general agreement that most of the rules of admissibility and exclusion are procedural and, as applied to federal courts, are within federal power to control.²¹⁶ Professor Degnan has found in contemporary congressional usage an indication of a belief on the part of Congress "that without express qualification the words practice and procedure include evidence."²¹⁷ Judge Clapp considers that, with two minor exceptions, all the Uniform Rules of Evidence are procedural in nature and are within the rule-making power.²¹⁸ Because there are at present few federal rules of court dealing with the admissibility of specific types of evidence, the periodicals and cases have usually discussed the propriety of applying federal evidence law from the standpoint of the *Erie* doctrine. A substance-procedure dichotomy is relevant to this doctrine as well as to the Acts of Congress authorizing rules of court. However, the test for distinguishing procedure from substance is not the same in each instance. The distinction used to test compliance of a particular federal rule of court with the enabling acts is whether the subject matter of the rule is primary rights and duties or the methods of enforcing them. If the former, the rule exceeds the authority given by the statute.²¹⁹

Whether burden of proof is to be considered substantive or procedural for the purpose of rule-making is uncertain. The term is usually considered

²⁰⁹ *Thompson v. Missouri*, 171 U.S. 380 (1898); *Dravo v. Fabel*, 132 U.S. 487 (1889).

²¹⁰ Clapp, "Privilege Against Self-Incrimination," 10 *Rutgers L. Rev.* 541, 565, 571 (1956); Degnan, "The Feasibility of Rules of Evidence in Federal Courts," 24 *F.R.D.* 341, 345 (1959); Sweeney, "Federal or State Rules of Evidence in Federal Courts," 27 *Ill. L. Rev.* 394, 398 (1932).

²¹¹ Equity Rules of 1912, 46-52, 226 U.S. 661-64 (1912).

²¹² Fed. R. Civ. P. 43. See text accompanying notes 133-34 *supra*.

²¹³ Fed. R. Crim. P. 26. See text accompanying notes 135-37 *supra*.

²¹⁴ General Orders in Bankruptcy 37, 305 U.S. 698 (1939). See text accompanying notes 145-49 *supra*.

²¹⁵ Admiralty R. 46A-46B, 307 U.S. 658-59 (1939).

²¹⁶ See *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960); *Wright, Federal Courts* § 93, at 358-59 (1963); Degnan, *supra* note 183; Joiner, "Uniform Rules of Evidence for the Federal Courts," 20 *F.R.D.* 429, 435-39 (1957); Ladd, "Uniform Evidence Rules in the Federal Courts," 49 *Va. L. Rev.* 692 (1963).

²¹⁷ Degnan, *supra* note 183, at 281.

²¹⁸ Clapp, *supra* note 210, at 571.

²¹⁹ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

to cover two different things, burden of persuasion and burden of going forward with the evidence. The Supreme Court in two cases held burden of proof to be substantive without saying which burden it considered significant in connection with classification.²²⁰ These cases applied *Erie*, but were decided before the outcome-determination test had become established. Consequently they might be thought to govern rule-making even if *Erie* is not applied. An earlier district court case, reviewing rules which had the effect of allocating the burden of proof, considered them substantive. The court followed the state law as to the burden and based the decision expressly on the substantive limitation of the Enabling Act and the *Erie* case.²²¹ On the other hand, the Restatement of Conflicts treats burden of proof as procedural.²²²

Under Rule 14(a) of the Uniform Rules of Evidence, a rebuttable presumption has the effect of determining which party has the burden of persuasion if the presumption is derived from basic facts having probative value as evidence of the presumed fact. Thus there is a question as to whether 14(a) should be included in the federal rules. Might it be held to deal with substance and therefore to be outside the Supreme Court's rule-making power? A difference of opinion as to the answer appears in legal literature.²²³

Uniform Rule 14(b) provides that if the facts from which a presumption arises have no probative value as evidence of the presumed fact, the presumption no longer exists after the introduction of evidence which would support a finding of the nonexistence of the presumed fact. The Supreme Court has said that presumptions and their effects are substantive.²²⁴ However, the case in which this was said involved a presumption establishing the burden of persuasion and may apply to subdivision (a) of Uniform Rule 14 rather than subdivision (b). Other factors to be considered are that the case was using outcome determination as the test of substance, and that the Restatement of Conflicts treats presumptions as procedural.²²⁵ Since the decision of the *Hanna* case, if the Supreme Court issues as a rule of evidence a provision that all presumptions shall have the minimum effect of shifting the burden of producing evidence, the rule

²²⁰ *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Cf. McCormick, *Evidence* § 332, 685-86 (1954).

²²¹ *Francis v. Humphrey*, 25 F. Supp. 1 (E.D. Ill. 1938).

²²² Restatement, *Conflict of Laws* § 595, comment (a) (1934). Accord, Restatement (Second), *Conflict of Laws* § 598 (Tent. Draft No. 11, 1965).

²²³ The weight of opinion considers the question procedural. Restatement (Second), *Conflict of Laws* § 598 and accompanying comments (Tent. Draft No. 11, 1965). For the contrary view see Comment, 1964 *Duke L.J.* 867, 882-83.

²²⁴ *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959).

²²⁵ See text accompanying note 222 *supra*.

might be held to be a part of the judicial process for enforcing rights and thus be valid under *Sibbach* and *Hanna*.²²⁶

The parol evidence rule is said to be a part of the substantive law of contracts. Wigmore, however, pointed out that the so-called rule is really made up of several rules.²²⁷ McCormick described one of them as procedural—that one which determines who (as between judge and jury) decides whether the writing was intended to supersede the alleged oral agreement.²²⁸ The federal courts seem to follow the traditional practice of assigning this function to the judge.²²⁹ Since the intent of the parties is certainly a question of fact, the decision by the judge can only be justified by recognizing it as a preliminary procedural question;²³⁰ otherwise there would be a violation of the seventh amendment in many cases. This procedural rubric could be incorporated validly in a federal rule of court although the substantive aspect of the parol evidence rule, the doctrine of integration, probably could not.

There is considerable disagreement as to whether privileges are controlled by state law.²³¹ The controversy has been as to the application of *Erie*, *York*, and *Byrd*. *Hanna v. Plumer* introduces a new factor. The advisory committee must decide whether to avoid a controversial subject or to include a provision on the subject and thereby present an additional opportunity for debate and possible resolution of the matter.

CONCLUSION

The drafting of evidence rules for the federal courts is a challenging task. In the past three decades the American Law Institute and the Conference of Commissioners on Uniform State Laws have devoted much thought and effort to the development of the Model Code and Uniform

²²⁶ Ladd, *supra* note 216, at 698 n.20, seems to think that even Rule 14(a) would be within the rule-making power where *Erie* does not apply. Degnan, *supra* note 183, at 283 n.35, distinguishes "merely regulating management of presumptions in the course of trial, as Uniform Rules of Evidence 13-16 do," from creating presumptions. He asserts that the latter affects substantive rights. Cf. *id.* at 299 n.102, on *Erie* and presumptions. "Conclusive presumptions" are sometimes treated as part of the law of evidence but actually are substantive law. 9 Wigmore, Evidence § 2492 (3d ed. 1940).

²²⁷ *Id.* § 2400(3).

²²⁸ McCormick, Evidence § 214, at 434-36 (1954).

²²⁹ *Id.* § 215.

²³⁰ It is said to be a question for the court because it relates to admission of evidence. *Naumberg v. Young*, 44 N.J.L. 331, 338 (1882). Federal cases referring to the parol evidence rule as substantive probably refer to the integration rule, which is a part of contract and property law. See *Patterson-Ballagh Corp. v. Byron Jackson Co.*, 145 F.2d 786, 790 (9th Cir. 1944).

²³¹ E.g., Louisell, "Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today," 31 Tul. L. Rev. 101 (1956) (apply state privileges in all cases); Weinstein, "Recognition in the United States of the Privileges of Another Jurisdiction," 56 Colum. L. Rev. 535, 545-47 (1956) (state privileges in diversity cases only); Pugh, "Rule 43(a) and the Communication Privileged Under State Law: An Analysis of Confusion," 7 Vand. L. Rev. 556, 568 (1954) (federal courts not compelled to honor state privileges).

Rules. The Uniform Rules have received more popular support than the Code and have actually been adopted in a few jurisdictions. Nevertheless they need additional thought and work and should be adapted to the peculiar needs of the federal courts. They are superior to the common law, even with its piecemeal statutory modifications. Yet it is probable that even the Uniform Rules can be improved. The Federal Advisory Committee may do its own drafting, but it will probably draw to some extent on the Uniform Rules and the recent codifications in five jurisdictions. Prominent among these are California and New Jersey, where elaborate studies were made. As a general plan for the project, several possibilities present themselves. The draft may take the form of detailed rules, a statement of principles, or a limited number of general rules. To borrow Professor Maguire's phrase, the choice is "between a catalogue, a creed, and a Code." It is unlikely that the committee will depend on a lengthy catalogue of desirable rulings such as Wigmore's Code of Evidence, published in book form in 1910, or on a mere statement of principles. The third possibility, which has been the plan of the Uniform Rules of the State Commissioners and of the codes recently adopted, is the most probable choice. Whatever form the draft takes, one objective must be improvement of the law of evidence. Since even those who criticize some particular effort agree that improvement is needed, a codification of existing law will not be satisfactory. If those who have the responsibility of initiating the rules can reconcile or choose wisely between the conflicting views which have been expressed, operate successfully within the limits of federal power and particularly of the Court's authority, and persuade the powers that be to accept what they produce, their accomplishments may approach those represented by the existing Federal Rules of Procedure.