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## A Comparison Of Uniform Rule Of Evidence 63(1) And (4) And Virginia Law

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will prove the soundness of the Article.<sup>50</sup> On the other hand, other writers point out that Article 4 is simply a codification of existing law and practices with additional clarification of many clouded areas.<sup>51</sup> Another authority suggests that the safeguards for the few bad transactions should not be permitted to clog the flow of the great majority of good transactions.<sup>52</sup>

This writer is inclined to believe that the Article would make a useful contribution to the banking law of Virginia. Although § 4-103 tends to favor the banks and would be more equitable in a compromise between the earlier drafts<sup>53</sup> and the present one, the inequity is not such as to make the whole Article objectionable. Since the banks could continue to operate in most areas under the regulations that they now follow, it would seem that they certainly should not object to the adoption of the Article; in fact, they should welcome it. In light of the fact that there is now a paucity of banking law in Virginia, it is submitted that the adoption of Article 4 would be beneficial to all parties concerned. The banks and their customers would be able to ascertain more readily their rights and obligations in a given situation, and their attorneys would be able to advise them with more certainty as to the result of action or non-action contemplated or taken.

LYMAN C. HARRELL, III

### A COMPARISON OF UNIFORM RULE OF EVIDENCE 63(1) AND (4) AND VIRGINIA LAW

In 1942 after years of demand for simplification and modernization of the common law rules of evidence, the American Law Institute's Model Code of Evidence was offered to the states. The objective of the Model Code was to revise instead of merely restate the law.<sup>1</sup> Although the Code was generally approved by authorities on the subject of evidence, it was not enacted by any state and was cited as authority by only a few courts. The failure of the Model Code is

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<sup>50</sup>Malcolm, *supra* note 3 at 265.

<sup>51</sup>A Symposium of the Proposed Uniform Commercial Code, *supra* note 10 at 81; see note 10 *supra* at 24.

<sup>52</sup>Leary, *supra* note 3 at 569-70. For a good discussion of the effect of Article 4 in Kentucky, which has recently adopted the Uniform Commercial Code, see Brown, *Bank Deposits and Collections*, 48 Ky. L.J. 232 (1960).

<sup>53</sup>See Brome, *supra* note 2 at 310.

<sup>1</sup>See generally, Model Code of Evidence pp. vii-xvi (1942).

attributed largely to its drastic departure from the common law rules of evidence, especially in its hearsay provisions.<sup>2</sup> In 1948 the National Conference of Commissioners on Uniform State Laws decided that the law of evidence was a proper field for uniform legislation and undertook to draft a more conservative set of rules, placing special emphasis upon acceptability and uniformity.<sup>3</sup> The Conference approved 'the Uniform Rules of Evidence in 1953.<sup>4</sup> The American Bar Association approved the rules in the same year,<sup>5</sup> and the American Law Institute followed in 1954.<sup>6</sup>

Rule 63(1) and (4) of the Uniform Rules of Evidence, which contains exceptions to the hearsay rule, will be compared with the existing Virginia law so as to point out some of the changes adoption of this rule would bring about.<sup>7</sup>

## I

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) 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.

A majority of jurisdictions, including Virginia, do not follow this rule, but hold that prior statements, whether consistent or inconsistent, are inadmissible as substantive evidence unless admissible under one of the established hearsay exceptions.<sup>8</sup> It is considered immaterial that the declarant is now in court and available for cross-examination. However, prior inconsistent statements are admissible for the purpose of impeaching the witness,<sup>9</sup> and prior consistent state-

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<sup>2</sup>McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 *Texas L. Rev.* 559 (1955).

<sup>3</sup>See National Conference of Commissioners on Uniform State Laws 161-63 (1953) [hereinafter cited as *Uniform Rules of Evidence*.]

<sup>4</sup>*Id.* at 103

<sup>5</sup>8 A.B.A. Rep. 134 (1953).

<sup>6</sup>McCormick, *supra* note 2 at 560.

<sup>7</sup>For more thorough discussions of all the Uniform Rules of Evidence pertaining to hearsay exceptions, see Symposium—Hearsay Evidence, 46 *Iowa L. Rev.* 207 (1961); Falknor, *The Hearsay Rule and Its Exceptions*, 2 *U.C.L.A.L. Rev.* 13 (1954).

<sup>8</sup>McCormick, *Evidence* § 39 (1954); Annot., 133 *A.L.R.* 1454 (1941).

<sup>9</sup>*Ibid.*

ments may be used to corroborate the testimony of a witness under certain circumstances.<sup>10</sup>

The proposed rule would "let in the prior consistent or inconsistent statements of a witness as substantive evidence of the facts."<sup>11</sup> This includes prior writings by the witness which under present Virginia law may be used only to refresh the recollection of the witness.<sup>12</sup> Rule 63(1) also admits "past recollections recorded" which are repudiated by the party making them.

The Virginia Supreme Court of Appeals has asserted that hearsay evidence is excluded for three reasons: (1) it lacks the sanction of an oath; (2) it facilitates the use of perjured testimony; and, (3) it lacks the test of cross-examination.<sup>13</sup> The first reason appears to have little, if any, validity when applied to hearsay statements because such hearsay statements are inadmissible even if made under oath.<sup>14</sup> Wigmore says that "it is clear beyond doubt that the oath . . . is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule."<sup>15</sup> The second reason does not apply because the proposed rule requires the declarant to be present at the hearing. The third and apparently principal reason for the hearsay rule, is adequately treated in the provisions of Rule 63 (1). Professor McCormick, a leading authority in the field of evidence, observes that the admission of prior statements as substantive evidence "is well justified, since prior statements were nearer to the event than the present testimony is, and since the opposing party is afforded the very safeguard that the hearsay rule is intended to guarantee, namely, the right of cross-examination."<sup>16</sup> Wigmore takes a similar view.<sup>17</sup>

Under present Virginia law, if the prior inconsistent statement is

<sup>10</sup>Hubbard v. Commonwealth, 174 Va. 493, 6 S.E.2d 760 (1940). For a discussion of the circumstances under which prior consistent statements may be used to corroborate the testimony of witness, see 17 Va. L. Rev. 696 (1931).

<sup>11</sup>McCormick, *supra* note 2 at 562.

<sup>12</sup>Fant v. Miller & Mayhew, 58 Va. (17 Gratt.) 187, 224 (1867).

<sup>13</sup>Hines v. Commonwealth, 136 Va. 728, 743, 117 S.E. 843, 847 (1923).

<sup>14</sup>For example, testimony given by a witness under oath in a former trial is excluded as hearsay when offered in a subsequent trial if the witness is available. Director Gen. v. Gordon, 134 Va. 381, 114 S.E. 668 (1922).

<sup>15</sup>5 Wigmore, Evidence § 1362 at 7 (3d ed. 1940).

<sup>16</sup>McCormick, *supra* note 2 at 562.

<sup>17</sup>"[B]y hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence, there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve." 3 Wigmore, Evidence § 1018 at 688 (3d ed. 1940).

admitted to impeach the witness, the opposing party is entitled to an instruction that the jury can consider the statement only for that purpose and not as substantive evidence.<sup>18</sup> Such a rule imposes upon the jurors the psychologically impossible task of considering the statement as it bears upon the credibility of the witness and then dismissing it from their minds as evidence to prove the facts stated. In reality, it is thought juries have long considered prior statements as substantive evidence, as McCormick recognized when he asserted that the proposed rule "avoids the empty ritual of instructing the jury not to consider the statement as substantive evidence."<sup>19</sup>

It should be noted that the Uniform Rules in another section provide a necessary limitation on the ease with which prior statements gain admission into evidence. Rule 45 permits the trial judge to exclude otherwise admissible evidence when he finds that its probative value is outweighed by the risk of confusion, prejudice, waste of time or surprise.<sup>20</sup> The Commissioners seem correct when they say, referring to Rule 63(1), that "when sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay."<sup>21</sup>

## II

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (4) A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if 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.

The Virginia Supreme Court of Appeals has long recognized that extra-judicial<sup>22</sup> statements are admissible under an exception

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<sup>18</sup>Va. Code Ann. § 8-292 (Repl. Vol. 1957).

<sup>19</sup>McCormick, *supra* note 2 at 562.

<sup>20</sup>Uniform Rules of Evidence rule 45 (1953).

<sup>21</sup>Uniform Rules of Evidence rule 63 (1), comment (1953).

<sup>22</sup>Extrajudicial has been defined as "that which is done, given, or effected outside the course of regular judicial proceedings; not founded upon, or unconnected with, the action of a court of law..." Black, Law Dictionary (4th ed. 1951).

to the hearsay rule as substantive evidence if the statement is a part of what is called the *res gestae*.<sup>23</sup> In determining whether the statement is part of the *res gestae* the Virginia court has placed more emphasis upon spontaneity than upon contemporaneity.<sup>24</sup> Therefore, in this state, while a statement need not be contemporaneous with the event it must be a spontaneous or an excited utterance.<sup>25</sup> The basis for the "spontaneous utterance" rule is said to be that "the spontaneity of the utterance is the guaranty of its trustworthiness in substitution of that provided by oath and cross-examination."<sup>26</sup> One test set forth to determine whether a declaration is part of the *res gestae* is that it must have accompanied the fact or followed under its immediate propulsion. The declaration must show no evidence or reflection, deliberation or calculation and it must have been a spontaneous, undesigned and illustrative incident or part of the litigated act.<sup>27</sup> Another test adopted by the Virginia court is whether the declaration was the facts speaking *through* the party or if the party was talking *about* the facts.<sup>28</sup>

The Uniform Rules of Evidence treat contemporaneous statements and excited utterances made after the event separately in Rule 63(4)(a) and (b) respectively. Rule 63(4)(a) admits contemporaneous utterances, and so only requires the statement to be made while the declarant is perceiving the event, thereby dispensing with the requirement of an excited utterance. The contemporaneous statement is worthy of credit for two reasons:

"First, it is in essence a declaration of a presently existing state of mind, for it is nothing more than an assertion of his presently existing sense impressions. As such it has the quality of spontaneity. . . . Second, since the statement is contemporaneous with the event, it is made at the place of the event. Consequently the event is open to perception by the senses of the person to whom the declaration is made and by whom it is usually reported on the witness stand. The witness is subject

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<sup>23</sup>Scott v. Shelor, 69 Va. (28 Gratt.) 891 (1877). For a criticism of the term see 3 Wigmore, Evidence § 1767 (3d ed. 1940); Payne, The Mysteries of Virginia's Res Gestae Rule, 18 Wash. & Lee L. Rev. 17 (1961).

<sup>24</sup>Pepoon v. Commonwealth, 192 Va. 804, 66 S.E.2d 854 (1951); Ellis v. Va. Ry. & Power Co., 132 Va. 24, 110 S.E. 382 (1922).

<sup>25</sup>Kuckenbecker v. Commonwealth, 199 Va. 619, 101 S.E.2d 523 (1958).

<sup>26</sup>Chappell v. White, 182 Va. 625, 633, 29 S.E.2d 858, 861 (1944). In this case the statements of a child as to the cause of an accident, which were made immediately after the accident, were held to be inadmissible, not because they were insufficiently close in time to the event, but because they were expressions of an opinion and not a statement of fact.

<sup>27</sup>Ellis v. Va. Ry. & Power Co., supra note 24.

<sup>28</sup>Upton v. Commonwealth, 172 Va. 654, 2 S.E.2d 337 (1939).

to cross-examination concerning that event as well as the fact and content of the utterance, so that the extra-judicial statement does not depend solely upon the credit of the declarant."<sup>29</sup>

It is submitted that Rule 63(4)(a) provides the guaranty of trustworthiness in substitution of that provided by oath and cross-examination which is the basis of the Virginia *res gestae* exception to the hearsay rule.<sup>30</sup>

Rule 63(4)(b) admits excited utterances made after the event while the declarant is under the stress of the nervous excitement caused by the perception of the event. Although the Virginia court has not used the literal language of this rule it seems to be in accord with Virginia law. In *Huffman v. Commonwealth*<sup>31</sup> the court points out that "whether a statement is a part of the *res gestae* depends on the circumstances of each case, and there is no fixed rule by which it can be decided. . . . [This determination] rests within the sound judicial discretion and judgment of the trial court."<sup>32</sup> The proposed rule also leaves the question of admissibility to the discretion of the trial judge whose finding, by necessity, must depend upon the circumstances of each case. In *Kuckenbecker v. Commonwealth*<sup>33</sup> the court, discussing the time lapse between the event and declaration, asserted that "while the statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such a time and under such circumstances as will exclude the presumption that it is the result of deliberation."<sup>34</sup> It is clear that neither the Virginia rule nor the proposed rule requires exact contemporaneity. Both have a common purpose, *i.e.*, to admit reliable evidence but to exclude fabricated stories that are the result of deliberation. Thus, it seems that any difference between the two rules is in the language and not in practical effect.

Rule 63(4)(c) is new and is said to represent a carefully considered middle ground between the liberal extreme proposed by the Model

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<sup>29</sup>Morgan, A Suggested Classification of Utterances Admissible as *Res Gestae*, 31 Yale L.J. 229, 236 (1922).

<sup>30</sup>See note 26 *supra*.

<sup>31</sup>168 Va. 668, 190 S.E. 265 (1937). The question faced by the court was whether the trial court had committed error by admitting statements disclosing the circumstances of the shooting which were made a very few minutes after the declarant had been mortally wounded.

<sup>32</sup>*Id.* at 681, 190 S.E. at 271.

<sup>33</sup>See note 25 *supra*. The court held a statement by the decedent which was made some thirty minutes after an alleged fight with the defendant was not admissible as a part of the *res gestae*.

<sup>34</sup>*Id.* at 622, 101 S.E.2d at 526.

Code of Evidence<sup>35</sup> and the attitude opposing liberalization of the hearsay exceptions.<sup>36</sup> The Commissioners point out that it was included on grounds of necessity to "let in narrative statements not falling within the definition of (a) or (b), but still having substantial basis for trustworthiness."<sup>37</sup> Recognizing that unreliable evidence should not be admitted regardless of the degree of necessity, it appears that both reliability and necessity are prerequisites to the admission of evidence under this rule. This is shown by the following Commissioners' comment:

"Clause (c) is drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions. The fact remains that there is a vital need for a provision such as this to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available. 'Unavailability' is carefully defined in Rule 62 so as to give assurance against the planned or fraudulent absence of the declarant."<sup>38</sup>

It has been pointed out that clause (c) would serve as a safety valve in those unusual situations in which there is an *ad hoc* assurance of reliability.<sup>39</sup> The greatest need for such a rule arises in cases involving claims for workmen's compensation or for accident insurance benefits when such claims rest upon a mortal injury observed only by the person injured.<sup>40</sup>

Rule 63(1), as outlined in the first part of this discussion, does not seem to fall under the objections to hearsay evidence as proposed by the Virginia court. The rule provides that prior statements are admissible only if the declarant is in court and then only if the evidence would be admissible if the declarant were on the witness stand. Such a safeguard insures a high degree of reliability and should remove this evidence from the classification of inadmissible hearsay.

It is further submitted that Rule 63(4) offers a needed clarification and simplification of the law in this area. In particular, clauses (a) and (b) treat contemporaneous statements and excited utterances separately and at the same time provide the necessary guaranty of re-

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<sup>35</sup>"Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." Model Code of Evidence rule 503 (1942).

<sup>36</sup>Uniform Rules of Evidence rule 63 (4) (c), comment (1953).

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*

<sup>39</sup>Laughlin, *Business Entries and the Like*, 46 Iowa L. Rev. 276 (1961).

<sup>40</sup>McCormick, *supra* note 2 at 562.