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THE PROPOSED FEDERAL RULES OF EVIDENCE—HOW WILL THEY AFFECT THE TRIAL OF CASES?

CHARLES B. BLACKMAR*

A highly expert committee has worked for nearly four years on a proposal for uniform rules of evidence to govern proceedings in United States District Courts and certain other federal proceedings. Their work has been published as of March 1, 1969, which is substantially ahead of the anticipated date. The draft will be commended to the Judicial Conference and to the Supreme Court of the United States for consideration and probable adoption under the Court's rule-making power. The draftsmen, however, present the following caution: "The draft submitted herewith has not yet been submitted to or considered by the Judicial Conference or the Supreme Court, and it should be understood that the Court is in no way committed to it and has not given it any consideration."

Trial lawyers as a class tend toward conservatism in their attitude toward rule changes. They feel that they know the present rules and standards, and they are dubious about proposals for change. Many will ask, "Why do we need a code of evidence?" They will point out the dangers and problems which are inherent in any codification. There is danger that the active trial bar will not present its collective experience because of a coolness or indifference towards the entire project.

The law of evidence has grown up over the centuries. Rules of evidence were traditionally established in order to keep juries from hearing things which it was felt that they should not hear. There has been a tendency to magnify the importance of evidentiary rules, so as to apply the rules governing jury trials in cases tried by courts without juries and in administrative proceedings. There is suspicion and mis-

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1Proceedings before United States Magistrates. PROPOSED RULE 1-01. The rules are published in pamphlet form, and are also reprinted in 46 F.R.D. 183 (1969). Page references are to the pamphlet, hereinafter cited as PRELIMINARY DRAFT.


3PRELIMINARY DRAFT, xi-xii.

4Suggestions may be addressed to the Advisory Committee on Rules of Evidence, Supreme Court Building, Washington, D.C. 20544.

5See generally K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE §§ 14.01-17 (1958). PROPOSED RULE 1-04(a) provides that a judge is not confined to evidence which is admissible under traditional concepts, in ruling on preliminary questions of
trust of any principle of evidence law which does not comply with the formalities of the rules of evidence.

Most of the law of evidence has been judge-made. There have been occasional statutory additions, as in the case of the statutes designed to facilitate the introduction of business records, but most of the growth of the law of evidence is found in the cases. Courts have not been unwilling to expand the law of evidence and to formulate new standards as the occasion presents itself, but reliance on judicial decision alone is not without problems. Some courts may content themselves with reiteration of existing rules, so as to perpetuate or extend undesirable restrictions. Innovative cases may be decided by courts remote from the scene so that they are not readily available to the lawyer who has need of them. Sometimes the evidence law of a particular jurisdiction may be determined only by an appeal and a reversal, with attendant waste of a trial. A law which depends on the cases shows wide divergence among the several jurisdictions, and the divergence is to some extent accentuated by the provisions of Rule 43(a) of the Federal Rules of Civil Procedure, calling for the application of either federal or state law, whichever favors the reception of evidence.

There have also been many volumes on evidence law. Wigmore's definitive treatment gets longer and longer, and other writers have made great contributions to the field. Law review articles abound. The committee cites many of these in its annotations. One who undertakes a study in evidence law, whether for academic or for professional reasons, is overwhelmed by the bulk of available material.

Under these circumstances the prospect of a reasonably simple and compact handbook containing the basic rules of evidence is most tempting. So there have been numerous proposals for codification. The American Law Institute concluded that the law of evidence could not be "restated" in the conventional way, and presented instead a Model fact which must be decided in order to determine admissibility. He must, however, give effect to claims of privilege.


7It is the apparent intention of the framers of the rules to propose abolition of Rule 43(a), so that questions of admissibility of evidence in the federal courts will be determined solely by the terms of the rules of evidence. This follows from PROPOSED RULE 11-01.

Code of Evidence, in which the guiding spirit was Professor Edmund M. Morgan. He was a profound student and a prolific writer, and made great original contributions to thinking about the law of evidence. The Model Code proposed some rather drastic changes. It was widely used as a sourcebook but was not adopted, or substantially employed, in any jurisdiction.

In 1953 the National Conference of Commissioners on Uniform State Laws came forward with proposed Uniform Rules of Evidence. These rules also show Morgan's influence but, in some respects they present a retreat from the line taken in the Model Code and they have not been essentially adopted except in Kansas, the Virgin Islands and the Canal Zone. There is now general agreement that adoption on a uniform basis is extremely unlikely.

The law of evidence has been codified in California and New Jersey. Each of these codifications borrows from the Model Code and from the Uniform Rules, but both introduce local variations. The several codes differ among themselves. The federal committee gave each of these codifications careful study, and they appear frequently in the annotations.

In some other jurisdictions codification has been proposed without success. The integrated Missouri Bar began work on a proposed evidence code in the nineteen-forties and presented a comprehensively annotated proposal. Lawyers still use the annotated document as a sourcebook on evidence law, but the proposal for adoption of the Code died and there seems to be little sentiment to revive it.

The federal proposal now under consideration came about as a result of a study by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. In 1963 this committee approved a conclusion of a special committee, as follows: "(1) That Rules of Evidence then being applied in the Federal courts should be improved and (2) that Rules of Evidence,

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9Model Code of Evidence (1942).
which should be uniform throughout the federal court system, were both advisable and feasible. . . .”

The expert committee which produced the present document was then appointed, and proceeded with the work which culminated in the proposal now under consideration.

The Committee’s report has extensive and valuable annotations, within a compact space. The annotations present analysis of the existing law, copious citations to treatises, the Model Code, the Uniform Rules, British sources, the state codifications, and significant cases. Sometimes the views of writers who disagree are counterposed. The report has enormous value as a reference book, quite aside from the merits of the proposals. The discussion is scholarly and professorial.

The proposed rules are often more conservative than the Model Code or the Uniform Rules. Perhaps it is felt that a proposal of this nature has a better chance for adoption. There are, however, some significant and substantial changes. Where existing authorities have shown disagreement among themselves, the draftsmen of the Proposed Rules have often made a deliberate choice.

One who is simply interested in the text of the proposals and in the reasons assigned by the Committee has no particular need of a law review article, in addition to those available. The Committee’s report and the annotations present ample material for thought, and one who is curious may pursue the sources which the report cites.

I propose a different form of exposition. The committee could not, within reasonable limitations of space, present a forecast of their proposals in operation. In this article I shall try to examine a few of the proposed changes in their application to situations which occur with some regularity in litigation. I shall draw on some of the experiences I have had in practice, and hope that others will do the same. Each practicing lawyer should ask himself, “How will the adoption of the Proposed Rules affect the actual trial of lawsuits in the federal courts?”

This article will deal for the most part with civil cases. The framers recognize a problem in the application of the Proposed Rules to criminal cases, because of the problem of the right of confrontation under the sixth amendment. In some instances the Proposed Rules have different provisions for civil and for criminal litigation. A study

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15 Preliminary Draft, 5.
16 E.g., Proposed Rules 2-01(g) (Judicial Notice); 3-01 (Presumptions in Criminal Cases). The hearsay exception rules recognize the problem and express their principles in terms of nonapplicability of the hearsay rule rather than in terms of ultimate admissibility, thereby leaving the courts free to construe and interpret the scope of the right of confrontation. Proposed Rule 8-02.
of the effect of the proposal on criminal trials, by one who is experienced in the area, should be of great value.

Most of the cases discussed here would come into the federal courts under the diversity jurisdiction. An entire article could be written on the *Erie-Tompkins* aspects of the Proposed Rules. The draftsmen recognize, for example, that state law would have to be applied in determining the effect of "presumptions." Other rules of evidence are generally considered "procedural," so that federal law could be applied. Whenever a particular matter appears to be of vital or controlling force in the disposition of litigation, however, there is a tendency to hold that it is a rule of substance rather than a rule of procedure. This article will simply state the problem without attempting to resolve it.

There is another reason why the proposed rules should be of concern to the lawyer who deals mostly with the trial of civil litigation in private cases and does most of his work in the state courts. If the federal proposal is adopted, then there will be suggestions for its adoption in the states. This was true of the Federal Rules of Civil Procedure, and can be expected with regard to rules of evidence. The Proposed Rules are framed on the basis of certain assumptions about the general procedural system in which they operate. They might have quite a different effect in a system which differs substantially from the federal. The effort of admitting additional exceptions to the hearsay rule, for example, might be quite different in a state which purports to follow the "scintilla" rule in deciding whether there is a case for the jury. So the proposal might not be capable of a complete transplant. Of this, more later.

The discussion which follows will operate in the trial area more than in the library. It will emphasize some situations in which one might be able to make out a prima facie case under the proposal, when he could not have done so under the preexisting law. Only a few situations can be covered. My hope is that others will see fit to add to these situations—to present material which will demonstrate the actual effect of the proposal on trials.

**THE ELIMINATION OF THE "VANISHING PRESUMPTION"**

The term, "presumption" is a vague one. It was analyzed by Professor James Bradley Thayer, who refined the concept of the disappear-

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27Proposed Rule 3-02.
ing presumption. By his analysis the true presumption was not evidence in any sense, but merely served as a substitute for evidence. The presumption disappeared on the introduction of evidence, and thereafter the case had to be decided solely on the evidence just as though no presumption had ever been in the case. The concept was expressed eloquently in an opinion of Judge Henry Lamm of the Supreme Court of Missouri, as follows: "Presumptions ... may be looked upon as the bats of the law, flitting in the twilight, but disappearing in the sunlight of actual facts."

Under the Thayer theory, a plaintiff might make out a prima facie case with the assistance of a presumption, only to have his prima facie case disappear along with the presumption on the admission of evidence. An excellent illustration is found in the case of O'Brien v. Equitable Life Assurance Society of the United States, involving a claim for accidental death benefits under an insurance policy. The plaintiff's husband, the insured, had made a trip to the home of a married woman for the ostensible purpose of delivering a car to her. He was found shot to death in her home. The wound was patently external and violent. By the governing law this showing gave rise to a presumption of accidental death within the meaning of the policy.

The defendant insurance company then presented testimony of the customer and of her husband. He apparently had been living apart from his wife for several days, but on the day in question he entered their home while the salesman was there and observed the latter in the course of an apparent assault upon his wife. He said that he was forced to shoot the intruder in order to protect his wife. She verified his story and said that the salesman had attacked her. The testimony of the two witnesses was not contradicted by other witnesses, nor was it impaired on cross-examination except for the normal confusion which a skilled examiner might produce. The court of appeals described this testimony as "substantial but not clear, positive and unequivocal."

The trial court held that the evidence of death as a result of criminal misconduct was sufficient to overcome the presumption of accidental death. Since there was no other evidence of accident, it directed a verdict for the defendant insurance company on the ground that the plaintiff had not met the burden of proving accidental death.

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18J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 313-82 (1898).
21Id. at 385.
The court of appeals affirmed and the Supreme Court of the United States denied certiorari.

The plaintiff's attorney argued at all stages that his client should be able to go to the jury on the question whether the defendant's witnesses were telling the truth. Such of course is the normal assumption in a case in which there is conflicting evidence. To those who follow Thayer, however, the presumption is not evidence and the question then has to be whether the plaintiff has made out a prima facie case on the basis of the evidence. It makes no difference that the evidence presented to overcome the presumption might have infirmities or implausible elements. Nor does it make any difference that a witness may have strong motivation for testifying as he has (as is certainly the case when the witness admits shooting another, or when a female witness is found by her husband in an encounter with another man). Since there is no evidence to contradict the testimony of these witnesses, there is no issue as to their credibility. One who is defending of course is entitled to go to the jury on the bare issue of the credibility of the opposing witnesses, but this is not so as to the party having the burden of proof. The court of appeals said that a "mere scintilla" of evidence would not overcome a presumption, but that the introduction of "substantial evidence" would do so. However analyzed, the plaintiff in the O'Brien case had an issue to submit to the jury when he rested his case, but lost that issue because of the defendant's evidence.

Another illustration is furnished by a Missouri case.22 An employer had furnished an employee an automobile for use in the business. The employee had permission to take the automobile home with him and to use it for his own purposes when the needs of the business did not require it. Under the applicable law, an employee driving his employer's car was presumed to be on the employer's business.

An accident happened and the employer was sued. The plaintiff proved the facts of the accident and the ownership of the car, and rested. At this point he had a prima facie case both against the employer and against the employee.

The employee then took the stand and testified that he had a mission for his employer which required him to travel north from his home, but that he decided first to make a trip due south to pick up a case of beer. The accident happened while he was returning home with the case, and before he had started his northward trip for the employer. The Supreme Court of Missouri held that this testimony effectively dis-

22Brown v. Moore, 248 S.W.2d 553, 556-57. (Mo. 1952).
sipated the presumption and that the trial court should have directed a verdict for the employer because of a lack of evidence of agency. This was so because there was no evidence of agency except the proof of ownership of the car.

In this case there is probably no substantial motive for fabrication. It is theoretically possible that the employee might want to please his employer by exonerating him from liability, but in these days of widespread insurance coverage the motivation appears slight. By the "vanishing presumption" theory, however, the existence of motivation for falsifying would be immaterial.23

Legion examples could be found from jurisdictions which follow Thayer, but they would serve no useful purpose. The examples given above are sufficient to illustrate the point. A plaintiff may lose the opportunity to go to the jury because his case depends on a presumption and the defendant introduces evidence which the court finds sufficient to overcome the presumption.

The Proposed Rules reject Thayer's view, in favor of that espoused by Professor Morgan and others, by means of the following provision: "A presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."24

There follow some rather complicated rules for the instruction of the jury in cases in which there is no evidence to counter that which gives rise to the presumption.25 These provide in effect that the party in whose favor the presumption operates has the burden of proof of the "basic fact," that is, the fact giving rise to the presumption. Whether or not the basic fact has been established is a jury question except in the rare situation in which the court may direct a verdict in favor of the party having the burden of proof. The jury is to be instructed, however, that if it finds that the basic fact has been established it must find the existence of the presumed fact. If the uncontradicted evidence shows that the employee was driving the employer's car, and the purpose of his trip was not shown, then the jury would be instructed to find that the employee was on the employer's business.

23But cf. Jack Cole Co. v. Hudson, 409 F.2d 188, 192-95 (5th Cir. 1969) holding that something more than "substantial evidence" is necessary to dissipate a presumption of this type, and that the evidence in the particular case was not sufficient to remove the case from the jury. The evidence was circumstantial and somewhat incomplete.

24Proposed Rule 3-09(b).

25Proposed Rule 3-09(c).
The framers realize that a jury in a criminal case may never be told that it must find a particular fact, and so there is a separate rule for presumptions in criminal cases.\textsuperscript{26} The framers also realize that questions of presumptions and burden of proof in diversity cases are governed by state law, so that a uniform federal rule may not be applied.\textsuperscript{27} One might wonder, under these circumstances, just how much effect the proposed changes would have. Most of the cases involving the traditional presumptions are diversity cases. Presumption cases governed by federal law are fairly unusual. Perhaps the proposed change in the presumption rules is more important as a standard or guide for state practice, than as a rule which will have substantial operative effect in federal cases.

It seems clear that the \textit{O'Brien} case would have been decided differently if the Proposed Rules had been in effect. If the presumption had cast the burden of proving that the death of the insured was not accidental on the defendant, then evidence about the shooting would simply raise a jury question. The jury would not have to believe a witness's story about the shooting of an intruder who was molesting his wife, even if she were to corroborate the story.

The case of the company car might be decided differently, depending on the applicable rules for direction of a verdict. In a jurisdiction which would permit the jury to disbelieve any oral testimony, the truth of the employee's explanation would presumably be a jury question. The jury could find agency, and presumably could do so simply because it felt that the employee might be lying. In a jurisdiction which allows the court more authority in the direction of verdicts, the court might very probably say that the bare showing of ownership is not enough to make out a case in the face of the employee's unequivocal testimony about his use of the car at the time of the accident.

It is evident, however, that jury issues would be made out in situations where it would not be possible under Thayer's view of presum-
tion, and that the committee had the purpose of making a change along these lines. The explanation is as follows:

The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. 28

The supporting authorities are almost wholly professorial. The framers adopt Professor Morgan's position in his long struggle to overcome Thayer. 29 The notes go on to cite several cases in which courts and legislatures have tried to solve presumption problems by changing the incidence of the burden of proof. These do not necessarily sustain the change they propose.

There is no discussion of the basic problem, which is whether there is injustice in taking a case from the jury simply because it depends on a presumption which is said to have been overcome by evidence. Does the "vanishing presumption" operate unreasonably? Should all presumptions in civil cases be treated the same way? Is the proposed change made in response to a demonstrated need, or is it offered simply in the interest of symmetry?

Some presumptions are established because the party against whom they operate is apparently better able to produce evidence. The prime example is the presumption of agency from a showing of ownership. The employer is assumed to know how his car is being used, while the injured party has no means of obtaining knowledge in the area. But when the employer makes an explanation should the jury be able to disregard it, on the bald assumption that he is lying? There is no prob-

28 PRELIMINARY DRAFT, 43.
29 The ALI Model Code of Evidence, Rule 704(2), adopts the "Thayer view." This was accomplished by a vote of 59 to 43, over the opposition of Professors Morgan and Maguire. Rule 14 of the Uniform Rules of Evidence rejects Thayer's position as to presumptions based on underlying facts having "any probative value," and states that if the presumption has probative value it operates to shift the burden of proof. If the facts giving rise to the presumption have no probative value, then on the introduction of evidence the case must be decided just as though no presumption had ever been in the picture. The Uniform Rule states, "the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact...." if the facts which give rise to the presumption have no evidentiary value. Proposed Rule 3-03 goes even further, and would have any recognized presumption operate to shift the burden of proof. The rule seems to recognize the possibility of a directed verdict "against the presumption," but this would apparently be possible only under the rather rigid tests which govern the direction of a verdict in favor of the party having the burden of proof.
lem even under Thayer's position if the facts giving rise to the presumption have independent evidentiary value so as to support inferences. In the case of the company car, however, it would seem that the showing of ownership has no bearing at all on the use being made of the car at the time of the accident. This is especially true of a case in which the employee is allowed to use the car for pleasure during his non-working hours.

Or should the court have authority to direct a verdict if the evidence offered in opposition to the presumption seems very strong? There is no agreement among the several jurisdictions in this area.

What we need, then, is a discussion of presumption cases which have been decided over the years. Would the effect of abandoning Thayer be to permit cases to go to juries in the face of all the substantial evidence? Or would those who have been the victims of unjust direction of verdict now have the opportunity for their day in court? The wisdom of the proposal should be decided on the basis of considerations such as these, in preference to a decision based on academic exchange.30

Extensions of Hearsay

The Approach to Hearsay

The Proposed Rules begin with the general proposition that hearsay statements are not admissible in evidence.31 They then proceed to set forth the presently recognized exceptions to the hearsay rule, and some additional ones, in two groups. There are 22 illustrations in Rule 8-03(b) of utterances which are hearsay in form but which are admissible, whether or not the declarant is available to testify. Rule 8-04

30The draftsmen apparently assume that the court has power to direct a verdict which is rather broad, at least when compared to the authority which exists in some states. See Proposed Rule 3-03(c)(2)(A). The Supreme Court of the United States has not spoken in the area recently, and there seems to be some difference of opinion as to the extent of the power. The Supreme Court is of the opinion that almost all cases arising under the Federal Employers Liability Act should be decided by juries, and has reversed many federal and state cases in which the courts have taken the cases from juries. The Court of Appeals for the Fifth Circuit reviewed the authorities recently in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). The opinion is replete with citations. The court said that Federal Employers Liability Act cases represent a separate category in which the Supreme Court has given particular leeway to juries, and that the rule applicable to those cases does not apply to civil cases generally. The general tenor of the opinion is in favor of a fairly broad power of direction, when the court is of the opinion that there is only one reasonable conclusion from the evidence.

31Proposed Rule 8-02. Rule 509 of the Model Code of Evidence proposed a radical alteration in the hearsay rules, but Rule 63 of the Uniform Rules of Evidence beat a retreat and the Proposed Rules follow the latter model.
(b) presents five additional illustrations, in which hearsay statements may be received if and only if the declarant is not available to testify. By this process the draftsmen perpetuate the recognized exceptions to the hearsay rule, enlarge some of them, and establish some new exceptions.

The proposal wisely makes no claim to set forth a complete catalog of all situations in which hearsay is to be admitted. The way is open for the courts to create new exceptions if the need appears. The listed "exceptions" are set forth as "illustrations" rather than as rules, with the clear indication that additions may be made through the process of judicial decision.

The Court of Appeals for the Tenth Circuit has already cited the Proposed Rules in recognizing a hearsay exception which does not fit neatly into any presently recognized compartment. An employee of a newspaper was indicted on charges of income tax evasion, committed, allegedly, in the failure to report the value of merchandise received from his newspaper's advertisers in lieu of monetary consideration for advertising space. He admitted receiving the merchandise but claimed that he had done so at the request and direction of his supervisor; that he received it for the account of the employer and not for his own account; and that he was obliged to account to the newspaper for the value of any of the merchandise which he retained for his own purposes.

The defendant offered in evidence a stenographic transcript of an examination of his supervisor, under oath, by revenue agents. The supervisor was not available to testify because of illness. The transcribed material tended to support the defendant's explanation of his conduct.

The trial court rejected the evidence, apparently feeling that it did not fall within any recognized exception to the hearsay principle. The transcript did not contain testimony reported in any proceeding, even though it was given under oath and transcribed by a court reporter. Nor were the statements essentially against the interest of the person making them.

The court of appeals reversed, citing the Proposed Rules in support of its action. The need for the statement was apparent, in view of the circumstances.

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32United States v. Brown, 411 F.2d 1134 (10th Cir. 1969), quoting Proposed Rule 8-04. This citation indicates the strong possibility that some courts may make use of the proposed rules in their present form, as authority on the current state of thought on evidence law, so that some rules may be given effect prior to any formal adoption.
of the declarant's inability to testify. The statement clearly could not have been admitted against the defendant because he had no chance to cross-examine, but this could not be said of the government. The agents could have examined the witness as fully as they cared to. The reviewing court found, therefore, that the reasons which had justified the traditional exceptions to the hearsay rule were present in the case before them.

The Proposed Rules extend the hearsay exceptions in several respects. This is in accordance with current thinking. In evaluating the proposal, it should be helpful to look at the newly created exceptions in the light of actual trial situations.

Inconsistent Statements

The notes to the Proposed Rules say: “Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence.”

If a witness takes the stand, then his prior statements which are completely or partially inconsistent with his trial testimony may be received in evidence. The jury may take its choice as to whether to believe the witness's testimony from the stand or his prior statements. If the witness denies making the inconsistent statement then other witnesses may be called to establish what he said on a prior occasion. This would pose a question of credibility which the jury would have complete freedom to resolve.

It is suggested that the prior statement might very probably be more accurate than the testimony from the stand because it was made when the memory was fresher. This may be true as to minor details, but seems highly unlikely as to flagrant inconsistencies.

The draftsmen of the rules no doubt feel as frustrated as others do about the absurd situations in which juries are told that they may not consider the inconsistent statements as evidence of the facts stated, but only in judging the credibility of the witness who is claimed to have made the inconsistent statements. The jury will believe as it chooses to believe, without distinguishing between “substantive” and “merely impeaching” evidence.

The problem arises, however, when the inconsistent statement presents the only “substantive” evidence on a particular point. In a recent criminal case, which did not reach the opinion stage in an appellate court, the defendant was charged with assault committed
during the course of an attempted robbery. The robber had been shot but not immobilized during an exchange with a police officer, and this defendant had a gunshot wound when he was arrested approximately one-half hour after the robbery. To overcome this circumstantial evidence, the defendant's brother took the stand to corroborate the defendant's alibi, which consisted of the claim that he had been at the brother's apartment and had been shot by the brother because of undue attentions to the latter's wife. The brother testified that he had shot the defendant. On cross-examination, he was asked: "Didn't you tell the police that (the defendant) had been shot when he tried to hold up a jewelry store?" An objection was made and overruled, and the brother then answered, "No, I did not say that."

A police officer then took the stand and testified that he had questioned the brother, who had told him that the defendant had been shot during the course of a robbery of a jewelry store. The judge of course advised the jury that this testimony could be considered only for such bearing as it might have on the credibility of the brother, and not as any evidence whatsoever that the defendant had held up a jewelry store. It is not realistic to expect the jury to give too much attention to this instruction. If it believed the policeman rather than the witness, then it would necessarily add the brother's prior inconsistent statement to the sum-total of the evidence before it in considering the defendant's guilt.

In the particular case, the problem was not a vital one because there was other evidence placing the defendant at the scene of the crime. Suppose, however, that there had been no other evidence placing the defendant at the scene of the crime. Quite aside from sixth amendment problems of confrontation, there is a serious question whether a case based on so unsubstantial a showing should go to the jury. The inconsistent statement may show that the brother is a liar, but it is scant support for a conviction.

Let us now consider a simple slip-and-fall case, where the plaintiff's recovery depends on his ability to show that the defendant had actual or constructive notice of a dangerous condition in sufficient time to do something about it. The element of notice is often the missing element in an otherwise very substantial claim. Many a plaintiff has been turned out of court because he was unable to prove notice, while other plaintiffs have succeeded because of evidence of notice which, to put it mildly, is suspect.34

34I once heard a federal judge complimenting a plaintiff's attorney, during the course of his explanation of the direction of a verdict against him, for not proving notice. The judge said in effect that many lawyers would have "found" a witness
Perhaps a fortunate attorney will find a witness who was in the store approximately half an hour before the accident took place, who noticed a grease spot at the point where the plaintiff fell, and who reported this to the manager. Here is perfect proof of notice, if the jury accepts it.

Now let us assume that the lawyer goes to trial relying on this witness's testimony, and that the witness disappoints him by saying from the stand that he has no recollection that he ever noticed or reported a grease spot. Under the conventional practice it would be difficult even to confront him with his prior statement, because of the prohibition against impeaching one's own witness. Even if this could be avoided on a claim of surprise, the problems are still formidable. If the witness admits making the statement but says that his testimony is true and the statement is not, then the statement does not represent substantive evidence. If the witness denies the statement, then the lawyer or investigator who heard it may be called as a witness and may testify to the statement, but solely for purposes of impeachment. If his witness fails to confirm the statement, and no other evidence of notice can be found, the plaintiff is probably out of court. In this situation it matters not how the jury is instructed as to its consideration of the statement. The case would not get to the jury.

Under the Proposed Rules the inconsistent statement, as established by the testimony of the person claiming to have heard it, (or, in rare cases, by the admission of the witness) would be admissible as substantive evidence of the facts stated. There would then be competent evidence in the record of a grease spot which had been reported to the manager. The notes to the Proposed Rules indicate that the admission of the statement would offer protection against witnesses who are "visited" by investigators and persuaded to have a convenient impairment of the memory. Yet there is another side of the coin. Was the statement ever made, or is the witness who claims to have heard it the real fabricator? May a slip-and-fall case, or any other case, be proved simply through oral testimony of a prior statement covering an essential element when the alleged declarant now disclaims the statement from the stand? Is it necessary or desirable to change the present law to admit this result?

\[\text{to supply the missing element and that he was proud of counsel who would resist the temptation to do so.}\]

\[^{35}\text{PROPOSED RULE 6-07 would do away with the proposition that one cannot impeach his own witness. Strangely, however, PROPOSED RULE 6-11(b) would limit cross-examination to the scope of the direct and to matters of impeachment.}\]
The problem might be resolved if the trial judge were to have the authority to direct a verdict, when such a statement constitutes the only evidence in support of an essential part of the claim. This authority might exist in the federal system, but it certainly would not apply in "scintilla" states. Even in the federal practice, however, the proposed illustration may permit a plaintiff to make out a prima facie case when he could not have done so before. The proposal, then, might have an effect which goes far beyond the elimination of an impractical and naive restrictive instruction.

Statements of Unavailable Witnesses

Illustration 2 in Proposed Rule 8-04(b) would make the statement of an unavailable witness admissible if it was made

... not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

The notes trace a history of jurisdictions in which such statements are made admissible by statute. The rule-makers seek to avoid the charge that the rule would encourage the presentation of carefully contrived and self-serving statements by claimants, lawyers, investigators, or others, by excluding statements of interested parties and those apparently procured by professionals. It is argued that the limitations on admissibility will serve to prevent abuses, and that the over-all effect of the proposal would be beneficial. Some lawyers may feel that this rule opens the door to hearsay possibilities the likes of which have never been seen before.

Let us again consider the slip-and-fall case. Suppose that an elderly lady writes her daughter in another city as follows:

While I was shopping at the XYZ Store today Mrs. Lamb who lives down the street slipped on a grease spot and fell on the floor. I think she broke her hip. The ambulance came and took her away. I heard the manager bawling out one of the stock boys because he was supposed to wipe the spot up and didn't. Honestly, people are so careless nowadays that I'm afraid to go out.56

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56One might say that this is an instance of "double hearsay." Under Proposed Rule 8-05, however, there would be no problem since degrees of hearsay are not recognized. The manager's statement would probably be admitted as an admission of an agent within the scope of his authority, since it is given as a part of his
Before a lawyer has a chance to interview or depose the old lady, however, she dies. The Proposed Rules would admit this statement on the ground that it was made without apparent motive or instigation and that the circumstances give every indication of truth. Perhaps details such as the broken hip will be eliminated, but the statement could be used to provide the essential element of notice. The framers of the rules would say that there is no reason to deny the plaintiff the benefit of this apparently reliable statement simply because of technical notions of hearsay. The possibility of a plant or a forgery would be remote. The only real problem is about how the attorney would have the colossal luck to find the letter.

But we will not always be dealing with a letter. The mother instead might have told her daughter at home that: "Mrs. Lamb fell on a grease spot at the XYZ today. One of the clerks was supposed to wipe it up but he didn't. The manager bawled him out, but that didn't help Mrs. Lamb." Now the mother has died and the daughter comes into court to testify to her mother's statement. There is a very real possibility that the mother never did make the statement, and this possibility must be acknowledged. The daughter, furthermore, is practically insulated from effective cross-examination. All she has to say is that her mother went to the store with some regularity and told her this particular story. There are certainly possibilities for abuse.

The Proposed Rules, moreover, would permit the admission of declarations which were not made at the time of or close to the events which they purport to describe. The only requirement is that the declarations be apparently unmotivated and uninspired, and when the event described is reasonably fresh in the mind of the witness. At its broadest, the proposal might permit the rather free introduction of cocktail-party gossip.

Perhaps there would be some virtue in modifying this proposal so that it would apply only to written statements. We would grant that when hearsay exceptions are recognized, one ordinarily does not restrict admissibility because of problems of the credibility of the witness whose testimony establishes the making of the statement. It is assumed that the witness who comes to court is subject to impeachment and cross-examination, so that his credibility may be judged in the same way as any other witness. Yet if the witness simply repeats what he heard someone say, there is certainly danger of abuse.

direction to the employees under him. See also Sanitary Grocery Co. v. Snead, 90 F.2d 374 (D.C. Cir. 1937), in which a statement of a clerk to the effect that a vegetable had been on the floor for "a couple of hours," made shortly after the accident, was held to have sufficient indication of spontaneity to be admissible.
Declarations Against Interest

Illustration 4 in Rule 8-04(b) expands the traditional scope of "statements" or "declarations" against interest, so as to include declarations against one's penal interest. Some earlier cases had limited the exception to declarations against proprietary interest.

It is generally assumed that a person will not make a statement which is against his interest, unless the statement is true. This generalization seems to be a reasonable one, even though some disoriented individuals might on occasion disparage their own interests. When a party makes an admission against his interest, it is freely received in evidence.

When the declarant is a witness but not a party, then the statement may not be received if the witness himself is available. (An inconsistent statement may of course be used for impeachment, and, under the Proposed Rules, as substantive evidence, but that is not our present point.) The testimony from the stand is to be preferred to extrajudicial declarations.

When the witness is not available, however, declarations against proprietary interest may be received. This exception has been recognized for many years. Courts have applied it guardedly, and have excluded declarations which are against other than a proprietary interest.

The Proposed Rules follow the lead of some cases. In Sutter v. Easterly, a substantial judgment had been recovered in a damage suit under suspicious circumstances. A post-trial investigation located a witness who signed a statement saying that the accident had been staged in its entirety and that he had been a party to the framing. When the case seeking vacation of the judgment on grounds of extrinsic fraud came to trial, however, this witness promptly asserted his rights under the fifth amendment and refused to testify. The court held that in asserting the privilege against self-incrimination the witness had rendered himself unavailable, as that term is understood in the law, and that his statement to the investigator therefore became admissible as a "declaration against interest." It was against his interest because of the possible penal liability. The court saw no reason for distinguishing between the proprietary and the penal interest.

This extension seems as sound as the basic rule. If there is a guarantee of trustworthiness because a statement is against the interest of a witness, then it should not matter what kind of interest is involved. It

37354 Mo. 282, 189 S.W.2d 284 (1945).
might be argued that a person who makes a declaration against his penal interest is not a reliable witness because he admits to having a penal interest; but his statement carries the means for its own impeachment on this ground and the jury may evaluate the character of the declarant in deciding how to receive the statement.

Situations of the type just discussed, however, are not without the potential for abuse. It might be comparatively easy to persuade a professional idler to admit complicity in a nefarious scheme, to sign a written statement, and then to "take the fifth" when called into court. The written statement, moreover, may be almost wholly in the language chosen by the investigator. There is no requirement such as is found in Illustration 2 of Proposed Rule 804(b), so as to limit the admissibility of statements to those which are not procured by professional investigators.

There is also a conceivable danger of the admission of oral statements, in that the jury has to decide upon the credibility of the person reporting the statement in addition to determining whether it should believe the declaration. A witness might testify to the following conversation:

Investigator: Now tell us what happened.
Witness: Jones got behind the car as it was backing out. Then he let out a yell which was the signal. Four of us ran up to him and kept everyone else away. We had already arranged to call Doc Brown. The officer had Jones carried to Doc's office on a stretcher.

Investigator: I've just written your story down. Would you look it over and sign it if it looks all right to you?
Witness: I'm not signing.
Investigator: Why not, isn't it true?
Witness: It's true enough but I'm not going to sign.
Investigator: Would you read it over?
Witness: O.K.

Investigator: Now would you make marks on the statement if you have any corrections?
Witness: No, I'm not going to write on it. It's all right as it is.

So the statement is received in evidence, authenticated only by the investigator's testimony. The document is entirely in his handwriting. There is also a ready-made explanation as to why it has not been signed.

Criminal cases might also present interesting possibilities. Suppose that Bill Bumm is on trial (in federal court) for attempted robbery of a national bank. Sam Shade testifies that he recently shared a jail cell with George Gonoph, whose present whereabouts are completely un-
known. Shade says that Gonoph said to him: "I did the Third National job alone. Bumm didn't have anything to do with it."

Perhaps the second sentence would be excluded on motion, but the first sentence would seem to be a declaration against interest which could be admitted for "what it is worth."

We should not renounce a generally beneficial rule simply because it may be abused. There should be, however, some consideration of problems of possible abuse in deciding whether to extend present exceptions and, if extensions are made, in determining the need for additional safeguards.

"Regularly Conducted Activity"

Illustration 6 of Proposed Rule 8-o3(b) covers the area which has usually been described as the "business record" exception. From the extensive notes it would appear that the rulemakers want to extend the concepts of admissibility. The proposal refers to "records of conduct of regular activity" and would admit:

A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The notes explain that the intent is to go beyond present practice, which seems to be concentrated on entries "in the regular course of business." The present statement of the business record rule, it is said, has a tendency "unduly to emphasize a requirement of routineness . . . ."

The notes discuss the many cases excluding police reports of accidents on the ground that "the officer qualifies as acting in the course but the informant does not." The new rule would produce substantial changes, some of which may not be apparent of first blush. There is good reason to admit the officer's recorded observations of time, place, weather, location of cars and debris, and other matters which he himself observed and could testify to. (Whether to admit these portions of the report only if the investigating officer is unavailable might be a point for discussion.) It would also appear that the statements of witnesses to police officers might be admissible if these qualify as declarations against interest, or as the voluntary statements of disinterested

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38See Preliminary Draft, 185-90.
witnesses within the meaning of Illustration 2 of Proposed Rule 8-04 (b). There is no reason to assume that the officer did not make an accurate record of what he saw and heard. Under the proposal, then, the police report might be admissible to the extent that it represents the officer's observations, and also his recordation of statements which would be admissible under a recognized hearsay exception.

There is, moreover, no basic distinction between the police officer and the private investigator. The investigator has some bias, perhaps, but this is not fatal to the case for admissibility. The investigator's regular activity consists of the taking of statements, and, in order to do his job, he must take accurate statements. He may suggest an answer to a witness, but, having done so, must report what the witness tells him. Illustration 2 to Proposed Rule 8-04(b) recognized the ability of a skilled investigator to put a witness's statement in his own words, and therefore does not extend to statements to investigators. With this qualification, the investigator's report might be admissible on the same basis as the police report.

The investigator's situation is essentially different from that of the engineer who is involved in an accident and is faced with the burden of justifying his actions to his superiors. If an investigator turns over false statements and false data to his employer then the employer will be the one harmed.

If an investigator secures a statement which is against the interest of the witness, and the witness is unavailable, then the statement would meet the tests for admissibility as established by Illustration 4 to Rule 8-04(b). (See, for example, Sutter v. Easterly, in which the witness admitted having had a part in the staging of an accident.) The investigator's report of the statement would be taken as a part of his regularly conducted activity and therefore would fall within the above-quoted hearsay exception.

Rule 8-05, then, comes into the picture. This rule provides that there are no "degrees" of hearsay and that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule . . . ."

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39It appears that the proposal would not change the result of such cases as Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943), in which a report of an engineer about an accident was not admitted as a "business record." The court of appeals felt that the situation was "dripping with motivations to misrepresent," 129 F.2d at 991, and that the engineer did not engage in the reporting of accidents as a regular part of his business. It would be difficult to say that the report was a "regularly conducted activity" on the part of the engineer.

40Mo. 282, 189 S.W.2d 284 (1945).
It is quite possible, then, that the interviewee’s statement might be received as a declaration against interest, and that the record in the investigator’s report could be received as the report of a regularly conducted activity. This would represent an extension of the past practice. While some may fear that investigators will fill their files with spurious statements, this hardly seems likely on a wholesale basis. If the change is generally desirable, it should not be avoided simply because particular cases offer the possibility of chicanery.

The last sentence of the proposal indicates that there are grounds for exclusion of a record if “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”\textsuperscript{4} This provision is not easy to apply. It might well be used to exclude purported records which appear on their face to be unreliable or incomplete, or in which the testimony shows no regular or systematic procedure for preparation. When a person makes a statement against his interest, however, the statement is presumed to be reliable, and when an investigator makes a record of what he sees or hears it may be assumed that he is doing his duty.

The preceding discussion does not exhaust the possibilities of “regularly conducted activity,” by any means. The purpose of the proposal is to extend the “shopbook” rule. There are many possibilities with regard to medical records, or records which are not kept as a part of a “business” activity.

\textit{Recorded Recollection}

The “recorded recollection” exception to the hearsay rule has been long recognized. Illustration 5 to Proposed Rule 8-03(b) states the exception somewhat more broadly than some courts have stated it in the past. A witness may testify with respect to a memorandum which he did not make, if it presents a record of his recollection. (Of course the memorandum would have to be authenticated by the person who prepared it, or would have to fall within one of the recognized exceptions to the hearsay rule such as the “business record” or, in the language of the new proposal, the “regularly conducted activity” exception.) Nor is it necessary that the recording be contemporaneous with the event recorded. All that is required is that the record be made when the subject matter is fresh in the mind of the witness. The memorandum may be used, however, only if the witness “has insufficient recollection to enable him to testify fully and accurately . . . .”

\textsuperscript{4} Proposed Rule 8-03(b)(6).
During the trial of a civil antitrust action in Philadelphia, involving the electrical industry, a witness who had pleaded guilty to a price-fixing conspiracy and had been sentenced to jail took the stand. He said that he had no recollection of some of the significant details and that he had made a conscious effort to forget them. He was then presented with a record of testimony he gave before a Senate Committee under the chairmanship of the late Estes Kefauver, properly authenticated. The witness said that he remembered the testimony and that he told the truth before the committee. He maintained his position that he had no present recollection, but said that "if that's what the record says, then it's true because I told the truth." The trial judge then admitted the record of the Senate hearings, on the basis that it represented a record of the witness's recollection. This was so even though the witness did not make the record, and apparently never saw it, and even though the testimony was given some time after the material events took place. The ruling seems to be in accordance with the point of view of the Proposed Rules.42

By the situation just described the witness has effectively shielded himself from cross-examination. If he really has no memory of the events in issue, he simply cannot elaborate. (It would be different of course if the witness were to admit that his memory had been "refreshed." ) The most frustrating answer to the cross-examiner is a simple, "I don't remember." In the case just described it seems unlikely that the lack of memory is as total as the witness would have one believe, but this is a point which the jury would have to resolve.

A strategy of taking detailed statements from witnesses, modifying them to suit the lawyer's purposes, and then asking the witnesses to claim loss of memory, would probably be ineffective in the great majority of cases. The jury will probably not be impressed by a witness who says that he has no memory at all of an event as to which he gave a detailed statement. In other respects the relaxation of the rigidities which some courts apply to the "past recollection" rule seems desirable.

CONCLUSIONS

We may make some generalizations on the basis of the fact situations just discussed.

(1) In numerous instances the Proposed Rules would allow the admission of evidence which would be excluded under present practice.

(2) In some of these instances, the admission of the evidence would

42See Preliminary Draft, 183-84.
take place under circumstances which would preclude cross-examination. When there is a declaration against the interest of an unavailable witness, or an "uninspired" statement of an unavailable witness, then the person making the statement will of course not be present in court. When an inconsistent statement is offered as substantive evidence, the witness obviously cannot be cross-examined about the statement if he denies having made it, or says that he has no recollection of having done so, or claims lack of memory of the facts in the statement. This is also true of a statement which records past recollection. Then too there are instances in which a statement will be presented in court without testimony either from the declarant or from the person who heard the declaration. One traditional objection to hearsay has been the absence of the opportunity for cross-examination. To the extent that exceptions are recognized, the courts hold in effect that the admissibility of the evidence is important even though cross-examination is not available. When exceptions are established in areas normally covered by oral testimony, then the abridgement of cross-examination may have more significance.

(3) It would be unrealistic to deny the potential for fabrication which is present in some of the Proposed Rules. The existence of such a possibility, of course, is not sufficient reason for the rejection of evidence which should otherwise be admitted. Fabrication is somewhat easier when one simply has to relate what another has said, and this is especially so when the other person is dead or when his whereabouts is unknown.

(4) If the Proposed Rules are adopted then cases will undoubtedly be submitted to juries which would have been disposed of by directed verdict under the earlier practice. With regard to presumptions the draftsmen apparently intend this result. There will be other cases in which an essential element may be established through evidence which would not have been received under the present state of the law in a majority of jurisdictions. I have used slip-and-fall cases as an example. They furnish a good one because they depend on a simple element which may be established through relatively brief oral testimony. There are undoubtedly other examples.

(5) The rules necessarily provide for some distinction between civil and criminal proceedings. The framers feel that no presumption may be given a binding effect in a criminal case. The jury must be free to disregard the presumption if it chooses. The admission of additional hearsay exceptions may present a problem of "confrontation" under the sixth amendment, in the view of the Supreme Court, whether or
not the Court's position is sound on a theoretical basis. It is of course more important to have the best available rules of evidence than to preserve the same set of rules for both civil and criminal cases.

By listing these problems I do not mean to argue against the Proposed Rules, or even to suggest that substantial modifications are in order. There are other considerations.

(i) It is not reasonable to assume that juries will simply swallow unsubstantial and unworthy evidence, simply because it is technically admissible. Perhaps a jury in the traditional slip-and-fall case is attuned toward the plaintiff's interest and will find for him if given the slightest opportunity to do so. In other cases, however, it should not be lightly assumed that the jury will accept a statement that someone else claims to have heard at some remote time, when there is a witness on the stand who gives testimony to the contrary. And if a witness professes lack of memory on an important detail, then a jury is likely to suspect his recorded recollection when other witnesses testify from present memory. A declaration or a record might be quite persuasive when coupled with other evidence, while the jury might give it little weight when presented alone and in the abstract.

(ii) If it appears that the Proposed Rules might permit cases to go to juries which should not be submitted, then the place for correction is in defining the court's power to direct a verdict. Let us look for a moment at the following possibilities which were considered in the earlier discussion:

(a) An employer is sued because of the alleged negligence of his employee. The only "evidence" of agency is the showing that the employee was driving a car owned by the employer at the time of the accident. There is uncontradicted testimony, however, showing that the employee was on a mission of his own at the time of the accident. By the rationale of the Proposed Rules, the defendant employer would have the burden of showing that the employee was not on his business.

(b) The only evidence of notice in a slip-and-fall case is the testimony of a witness who had not been in the store, about what that witness heard another person say as to the manager's admission of knowledge. Under the proposal this evidence would be admissible if the person who claims to have seen the accident is dead or otherwise unavailable.

When the plaintiff's case depends on evidence of such slight probative value as that indicated above, is there necessarily a case for the

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43 See Preliminary Draft, 156-59.
44 See note 30 supra.
The common law expedient was to grant a new trial if the judge is of the opinion that a verdict is against the weight of the evidence. The judge would in effect tell the plaintiff that he would have to sell his story to another jury before he could hold a verdict. Sometimes there was an implicit threat to order a new trial in every case in which the particular plaintiff should succeed in getting a jury verdict. Some jurisdictions have limited the court's power to grant a new trial on the ground that the verdict is against the weight of the evidence, or have limited the number of times that this power may be exercised in a particular case. The granting of a new trial is not so effective as a means of correcting unreasonable verdicts as it may have been in the past.

This is particularly so because of the high cost of litigation and the crowded situation of dockets. So we have the suggestion that if the trial judge feels that he is compelled to set aside a verdict because he feels that the verdict is clearly contrary to the weight of the evidence, he should then complete the process by directing a verdict in favor of the opposite party. The federal courts apparently have a broader power for direction of verdicts than do some state courts. Some of the latter say that a case must go to the jury if supported by a scintilla of evidence, or that a verdict may not be directed in favor of the party having the burden of proof on the basis of oral testimony. Perhaps there is a need for reconsideration and clarification of the situations in which a verdict may be directed. A rule of evidence which seems to be otherwise desirable should not be rejected or pared down simply because it might allow some possibly unmeritorious cases to go to the jury which could not otherwise have done so. The rules of evidence are not designed to govern the taking of the case from the jury. They often have had the effect of determining the submissibility of a case, but this is not a necessary result.

We need further study of fact situations which recur regularly, from lawyers who are familiar with them. I have tried to give consideration to some of these. Perhaps there are others. It may be that in some instances the Proposed Rules are too restrictive. This should also be discussed on the basis of experience. Maybe a degree of "tightening" in some areas will make for improvement. The present draft re-

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42 See, e.g., Mo. Sup. Ct. R. 78.01, derived from Mo. Rev. Stat. § 510.330 (1952) and providing that only one new trial may be granted to the same party on the ground that the verdict is against the weight of the evidence.

45 See Galloway v. United States, 319 U.S. 372 (1943); note 30 supra.
quires that a witness's memory be impaired to some degree before a record of his recollection can be admitted. This is decreed so that a witness who remembers the facts cannot have his testimony prepared for him by an interested and expert hand. A statement of an unavailable witness, not constituting a declaration against interest, may be received only if the witness is disinterested and the statement is not inspired by a professional. Perhaps other restrictions might be desirable to eliminate problems with rules which are otherwise desirable.

We should remember, furthermore, that perfection is not to be expected. It is impossible to frame any rule of evidence which is not subject to abuse or tampering. A rule should not be rejected simply because a horrible example may be conjured; and new proposals should not be turned down for assigned reasons which would apply as well to the old as to the new.

Following a consideration by those who have experience in the area it should not be difficult to reconsider the proposed draft, to make alterations which seem desirable, and then to submit it for adoption. It is very likely that the proposal will be adopted without major changes. My opinion is that adoption of the study and indicated revision is desirable.