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JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON, D. C. 20544

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RULES OF EVIDENCE

May 22, 1974

The Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Standing Committee of the Judicial Conference and the Advisory Committee on Rules of Evidence appreciate the invitation to appear as witnesses before the Senate Committee on the Judiciary when your Committee considers H. R. 5463, which would amend the proposed Federal Rules of Evidence submitted to the Congress by Chief Justice Burger on behalf of the Supreme Court of the United States.

We also appreciate and have taken advantage of your invitation to submit written comments on H. R. 5463. Those comments, which are enclosed herewith, reflect the views of the Standing and Advisory Committees, arrived at after a joint discussion of H. R. 5463, as it passed the House of Representatives.

Sincerely yours,

Chairman,
Standing Committee on Rules of Practice
and Procedure of the Judicial Conference
of the United States

Enclosure

COMMENTS OF THE STANDING COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE AND
THE ADVISORY COMMITTEE ON RULES OF EVIDENCE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
ON H.R. 5463 DEALING WITH

- FEDERAL RULES OF EVIDENCE -

AS SAID BILL PASSED THE HOUSE OF REPRESENTATIVES

On April 5, 1974, the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States met in joint session for the purpose of considering H.R. 5463, which would amend some of the Federal Rules of Evidence submitted to the Congress by the Supreme Court, with its recommendation that they be approved. They had previously been approved and recommended to the Supreme Court by the Judicial Conference of the United States.

The Standing Committee and the Advisory Committee considered fully all of the provisions of H.R. 5463, as it passed the House of Representatives. No change of substance was made by the House in the great majority of the Rules. The Joint Committees offer the following comments on the changes which were made. No comments are offered on changes in style or syntax, or minor changes made for clarification.

Rule 105

As submitted by the Court, the rule read:

> Rule 105. Summing Up and Comment by Judge
>
> After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

The House Subcommittee struck the Rule in its entirety. The Report of the House Committee on the Judiciary commented as follows:

> . . .The Committee recognized that the Rule as submitted is consistent with long standing and current federal practice. However, the aspect of the Rule dealing with the authority of a judge to comment on the weight of the evidence and the credibility of witnesses--an authority not granted to judges in most State courts--was highly controversial. After much debate the Committee determined to delete the entire Rule, intending that its action be understood as reflecting no conclusion as to the merits of the proposed Rule and that the subject should be left for separate consideration at another time.

The Rule as submitted by the Court embodies a constitutional mandate and reflects the rule that the judge has

traditionally filled in jury trials in the Federal Courts. In Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899), the Court said:

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

and in Vicksburg & M.R.R. v. Putnam, 118 U.S. 545, 553 (1886):

> In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of facts are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. [Citations omitted.] The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion upon the facts.

The principle announced in these opinions has often been reaffirmed. See, e.g., Herron v. Southern Pacific Co., 283 U.S. 91 (1931); Quercia v. United States, 289 U.S. 466 (1933); United States v. England, 347 F.2d 425 (7th Cir. 1965); Ray v. United States, 367 F.2d 258 (8th Cir. 1966).

The Report of the House Subcommittee concedes that the rule "is consistent with long standing and current federal practice." The Report states, however, that the Rule contains "an authority not granted to judges in most State courts," and concludes that the decision to delete reflected no conclusion on the merits of the Rule but rather a deferral for separate consideration at another time.

Authority to sum up and comment has solid advantages. It removes the judge from the category of mere presiding officer and makes him an effective participant in the judicial process. In the absence of the authority, juries often are compelled to apply a series of abstract, and probably not well understood, instructions to a confusing and conflicting mass of evidence, guided only by necessarily argumentative and biased presentations of opposing counsel. When the authority is exercised, the jury receives from the trial judge valuable assistance in identifying the issues and marshalling the pertinent items of evidence. Even when not exercised, the very existence of the authority cannot help but have a sobering influence on contemplated flights of fancy by counsel. Those who would deny the authority are saying to the judges in effect: "Either because we do not have faith in your ability and integrity, or because we believe that we can more probably influence juries to

favor our particular cause if you do not sum up, we wish to reduce your role in the trial process to a minimum."

The desirability of authorizing the trial judge to sum up and comment has powerful support, including The American Law Institute, the Commissioners on Uniform State Laws and the Judicial Conference of the United States. See A.L.I. Code of Criminal Procedure § 325 (1930); A.L.I. Model Code of Evidence, Rule 8 (1942); Uniform Rules of Criminal Procedure, Rule 39. Of the many comments received from the bench and bar after the publication of the 1969 and 1971 drafts, few even referred to Rule 105.

In the opinion of the Joint Committees the present federal practice is the superior one and should receive express recognition. The Rule as submitted by the Court should be reinstated.

Rule 201

Subdivision (g) of the Rule was amended by the House Subcommittee and passed as follows:

> (g) Instructing jury.--In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

The subdivision as submitted by the Court read:

> (g) Instructing jury. The judge shall instruct the jury to accept as established any facts judicially noticed.

With regard to civil cases, the two versions are for all practical purposes identical: the judge instructs the jury that judicially noticed facts are to be accepted as conclusive. In criminal cases, however, the amended version of the House directs the judge to instruct the jury that judicially noticed facts may be, but are not required to be, accepted as conclusive. The House version is in conformity with the 1969 Preliminary Draft. The rather sparse authorities are divided as to the proper instruction to be given. Some take the position of the 1969 Preliminary Draft and the amendment, i.e. that the jury may but is not required to accept judicially noticed facts as conclusive. Others espouse the contrary view, i.e. that the jury must accept

judicially noticed matters as conclusive. The former position seeks support in the argument that the opposing view invades the right of jury trial, while the latter counters with the contention that the right of jury trial extends only to matters that are genuinely in controversy. Neither argument is conclusive, and we feel that there is insufficient basis for departing from the Rule as submitted by the Court.

Rule 301

Rule 301 for civil cases, except diversity cases, as submitted by the Court read:

> Rule 301. Presumptions in General
>
> In all cases not otherwise provided for by Act of Congress or by these rules 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. (Underscoring supplied.)

That Rule, as amended by the House Subcommittee and passed, provides:

> Rule 301. Presumptions in General in Civil Actions and Proceedings
>
> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of the facts. (Underscoring supplied.)

This basic and startling change first appeared in the Committee Print of October 10, 1973.

In proposing the original Rule, the Advisory Committee believed that the same considerations of fairness, policy, and probability which dictate the allocation of the various elements of a case between plaintiff's prima facie case and defendant's affirmative defenses also underlie presumptions. The basic choice is between the so-called "bursting bubble" theory and one shifting the burden of persuasion. Under the bursting bubble theory, the presumption vanishes upon the introduction of evidence that would support a finding of the nonexistence of the presumed fact, without regard to whether anyone believes the evidence. The Advisory Committee concluded that the bursting bubble theory failed to give presumptions an effect consistent with the reasons underlying their creation. In this conclusion the House Subcommittee and Committee on the Judiciary concurred. They did not, however, concur in the decision that the proper resolution of the problem lies in a rule imposing a burden of persuasion on the party against whom the presumption is directed. This, they thought, gave presumptions too great a force. Seeking a middle ground, they substituted the provision that the burden is one of going forward with the evidence, and they further provided "and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of the facts."

Grave difficulties are inherent in the amended Rule.

(1) The amended Rule rests on no clearcut theory. It commences by announcing that presumptions impose a burden of "going forward with the evidence," which is the ordinary formulation of the "bursting bubble" theory. Then, however, instead of continuing with the usual follow-up language, "and disappears upon the introduction of opposing evidence," the amended rule provides "and, even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed to be considered by the trier of the facts." This attempt to achieve what the Subcommittee described as an "intermediate position" in fact achieves only uncertainty and confusion.

(2) The amended Rule attempts to turn presumptions into evidence. Presumptions are not evidence but ways of dealing with evidence. This basic difference is not susceptible of being eliminated by legislative fiat.

True, the amended Rule does not, in so many words, say that presumptions are evidence. However, the inescapable meaning of the language, "even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed to be considered by the trier of the facts," is that presumptions are to be treated as evidence.

This treatment calls upon juries (or judges) to perform an impossible task and can only confuse and frustrate them in performing their duties. The California experience bears out this conclusion. The Code of Civil Procedure of 1872 was construed to make presumptions evidence. Accordingly, instructions were given, and approved, containing the following:

> [T]he presumption together with any other evidence supporting it must have more convincing force than the contrary evidence in order to justify a finding in accordance therewith.

BAJI (California Jury Instructions, 4th ed. 1956) No. 22 (Rev.)

Or again:

> I instruct you that there is a legal presumption that the deceased, Leonard Walters, was obeying the law at the time and place of the accident in question and that he was exercising ordinary care for his own concerns at the time and place of said accident. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence. This presumption is disputable, but unless it is adequately and sufficiently controverted, you, the jury, are bound to find in accordance with the presumption that the deceased, Leonard Walters, was obeying the law and was exercising ordinary care for his own concerns and was not negligent at the time and place of the accident. *It is evidence in the case and is sufficient in and* of itself to support a verdict *of [sic] finding on your part that the said deceased* was careful at the time and place of the accident in question.

Gigliotti v. Nunes, 45 Cal. 2d 85, 286 P.2d 809, 815 (1955).

This kind of obvious nonsense had already moved Professor Morgan to say:

> If in attempting to determine the existence or non-existence of B the jury is required to use the presumption as evidence of its existence, or to weigh it with the other evidence, it will not be difficult to construct a charge so advising them. But will this not put upon them an impossible psychological task? How can one weigh a presumption against, or with, or as, evidence? Just what will be the mental process? Is the presumption to be treated as if a witness had testified directly to the presumed fact? Surely it cannot be meant that the presumed fact is to be weighed as evidence, for that would be treating it as a fact, and obviously the most that can be attributed to it is a tendency to establish the fact. Just as certainly it cannot mean that the jury is to treat A as evidence of B, for if it has any probative value on the existence of B, it is already in the case for what it is worth; and offering evidence against B doesn't destroy A as a fact; it tends only to hinder or destroy the process of drawing the inference B from A. Is telling the jury that the establishment of A raises the presumption that B exists and that the presumption is evidence of B effective to convey any intelligible idea to them? Is it not a conglomeration of words which will parse as a sentence and appears to say something, but which actually is "full of sound signifying nothing"? Suppose that a jury should ask the judge just what the instruction means; would he not be put to it even to give them an illustration of its application?

Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 73 (1933).

It also moved Justice Traynor to say:

> It is a mental impossibility to weigh a presumption as evidence. Juries can decide upon the probable existence of a fact only by a consideration of actual probative evidence bearing thereon. A rule of law that the fact will be presumed to exist in the absence of evidence cannot assist them in determining from an examination of evidence whether or not the fact exists. It is impossible to weigh a rule of law on the one hand against physical objects and personal observations on the other to determine which would more probably establish the existence or non-existence of a fact.

Speck v. Sarver, 20 Cal. 2d 585, 594, 128 P.2d 16, 21 (1942).

Professor McCormick gave the presumption-as-evidence theory short shrift:

> Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence," to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.

McCormick, Evidence 669 (1954); id. 825 (2nd ed. 1972).

So unsatisfactory was the California experience that the concept of presumptions as evidence was abandoned in 1965 in emphatic terms:

> A presumption is not evidence.

Cal. Ev. Code 1965 § 600.

It would be regrettable indeed to find the federal courts now raising this jurisprudential Lazarus from the grave.

(3) Finally, and most importantly, the amended Rule entails an impermissible invasion of judicial function. As Mr. Justice Black, dissenting, said in United States v. Gainey, 380 U.S. 63, 85 (1965):

> Congress can undoubtedly create crimes, but it cannot constitutionally try them.

And the majority, through Mr. Justice Stewart, did not on this score disagree with him:

> Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial, including the right to have a case withheld from the jury when the evidence is insufficient as a matter of law to support a conviction.

380 U.S. at 68.

The amended Rule provides that "even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed to be considered by the trier of the facts." The weight of the opposing evidence is wholly disregarded. The effect of the amended Rule thus seems quite clearly to be a withdrawal from the judge of his power to find contrary to the presumed fact when the weight of the contradicting evidence is such as would warrant directing a verdict, contrary to the teaching of Gainey.

The Joint Committees strongly urge reinstatement of the original language of the Rule.

Rule 303

Rule 303, dealing with presumptions in criminal cases, was deleted from the Rules in the bill passed by the House. The reason for the deletion, as explained in the Report of the House Committee on the Judiciary, was that the subject is treated in bills pending before the Committee to revise the federal criminal code.

This legislative procedural determination is certainly entitled to the utmost respect. Several factors, however, suggest the advisability of restoring the Rule now: (1) The subject of presumptions in civil cases is covered at this point in the Rules, and convenience and avoidance of confusion would be served by enlarging this coverage to include the entire subject, criminal as well as civil. (2) The revision of the criminal code is a project of great scope, and until the Congress acts thereon, a restored Rule 303 would be a helpful codification of the law of presumptions in criminal cases. (3) If the Congress ultimately decides that the Rule ought to be amended, that result can readily be accomplished as an aspect of the criminal code revision.

The Rule as submitted by the Court should be reinstated.

Rule 408

The Rule as passed by the House reads:

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering

or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of admissions of liability or opinions given during compromise negotiations is likewise not admissible. Evidence of facts disclosed during compromise negotiations, however, is not inadmissible by virtue of having been first disclosed in those negotiations. This rule does not require exclusion when evidence of conduct or statements made in compromise negotiations is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. (Underscoring supplied.)

The amendment to the Rule first appeared as a House Subcommittee proposal in the Committee Print of October 10, 1973. By the amendment, the underscored language of the second sentence was substituted for the original language "conduct or statements in," and the entire third sentence and the underscored language of the fourth and final sentence were added. The impact of the amendment is such as to deprive the Rule of much of its salutary effect.

The common law recognized a strong public policy favoring the out-of-court settlement of disputes. In order to promote that policy, evidence of the making of an offer of compromise was inadmissible on the issue of fault or liability. However, the common law rule did not exclude evidence of admissions of fact made in the course of compromise negotiations, unless hypothetical in form or stated to be without prejudice. McCormick, Evidence § 274 (2nd ed. 1972). The exception for factual admissions was believed by the Advisory Committee to hamper free communication between the parties and thus to constitute an unjustifiable restraint upon truly effectuating the purpose of the rule. The particularized treatment accorded by the common law to factual admissions made hypothetically or without prejudice was, in addition, believed to constitute an unwarranted preference for the sophisticated and correspondingly a trap for the unwary. The Rule therefore was drafted with sufficient breadth to include statements made in compromise negotiations, in addition to the offer itself. The evident purpose of the amendment is to eliminate this enlargement of scope and to return the Rule to the narrow confines of the common law.

In making the amendment, the House Subcommittee evidently was persuaded by communications received from the Acting General Counsel of the Treasury, the General Counsel of the Equal Employment Opportunity Commission, and the Acting Deputy Attorney General. These appear at pages 301, 311,

and 345 of Rules of Evidence (Supplement), Hearings Before the Subcommittee on Criminal Justice (1973). It may be worth noting that at no time did any of these sources express such a position to the Advisory Committee during the seven years of its deliberations.

The principal ground urged by all three agencies is that valuable evidence obtained in the course of settlement negotiations and admissible under the common law rule, insofar as factual in nature, would no longer be available to the agencies. Stated more bluntly, taxpayers and others dealing with agencies would no longer be the source of the agency's case against them when settlement efforts broke down. Of course, as the House Committee on the Judiciary Report admits, that is now the rule for the sophisticated bargainer who phrases his admissions in hypothetical conditional form, and the amendment leaves it undisturbed.

In the case of the E.E.O.C., the position taken is particularly surprising since the law under which that agency exists provides:

> If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding.

42 U.S.C. § 2000e-5(a). (Underscoring supplied.)

This considered congressional position is now sought to be nullified by indirection.

A further point raised by the Acting General Counsel for the Treasury and the Acting Deputy Attorney General is that the result of extending the compromise principle to include statements of fact would be encouragement of the making of misrepresentations during the course of settlement negotiations by eliminating responsibility therefor. Of course that is not the case. Reference to the language of the rule discloses that its protection applies only when the evidence is offered for the purpose of establishing liability for or invalidity of a claim.

It is unclear whether the amendment proposes (1) to restore the common law rule that admissions of fact are admissible even though made in compromise negotiations, or (2) to insure that an immunity is not conferred on the facts themselves, when later sought to be proved by evidence other than the admission. This ambiguity pervades both the amended Rule and the Report of the House Committee on the Judiciary.

The Amended Rule. The third sentence of the amended Rule, read literally, perhaps does no more than negate the possibility of an immunity against proof by any means, mentioned as item (2) above. This conclusion assumes that the participial phrase modifies "facts", rather than "evidence", which is by no means clear. Since, however, neither the common law nor the Rule as adopted by the Court purported

to confer such an immunity, the sentence is both needless and confusing.

With regard to the status of admissions of fact, the amended Rule is wholly silent. They would therefore be admissible under Rule 401.

Moreover, the phrase "conduct or statements" in the last sentence leaves it uncertain what is meant to be excepted from the Rule, i.e. whether offers, completed compromises, admissions of liability, and opinions all are intended.

The House Judiciary Committee Comment. The House Judiciary Committee Note reads as follows:

> Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until "compromise negotiations" began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible [illegible]tions to the introduction of such evidence. The Committee i[illegible]s no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

The first sentence is correct only if limited to admissions of fact. Compare the final sentence of the amended Rule. The second sentence bears out this construction of the first, since the second sentence of the Court's Rule is clearly meant to include admissions of fact.

The fifth sentence of the comment, however, refers to the immunity for facts themselves, mentioned above.

Nevertheless, the sixth sentence states positively that the purpose of the amendment was to render admissions of fact admissible. This assertion is completely contrary to the third sentence of the amended Rule, which speaks of "evidence of facts" and says nothing whatever about "admissions of fact."

It will be noted that the amended Rule, if construed as inapplicable to admissions of fact is inconsistent with Rule 410.

The Joint Committees urge the restoration of the Rule as it read prior to the amendment.

Rules 501-513

Believing that privileges in the federal courts should be uniform and governed by federal law, the Joint Committees are unable to concur with the treatment given privilege by H.R. 5463. While Rules 502-513 if enacted as prescribed by the Court would give a strong thrust in the direction of uniformity in criminal prosecutions, federal question cases, and generally in bankruptcy, the proposed amendment injects an element of doubt. Experience under Rule 26 of the Criminal Rules offers small encouragement for the evolution of a comprehensive and uniform scheme of privileges through the decision-making process.

For the reasons set forth in the Advisory Committee's Note to Rule 501, as submitted by the Supreme Court, the Joint Committees are also unable to agree with the House's treatment of privileges in diversity cases. In brief, the House's Rule 501 would leave privileges created by State law in the peculiar posture of being effective in diversity cases but ineffective in all other federal cases, notably in criminal cases, which undoubtedly lie in the area of greatest sensitivity. With these privileges thus rendered largely illusory, their limited recognition is explainable only in terms of possible impact on the outcome of litigation, a result that has been rejected generally elsewhere in the federal procedural field.

Rule 601

Rule 601, as submitted by the Court, with the changes made by the House, is as follows:

> Rule 601. General Rule of Competency
>
> Every person is competent to be a witness except as otherwise provided in these rules. <u>However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law</u>.

The addition to Rule 601, adopted by the House, means that in diversity cases the competency of witnesses is governed by State law.

The principal effect of the amendment would be to call the state Dead Man's Acts all of which differ, into operation in diversity cases, although in terms the amendment is not thus limited. The Advisory Committee, after an exhaustive study on a nationwide basis, decided that the implementation of the laudable desire to protect estates of decedents from attacks based on perjured testimony assumed so great a variety of forms in the various States as to compel the conclusion that such efforts are foredoomed to failure. There is wide agreement with regard to the underlying sentiment but very little as to what to do about it. The reality is simply that these statutes place serious roadblocks in the way of

honest litigants but none in the way of the dishonest litigant, prepared to commit perjury himself if allowed to testify but in nowise hesitant to suborn the perjury of others if not himself allowed to testify. The Committee believed that encouragement of the perpetuation of this remnant of the common law incompetency of parties would be a disservice to the law of evidence, to be avoided if possible.

No compelling reason requires that State-created rules of competency prevail in diversity cases. Rules of competency are essentially legal formulations of credibility, and credibility is undeniably a matter of procedure. No one contends, for example, that State rules on impeachment of witnesses must be applied by federal courts in diversity cases. Of course, rules on credibility are designed to affect the outcome of litigation, but the same is true of procedural rules generally and has not been held to mandate the application of Erie principles.

The amendment should be deleted.

Rule 606

Rule 606, as submitted by the Court with the changes made by the House, is as follows:

Rule 606. Competency of Juror as Witness

(a) At the trial.--A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of a verdict or indictment.--Upon an inquiry into the validity of a verdict or indictment, a juror may not testify [as to any matter or statement occurring during the course of the jury's deliberations or to] <u>concerning</u> the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith [except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror]. Nor

may his affidavit or evidence of any statement by him [concerning a matter about which he would be precluded from testifying] indicating an effect of this kind be received for these purposes.

The Rule states the boundaries of the area within which a juror may testify to impeach the verdict. As originally formulated in the 1969 Preliminary Draft and retained in the 1971 Revised Draft, the prohibited area was the effect of anything on his or any other juror's mind or emotions in assenting to or dissenting from the verdict. Any other relevant evidence, whether it concerned events inside or outside the jury room, was admissible. The Rule as submitted by the Court expanded the prohibited area somewhat to include matters and statements occurring during the course of the jury's deliberations, excepting the improper receipt of extraneous prejudicial information or the exertion of improper outside influence. The bill passed by the House returns to the earlier version of the Rule.

The Joint Committees recommend that the Rule as submitted by the Court be reinstated.

Rule 609

Rule 609, as submitted by the Court with the changes made by the House, is as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.--For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible [but] only if the crime [(1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2)] involved dishonesty or false statement [regardless of the punishment].

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction [imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction], whichever is the later date.

(c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a [substantial showing of] finding of the rehabilitation [and the witness] of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.--Evidence of juvenile adjudications is generally not admissible under this rule. The [judge] court may, however, in a criminal case, allow evidence of a juvenile adjudication of a witness, other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the [judge] court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.--The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The Joint Committees recommend that the Rule as submitted by the Court be reinstated for the reasons set forth in the Advisory Committee's Note to the Preliminary Draft of 1969.

Rule 611

Rule 611, as submitted by the Court with the changes made by the House, is as follows:

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by [judge] court.--The [judge] court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.--[A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.] Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions.--Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. [In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.] When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

As for subdivision (b), the Joint Committees reaffirm their support of the treatment of the scope of cross-examination in the Rule in the form submitted by the Court. The reasons are set forth in the Advisory Committee's Note.

Subdivision (c) of Rule 611, as submitted by the Court, reads as follows:

> (c) Leading questions.--Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

The House Subcommittee amended the final sentence to read:

> When a party is entitled to call an adverse party or a witness identified with an adverse party, interrogation may be by leading questions.

(Committee Print, October 10, 1973.)

The purpose of the amendment, as stated in the Subcommittee Note, was to extend to a defendant in a criminal case the right to ask leading questions of a witness called by him but identified with the government. The House Committee on the Judiciary then amended the subdivision in the form passed by the House:

> When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The purpose of the further amendment was said, in the Report of the House Committee on the Judiciary, to be to allow leading questions to be asked of any hostile witness.

The effect of the final sentence of the Rule is to declare certain witnesses hostile as a matter of law and hence subject to interrogation by leading questions without any showing of hostility in fact. To extend the right to criminal cases involves troublesome problems of determining what witnesses are "identified with" an adverse party that are not present in civil cases.

The final sentence as it appears in the bill as passed by the House, reflecting the amendment by the House Committee on the Judiciary, poses additional difficulties. The first sentence of the Rule, which remains unchanged, is of broad application. It cautions against the use of leading questions on direct examination of a witness "except as may be necessary to develop his testimony." The purpose of the quoted provision is to take care of the need to use leading questions in order fully to explore and exhaust the knowledge of the witness in a variety of situations. The witness may be hostile, unwilling, or reluctant. He may be a child, or ignorant, timid, or weak-minded. His account, as elicited by nonleading questions, may still be incomplete. Ample authority supports the use of leading questions in all these situations. The purpose of the final sentence of the Court's Rule is simply to single out certain witnesses and declare them subject to leading questions, with no requirement of a factual showing of need for leading questions contemplated

under the first sentence. The inclusion of "hostile" witnesses in the House version of the final sentence must mean hostile in fact, rather than as a matter of law, yet witnesses hostile in fact, with all the other similar cases, have already been covered in the first sentence. The amendment raises doubt as to the meaning of the first sentence and serves to create confusion.

The final sentence of the House-passed version may also suggest a right to call and examine a witness despite valid claims of privilege, even including self-incrimination.

We strongly recommend that the Rule as submitted by the Court be reinstated.

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Rule 612

Rule 612, as submitted by the Court with the changes made by the House, is as follows:

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, [either before or while testifying] *either*—

(*1*) *while testifying, or*

(*2*) *before testifying, if the court in its discretion determines it is necessary in the interests of justice,*

an adverse party is entitled to have [it] *the writing* produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the [judge] *court* shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the [judge] *court* shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the [judge] *court* in [his] *its* discretion determines that the interests of justice so require, declaring a mistrial.

As submitted by the Court, with regard to documents used by a witness to refresh his memory for the purpose of testifying, the Rule gave the adverse party a right to inspect, to cross-examine, and to introduce in evidence. The Rule gave the same right with regard to documents used to refresh memory prior to testifying. As passed by the House, the Rule was amended to make its application to documents consulted before testifying discretionary with the judge if he determines it necessary in the interests of justice. In view of the safeguards and limitations incorporated in the Rule, the grant of discretion is neither required nor appropriate. The Rule as submitted by the Court should be reinstated.

Rule 801

The Rule defines what is and what is not hearsay. The House amended only subdivision (d) which specifically exempts certain out-of-court statements from the category of hearsay. Interest in the House centered upon subdivision (d)(1)(A) of the Rule, which concerns prior inconsistent statements of a witness.

As submitted by the Court, this portion of the Rule read:

> (d) Statements which are not hearsay.
>
> A statement is not hearsay if
>
> (1) Prior statement by witness.
>
> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony. . . .

Amendments have consisted of adding limiting language to item A. The House Subcommittee added underscored language as follows:

> (A) inconsistent with his testimony and was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury . . . .

The House Committee on the Judiciary added a requirement that the prior statements have been subject to cross-examination

and struck the reference to grand jury proceedings, and the item was included in the bill passed by the House as follows:

> (A) inconsistent with his testimony and was given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition . . . .

The result of either version is virtually complete destruction of the usefulness of the provision.

The traditional rule respecting prior inconsistent out-of-court statements of a witness has been that they are admissible to impeach but not as substantive evidence, and juries are to be instructed accordingly. Under that rule the fact that the witness may be cross-examined on the statement under oath in open court at the trial has been held to be of no significance. The traditional rule is still the prevailing majority rule.

The foundation of the traditional rule is that the requirements of oath, right of cross-examination, and observation of demeanor must be satisfied simultaneously with the making of the statement; supplying them subsequently has not been considered adequate.

The conclusion is not a sound one, as is disclosed by examination of three leading cases most vigorously espousing the traditional rule: State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967); People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968). In Saporen, a carnal knowledge prosecution, a state witness testified that he had seen the victim

in defendant's room but on a date other than the one charged; he was then asked about a prior statement fixing the event on the date charged and giving some further information. The witness admitted that he had made the prior statement but claimed that he was forced to do so by threats of seven years in the reformatory if he refused. In Ruhala, a wrongful death case, the prior statement was excluded and there was therefore in fact no cross-examination on it. The court, in order to make its point, however, incorporated in the opinion two hypothetical cross-examinations, one supposedly contemporaneous and one during the trial, both directed to showing that the somewhat cryptic prior statement was designed to conceal a lack of firsthand knowledge. The line of questioning in each instance is virtually identical, except that in the contemporaneous version the witness recants his prior version at the conclusion of the cross-examination while in the subsequent cross-examination he has already done so. The only difference lies in the eye of the cross-examiner, who is in the latter instance deprived of a final triumphal flourish. In Johnson, a prosecution for incest, defendant's wife and daughter, after testifying against him before the grand jury and giving statements to law enforcing officers, both recanted on the stand and denied that the alleged acts had taken place. Confronted with their grand jury testimony and other statements, they explained that they had been angry at and afraid of defendant and had been encouraged to bring the charges in order to subject him to psychiatric treatment.

One common pattern runs through all three of the foregoing cases: not only does the witness in each instance recant his earlier story, but he also explains, in not unplausible fashion, the reasons why he did so. This is cross-examination successful beyond the dreams of avarice. In State v. Saporen, supra, 285 N.W. 898, 901, the court said:

> False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

Whatever validity the statement may possess under other circumstances, it has none when the witness has recanted his prior story. As Justice White said for the Court in California v. Green, 399 U.S. 149, 159 (1970):

> That danger, however, disappears when the witness has changed his testimony so that far from "hardening," his prior statement has softened to the point where he now repudiates it.

Once the question of adequacy of cross-examination is disposed of, less important questions remain with respect to the absence of oath and so-called demeanor evidence. As regards the absence of a contemporaneous oath, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. And concerning demeanor, it would be difficult to improve upon Judge Learned Hand's observation that when the

jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court. Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925).

The Rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand. Comment, California Evidence Code § 1235; McCormick, Evidence § 38 (2nd ed. 1972). The rubric of requiring surprise as a condition to impeaching one's own witness is eliminated, consistently with Rule 607 And it eliminates "the historic ritual," United States v. Klein, 488 F.2d 481, 483 (2d Cir. 1973), of instructing the jury to use the prior statement for impeachment only. See McCormick, Evidence § 251 (2nd ed. 1972).

The constitutionality of such a Rule (California Evidence Code § 1235) was upheld in California v. Green, 399 U.S. 149 (1970).

Prior to the appearance of the 1969 Preliminary Draft, support for a Rule of this kind was already accumulating. Both Model Code Rule 503 and Uniform Rule 63(1) admitted prior statements of witnesses, with no requirement of inconsistency. The Uniform Rule has been adopted in Kansas without change. 4 Kan. Stat. Anno. § 60-460(a). New Jersey, California,

and Utah incorporated a requirement of inconsistency. Calif. Ev. Code § 1235; 2A N.J. Stats. Anno. § 84A-63(1); 9 Utah Code Anno., U.R.E. 63(1). The inappropriateness of applying the hearsay rule to prior inconsistent statements was recognized by decision in Hobbs v. State, 359 P.2d 956 (Alas. 1961); Jett v. Commonwealth, 456 S.W.2d 788 (Ky. 1969); Thomas v. State, 186 Md. 446, 47 A.2d 43 (1946); Letendre v. Hartford Acc. & Ind. Co., 21 N.Y.2d 518, 289 N.Y.S.2d 183, 236 N.E. 2d 467 (1968); Vance v. State, 190 Tenn. 521, 230 S.W.2d 987 (1950) cert. denied 339 U.S. 988; Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609(1969). After the appearance of the 1969 Preliminary Draft, the Rule (which remained unchanged and was promulgated by the Court) was adopted by rule or statute in its original form by the three states that have thus far adopted the Proposed Federal Rules: Nevada, New Mexico, and Wisconsin. Nev. Rev. Stats. § 51.035(2)(a); N. Mex. Stats. (1973 Supp.) § 20-4-801(d)(1)(A); West's Wis. Stats. Anno. (1973 Supp.) § 908.01(4)(a)(1). The Rule has also been adopted by specific reference in Beavers v. State, 492 P.2d 88 (Alas. 1971); State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973); State v. Igoe, 206 N.W.2d 291 (N. Dak. 1973), and without specific reference in Wallace v. Rashkow, 270 So. 2d 743 (Fla. App. 1973). The Rule is also incorporated without change in Proposed Nebraska Rules of Evidence (Aug. 1, 1973).

The Report of the House Committee on the Judiciary sets forth a twofold rationale for its decision to curtail so

greatly the Rule as promulgated by the Court: "(1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement."

Neither of these reasons takes into account the considerations, discussed above, underlying the formulation of the Rule, and neither is sound.

The first reason appears to be based on the underlying assumption that in the case of prior inconsistent statements some factor is present that requires an extraordinary degree of assurance that the statement was in fact made. The nature of this factor is not explained. As far as the assurance itself is concerned, seemingly the assumption is that it would take the form of a written transcript of testimony, yet the amendment requires none, and it is well established that former testimony may be proved by the testimony of any person who was present and heard it given. Meyers v. United States, 84 App. Dec. 101, 171 F.2d 800 (1948) cert. denied 336 U.S. 912. Indeed, many out-of-court statements are now admissible without any requirement that they be in writing, and neither the Rules nor any of the amendments propose any change in this respect. Among them are admissions (including confessions), spontaneous utterances, statements for purposes of diagnosis or treatment, declarations of pedigree, reputation, dying

declarations, declarations against interest, and former testimony. Moreover, the mere presence of a writing by no means eliminates controversy over its accuracy, particularly in the case of stenographic transcripts.

The second reason advanced by the House Committee's Report is that the requirements of a formal proceeding, an oath, and opportunity to cross-examine provide "firm additional assurances of the reliability."

As has been demonstated previously, these assurances are already present in full measure in the Rule as submitted by the Court. The amendment distorts them by overemphasis; not one formal proceeding, but two; not one oath, but two; not one cross-examination; but two. These are additional assurances beyond reason. Former testimony, as a hearsay exception, requires only one of each. No other hearsay exception requires any of them.

The instances in which the Rule as proposed to be amended would operate would be few in number. Departures from prior testimony given under oath and subject to cross-examination do not constitute a problem area. The problem area consists of cases in which the prior statement, now recanted on the stand, was not given under those conditions, and a rule which fails to deal with those cases is of slight practical significance.

The Joint Committees strongly urge that the Rule as submitted by the Court be reinstated.

Rule 803

Subdivision (5)

This subdivision of the Rule was passed by the House with the underscored language as an amendment:

> (5) Recorded recollection.--A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made <u>or adopted by the witness</u> when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The result of the amendment, according to the Report of the House Committee on the Judiciary, is a treatment "consistent" with the definition of statement in the Jencks Act, 18 U.S.C. § 3500. Since the functions served by this subdivision of the rule and by that act are wholly unrelated, the reasons why consistency of treatment is desirable are wholly unclear.

It may well be that the amendment was formulated under the belief that a broadened applicability would result, i.e. the subdivision would apply to memoranda adopted by the witness as well as those made by him. This conclusion is in error, since the subdivision as submitted by the Court

was silent on the question of who was to make the memorandum. As the Advisory Committee's Note suggests, the important thing is the accuracy of the memorandum, rather than who made it. Thus the effect of the amendment is actually a narrowing rather than a broadening. The probable points of impact would be situations in which multiple participants were involved, e.g. employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons as in Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591 (1894); Rathbun v. Brancatella, 93 N.J.L. 222, 107 Atl. 279 (1919).

The amendment should be deleted.

Subdivision (6)

Subdivision (6), as submitted by the Court, with the changes made by the House, is as follows:

> (6) Records of regularly conducted activity. 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] if kept in the course of a regularly conducted business activity, and if it was the regular practice of of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source[s] of information or the method or [other] circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, profession, occupation, and calling of every kind.

The Rule as submitted by the Court dealt with the admissibility of records of a "regularly conducted activity." The amendment speaks of records of a "business activity" and defines "business" as including "business, profession, occupation, and calling of every kind." The terminology of the amendment is essentially that of 28 U.S.C. § 1732(a). The drafting technique is an undesirable one, likely to mislead. The word "business" has a definite, well accepted meaning. Only the

reader who reads the rule completely through, including the final definitional sentence, will find that the term "business activity" includes a variety of other forms of activity not ordinarily thought of as "business," i.e. "profession, occupation, and calling of every kind."

Although the amendment's definition goes well beyond the traditional concept of business records, the terminology leaves at least doubt with respect to the admissibility of a great many records that surely enjoy equivalent guarantees of trustworthiness. Schools, churches, and hospitals, for example, scarcely fall within the definition, and quite certainly many individually kept financial records would not. Uniform Rule 62(6) and the Uniform Act provide a partial solution by adding "institution" to the enumeration, as does 28 U.S.C. § 1732(b), which deals with photographic copies of records. Regardless, however, of details of definition, the use of the term "business activity" in the amendment will impair the usefulness of this exception to the hearsay rule.

The Rule should be reinstated as submitted by the Court.

Subdivision (8)

As passed by the House, the subdivision reads in part as follows, the underscored matter representing two amendments made on the floor of the House to the rule as submitted by the Court:

> (8) Public records and reports.--Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law <u>as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel</u> . . . .

The first clause of the amendment requires that there be not only a duty to observe, but that there also be a duty to report. The provision is unduly restrictive and should be deleted.

The second clause specifically excludes reports by police officers. The decision to single out police officers as a specially designated untrustworthy class is unfortunate. The amendment appears to be based on the mistaken assumption that it deals with investigative reports. The latter, however, are dealt with as a separate item (C) in the subdivision, which excludes <u>all</u> investigative reports from use against the accused in criminal cases.

The entire amendment should also be deleted.

Subdivision (24)

The Rule as submitted by the Court contained the following final subsection:

> (24) Other exceptions.--A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

It was deleted by the House, together with a companion subsection, Rule 804(b)(6).

The reasons for this action, as stated in the Report of the House Committee on the Judiciary, were that the proposed rule was "injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." This comment is followed by a cryptic reference to the direction in Rule 102 that courts construe the Rules to promote "growth and development." If Rule 102 and subdivision (24) of Rule 803 have the same effect with regard to judicial recognition of additional hearsay exceptions, then subdivision (24) is a helpful clarification and should be retained. If they do not have the same effect, then what is meant by the reference is wholly unclear.

In drafting Rules 803 and 804, the Advisory Committee sought to incorporate all the hearsay exceptions that had achieved substantial recognition over the years and appeared to satisfy requirements of trustworthiness. The Advisory

Committee's Note to subdivision (24) pointed out:

> It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.

See Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961).

After explaining the deletion of subdivision (24), the Report of the House Committee on the Judiciary concludes, unfortunately, that "if additional hearsay exceptions are to be created, they should be by amendments to the Rules, not on a case-by-case basis." However neither the rule-making nor the legislative process possesses the immediacy of response required to meet the needs of a live case on trial. The common law developed the existing hearsay exceptions on a case-by-case basis. This time tested and useful process should be encouraged, let alone allowed to continue.

The approach of the House Committee on the Judiciary to the exercise of judicial discretion and invention at this point in the Rules is totally at variance with that manifested with regard to privilege in amended Rule 501. The subdivision should be reinstated.

Rule 804

Subdivision (a)(5)

Subdivision (a) was passed by the House as submitted by the Court, with an amendment to paragraph (5) indicated by underscoring:

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability.--"Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (<u>or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony</u>) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

As originally proposed by the House Subcommittee, the amendment contained no exemption for former testimony.

The purpose of the amendment, according to the Report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable." Since no other purpose is apparent, a question may be raised why language directly specifying a deposition requirement was not employed. See, e.g. Model Code of Evidence Rule 1(15)(b).

Presumably, the similarity between the former testimony exception and depositions led to the exemption of that exception from the deposition requirement. The exception thus exempted is no doubt the most frequently recurring of the hearsay exceptions covered by the Rule, and the impact of the deposition requirement is correspondingly reduced. Nevertheless the amendment continues it with respect to dying declarations, declarations against interest, and declarations of pedigree. None of them warrants this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases. Uniform Rule 63(10); Kan. Stat. Anno. § 60-460(j); 2A N.J. Stats. Anno. § 84-63(10). In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements are admittedly and necessarily based largely on word of mouth, not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of

the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

The amendment should be deleted.

Subdivision (b)(1)

The hearsay exception for former testimony as submitted by the Court, with the changes made by the House, is as follows:

> (1) Former testimony.-- Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] <u>if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.</u>

The essential difference between the two versions is the House's substitution of the common law's "same party" or "predecessor in interest" test in place of the more simple "with motive and interest similar to those of the party against whom offered" test provided in the subsection as submitted by the Court.

The position of the House represents a step backward and is needlessly and unjustifiably restrictive. It must be remembered, in view of the unavailability requirement, that the choice is not whether to insist upon production of the witness but rather whether anything at all is obtainable from that source. Subjecting the testimony to a winnowing and sifting process by a person with like interest surely furnishes a guarantee of trustworthiness equal to that for the vast majority of hearsay exceptions that require no oath or cross-examination at all. Modern authority supports this position. Tug Raven v. Trexler, 419 F. 2d 536 (4th Cir. 1969) (testimony at Coast Guard inquiry admissible in wrongful death action); Cox v. Selover, 171 Minn. 216, 213 N.W. 902 (1927) (testimony against guarantor with corporate connections admissible against corporate guarantor); Bartlett v. Kansas City Public Service Co., 349 Mo. 13, 160 S.W. 2d 740, 142 A.L.R.

666 (1942) (testimony for defendant in suit by husband admissible in suit by wife); Travelers Fire Ins. Co. v. Wright, 332 P.2d 417 (Okla. 1958) (testimony against one partner in criminal prosecution for arson admissible in action on fire policy by partners).

The Rule should be reinstated in the form submitted by the Court.

Subdivision (b)(2)

The bill passed by the House deleted the following provision from the Rules:

> (2) Statement of recent perception. A statement, 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 Report of the House Committee on the Judiciary explains the deletion on the ground that the exception is unwarranted on the ground that it does not bear sufficient guarantees of trustworthiness. This conclusion disregards the safeguards which were incorporated in the Rule. Since the Rule requires unavailability of the declarant, the effect of the deletion is simply to eliminate all evidence from that source.

The Joint Committees recommend reinstatement of the Rule for the reasons set forth in the Advisory Committee's Note.

Subdivision (b)(3)

The provision relating to dying declarations, applicable without limitation as to type of case under the Rule as submitted by the Court was amended by the House to apply only in homicide prosecutions and civil cases, thus excluding nonhomicide criminal prosecutions.

This result was predicated on alleged lack of reliability of this form of hearsay. The reasoning is elusive. If the evidence may be used in the most serious, i.e. homicide, cases, why should it not be used in the lesser ones?

The narrow subject-matter scope of the Rule affords built-in safeguards against abuse.

The Rule should be restored to its original form.

Subdivision (b)(4)

This subdivision, as submitted by the Court, with the changes made by the House, is as follows:

(3) Statement against interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to [civil or] criminal liability, [or to render invalid a claim by him against another or to make him an object of hatred, ridicule or disgrace] that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless [corroborated] corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.

With regard to the type of interest declared against, the version submitted by the Court included statements tending to subject declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the many cases construing "pecuniary or proprietary interest" narrowly, so as to exclude, e.g., tort cases, this deletion is unfortunate.

The House also deleted the provisions respecting exposure of the declarant to "hatred, ridicule, or disgrace." These provisions are based on ample motivation to tell the truth and should be restored.

The rephrasing of the corroboration requirement to include the word "clearly" imposes a burden beyond those ordinarily attending the admissibility of evidence, particularly that offered by accused persons. It should be deleted.

The final sentence added by the House is believed to be broader than required by the Bruton case. See Advisory Committee's Note.

The Rule should be reinstated as submitted by the Court.

Subdivision (b)(6)

The House deleted this subdivision which, as submitted by the Court, read as follows:

(6) Other exceptions.--A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthyness.

See comments under Rule 803)(24).

SECTION 2 OF H.R. 5463

The Joint Committees approve the provision of Section 2 of H.R. 5463 adding a section 2076 to title 28 U.S.C. which would confer on the Supreme Court power to prescribe amendments to the Federal Rules of Evidence. After these rules have become effective by Act of Congress there will undoubtedly arise instances in which amendments will be found in the interest of justice, and it will be very much in the public interest to make it entirely clear that the Court is empowered to deal with them. Likewise the Committees are satisfied that it is appropriate to require that amendments proposed by the Court be reported to the Congress and that they not take effect until a specified time has elapsed after they have been so reported, the exact length of that period of time being for the Congress to determine.

Section 2 of H.R. 5463 further provides that if either House of Congress disapproves any rules amendment prescribed by the Supreme Court the amendment shall not take effect.

The Committees understand the problem which this provision is designed to meet but believe that the provision is unsound in principle and might in practice place either the Senate or the House at loggerheads without means of accommodation and defeat a necessary exercise of the rule amending power which the section is designed to grant. It is suggested that the problem sought to be met could better be taken care of by a substitute provision that either House of Congress shall have authority by resolution to postpone the effective date of a rules proposal received from the Supreme Court for such a period of time as it might deem necessary to enable the Congress to give full consideration to it and to take action upon it.

The difficulty which the Committees see in the provision giving a single House the veto power is its inevitable seriously inhibiting effect on the exercise of the rulemaking power. The Committees believe that in a matter as vital to

the administration of justice as the formulation of rules, the Supreme Court, having been given primary responsibility, is entitled to have any action by the Congress in this field take the form of a binding law enacted by both Houses, just as the Congress is now doing in the case of these proposed Federal Rules of Evidence, and not as a mere negative reaction from a single House.

Section 2 of H.R. 5463 imposes a further limitation upon amendments creating, abolishing, or modifying a privilege, in that the section provides that no such amendment shall be effective unless approved by Act of Congress. Thus inaction by either House is an automatic veto. This provision is therefore even more restrictive than the one allowing a veto by action of either House. It reduces the rulemaking power in this area to a mere advisory capacity, and nothing more.

It is believed, as suggested above, that the need of each House of Congress to have ample time to consider and act upon rules amendments and the need of the Supreme Court, the bench, the bar, and the public to have the guidance of statutory law when the Congress acts in this area, will be

met if each House is given independent authority to postpone the effective date of a rules proposal prescribed by the Supreme Court for a period of time sufficient to enable both Houses to act on it.