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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

THE PROPOSED MISSOURI EVIDENCE CODE

[Editor's Note: The following fifteen comments discuss the more important problems arising in connection with the Proposed Missouri Evidence Code. These comments have been prepared by student editors of the REVIEW under the direction of Professor Carl C. Wheaton.]
This comment is not concerned with specific changes which the proposed Missouri Evidence Code is intended to make in Missouri evidence law. Those changes are discussed in succeeding comments. The purpose here is to present the general advantages and disadvantages of the proposed code.

As an approach to the question of whether Missouri should have an evidence code several things must be kept in mind. On the one hand, it must be remembered that the law of evidence, as it is today, has been under serious attack from various quarters of the legal profession for some time. That its very foundations have been shaken by the charges made is indicated from the fact that the American Law Institute refused to restate the law of evidence, feeling that reformation in the form of a code was the greater need. It should also be remembered that the proposed Missouri Code has been a four year project which has used the time and talent of some of Missouri's best lawyers. They, in turn, have profitably utilized the Model Code of Evidence, which was created by men of outstanding ability. On the other hand, we should keep in mind the fact that an established institution—good or bad—in which many sound lawyers have faith, is being attacked and that a new and untried system is proposed to be substituted.

Two factors, which occasion a great deal of argument should be disposed of at the outset. They have a decided emotional effect, but, in the final analysis, they do not go to the merits. One is the general distaste of the lawyer, or anyone familiar with a particular pattern of thought or activity, to be required to make a change. This feeling may be due to the indolence of the lawyer, or just as likely to his general satisfaction with the present state of affairs. To overcome this inertia proponents of the proposed code will have to show cause, but this is always a condition precedent to an orderly upsetting of the status quo. The other factor is an inherent and often unexpressed fear that the provisions of any new code may have hidden meanings which actually effect substantial changes in the law when the ostensible intention is to change only the form in which the law is stated. Careful study and discussion precedent to the adoption of the code and subsequent judicial interpretation minimize this possibility, however, such fears and lethargy alone are hardly grounds for obstructing changes if they are needed and worthwhile.

There is ample, in fact almost uncontested, authority for the assertion that changes are needed. As to general conditions in evidence law Morgan says, "...the law of evidence is now where the law of forms of action and common law pleading

2. CLARKE, THE SCIENCE OF LAW AND LAWMAKING 281 (1898). Carr, The Proposed Missouri Code of Evidence, 15 KAN. CITY L. Rev. 1 (1946), "Aside from the recent (1942) work of the committee on Evidence of the American Law Institute in the formulation of a 'Model Code of Evidence' ... no systematic and complete overhauling of the rules of Evidence, to my knowledge, has been attempted."
3. 6 ENCYC. BRITANNICA 633 (13th ed. 1926).

http://scholarship.law.missouri.edu/mlr/vol14/iss3/2
was in the early part of the nineteenth century." Cardozo notes that, "Some of its rules are so unwieldy that many of the simplest things of life . . . are often the most difficult to prove." Justice Stone, in a general plea for law simplification, had this to say with reference to evidence: "... a statutory enactment of the rules of evidence abolishing many of the existing rules altogether are proposals worthy of serious consideration." Specific charges have been made as to the outrageous nature of many exclusionary rules which today do nothing but work adversely to the honest litigant. The social value of "truth-repressing" privileges needs to be re-examined and re-evaluated in the light of present-day needs. It is strange indeed that an effort has not been made sooner to modify or eliminate the "Dead Man Statute," to reduce the confusion caused by conflicting expert testimony, or to clear away the illogical limitation of dying declarations to homicide and abortion cases. The need is clear; the debate rages only as to the manner and degree of change which will be necessary.

From the standpoint of predictability, if the past be a satisfactory criterion, inferences may be drawn in favor of the proposed code from an historical point of view. The codes which have succeeded to the point of actual adoption and use were usually the result of some abnormally compelling need and not the consequence of a theoretical belief that there was an inherent superiority in the form in which statutory codes stated the law. The latter advantage, where present, was an incidental benefit.

There are many illustrations. Uniformity was the compelling need behind the Negotiable Instruments Law; in India, where it might be thought that English case law would dominate, codes arose due to irreconcilable conflicts between diverse local laws and also due to the need for guiding untrained judges and magistrates; the driving force behind the Napoleonic Code was supplied by a need for unifying two conflicting systems of law in France. The common element present in each instance was an effort to correct some evil with which the courts could not adequately

8. Id. at 7.
9. This is done in the Missouri Evidence Code (Proposed) §§ 1.001, 5.01 and 11.14.
10. Id. § 10.05.
11. Id. § 11.10.
12. ILBERT, THE MECHANICS OF LAW MAKING 166 (1914).
13. Id. at 155; CLARKE, THE SCIENCE OF LAW AND LAWMAKING 264 (1898).
cope and which served as the initial force in the ultimately successful demand for
codification. The need for reformation would seem to bring evidence within this
historical rule. When reformation is combined with the added benefits of simplicity,
clarity, and certainty that may be expected as a result of the code, and which in this
field assume roles of major importance, we find a force which is difficult to resist.
Criticism, even, can come only with hesitancy.

How far should Missouri go in reforming evidence law? The answer to this
question has certain practical limitations. Though reasoned argument might justify
a code of very broad coverage, it is not a case of formulating the most modern and
highly advanced of codes. It is a matter of selecting those changes, both as to form
and degree, which will give reasonable assurance of working satisfactorily and which
will be generally acceptable. An unadopted code will serve no purpose. Wigmore,
who can hardly be classed as a conservative in the field of evidence, felt that ignor-
ing this factor was a prime objection to the Model Code of Evidence. It was just
"too radical for present use." This does not detract from the fact that the Model Code
still effectively serves a dual role—as a present invaluable guide and as an
ultimate goal. The proposed Missouri Code should be generally acceptable; the
blanket objection of radicalness seems out of place because, for the most part, evi-
dence has been restated in the light of earlier Missouri law.

But this raises another question, for compromise has its price. The use of
the proposed code by administrative tribunals is considered a strong reason for its
adoption. Is the proposed code sufficiently reformatory so that administrative trib-
unals may be compelled to conform to it and still adequately perform their functions?
Much of the argument on this question will revolve around the exclusionary rules—
primarily the hearsay and the best evidence rules—but many will question the
advisability of encumbering administrative tribunals with rules which are still
highly technical, when much of the merit, as well as weakness, of this type of tribunal
is found in its informal, inexpensive, and summary method of procedure.

It might incidentally be pointed out, in connection with the application of the
proposed code to administrative proceedings, that there should be little objection
to the best evidence rule because of the wide discretion which the proposed code
leaves in the hands of the trial judge, but the same cannot be said for the hearsay
rule. This is clearly illustrated by the comment to § 11.01 of the proposed code:
"This rule (hearsay) is one of the main distinguishing features being a judicial
trial and a hearing before an administrative tribunal with its loose rules of evidence,
and should be retained." This quotation serves the additional purpose of emphasizing
the even more serious question posed by Wigmore as to the feasibility of applying
jury trial rules to administrative tribunals. Rules too radical for jury trials may

15. Sec. 12.03.
16. 1 WIGMORE, EVIDENCE § 4 (3d ed. 1940). Vanderbilt says in The Tech-
nique of Proof Before Administrative Bodies, 24 IOWA L. REV. 464, 467 (1939),
"The rules of Evidence at common law are the product of trial by jury. They aim
be too conservative for administrative tribunals; however, this hurdle is probably not insurmountable if there is a real willingness to modify, "radically" if necessary, inapplicable provisions in the proposed code to meet the specific and peculiar needs of the various administrative tribunals.

The fact that evidence comes within the general category of procedural law is, in itself, a strong point in favor of its codification. In the past, the most hardened foes of codification have generally drawn a line between substantive and procedural law and directly or indirectly admitted that codification may be advantageous in the latter instance. Thus, Clarke's attack on codes was limited in the following manner; "The true debatable grounds, over which codifiers and non-codifiers dispute, are those broad fields of social activity wherein the disputed questions arising in the particular cases presented, necessitate the application of ethical principles, as guides to the attainment of an equitable result." In dealing with substantive law, where equities are being weighed, few will disagree with the view that rigid certainty is unwanted and that the desired flexibility is admirably achieved by case law. But where procedural law is involved lines, even rigid lines, may be drawn without injury. In this respect, "rules of proof" readily lend themselves to codification, for their prime reason for being is the prompt and fair presentation of evidence in a manner most conducive to ascertaining the truth.

A great deal has been said about the present-day lack of clarity of evidence rules. As to the cause of it, a fair amount of blame may be placed upon the now herculean shoulders of our reports. This is true notwithstanding Holmes' often quoted and reassuring statement that, "It is a great mistake to be frightened by the ever increasing number of the reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the

to protect from false reasoning a temporarily convened tribunal of laymen." Recognition must be given to Morgan's contention that hearsay is not a product of the jury system but of the adversary system. Morgan, supra note 7, at 36. With reference to the Model Code of Evidence, Long states in The Code of Evidence Formulated by the American Law Institute, 23 Mich. S. B. J. 3, 20 (1944), "The only query in my mind is whether the Code goes far enough. It is my judgment derived from a great deal of observation and experience with the functioning of administrative tribunals...that in any proceeding before any tribunal any party should have the right to offer as evidence anything which shall appear to possess probative quality such as a reasonably prudent person commonly acts upon in the conduct of the ordinary affairs of such person only to the adverse party being afforded reasonable opportunity to produce better or more direct evidence." See Hoyt, Model Evidence Code—Applicability to Administrative Hearings, [1945] Wis. L. Rev. 85.

19. Cardozo, The Growth of the Law 3 (1924), "Our laws stand indicted for uncertainty, and the names of weighty witnesses are endorsed upon the bill." As to the causes of uncertainty he says, "The weightiest, I fancy, is the multiplication of decisions."
present point of view. Sheer bulk alone adds confusion and doubts, not to speak of the physical problem in research, and, as noted infra, matters have been further complicated by the tendency to search for and rely largely on "comparable fact situations." Such a situation is especially unforgivable in a field like evidence where ready accessibility is an essential. Such bulk can be reduced to a large degree by code.

In addition to reducing the bulk of the law, a code can sometimes simplify the rules by restating them in clearer language, free from the confusing imprint of the hundreds of varying cases out of which they were born. "Legislation, too, can sum up at times and simplify the conclusions reached by courts and give them new validity." This is an argument of great strength where administrative tribunals with lay members are involved and has been properly recognized and emphasized by the proponents of the code. The desired goal of simplicity with particular reference to the lawyer has been suggested to be a restatement of the rules of evidence so that they are "...simple enough to be applied with fair accuracy on the spur of the moment by judges and lawyers of reasonable skill and learning. ..." A concise, complete, and clear codification of evidence law should supply such a need.

As important to evidence as simplicity is certainty, for it is another basic requirement of any procedural rule. There is general agreement with the proposition that where certainty is paramount a code is in its proper sphere. The certainty which codification promises, more than anything else, counter-balances the argument that codification results in rigidity and inflexibility in the law. But where arises this uncertainty in evidence? To a degree, as noted supra, basic principles are clouded over and may be swept clear by statute, but a blanket statement that all or most of the rules are unknown or not understandable seems out of place. In the abstract they are usually knowable, in fact they normally stand out. It isn't so much a question of knowing what the law is that causes uncertainty, but, as frequently observed, the uncertainty lies in the actual application of its principles to the myriad of varying factual situations that develop. The difficulty of application increases as the emphasis on intricate details increases. This understandably results in a forced use of similar factual situations for guidance to supplement even clear general principles which have become less and less adequate. Thus arises the

21. Foreword to the Missouri Evidence Code (Proposed) p. VIII.
23. In the Foreword to the Missouri Evidence Code (Proposed) p. XVI the elements of clarity and simplicity were apparently emphasized as the primary advantage to be gained in the use of the Code by administrative tribunals.
complaint that evidence "is ceasing to be a question of principles, and is becoming a mere question of patterns." 26

It is this problem of certainty and the need for guidance to attain it that causes even the advocates of evidence codes to differ. Should we have a code that is detailed or one that relies largely on general principles? The consequences of taking the latter course are summed up as follows: "The true significance and implications of these generalities would be left to be worked out by reference to the old common law which such a code professes to supersede but which would in reality be retained in existence as a necessary instrument of interpretation. . . . While preserving the old law in all its complexity as the essential means of interpretation it would add new sources of difficulty and uncertainty." 27

Too many details, on the other hand, are to be avoided for much of the merit of a code lies in its conciseness. The proposed Missouri code is more than a statement of general principles, but still it might be asked whether the proposed code will be self-sufficient and certain enough in guiding the judge and lawyer, unless it is to be followed by an abnormal amount of judicial interpretation or unless there is to be a continued reference to the old cases to guide and justify the application of the rules. If the latter occurs, it will destroy most of the advantage of a code which purports to sweep away the ambiguities and conflicts of the past.

Lack of detail may well be the first basic weakness of the proposed code. The reason submitted for a code and the cure may not be met with complete agreement. On the one side, we still insist—perhaps correctly—on materially limiting the discretion of the trial judge and, on the other side, we want the law of evidence in simple and concise form without excessive detail. The conflict will cause one or the other to give way and in this instance details will be increased. The real objection, however, is that the detail will not be supplied by the code but by judicial decisions, many of which were written without the code as a basis for interpretation. In comparison, the much complained about wide discretion which the trial judge is given under the Model Code of Evidence eliminates the need for too much detailed guidance. The good judgment of the trial judge and not that of the supreme court on appeal is intrusted with the task of drawing most of the fine lines.

But even in the Model Code of Evidence Wigmore recommended greater detail. 28 The following observations by him warrant careful consideration: "If the objection be made that the law of Evidence should no longer remain a network of petty detailed rules, the answer is, first, that both Bench and Bar need concrete guidance in order that a normal routine be ordinarily followed for speedy dispatch without discussion; secondly, that the Bar needs them in order to prepare evidence for trial along normal expected lines; and thirdly, that the really effective way

26. Quoted in the Foreword to the Missouri Evidence Code (Proposed) p. VIII.
27. Salmond, The Literature of the Law, 22 Col. L. Rev. 197, 201 (1922). The reference was to codification in general, but is equally applicable to evidence.
to eliminate the present frequent over-emphasis on detailed concrete rules is to provide that they shall be only guides, not chains—directory, not mandatory—by forbidding the review of the Trial Court's application of them except in extreme instances.\textsuperscript{29}

There would seem to be little doubt that the old cases will remain as a background of interpretative material for the proposed code. Section 1.001 of the code, while expressly repealing prior statutes is silent about prior case law. Assistance might be found in § 1.02 which says, "... but this Code shall not be construed to prohibit the introduction of any evidence or to prevent any witness from testifying unless this Code, by express language or by necessary or clear implication, or another particular statute or a constitutional provision so requires." This could be the most praise-worthy and reformatory part of the code if it is vigorously interpreted, but enthusiasms are dampened somewhat by the comment to § 1.02: "The Code abrogates the effect of any prior judicial decision contrary to any part of any of the Code sections, and prevails over inconsistent statutory provisions." From this the conclusion is readily drawn that contradictory decisions alone are intended to be touched.

It is submitted that if Missouri is to place the law of evidence in the form of a code, then all of the rules which are deemed necessary for the conduct of a trial should be incorporated in it. Subsequent uncertainties should then be cleared up by prompt amendments or by judicial interpretation made solely in the light of the provisions and general tenor of the code. If greater detail is now thought necessary for guidance then one of two conclusions may be drawn—either the proposed code is inadequate or the bar is unwilling to sufficiently de-emphasize the importance of evidence in our courts.

The second major objection to the proposed code goes neither to its form nor substance, but concerns the manner of the code's adoption and the provision for its subsequent change. It is entirely legislative. In enacting a complete, well-integrated code through the legislature we are increasing both the opportunity and the inclination for individuals interested only in procedural advantage to press for modification. We are also increasing the temptation for well-meaning but incompletely informed legislators to tinker with it.\textsuperscript{30} Changes will be needed for uncertainties develop in the best drawn code. It must also grow, cultivated by those sensitive to the needs to which it must adapt itself. Unneeded changes are going to be demanded. The best source, in fact the only source, for suggestions must come from the bar, which is, in itself, heavily handicapped by the inherent bias of single client practice and specialization. In many instances the most influential advice will come from members with such handicaps.\textsuperscript{31} This advice must be in-

\textsuperscript{29} Wigmore, Preface to the \textit{Code of the Rules of Evidence} (3d ed. 1942).


\textsuperscript{31} Pound, \textit{Some Principles of Procedural Reform}, 4 Ill. L. Rev. 388, 399 (1909). This was Pound's sixth factor contributing to the then chaotic conditions in the procedural field.
telligently evaluated in a highly informed and unbiased manner. If it is in the hands of the legislature, pressure and not reason will govern in too many instances. The legislature's agility in drawing statutes which are a compromise between the pressure of conflicting rights seems out of place in a branch of the law where no vested rights exist and where the overriding consideration is what rule is best to bring the truth to light.

Profit should be derived from past experience, for legislative control of rules of civil procedure has been anything but successful. The old complaints will be heard again. "Certain it is that we will not be able to get any Code that is satisfactory to anybody so long as each individual member of the Legislature finds it necessary to have passed two or three separate amendments to relieve constituents who are embarrassed by present litigation."3

The solution is Rules of Court. The existence, of Article 5, Section 5 of the Missouri Constitution prohibiting such rules is both a barrier to this move and living proof that, unless such an alternative is used, an excellent and highly commendable piece of legal reform will fall far short of the success that it deserves and should attain.

RICHARD J. WATSON

THE DEAD MAN STATUTE

Section 1.001 of the proposed Missouri Evidence Code repeals § 1887 of the Missouri Revised Statutes (1939), the dead man statute. A brief history and discussion of this statute would be beneficial in understanding what this means and what the code proposes to enact in place of § 1887.

At common law interest disqualified one from being a witness. This general disqualification for interest in civil cases was removed in Missouri in 1855.1 However, a party to the action, or any person for whose immediate benefit the action was prosecuted or defended remained incompetent to testify as did an assignor of an account, judgment or thing in action, concerning facts occurring anterior to the assignment. In 1865 the disqualification as to parties was removed but a proviso was attached that "... in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor..."2

After having removed the general disqualification of witnesses for having an interest in the subject matter of the trial and for being a party thereto, the legislature evidently considered it good policy to silence the living party to a transaction where the other was dead, since the latter could not be present to defend himself and, under the then existing rules, his hearsay declarations were inadmissible.

32. 24 REPORTS OF N. Y. STATE BAR ASS'N. 294 (1901).
2. Mo. Rev. Stat. c. 144, p. 586 (1865). This history is set out in Freeman v. Berberich, 332 Mo. 831, 842-844, 60 S.W. 2d 393, 398-399 (1933).
A great majority of the states have statutes similar to § 1887 of the Missouri Revised Statutes (1939). Although the reasons for the rule have been stated variously, the underlying principle for having such a statute seems to remain constant. In a West Virginia case decided in 1878, Haymond, J., said: ". . . the law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf. Any other view of this subject, I think, would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous. . . ."

Section 1887 has remained on the statute books unchanged since 1887 but in that period much dissatisfaction has been expressed in judicial opinions and by text writers both of the Missouri statute specifically and of dead man statutes in general. A glance at the Missouri Revised Statutes of 1939 Annotated will indicate the number of decisions that have been handed down on § 1887. Of course, this alone would not be sufficient to justify its repeal if it were found to be based on a valid principle and productive of justice.

Mason Ladd, writing from the Iowa Law Review, said: "The basic objective of all [dead man] statutes is the same. Survivors of a deceased person are looked upon with suspicion as persons ready on first opportunity to fabricate false claims against

3. Owens v. Owen's Adm'r., 14 W. Va. 88, 95 (1878); Louis v. Easton, 50 Ala. 470, 471 (1874): "This right and privilege [of testifying] must be mutual. It cannot exist in the one party, and not in the other. If death has closed the lips of the one party, the policy of the law is to close the lips of the other."

4. Garden, The "Dead Man's Statute" In Missouri, 23 WASH U. L. Q. 343 (1938) (sets out at great length the complexities and ramifications of the dead man statute in Missouri); THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM 23, 34-35 (1927) "Both theory and experience, therefore, justify the abolition of the rule disqualifying an interested survivor and the establishment of a rule making all relevant statements of the decedent admissible. . . . If the proponent of such evidence be required to satisfy the judge that the decedent really made the statement and that he made it in good faith and on his personal knowledge, the evidence which will get to the jury by reason of the proposed rules will certainly be quite as trustworthy and quite as easy of valuation as much of the testimony now receivable under established rules."; McCormick, Tomorrow's Law of Evidence, 24 A.B.A.J. 507, 511 (1938) "Some ancient barnacles will go. . . . Next, that fragmentary relic of the disqualification of parties to testify, the survivor's evidence statute. Where one man's lips are closed by death, the other's must be closed by the law. The phrase has a specious equity which conceals a baneful potency for injustice. It is a sin against the light, when in the name of solicitude for the dead, the law permits one set of living folks to cut off another's claim without a fair hearing."; Note, Evidence by Survivors: Proposed Revision of the Illinois Statute, 31 ILL. L. REV. 218 (1936).

2 WIGMORE, EVIDENCE § 578 (3d ed. 1940) (There is no more justification "to save dead men's estates from false claims than to save living men's estates from loss by lack of proof."); Ladd, The Dead Man Statute: Some Further Observations and a Legislative Proposal, 26 IOWA L. REV. 207 (1941).
the decedent’s estate because the deceased is unable to repudiate them. The right of living claimants to establish honest claims is sacrificed because of the danger that a substantially greater number of the survivors would take advantage of the situation and give perjured testimony for their gain. The existence of the dead man statutes represents the judgment of legislative bodies that the general honesty and truthfulness of people in modern society is at a pretty low ebb and that all it takes is the motive of interest plus a good chance created by death of one of the parties to cause the majority of people to concoct false claims to plunder the estates of deceased persons.

According to most modern authorities on evidence dead man statutes should be repealed; but the question arises here as to what the over-all result of this repeal would be under the proposed Missouri Evidence Code.

Section 1.03 makes every person a qualified witness except as otherwise provided in the code, in other particular statutes and in constitutional prohibitions. Section 5.017 states further qualifications for witnesses and § 5.10 allows interest to be shown to affect credibility but not to disqualify. Under § 11.01 hearsay evidence is inadmissible except as expressly authorized by the code or by other statutory or constitutional provisions. Section 11.14 makes an exception to § 11.01 in

5. Ladd, The Dead Man Statutes: Some Further Observations and a Legislative Proposal, 26 IOWA L. REV. 207 (1941). Dean Ladd deplores the existence of the statute saying that when the Iowa legislature of 1860 passed the dead man statute, it overlooked three things: “First, even assuming that all people would lie in order to get something out of the estate of one who had died, at least many of them would not have to lie because they would have a true story to be told; second, the assumption that all people or that the majority of people are proverbial liars awaiting only a chance to falsify for profit is contrary to human experience and a terrific indictment of our civilization; third, even among those who would falsify the statute presupposes the inability of lawyers to expose to court and jury the falsity and corruption of enough of them to take chances by permitting all witnesses to testify.” (p. 225).

6. Missouri Evidence Code (Proposed) § 1.03: “Except as otherwise provided in this Code, in other particular statutes, and in constitutional prohibitions: 1. every person is qualified to be a witness, and 2. no person has a privilege to refuse to be a witness, and 3. no person is disqualified to testify to any matter, and 4. no person has a privilege to refuse to disclose any matter or to produce any object or writing, and 5. no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and 6. all relevant evidence is admissible.”

7. Missouri Evidence Code (Proposed) § 5.01:
a. A person is qualified to testify as a witness, unless the judge finds that 1. the proposed witness at the time he is offered as a witness is incapable of expressing himself concerning the matter with respect to which his testimony is sought or cannot be understood either directly or through interpretation by one who can understand him, or 2. the proposed witness is incapable of understanding the duty of a witness to tell the truth.

b. Nothing in this section contained shall be construed to disqualify a witness as to testimony given after his recollection has been refreshed or with respect to past recollection recorded evidence as rendered competent by this Code.”


9. Missouri Evidence Code (Proposed) § 11.01: “Hearsay evidence is inadmissible except as expressly authorized by this Code or by other statutory or constitutional provisions.”
that if one party to a contract is dead, insane or unavailable, and the survivor introduces testimony with respect thereto, the statements of the deceased which the trial judge finds were made in good faith shall not be excluded as hearsay.  

In 1938 the Committee on Improvements in the Law of Evidence of the American Bar Association advocated the repeal of the dead man statute and suggested the following rule be enacted instead: "No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise. In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge."

In 1942 the American Law Institute proposed the repeal of the dead man statute and made the survivor to a transaction a competent witness against the estate of the deceased. In order to protect the estate of the deceased the hearsay declarations of the deceased were admitted under Rule 503 of the Model Code: "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination."

Connecticut, Massachusetts and Rhode Island have completely abandoned the disqualification for interest and, at the same time, have made provision for admission of the decedent's hearsay declarations "as an antidote to the survivor's tes-
timony. The weight to be given to the survivor's testimony is left to the triers of fact. In Connecticut and Rhode Island the hearsay declarations need only be relevant to the issue on trial, while in Massachusetts the trial judge must first find that the hearsay declaration was made by the decedent in good faith and on his personal knowledge. Mason Ladd questions the propriety of this good faith provision (also in the Missouri code) but concludes that its presence would not prove a serious impediment.

Another type of statute has been passed in Virginia, Oregon and New Mexico. These statutes remove the incompetency of the surviving witness but seek to give at least some protection to the estate of the deceased by refusing to allow a verdict in the survivor's favor unless his testimony is corroborated. It has been suggested that these statutes evince but a small change in attitude since they still do not place the duty of weighing the testimony of the survivor completely within the hands of the triers of fact.

Under the New Hampshire and Montana statutes it is within the discretion of the trial court to admit the testimony of the survivor when it appears that in-

would be admissible in favor of his representatives, such entries and memoranda may be admitted in favor of any person claiming title under or from the decedent.

"Sec. 6. A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

18. VA. STAT. § 6209 (Michie, 1930).
20. N. M. STAT. ANN. § 20-205 (1941): "In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

Note the correlation between this type of statute and the Chancery rule as expressed In re Hartnett, 17 L. R. Ir. 543, 547 (1886): "Look at the result of acting on such evidence alone. A claimant, who cannot by possibility be contradicted, and who may be too clever and unscrupulous to break down under cross-examination, could put forward a claim founded solely on his own oath, which the judge can detect no reason for disregarding, and which in the absence of such a rule he would be bound to act upon, the only person who could contradict it being dead. It is not a rule which depends on the character of the witness, but on the manifest danger which requires the establishment of a general rule applicable to all alike from the great difficulty or impossibility of detecting falsehood." (As set forth in 7 WIGMORE, EVIDENCE § 2065, p. 371 (3d ed. 1940), where it is stated that this rule never did obtain a final place in English law.).

21. 46 HARV. L. REV. 834, supra note 16 at 835.
23. MONT. REV. CODE ANN. § 10535 (1935): "The following persons cannot be witnesses: . . . 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person,
justice will be done without it. These seem to be very little more beneficial than the ordinary dead man statute.²⁴

Dean Ladd prefers the Connecticut type of statute and proposed that the following be enacted in Iowa: “In actions, suits, or proceedings by or against the representatives of deceased or insane persons, including proceedings for the probate of will or proceedings in which successors in interest of such persons are parties, any statement of the deceased or insane person while sane, whether oral or written, shall not be excluded as hearsay.”²⁵

It is notable that the proposed Missouri code differs basically from all the suggested statutes and the statutes as enacted in other jurisdictions in that: (1) Section 11.14 applies only to contract actions, and (2) the surviving party to the contract must have offered testimony before the hearsay declarations of the deceased are admissible.²⁶

Mr. Charles L. Carr, Chairman of the Evidence Code Committee, in his commentary following § 11.14 states that a “...real need for this hearsay exception exists in contract actions. A real danger would be created if the bars were thrown down to permit self-serving hearsay declarations in tort actions.”²⁷ It is clear that the need for the exception does exist with respect to contract actions in order to afford some protection to the estates of deceased persons since under the code the survivor to such transactions is not denied the right to testify; but it is not so clear that this same need does not exist also in actions in tort.

A simple hypothetical will illustrate the problem. Suppose that A is seriously injured in an automobile accident with B to which there were no witnesses. A is taken to a hospital where he later makes statements to disinterested third parties tending to show that the accident was the fault of B, e.g. that B was on the wrong side of the road, had no lights, etc. A subsequently dies before the trial. When the statements were made, A was not conscious of approaching death so as to bring his statements within the exception of a dying declaration (§ 11.10), nor under such circumstances so as to bring them within § 11.02, the spontaneous statement section. Under the code at the trial B would be free to give whatever version of the accident he wished whereas A’s hearsay declarations would be inadmissible. Would it not be better to place both the testimony of the survivor and the hearsay of the deceased before the triers of fact and allow them to evaluate the respective testimony and base their decision on all the evidence available?

Isolated cases like this may be infrequent and not determinative of the problem. Yet, basically, the question seems to turn upon whether or not we are willing as to the facts of direct transactions or oral communications between the proposed witness and the deceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court that, without the testimony of the witness, injustice will be done.”²⁴

²⁴. For a more detailed discussion of these statutes see Ladd, The Dead Man Statute: Some Further Observations and a Legislative Proposal, 26 IOWA L. REV. 207, 229-240 (1941).
²⁵. Id. at 239.
²⁷. Id. at 161.
to trust the jury to evaluate all the evidence available and to place faith in our judicial system and court procedure of cross-examination to bring the light inconsistencies of statements and the untrustworthiness of dubious testimony. In the commentary on hearsay in general the Model Code of Evidence summarizes: "The fact is, then, that the law governing hearsay today is a conglomeration of inconsistencies, developed as a result of conflicting theories. Refinements and qualifications within the exceptions only add to its irrationality. The courts by multiplying exceptions reveal their conviction that relevant hearsay evidence normally has real probative value, and is capable of valuation by a jury as well as by other triers of fact. This is further demonstrated by the majority view that inadmissible hearsay received without objection may be sufficient to sustain a verdict. Most statutes regulating procedure before administrative tribunals make hearsay admissible. And it is by no means clear that the administrative official ordinarily presiding at a hearing has more competence to value testimony than has a jury acting under the supervision of a judge. The number of cases tried before juries, as compared with the number tried before judges without juries and before administrative tribunals, is small indeed; and to make general rules based on a questionable distrust of the jury seems unwise."28

The second feature of § 11.14 of the proposed code which distinguishes it from other similar statutes is that the survivor must have introduced testimony before the hearsay declarations of the deceased will be admissible. If, as declared above, the hearsay of deceased is to be merely "an antidote to the survivor's testimony,"29 then this provision is no doubt sound. But if it is intended to afford some protection to the estates of deceased persons, then it seems to overlook the proposition that "protection" includes not only the right to be free from being placed at an undue disadvantage when a survivor is seeking to enforce an oral contract against the estate of a deceased, but also the opportunity to enforce legitimate claims which the estate has against the survivor. The contract rights of a deceased are as much a part of his estate as his other personalty and as deserving of protection. To limit the ability of the estate to realize upon these rights is tantamount to destroying them, which seems to be contrary to the purpose, but the inevitable result, of § 11.14.

Suppose that A has an oral contract with B. A later dies and his personal representatives seek to enforce this contract against B. In the pleadings and on trial A alleges the existence of the contract and B denies such existence. No testimony is offered by B. The burden of persuasion is on A's representative and under § 11.14 he cannot introduce any of A's hearsay to prove the contract until and unless B testifies with respect thereto. Under circumstances which this section seems to presuppose, i.e. that there is no better evidence than hearsay, it would be virtually impossible for A's estate to enforce a legitimate claim arising ex contractu.

This section seems to be aimed at that which Judge (then Commissioner)

29. 46 Harv. L. Rev. 834 (1933) supra note 16.
Hyde evidently advocated by his query in *Freeman v. Berberich*: “Will not courts more often reach the truth by properly weighing the evidence which can be produced?” But surely this means all evidence which has any probative value and not just some of the evidence sometimes.

Jeremy Bentham in more elaborate phraseology but with the same thought said: “In principle there is but one mode of searching out the truth: and (hating the corruptions introduced by superstition, or fraud, or folly, under the mask of science) this mode, in so far as truth has been searched out and brought to light, is, and ever has been, and ever will be, the same, in all times, and in all places, in all cottages and in all palaces—in every family, and in every court of justice: Be the dispute what it may, see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it—the parties.”

It is respectfully suggested that this would be a much more workable statute and more conducive to equality and justice if it were more nearly modeled on the Connecticut statute or Rule 503 of the *Model Code*, i.e. by making it applicable to actions both *ex contractu* and *ex delicto* and by eliminating the qualification that the survivor must have offered testimony first before the hearsay of the decedent is admissible.

JOHN W. INGLISH

**Judges and Jurors as Witnesses**

In England in the seventeenth and eighteenth centuries there seemed to be no doubt but that a judge was a competent witness, although the propriety of his again taking the stand after having testified was not so clear. More recently, however, in England and in the United States this policy of one person occupying the dual capacity of judge and witness has been seriously questioned.1 “... whatever difference of opinion may once have existed on this point, it seems now to be agreed, that the same person cannot be both witness and judge, in a cause, which is on trial before him. If he is the sole judge, he cannot be sworn; and if he sits with others, he can still hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.”

Objections to this practice are based not upon the general quality of judgeship, nor of the judge’s privilege against compulsory process, or of his privilege “to withhold, in a trial not before himself, information received confidentially and officially, from an informer or a party confessing, not in open court...” but rather

30. *Freeman v. Berberich*, 332 Mo. 831, 845, 60 S.W. 2d 393, 400 (1923).

1. 6 *Wigmore, Evidence* § 1909, pp. 586, 587 (3d ed. 1940).
2. 1 *Greenleaf, Evidence* § 254c, p. 395 (16th ed. 1899).
upon the impolicy of a judge becoming a witness without ceasing to be a judge of
the cause.  

Wigmore sets forth four cases which raise objections to allowing a judge to
testify at a trial over which he is presiding. One objection is the inability of a
judge to administer the witness' oath to himself. He says this is petty and could
be overcome by empowering the clerk to administer the oath. Another objection
is the impropriety of the judge's passing upon his own claim of privilege and the un-
seemliness of the judge's veracity being impeached by the opponent. These are
the merest possibilities according to Wigmore. He says that they "may be trusted
to be avoided through the combined good sense and discretion of counsel and
judge, and . . . to establish a universal rule for the sake of rare contingencies is
unpractical and unnecessary."

The remaining objections in which he says there is but a mere modicum of truth
are: (1) that the judge would thereby be put into a more or less partisan attitude
before a jury and would lose some of his essential traits of authority and impar-
tiality; (2) his continuing power as judge would limit the opposing counsel on
cross-examination and restrict his opportunity to expose the truth; (3) his authority
would unfairly impress his testimony upon the jury. He concludes that these are
small problems which arise but infrequently and would be better taken care of by
the judge himself in his own discretion as the occasion arises since he has no interest
or desire to subject himself to these supposed embarrassments. We "... need not
employ the cumbrous weapon of an invariable rule of exclusion to destroy an entire
class of useful and unobjectionable evidence in order to avoid embarrassments which
can easily be dealt with when they arise.”

Undoubtedly, Professor Wigmore's concluding argument is not without con-
siderable weight in the determination of this problem. Yet, it must be borne in
mind that the rule of exclusion contemplated in § 5.03 of the proposed Code of
Evidence for Missouri would probably not prevent a judge from disqualifying him-
self as a judge and taking his place on the witness stand. It would prevent him
from again resuming his former position as judge, however. It is true that in
such a case the trial might be delayed; but, when a desire for expediency conflicts
with a rule designed to prevent possible, if not probable, prejudice and consequent
injustice to one of the parties (which even Wigmore admits does exist) then ex-
pediency, the lesser of the two, should bow to prejudice.

Rule 302 of the Model Code of Evidence provides that the judge or petit juror
in an action may be a witness therein. If the judge testifies concerning a disputed
material matter, he shall not continue as a judge in the action against the objection
of a party not calling him. If § 5.03 of the proposed code is interpreted to mean
that a judge may testify at a trial providing he first disqualifies himself as a judge,
it would not seem to differ very greatly from Rule 302 of the Model Code in that

3. 6 Wigmore, Evidence § 1909, pp. 587, 588 (3d ed. 1940).
4. Id. at 590, 591.
5. 6 Wigmore, Evidence § 1909, p. 592 (3d ed. 1940).
6. Ibid.
The commentary following Rule 302 states that most cases agree with the rule. As noted by the authorities supra, this statement is questionable insofar as the rule allows a judge to leave the bench temporarily, testify as a witness, and then return to the bench. Rather, the weight of authority seems to be that such practice is improper although it may not constitute prejudicial error. However, in some jurisdictions it has been broadly held that a judge is competent as a witness on the trial of a case before him.

Whether § 5.03 as respects judges would change present Missouri law on the subject is uncertain. Under the source notes following the section no cases on this point are cited and none were found by the writer. However, on both principle and authority from text writers and the common law of other jurisdictions, this section would seem to be desirable.

Section 5.03 further provides that "A juror trying a case is disqualified as a witness at such trial with respects to the merits of the action." The common law seems generally to be in opposition to this section, especially in civil actions. Greenleaf in writing on the competency of judges as witnesses, quoted supra, says that "This principle (of exclusion) has not been extended to jurors." American Jurisprudence makes the statement that "It has been held that a juror is not incompetent to testify as a witness solely on account of having been impaneled and sworn in the case, if he is otherwise competent." If a juror possessed any knowledge in respect to the matter in issue as to which he might testify, he must be sworn as a witness and give his testimony openly in court, as other witnesses.

Wigmore cites cases involving objections to this practice which are "... reducible in substance to two; first, that the opposing counsel will be embarrassed by a fear of offending the juror, so that an adequate cross-examination or impeachment would be prevented; and, secondly, that the juror, sitting afterwards as judge of the facts, would be disposed to give excessive weight to his own testimony and in general to treat too favorably the testimony of the side whose partisan he had been made." He says that both of these dangers may be obviated by examination on "voir dire" and exclusion by challenge; that the second is of small importance, since the impartiality of the remaining jurors can be relied upon to counteract the possible bias of the testifying juror and since his bias will extend to only a small portion of the evidentiary matter. He then states that "... it has always been regarded as proper that a juror having any relevant knowledge may be called as a witness, returning to the box after completing his testimony."

9. 5 Jones, Evidence § 2209, p. 4207 (2d ed. 1926), cases cited.
13. 6 Wigmore, Evidence § 1910, p. 594 (3d ed. 1940).
14. Ibid.
The argument of Professor Wigmore that, although there is a possibility that the testifying juror may be biased, eleven other jurors remain to counteract this bias would seem to be of questionable validity. If the constitution provides for twelve jurors and one is possibly, if not probably, biased, how can we say that it is sufficient that the remaining eleven are impartial? The opposing party is unequivocally entitled to twelve jurors—twelve unprejudiced jurors—who will fairly try the facts as presented to them.

His other argument in justification of the rule of competency of jurors also seems questionable. A jury does not consider the evidence piecemeal but in toto. A party has the right to have all the evidence tried by an entirely unbiased jury. If a part of the jury is biased as to part of the evidence, how can we say that this was not sufficient to swing the decision of the jury opposite to what it would otherwise have been? If a bundle of straws, one straw too heavy, is placed upon the back of a camel, how can we say just which one of the straws broke the camel’s back?

The Model Code of Evidence also permits a juror to be a witness and continue as a juror unless the court finds that to do so is likely to prevent a fair consideration of an issue of fact by the jury. This type of rule affords some protection to adverse parties but is open to the obvious objection that, especially in criminal cases within a jurisdiction requiring a twelve man jury with no provision for an alternate, a new trial might be required entailing considerable delay and expense.

As stated above, in general the common law rule is that a juror is a competent witness. However, Missouri does not follow the general rule. In State v. Marshall the Missouri court said: “Of course, after any person was left on the jury to try the case, the court could not then allow him to be sworn as a witness. Whether such person should be a witness or juror must obviously be settled in advance. A trial court should always be very careful not to leave any one on the jury who is incompetent, and certainly not one who knows facts which would make him a material witness.” However, it must be borne in mind that this was a criminal prosecution for violation of a local liquor option law. Prospective jurors had been called as witnesses by the defendant and the defendant objected to having them qualified as jurors under Section 5219, Missouri Revised Statutes, 1909. The court informed the defendant that he could examine them and if found incompetent, they would be excused. But the defendant declined to do so. After they were put on the jury, he wanted two sworn as witnesses. The court refused to do so and this was held not error on appeal. Whether this same rule would be applicable to civil cases is uncertain. Yet, Jones cites this case as authority for the statement that

17. Mo. Rev. Stat. § 4059 (1939), which reads: “No witness in any criminal case shall be sworn as a juror therein if challenged for that cause before he is sworn; and if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court,” is the present revision of Mo. Rev. Stat. § 5219 (1909).
“Even in the absence of statute there is authority to the effect that one may not be both juror and witness in the same trial.”

Jones says further that, “Although there are serious objections to the practice of allowing a juror to be called as a witness and to continue to act as a juror, it has been sanctioned in a few cases, and in several states the subject is regulated by statute. There appear to be very few modern cases on the subject. Although the practice has found some sanction, it is open to so many abuses that it should be legislated against in those states where the court has not the power to deal with it.”

From the language of the Marshall case, it appears that the Missouri court decisions even in the absence of statute and in civil cases would probably be in accord with §-5.03 as respects the competency of a juror as a witness. No Missouri cases directly in point are cited in the source notes following the section and the writer has been unable to find any. This absence, or at least paucity of authority, is indicative of the fact that the matter must generally be determined on “voir dire,” anyway. My conclusion, therefore, is that the rule barring jurors as witnesses is desirable and at least has the salutary effect of making the law certain.

JOHN W. INGLISH

COMPETENCY OF A JUROR IN IMPEACHING A VERDICT

Section 5.03 of the proposed Missouri Evidence Code seeks to make a juror a competent witness for the purpose of impeaching a verdict because of misbehavior on the part of a juror, the jury or another in relation to the jury or juror as such. Concededly, this would alter existing Missouri law and is contrary to the general rule now existing in the majority of other jurisdictions.

In criticizing the present general rule Wigmore says: “The dogma that a juror may not impeach his verdict is, then, in itself neither correct in law nor reasonable in principle; but it has reference to a group of rules deducible from three general and independent principles which must be examined separately.” (1) The principle of privileged communications should apply to petit jurors; (2) the parol evidence rule should apply to verdicts; (3) the rule against self-stultifying testimony bars testimony of this type of jurors. Under the law of privileged communications, the general rule seems to be that no juror can reveal the communications of another juror made during retirement, without the latter’s consent. Since a verdict

18. 5 Jones, Evidence § 2209, p. 4216 (2d ed. 1926).
19. Id. at 4215.

1. “A juror is a qualified witness and the testimony of a juror is competent with respect to the misbehavior of the jury, a juror, or another in relation to the jury or juror as such (1) whether the claimed misbehavior occurred in or without the jury room or at or away from the trial and (2) whether the testimony of the juror tends to impeach or support any verdict rendered.” Missouri Evidence Code (Proposed) § 5.03.
2. 8 Wigmore, Evidence § 2345, p. 664 (3d ed. 1940).
3. Id. § 2346, pp. 664, 665.
is an operative act like a contract, will or judgment, the parol evidence rule applies. Its application to a verdict falls under several heads but the one with which we are most concerned under § 5.03 is the failure to observe those forms of behavior which are essential to the validity of jurors' actions. Self-stultifying testimony, if permitted, would permit a juror by his testimony to prove his own misbehavior. It is argued that this is improper.

In analyzing this problem, one should be cautious not to confuse the general proposition that a juror is incompetent as a witness to impeach a verdict with the isolated rule of privileged communications. Section 5.03 evidently does not seek to take away a juror's privilege entirely, since it applies only to "an overt act of misconduct."

In general, these overt acts of misconduct may be shown to invalidate a verdict without violating either the parol evidence rule or the juror's privilege. But the question remains, by whom may they be shown?

The general common-law rule has been, since the time of Lord Mansfield, that, though these irregularities consisting of overt acts would be sufficient, if proved, to set aside a verdict, a juror cannot testify with respect thereto. Wigmore states that this rule is unsound. Nevertheless, it was so rapidly accepted by courts in this country that most jurisdictions had committed themselves thereto before opinions criticizing the rule, especially those of which the judiciary took notice, were written. One of the foremost of these critical opinions was that of Cole, J. in Wright v. Illinois & Miss. Telegraph Co., in which he set up a judicial rule allowing a juror to impeach a verdict for those acts of misconduct which did not inhere in the verdict itself. Today a few other states have followed that rule.

The reasons for the rule against permitting impeaching evidence are succinctly set forth by Jones in his treatise on Evidence: "(1) Because they would tend to defeat their own solemn acts under oath; (2) Because their admissions would open a door to tamper with jurymen after they have given their verdict; (3) Because they would be the means in the hands of a dissatisfied juror to destroy a verdict at any time after he had assented to it."

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4. "... in truth the rule against impeachment is wholly unrelated to the problem now before us, the limits of the privilege to maintain a confidence inviolate. [citing 5 WIGMORE, EVIDENCE § 2346]. Impeachment may be forbidden though the jurors waive their privilege, and combine with the defeated litigant to make the verdict null. Privilege may be asserted though there is nothing to impeach." Clark v. United States, 289 U. S. 1, 18 (1932).

5. "... in all cases of misconduct other than utterances, what is there to prevent the use of jurors' testimony in proof, as well as any other person's? Nothing, except a curious doctrine of Evidence once and temporarily in vogue, long ago discarded in every other relation, and now here persisting through the sponsorship of Lord Mansfield's great name. ..." 8 WIGMORE, EVIDENCE § 2352, p. 683 (3d ed. 1940).

6. 20 Ia. 195 (1866).

7. Florida, Iowa (perhaps), Kansas, Nebraska (perhaps), North Dakota, Ohio (perhaps), Oregon, Tennessee, Texas and Federal Courts. 8 WIGMORE, EVIDENCE § 2354, p. 690 (3d ed. 1940).

8. 5 JONES, EVIDENCE § 2211, p. 4219 (2d ed. 1926).
In Missouri this general rule of exclusion of the juror's testimony to impeach a verdict has been followed. In *Reick v. Thompson* it was said: "The rule in this state is that a juror will not be heard to impeach the verdict, whether the alleged misconduct occurred inside or outside of the jury room." "The necessity for the stability of judgments is urged as the reason for the unqualified application of the rule in this state, a modification of which it is contended would have the effect of placing the verdict of a jury in the power of a single jurymen." However, in the *Reich* case it was held not improper to receive the testimony of a deputy clerk who overheard the conversation of jurors in the jury room.

In a relatively early case, *Pratte v. Coffman*, the Missouri court after having adopted the rule as a general rule of policy said: "...still we think that cases may arise, particularly when life and liberty are at stake, which may call for a departure from the rule. As, for instance, when the court shall have reason to believe from evidence derived from other sources than the affidavit of the jurors, that there has been such misconduct on their part as to influence their verdict, we see no good reason why the affidavit of a juror might not be received for the purpose of explaining or enlarging such evidence." However, this suggestion was expressly repudiated in *State v. Branstetter*. This involved a trial for murder and the defendant alleged that the verdict had been arrived at by quotient. The court held that such misconduct would invalidate a verdict but that even in a trial involving life or liberty, a juror was not competent to prove the alleged misconduct.

The difficulty present in the *Branstetter* case was recognized in *Thompson v. City of Lamar*. There it was alleged that the verdict was arrived at by division — "a quotient" verdict. The court admitted that these are condemned in Missouri if the jurors have agreed beforehand to be bound by the averaging of the individual estimates of the jurors, and that agreeing to such a verdict amounts to misconduct on the part of the jury. However, this agreement cannot be proven by testimony of any of the jurors but must be proven by testimony aliunde the jurors themselves. Hence, "In general there is therefore no way to prove that a verdict is the result of such an agreement ... ."

The *Model Code of Evidence*, Rule 301, allows a juror to testify with respect to any material matter whenever any act, event or condition is the subject of lawful inquiry (as to which no guide is given) except that no "... evidence shall be received concerning the effect which anything had upon the mind of a juror as

9. 346 Mo. 577, 142 S.W. 2d 486, 492 (1940); Steffen v. Southwestern Bell Telephone Co., 331 Mo. 574, 56 S.W. 2d 47 (1932); State v. Malone, 333 Mo. 594, 62 S.W. 2d 909 (1933).
11. 33 Mo. 71, 78 (1862).
12. 65 Mo. 149, 156 (1877).
13. 322 Mo. 514, 17 S.W. 2d 960, 976 (1929).
14. Sharp v. Kansas City Cable Ry., 114 Mo. 94, 106, 20 S.W. 93, 96 (1892); Sawyer v. Hannibal & St. J. R. R., 37 Mo. 240 (1866) (also condemns a quotient verdict).
tending to cause him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was reached." It is recognized that this would change much existing American law but it was considered by the drafters that such a change would be desirable.25

Unquestionably, § 5.03 would change established Missouri law with respect to the competency of jurors in impeaching a verdict. In determining whether the change is good or bad two aspects of the problem must be considered: (1) If affidavits of jurors are received to impeach their own verdict, it may become difficult to sustain verdicts; (2) on the other hand, since, for instance, a determination by lot can hardly ever be established by other than the jurors' testimony, it becomes a mere pretense to declare a certain irregularity fatal and exclude all practical means of proving it.

Although the question is rather difficult of solution, I would resolve it in favor of the rule as proposed in § 5.03. In the words of the Kansas court: "... it seems to us that the interests of justice will be promoted, and no sound public policy disturbed, if the secrecy of the jury-box is not permitted to be the safe cover for the perpetration of wrongs upon parties litigant. If the jury has been guilty of no misconduct, no harm has been done by permitting their testimony to be received. If the jury has been guilty of misconduct, but such misconduct was not of such a nature as to prejudice the rights of the parties, ... let the verdict stand, and simply punish the offending juror. But if such misconduct has wrought prejudice, not only should the juror be punished, but the verdict also should be set aside."26

JOHN W. INGLISH

JUDICIAL NOTICE—MUNICIPAL ORDINANCES

Section 2.02 of the proposed Missouri Evidence Code providing for discretionary judicial notice, without request, of municipal ordinances and Section 2.03 providing for compulsory judicial notice on request, if certain measures are complied with, is a definite extension of present Missouri law. It seems to be well settled in Missouri that neither trial courts nor appellate courts will take judicial notice of such ordinances except as to boundary ordinances. The ordinance like any other material


1. See Missouri Evidence Code (Proposed), Judicial Notice, §§ 2.01-2.06. Section 2.01 of the proposed code is not herein discussed. It is based upon compulsory judicial notice and in general is a codification of existing Missouri law as to those matters provided for.
2. City of St. Louis v. Pope, 129 S.W. 2d 106 (Mo. App. 1939) (since defendant was tried and convicted for the violation of an ordinance of the City of St. Louis, he was bound to see to it that said ordinance was inserted in the transcript of the record filed in this court on appeal, for neither appellate nor trial courts take judicial notice of city ordinances); Hartley v. McKee, 86 S.W. 2d 359 (Mo. App. 1935) (trial court could not take judicial notice of city ordinance); Robinson v. Ross, 47 S.W. 2d 122 (Mo. App. 1932) (appellate court does not take judicial notice of municipal ordinances, but looks solely to ordinances introduced in evidence).
3. Mo. Rev. Stat. (1939) (boundaries of cities, § 6609 (LXXXI) (second class cities), §§ 7513-7514 (special charter cities), § 7626 (cities over 100,000); see 9 Wigmore, Evidence § 2575 (3d ed. 1940) (Mo. cases noted).
fact, must be pleaded and proved. The Missouri view is in accord with the prevailing view in reference to a court of general jurisdiction. But there is a conflict within the majority view in regard to an action before an appellate court which originated in a municipal court. The majority opinion appears to be that an appellate court may, when trying de novo a case that originated in a municipal court, take judicial notice of ordinances that the municipal court might have. However, upon a review of a municipal court judgment involving only questions of law, the prevailing view is that the reviewing court may not take judicial notice of such ordinances, even though the municipal court might have. Missouri apparently holds contra to the prevailing view in the former situation and adopts the prevailing view in the latter.

The American Law Institute's *Model Code of Evidence* provides for both discretionary judicial notice without request and compulsory judicial notice of ordinances on request. The proposed Missouri Evidence Code, by the sections above mentioned (2.02, 2.03), takes substantially the same view as expressed in the *Model Code*. Section 2.02 of the Missouri Code states that, "Judicial notice may be taken of facts (additional to facts required to be noticed under Section 2.01) without request, when . . . (2) such facts concern the enactment and contents of municipal ordinances, other than boundary ordinances, of Missouri municipal corporations." This is to be contrasted with Rule 802 of the *Model Code* which provides that, "The judge may of his own motion take judicial notice of (a) . . . duly enacted ordinances and regulations of governmental divisions or agencies of this State. . . ." Section 2.03 of the proposed Missouri Code provides, "Judicial notice shall be taken of facts authorized to be judicially noticed under Section 2.02 if a party (1) re-

4. Murray v. Wells, 17 S.W. 2d 613 (Mo. App. 1929) (courts do not take judicial notice of municipal ordinances and their existence and contents must be proven like any other fact).
5. 31 C.J.S. § 27, pp. 540-542 (cases cited); 20 AM. JUR. § 38, p. 62 (cases cited).
6. St. Louis v. Young, 235 Mo. 44, 138 S.W. 5 (1911) (The St. Louis court of criminal correction does not take judicial notice of St. Louis ordinances; and hence, in the absence of an abstract showing that any such ordinances were before that court, their existence cannot be assumed on appeal); St. Louis v. Roche, 128 Mo. 541, 31 S.W. 915 (1895); St. Louis v. Pope, 129 S.W. 2d 106 (Mo. App. 1939); 31 C.J.S. § 27, p. 542; 111 A.L.R. 959-966 (1937).
7. St. Louis v. Ameln, 235 Mo. 669, 139 S.W. 429 (1911) (Courts will not take judicial notice of ordinances and by-laws of villages, towns, and cities); St. Louis v. Bippen, 201 Mo. 528, 100 S.W. 1048 (1907) (Since the court cannot take judicial notice of the ordinances of a city, a contention that an ordinance is void, because in conflict with other unrepealed general ordinances thereof not proven, cannot be considered); St. Louis v. Liesing, 190 Mo. 464, 89 S.W. 611 (1905); Tarkio v. Loyd, 179 Mo. 600, 78 S.W. 797 (1904); Cox v. St. Louis, 11 Mo. 431 (1848).
8. Rule 802.
quests that judicial notice be taken, and (2) furnishes sufficient information to enable the judge, court or tribunal to comply with the request, and (3) has given each adverse party such notice, if any, as the judge, court or tribunal deems necessary to enable the adverse party fairly to prepare to meet the request.” This section is substantially the same as Rule 803 of the Model Code except for a few minor exceptions. In relation to the change under consideration, the Model Code and the proposed Missouri Evidence Code are, for all practical purposes, in accord.

It is, in general, stated that judicial notice will be taken of facts that are so notoriously true as not to be the subject of reasonable dispute or which are easily ascertainable by resort to sources of indisputable accuracy. Does the enactment and content of a municipal ordinance fall within the purview of either? A Wisconsin court expressed its view as follows: “It is difficult to perceive how the legislature can thrust knowledge into the heads of the judges in this way, or what good can come of the enactment, unless parties interested bring the ordinances or copies of them into court, and put them in evidence in the usual way.” It has also been strongly contended that, “It would be a ridiculous extension of the catalogue of those things which a court for good reasons has judicially to know. . . .” That, to a certain extent, these views have a large following is evident by the majority view. The majority, in general, base their holding apparently upon the reasoning that the means to ascertain the ordinances of a particular municipality in effect at any particular time, even without change or amendment, are not reasonably accessible to the courts and frequently not capable of indisputable demonstration. Further, that the number of municipalities in a given state and the number of ordinances, changes, and amendments at a given time, coupled with the purely local sources of the ordinances, forms a definite basis for a valid argument against judicial notice of such ordinances cannot be denied. As stated by a noted writer: “That there is a priori a high degree of probability of the truth of a particular proposition may be a good reason for putting upon the party asserting its untruth the burden of producing credible evidence, or of persuading the trier, of its untruth, but it cannot justify a tribunal in taking judicial notice of its truth.” The writer goes on to say that to “warrant such judicial notice the probability must be so great as to make the truth of the proposition notoriously indisputable among reasonable men.”

11. Pettit v. May, 34 Wis. 666, 674 (1874) (Village charter provided that all courts must take judicial notice of ordinances. However, case was decided on other grounds.).
12. 1 Jones, Evidence § 116 (117) p. 551-554 (1913) (“It would be a ridiculous extension of the catalogue of those things which a court for good reasons has judicially to know, to fasten upon them, and to save municipal bodies the trouble of proving them, official cognizance of such acts. . . . It is sufficiently burdensome upon the court to be required to take cognizance of all acts creating municipal corporations and their powers.”).
It does not seem, however, that the foregoing statements are applicable to judicial notice of municipal ordinances, considering the protective provisions set forth in the proposed Missouri Evidence Code. The code has made adequate provisions for such possible difficulties. Under Section 2.02 (supra) of the proposed Missouri Evidence Code the judge is not required to take judicial notice of municipal ordinances but rather it lies within his discretion. The judge will not do it unless justified by the facts and circumstances and it is convenient to do so. Under this rule the proper source of material must be opened up to the judge, court or tribunal and if there is ground for reasonable dispute, after the source is opened up, the judge, court or tribunal will not take judicial notice of the matter. The material needed in most instances can be brought to the courts attention by "diligence of counsel and conciliatory stipulation, without formal proof under the rules of Evidence." Rule 2.02 does no more than change the Missouri law from "excluded" to "discretionary" relying upon the judiciary for proper administration. It is noted that municipal ordinances have been placed under the section relating to compulsory judicial notice without request. There is no pretense or suggestion that the ordinance should be placed upon the same level as statutes of the State of Missouri. It is readily admitted and is treated in a way recognizing such limitations.

Section 2.03 (supra) makes it compulsory for the court to judicially notice municipal ordinances, but only upon condition that certain measures are complied with which prevent hardship upon the judge or surprise or undue prejudice to the opposing party. The provision makes the compulsory taking of judicial notice dependent upon furnishing the judge, court or tribunal with sufficient information and compels the party requesting application of the doctrine to give the adverse party such notice as the judge deems necessary for the adverse party to prepare to meet the request.

Section 2.02, along with Section 2.03, makes possible both discretionary and compulsory judicial notice of municipal ordinances. However, in each instance, provision is made, as stated above, for the protection of the judge, court, tribunal or opposing party and, at the same time, permitting the judge, court or tribunal to eliminate the introduction of evidence that is not subject to reasonable dispute.

Section 2.04 of the code provides, in effect, that the parties will have an opportunity to be heard as to whether a matter falls within the realm of judicial notice, and, if judicial notice is to be taken, as to the tenor of matter that is noticed. The judge may request the parties to furnish information and may make such investigations himself as he thinks necessary. This information does not constitute evidence and exclusionary rules of evidence (other than privilege rules) do not apply thereto. If, with available information, the matter is shown not clearly to fall within the scope of judicial notice, the parties will be put to their proof.

Section 2.05 provides for instructing the trier of facts as to matters judicially noticed.

15. Missouri Evidence Code (proposed) § 2.01.
Section 2.06 provides that the failure or refusal of the trial judge, court tribunal or review court to take judicial notice at one stage of the proceeding will not preclude later judicial notice of the matter and provides reasonable opportunity for the parties to present information relevant to the taking of judicial notice at this later stage in the proceedings. The rule also provides for review of trial court rulings.

With such guarantees as provided by the foregoing provisions against misapplication of the doctrine of judicial notice there would seem to be no valid reason why municipal ordinances should not be within the proper scope of judicial notice. Wigmore referred to the rules prohibiting judicial notice of municipal ordinances as "technical quiddities" and stated in another part of his work, "The doctrine of Judicial Notice contains the kernel of great possibilities, as yet not used, for improving trial procedure in the courts of to-day."

The desire for simplifying and expediting trials is an important factor to be considered for the extension of judicial notice. Its liberal application based upon the sound judgment of the judiciary would seem desirable.

JAMES F. FORD

THE PHYSICIAN-PATIENT PRIVILEGE

The privilege as to communications between physician and patient did not exist at common law. It was created by statute first in New York in 1828, followed by Missouri in 1835. Subsequently other states adopted this type of statute until all but seventeen states were subdued in the "physician-patient vogue." In the seventeen states that do not provide for this type of privilege, a physician is required to testify as any other competent witness. The statutes and their construction are not harmonious. The pertinent part of the Missouri statute provides: "The following persons shall be incompetent to testify: . . . fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon."

16. 9 Wigmore, Evidence § 2572, p. 553 (3d ed. 1940) ("Of course, these technical quiddities, in the reviewing Court's rulings, refusing to take judicial notice, mean little more than that counsel should have taken care to adduce formal proof of the law or ordinance at the trial below, or at least to have set it forth in the appellate brief.").

17. 9 Wigmore, Evidence § 2583, p. 580 (3d ed. 1940) (Citing Thayer: "The failure to exercise it tends daily to smother trials with technicality and monstrously lengthens them out.").

2. See N. Y. Civil Practice Act (1920) §§ 352, 354 (as subsequently amended).
The Model Code of Evidence published in 1942 by the American Law Institute includes a form of the physician-patient privilege, but places numerous limitations on the privilege that tend to eliminate many of the undesirable effects that are inherent in such a privilege. It is interesting to note that the Reporter, Chief Consultant, and advisers were unanimously opposed to the privilege. The final tentative draft did not include it and it was only during the last period of the drafting that it was adopted, due to the insistence of the lawyers from those states having the privilege. It was included within the Model Code in the belief that the limited form of the privilege would, if adopted, be an improvement in those states having the privilege and could be omitted in those states not having the privilege. Due to the position taken by members of the Institute, it appears that they adopted the privilege, not as an advancement in the field of evidence, but, rather, as a compromise with the recommendation that it be omitted entirely.

The textwriters for the most part vigorously condemn the physician-patient privilege. Their refusal to accept the privilege is, in general, based upon the reasoning that confidentiality from disclosure is not essential to the free exercise of the relation. It is contended that only in rare instances does a person refuse medical aid due to the consideration that the communication might be divulged in future litigation. As a practical matter, the patients will, in most instances, converse freely of their ailments with friends and intimates. Also, in many other situations the affliction is visible and incapable of nondisclosure. Ordinarily, bodily afflictions and disease are not such that, if disclosed they would bring disgrace and humiliation to the patient. But there is a small segment of bodily ailments which, if disclosed, would bring shame and disgrace. It is suggested that, in the final analysis, the privilege is for the protection of the few who have venereal disease and that it would be very meritorious for the legislature to protect these persons, except for the improper effects occurring in the bulk of the cases where the privilege is invoked. The innocent are compelled to bear the burden for the benefit of the few guilty persons. "He who has acquired venereal disease by clandestine liaison has scant claim upon legislative consideration for protection from the shame which he has deliberately invited."

8. See, 8 Wigmore, Evidence § 2380a (3d ed. 1940); 1 Greenleaf, Evidence § 247a (16th ed. 1899).
10. Maine v. Maryland Casualty Co., 172 Wis. 350, 178 N.W. 749 (1920) (Owen, J., diss., "In the last analysis, therefore, this statute must be said to have been enacted to save from shame and disgrace those who by their own acts have forfeited their honor. . . . Taking society as a whole, this statute cheats rather than promotes justice. It suppresses rather than reveals truth."").
11. The law does not permit silence in the abortion cases, See, Mo. Rev. Stat. § 4079 (1939) (no privilege re abortion or attempted abortion); 1 Am. Jur., Abortion § 43.
The physician is most often called to be a witness where the litigation involves personal injury claims, sanity in testamentary litigation or insurance claims. For what purpose may the privilege be invoked other than the suppression of testimony which might "... destroy the false claim of a patient or support a righteous one"? It would seem that sound policy would require the omission of such a rule. What has been the effect in the numerous jurisdictions that have not adopted the privilege? Are the hospitals there less patronized? What proof may reasonably be offered that medical aid is less sought in those states not having the privilege? If a statute were enacted in one of the states establishing the privilege would it be reasonable to assert that there would be a great flow of patients to the physician's office that heretofore would not go? It seems absurd to conclude that a person in need of medical attention would debate whether to consult a doctor since there exists the possibility that the physician may be called as a witness in future litigation. The purported principle behind the doctrine is that the social interest of public health requires it, but what facts may be alleged proving such? On the contrary, due to the injustices inflicted on so many for the protection of so few, it would seem that social interest would require "condemnation" of the privilege.

It is often argued that without the privilege a physician is caught between his legal duty and professional honor, requiring nondisclosure of professional "secrets," and because of this there would be a temptation for the physician to withhold the truth. What of the physicians in the states not affording the patients such a privilege, have they had such difficulty? The very existence of the privilege is conducive to perjury, not on the part of the physician, but on the part of the patient attempting to prove a false claim.

Another reason often advanced for the privilege, and probably the most plausible, is that the employee-patient may be treated by a "company physician" and, stemming from the relationship between the physician and employer, the physician is, consciously or unconsciously, inclined to be favorable in his testimony to the employer. But is not this merely a matter of weight to be afforded the testimony of the physician?

This is not a battle of the professions and the fact that the communications of the attorney and client are privileged is no basis for an argument in support

13. 8 WIGMORE, EVIDENCE § 2380a, p. 814 (3d ed. 1940).
14. WIGMORE, EVIDENCE § 413, p. 408 (Student's Textbook 1935).
17. I GREENLEAF, EVIDENCE § 247a, p. 385 (16th ed. 1899), ("As to the policy of the privilege, and of extending it, there can only be condemnation.").
18. 1836, Commissioners on Revision of the Statutes of New York, III, 737 ("Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversity or concealment of truth, too strong for human resistance.").
of a physician-patient privilege. It should be noted that the attorney-client privilege rests upon a different basis than that of the privilege now under discussion. The attorney is sought "primarily for aid in litigation, actual or expected" and the communications to an attorney would be admissions and, without the privilege, the attorney would become no more than an informer, "while the physician, being called upon only rarely to make disclosures, is not consciously affected in his relation with the patient."20

In 8 Wigmore, Evidence § 2380a (3d ed. 1940), it is stated there are four "fundamental canons which must be satisfied by every privilege for communications." These questions must be asked: "Does the communication originate in confidence? Is the inviolability of that confidence vital to the due attainment of the purposes of the relation of physician and patient? Is the relation one that should be fostered? Is the expected injury to the relation, through disclosure, greater than the expected benefit to justice?" It is stated further that, "A negative answer to any one of these questions would leave the privilege without support," and that all but the third may be justly answered in the negative in regard to the physician and patient privilege.

Section 6.05 of the Missouri Evidence Code (proposed)21 sets forth a modified form of the physician-patient privilege, as contrasted with the present law.22 Part b (6) of this section, in particular, is a definite modification of Missouri law. It provides: "This privilege shall not extend to any information which is transmitted or acquired, as aforesaid, . . . (6) when the patient receives personal injuries (whether or not such personal injuries result in or are followed by the death of the patient) and the patient or other proper person commences a civil action, or asserts a claim in a civil action, to recover damages or a penalty (a) for personal injuries to the patient, (b) for loss of services on account of personal injuries to the patient, or (c) for wrongful death of the patient;—the privilege being nonexistent from and after the commencement of such action or the assertion of such-claim with respect to all information to any and all physicians which is relevant to the issues involved in the action; . . ." The present Missouri law provides that the privilege is not terminated, or waived, until the person23 or physician24 testifies in his behalf as

20. 8 WIGM. EVIDENCE § 2380a, p. 813 (3d ed. 1940).
22. For general principles see, Epstein v. Pennsylvania R. R., 250 Mo. 1, 156 S.W. 699 (1913); Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907); Gartside v. Connecticut Mutual Life Ins. Co., 76 Mo. 446 (1882); 29 Mo. DIGEST, Witness §§ 208-214.
24. Wells v. City of Jefferson, 345 Mo. 239, 132 S.W. 2d 1006, 1010 (1939) (Hyde: "The privilege . . . is personal to the patient (not a privilege of the doctor) and is waived by voluntarily calling the doctor to testify in plaintiff's behalf about his condition, . . . his treatment and what his doctors advised about it; and calling one doctor waives it at least as to all others who treated a plaintiff, in a personal injury suit, after the time of his injury."); 90 A.L.R. 646 (1934) (Waiver of privilege as regards one physician as a waiver as to other physician).
to the claim. Under Section 6.05, part b (6), the privilege would be terminated upon the filing of suit for personal injuries. This section would seem to impose only a reasonable limitation on the privilege, as the filing of suit for personal injuries brings out openly that which the privilege is designed to conceal. What justification may be offered for withholding the truth when the truth is so urgently needed and the purpose of the privilege to conceal has been defeated by the person who now claims it. Our system of jurisprudence is based upon the fundamental concept that we shall seek the truth. Without this section and under the present Missouri law, A may sue B for personal injuries due to B's negligence and, at the same time, withhold, what, in most instances, is the only substantial source of information as to the severity of the injuries—the physician that treated A. Why will the physician's testimony be withheld other than suppression of evidence that would prove the claim false or at least mitigate it?

Rule 6.05 provides many necessary limitations and exceptions to the privilege and, if we are destined to have the privilege in the State of Missouri, then the code provision appears to be an improvement, but, as suggested by the framers of the proposed code, "it would be better to do away with this privilege in its entirety."25

JAMES F. FORD

EXTRA-JUDICIAL CONFESSIONS OF CRIME

Section 3.03 of the proposed Missouri Evidence Code is for the most part merely a codification of the existing Missouri case law relating to confessions made by accused persons to officers or other persons outside of court. It reads as follows:

"Section 3.03. Extra-Judicial Confessions of Crime. Any extra-judicial confession of crime by an accused person, and for which crime the accused person is on trial, or any extra-judicial acknowledgment in express words by the accused that he has done or omitted something the doing or omission of which constitutes the crime for which he is being tried or an essential part of such crime, shall be admissible in evidence against said accused, provided that:

1. the accused was not forced or compelled to make such confession or acknowledgment by
   (a) physical violence to his person or threats thereof; or
   (b) mental suffering, agitation or confusion brought about by unreasonably long and continued questioning or other methods tending to produce fear, fatigue or despair; or

2. the accused was not induced or persuaded by public or law enforcement representatives to make such confession or acknowledgment by promises or assurances that such confession or acknowledgment would benefit him in some manner concerning action to be taken by an authorized public official with references to the charge or the prosecution thereof;

25. Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907) (personal injuries: suit held not a waiver).
3. the accused when making the confession or acknowledgment was conscious and rational and capable of understanding what he said and did;
4. the accused after being taken into custody and prior to or at the time of making a confession or acknowledgment to public or law enforcement representatives
   (a) was not denied, upon request, the right to advice of counsel, and
   (b) was informed before being questioned that any statement that the accused desired to make could be used against him;
5. the corpus delicti has been sufficiently established by proof of corroborating circumstances corresponding with the circumstances related in said confession and acknowledgment except where under extraordinary circumstances, for good cause shown and in the exercise of a sound discretion, the trial judge changes the order of proof."

Lawyers and students of the law, familiar with the general law of evidence in Missouri relating to the introduction of confessions in evidence, will see that the section quoted above primarily is a compilation of the court decisions, and, with the exception of numbered paragraph 4 of the section, makes no changes or additions in the present law. Insofar as it does not change or add to the present law, it represents an advancement in that it does collect and codify the authorities on this point. If for no other reason than that it furnishes a guide for lawyers and law enforcement officials to follow in the taking of confessions and their introduction at trials, the section is worth a great deal. However, paragraph 4 of the sub-section does make a change in the present law. As stated by Mr. Charles L. Carr, Chairman of the Evidence Code Committee of the Missouri Bar in his foreword to the proposed Evidence Code:

"Section 3.03 (page 39) modifies Missouri law by giving an accused person, after being taken into custody and before making a confession, the right, upon request, to the advice of counsel. This Section also requires the public or law enforcement representatives before taking a confession from a person in custody to advise such person that any statement made can be used against him."

It is with paragraph 4 of Section 3.03 of the proposed Evidence Code that this comment will be concerned.

The word modifies, as used by Mr. Carr, apparently understates the effect the proposed paragraph would have on the present Missouri law insofar as right to counsel and to receipt of warning are concerned. The Missouri cases that have been concerned with the admissibility of confessions in evidence have either expressly or impliedly held that it is not necessary, in order to render an otherwise voluntary confession admissible, for an accused person to have counsel prior to or at the time of making the confession; nor is it necessary for the accused to be warned that any statement he makes might be used against him.¹

1. There are many more Missouri cases which more or less directly bear on this point, but the following cited cases, and the authorities referred therein, are a good sampling of the unchanging decisions of the Missouri Supreme Court on these matters down through the years. It has been uniformly held that no warning to an accused person is necessary to render his confession admissible, and it has been
Since Missouri law on the admission of extra-judicial confessions in evidence would be so effectively changed and the problems which prosecutors would face in introducing such confessions at the trials of accused confessors would be greatly multiplied, if this portion of the proposed code is enacted, it is the opinion of this writer that the paragraph in question (paragraph 4 of proposed Section 3.03) would best be omitted from the code, if and when the code is adopted. This opinion is based on the present law in the majority of American jurisdictions, the opinion of the foremost private authority on evidence, and an appreciation of some of the practical problems which confront law enforcement and prosecuting officials.

Before undertaking a brief review of decisions of courts in other jurisdictions on this question, it is to be pointed out that the Model Code of Evidence, adopted and promulgated in 1942 by the American Law Institute, makes no provision for counsel or warning. Indeed, the comment in the Model Code following Rule 505 (Confessions) states, "It has been urged for confessions to a police officer additional limitations should be imposed. Should a confession to a police officer be received only if it was made in the presence of counsel for the accused . . .? [This] would in effect prevent all use of confessions, for counsel would always instruct the accused to remain silent." While no comment is made concerning the matter of warning an accused that what he said may be used against him, it is significant that the Model Code did not include such a provision.

The general rule as to the necessity for counsel and warning seems to be as follows: "In the absence of a statute to the contrary, a voluntary confession is not rendered inadmissible because it was made without accused having been cautioned or warned that it might be used against him; or because he was not advised of his constitutional or legal rights . . . to consult counsel . . . It is not the duty of law enforcing officers, in the absence of a statute, to caution a prisoner. . . ."

uniformly held that the accused's counsel does not have to be present. Herewith, the list of key cases: State v. Jones, 54 Mo. 478 (1874); State v. Guy, 69 Mo. 430 (1879); State v. Phelps, 74 Mo. 128 (1881); State v. Rush, 95 Mo. 199, 8 S.W. 221 (1888); State v. McClain, 137 Mo. 507, 38 S.W. 906 (1897); State v. Shackelford, 148 Mo. 493, 50 S.W. 105 (1899); State v. Northway, 164 Mo. 513, 65 S.W. 331 (1901); State v. Barrington, 198 Mo. 23, 95 S.W. 235 (1906); State v. Robinson, 263 Mo. 318, 172 S.W. 598 (1915); State v. Johnson, 316 Mo. 86, 289 S.W. 235 (1926); State v. Hoskins, 327 Mo. 313, 36 S.W. 2d 909 (1931); State v. McGuire, 327 Mo. 1176, 39 S.W. 2d 523 (1931); State v. Askew, 331 Mo. 684, 56 S.W. 2d 52 (1932); State v. Evans, 345 Mo. 398, 133 S.W. 2d 389 (1939); State v. Pippin, 209 S.W. 2d 132 (Mo. 1948).

2. 22 C.J.S. § 822, at p. 1441. As authority for these statements, cases from the following jurisdictions are cited as being in accord with the majority view: Arizona, Arkansas, California, Colorado, Florida, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, West Virginia, Wisconsin, and United States Circuit Court of Appeals for Illinois. With the exception of Texas cases, no cases are cited as authority for requiring a warning to the accused. For the reason for the Texas cases see note 3, infra.
Texas appears to be the only state where a warning to the accused that any statement he makes may be used against him is required by statute.\(^3\) In other jurisdictions it is uniformly held that a failure to warn the accused does not render an otherwise voluntary confession inadmissible.\(^4\) The same holding is the rule where there is an absence of a statute requiring counsel; an otherwise voluntary confession is admissible even though counsel is not present.\(^5\)

One of the better reasoned arguments for not making the introduction of confessions in evidence more difficult is given by Professor Wigmore in his work on *Evidence*, where he states:

"In the first place, an innocent person is always helped by an early opportunity to tell his whole story; hundreds of suspected persons every day are set free because their story thus told bears the marks of truth. Moreover, and more important, every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested. This psychological truth, well known to all criminal trial judges, seems to be ignored by some Supreme Courts. The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one. And this expedient, if sanctioned, saves the State a delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' solicitations, and comes under the sway of the natural human instinct to struggle to save himself by the aid of all technicalities."

This argument does not suggest that any involuntary confession be admitted, but it does make the reasonable suggestion that when a criminal is ready to make a voluntary confession, it is better not to either scare him out of it by the solemn warning that what he is about to say *will be used against him*, or give him a chance to think better of it by waiting for his lawyer to appear and advise him to keep quiet. The chances are that when a criminal demands a lawyer before he says anything, he is not going to make any sort of voluntary confession anyway.

Apparently, the purpose of adding the two requirements of warning and counsel to Missouri law is a desire on the part of the members of the committee to safeguard the rights of citizens against being forced to make involuntary confessions,

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5. For examples, see: State v. Neubauer, 145 Iowa 337, 124 N.W. 312 (1910); McCleary v. State, 122 Md. 394, 89 Atl. 1100 (1914); State v. Murphy, 87 N.J.L. 515, 94 Atl. 640 (1915); People v. Pongetti, 72 Cal. App. 2d 749, 165 P. 2d 479 (1946).

6. 3 *Wigmore, Evidence* p. 319 (3d ed. 1940).
by increasing the difficulty of obtaining them and of introducing such extra-judicial
confessions in evidence. It is to be admitted that the theory of the burden of the
proof of the crime being on the state is being adhered to by this proposal, and it
would tend to more than protect the rights of accused persons. It is the author's
opinion, however, that the present law makes adequate provision against the in-
vention of involuntary confessions, and that the two new requirements would
not do any more to prevent third degree methods by police. All it would do is make
otherwise voluntary confessions largely unavailable to public prosecutors, or prevent
the obtaining of confessions almost completely.

In the majority of offenses dealt with by law enforcement officials, information
obtained by the questioning of suspects or persons having knowledge of the crime
being investigated either provides the officials with the solution, or greatly aids them
in obtaining the solution thereof. With the proposed requirements in effect, every
person questioned by a law enforcement official would have to be warned against
making a statement, and could demand counsel before making any statement. This
would obviously hinder, delay, and burden criminal investigation to such a degree
that any sort of effective police work, especially in the larger cities, would be almost
impossible.

There is another possibility to be considered. Instead of reducing the prob-
ability of extreme measures on the part of police officials to obtain forced confes-
sions, these additional requirements conceivably could encourage third degree
methods. Since the police would realize that their chances of getting a confession
which would be admitted in evidence would be so greatly lessened, and that they
would have to depend on other evidence for a conviction, they might decide to force
what information they could out of suspects in order to obtain leads which would
guide them to other evidence, and make no mention of statements made by the
accused.

The courts of Missouri have excluded involuntary confessions for many years
now without unnecessarily curtailing the efficiency of police departments and other
law enforcement agencies in the state. There has been a proper balance achieved
between the interests of the individual to be free from police state methods, and the
interest of the state to see that criminals do not go unpunished. It is believed that
this balance would be upset to the detriment of society, if the suggested paragraph
4 of Section 3.03 of the proposed Evidence Code were to become law.

E. S. VAN MATRE

Cross Examination

Section 5.05 of the proposed Missouri Evidence Code reads as follows:

"All witnesses, notwithstanding by whom produced, may be examined and
cross-examined [credited or discredited] by any party and on the entire
case."

1. Missouri Evidence Code (Proposed), as promulgated by the Missouri Bar.
2. Words "credited or discredited" are suggested changes by the Evidence
Code Committee, not officially adopted as yet.
The comments on this section announce that the existing Missouri law is changed, first, by abolishing the prohibition against impeaching one's own witness:

"While parties continue to produce the witnesses that they desire to have testify, such witnesses, in legal effect at least, are no longer the witnesses of a particular party... Thus technical evidence rules as to which party vouches for the witness and as to when a party may or may not impeach the witness, are abolished."

Second, in a criminal case, the defendant and his spouse would be subject to cross-examination on the entire case, rather than be limited to the examination-in-chief.

The apparent revolutionary nature of this section in its effect on Missouri law becomes less obvious upon close examination of the existing law. Section 1891 of the Missouri Revised Statutes (1939) allows cross-examination on the entire case except where a defendant in a criminal case is testifying in his own behalf. Furthermore, though it is the general rule that a party may not cross-examine his own witness, there are a number of exceptions recognized by our courts which make the general rule at least questionable. It has been held that a trial court, within its discretion, may allow a party to cross-examine his own witness and to ask him leading questions. Despite this broad language, the cases indicate that the exercise of discretion is held within the bounds of established precedent. Where a witness' interest is adverse or is hostile to the party presenting him, it is held to be a valid exercise of discretion to permit such party to cross-examine the witness. This rule, too, is subject to limitations as pointed out in the case of Hughes v. Patriotic Insurance Co. of America:

"The rule is that before a party may be allowed to impeach his own witness, he must not only have been actually surprised by the testimony of such witness, but in addition the testimony must have been affirmatively favorable to the opposite party, and hostile and prejudicial to the party calling the witness, so as to have produced a situation amounting to an entrapment." (Italics supplied.)

The court may, also, allow a party to proceed by cross-examination of his own witness in order to refresh his recollection. A party may contradict the testimony

3. Section 1891: "A party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness (except where a defendant in a criminal case is testifying in his own behalf) on the entire case..."

5. State ex rel. Mutual Benefit Health & Accident Ass'n. v. Hughes, 351 Mo. 1081, 174 S.W. 2d 859 (1943); McNeill v. Fidelity & Casualty Co., 336 Mo. 1142, 82 S.W. 2d 582 (1935); State v. Kinnamon, 314 Mo. 662, 285 S.W. 62 (1926); State v. Church, 199 Mo. 605, 98 S.W. 16 (1906).
7. 193 S.W. 2d 958, 959 (Mo. App. 1946).
of one of his witnesses by the testimony of another witness. Though this is not technically cross-examination, the writer submits that it has the same effect of discrediting the testimony of the first witness. However, in the case of Talley v. Richart the Missouri Supreme Court seeks to distinguish contradiction from impeachment in the following manner:

"Such rule [permitting contradiction] does not violate the general rule that one may not impeach his own witness because to contradict is not to impeach. . . . Impeachment is directed to the credibility of the witness for the purpose of discrediting him. It ordinarily furnishes no factual evidence. Contradiction, on the other hand, is directed to the accuracy of testimony and supplies additional factual evidence to be considered along with such testimony."

There is no doubt that the general rule which prohibits one from cross-examining one's own witness does give rise to technical and confusing rules as to when a witness' testimony becomes testimony for one or the other party. For example, a defendant may cross-examine a plaintiff's witness as to subjects other than those brought out in examination-in-chief, but as to those other subjects he is the witness of the defendant, not of the plaintiff. Further, if the defendant calls a witness already presented by the plaintiff, his testimony becomes the evidence of the defendant, and the plaintiff may cross-examine such witness. By considering each witness as a witness of the court, this confusion would be eliminated.

It is already established that a party may restore the credit of his witness by way of rehabilitation after such witness has been impeached on cross-examination. This is accomplished by introducing a statement made by such witness which tends to negative the contradictory impeaching statement, provided that the rehabilitating statement was first uttered prior to the impeaching statement. However, one may not introduce evidence to prove the general reputation for truth and veracity of the witness, and the statements must be directed toward the controverted testimony.

The point is made that under proposed Section 5.05, the witness becomes the witness of the court. Although it has been said that a witness called for by either party is his witness as noted supra, the trial court exercises a good deal of control over the examination of such witness, and affords protection to him. A party has an absolute right to cross-examine a witness, but is is within the discretion of

10. 353 Mo. 912, 185 S.W. 2d 23, 26 (1945).
11. Ayers v. Wabash R. Co., 190 Mo. 228, 88 S.W. 608 (1905).
the trial court to limit and control the scope and extent of such examination.\(^7\) The trial judge has the further power to call witnesses or to examine and cross-examine witnesses, himself, both in civil and in criminal cases,\(^8\) so long as he does so within such bounds as control attorneys in similar examinations.\(^9\) However, the judge must not exhibit any prejudice against any party or witness so as to influence the jury.\(^9\)

Under the present Missouri law, a defendant in a criminal action or his spouse who testifies is afforded more protection than an ordinary witness. Section 4081 of the Missouri Revised Statutes (1939) provides:

"... no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case. . . ."

The courts have not interpreted the limitation on the scope of the cross-examination strictly, saying that the cross-examination need not be confined to a mere categorical review of the matters stated in the direct examination, but the same may be employed as a means to test the truth of the evidence given in such direct examination.\(^{21}\) Further, in *State v. Shipman*, the court stated:\(^{22}\)

"A defendant may be cross-examined concerning prior convictions notwithstanding he was not interrogated on that point during his examination in chief."

The statute was stretched even further when it was held that a prosecuting attorney may comment on the failure of a defendant, who took the stand on his own behalf, to deny certain statements which the prosecutor had averred were made by him.\(^{23}\) Thus, with these in-roads on the statutory scope of cross-examination, the courts, themselves, have done a great deal to liberalize the rule.

A brief recitation of the applicable rules in various other jurisdictions will serve to sketch in the background for the writer's comment upon the proposed section. Since space is too limited to give a complete picture, the reader is referred

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17. Menke v. Rovin, 352 Mo. 826, 180 S.W. 2d 24 (1944); Roach v. Kansas City Public Service Co., 141 S.W. 2d 800 (Mo. 1940); State v. Murphy, 338 Mo. 291, 90 S.W. 2d 103 (1936); Gardner v. St. Louis Union Trust Co., 85 S.W. 2d 86 (Mo. 1935); Kelso v. W. A. Ross Construction Co., 337 Mo. 202, 85 S.W. 2d 527 (1935); State v. Wagner, 311 Mo. 391, 279 S.W. 23 (1936); Heier v. Funsch, 61 S.W. 2d 253 (Mo. App. 1933).

18. Fitzjohn v. St. Louis Transit Co., 183 Mo. 74, 81 S.W. 907 (1904); State v. Lockett, 168 Mo. 460, 68 S.W. 563 (1902); State v. Pagels, 92 Mo. 300, 4 S.W. 931 (1887); Townsend v. Joplin, 139 Mo. App. 394 (1909).


21. State v. Keener, 225 Mo. 488, 125 S.W. 747 (1910); State v. Myers, 221 Mo. 598, 121 S.W. 131 (1909).


23. State v. Graves, 352 Mo. 1102, 182 S.W. 2d 46 (1944); State v. Larkin, 250 Mo. 218, 157 S.W. 600, 46 L.R.A. (N.S.) 13 (1913); State v. Testerman, 68 Mo. 408 (1878).
to Wigmore on *Evidence*, 3d edition, Volume III, for a more complete summary and compilation of cases. Wigmore states: 24

"... the rule has been long established, and is in its general validity never to-day questioned, that the party on whose behalf a witness appears cannot himself impeach that witness in certain ways."

An exception to this rule allows the introduction of self-contradicting statements by a party to impeach his own witness subject to the following rules in the various jurisdictions. The majority of courts admit such evidence after a showing that the party has been "surprised," or "entrapped," or "misled" by the witness. Some courts admit the evidence in any shape; others reject it absolutely in every shape. Still others exclude self-contradiction if offered by extrinsic testimony, but allow it if brought out by a questioning of the witness himself. Some exclude all use of self-contradictory statements as such, but allow a witness himself to be questioned about the former statement purely for the ostensible purpose of stimulating his recollection and inducing him to make a correction. Others exclude outside evidence and allow only the question to be put *primarily* to *stimulate* recollection, but do not object to *incidental discrediting* which may ensue. Still others permit the question to be put *primarily* to *refresh* recollection, or *frankly to discredit*, and allow outside testimony to be offered in case the witness proves hostile. 25

The general rule in the United States is that one may contradict testimony of one witness by testimony of another witness presented by the same party. 26 These cases reason that in absence of such a rule one could not prove the facts of his case if the first witness called were to testify untruly. It has further been held that counsel without offering witnesses may argue that his own witness is in error. 27

Necessary witnesses, i.e., one called by compulsion of law, may be impeached by the person presenting him in some jurisdiction, by statements of self-contradiction, and by other means in a few. Examples of such instances are calling an attesting witness to prove up a will, 28 presenting a witness under a criminal statute which requires the state to produce all material witnesses. 29

The scope of the cross-examination varies considerably in the various jurisdictions, and the distinction made in Missouri between the ordinary witness and the defendant or his spouse in a criminal action is apparently not usually observed. In England and in many states in the United States, one may cross-examine as to any matter material in the action including the credibility of any witness. 30 The major-

24. 3 WIGMORE, EVIDENCE § 896 (3d ed. 1940).
25. Id. § 905.
26. Id. § 907 (cases compiled in n. 7).
27. Schmidt v. Durnam, 50 Minn. 96, 52 N.W. 277 (1892).
30. AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rule 105, comment to clause "h".
ity of states follow some form of the so called "Federal Rule," which rule is that a witness may not be cross-examined on facts not brought out in direct examination. Of these states, the majority complies strictly with the rule; a large minority and the federal courts follow the rule, but allow the trial court within its discretion to increase the scope of the cross-examination; and a small minority permits the cross-examination to extend to other matters which limit, qualify or explain the facts, or inferences brought out on the direct examination.  

The pertinence of the present Missouri statutes and decisions referred to above is more than to serve as a background for and comparison with proposed Section 5.05. Since by the proposed section, witnesses would be statutorily recognized as witnesses of the court, the court may base the exercise of its discretion in protection, examination, and cross-examination of the witness on the decisions reviewed above.

There is little doubt in the writer's mind that the proposed section is desirable, not only from the standpoint that it is already partially in effect, but in that it is founded on good sense. The basis for the rule that one may not impeach his own witness is a purely historical one not today apropos. Centuries ago, it was the function of a witness to take an oath that the party presenting him was telling the truth. Hence, the court holds today that a party presenting a witness vouches for his veracity. Nothing could be more absurd. The lawyer presenting a witness very rarely has an opportunity to investigate such witness' truth telling reputation. Furthermore, a witness may be presented simply because he is the only one who has knowledge of the incident. Wigmore suggests that the true basis of the rule is that if the party presenting a witness were allowed to impeach him, "the terrors of the witness box would be doubled," and it would be difficult to get witnesses to appear. "But, after all, it is a reason of trifling practical weight. It cannot appreciably affect an honest and reputable witness." The very fact that there exist so many exceptions to the general rule that one may not impeach his own witness attributes to the good sense of the courts in recognizing that it has lost its applicability in specific instances, at least. As for the defendant or his spouse being examined on the entire case, it has been noted above that the tendency of the Missouri decisions is to allow just that under the existing statute. Furthermore, Section 5.10 of the proposed code, discussed infra, adequately protects such defendant's rights. Section 5.05 simply recognizes that the vestige of an archaic rule of evidence serves no useful purpose, and, in fact, works contrary to justice.

NEDWYN R. NELKIN  

31. 6 WIGMORE, EVIDENCE § 1885 (3d ed. 1940); Federal Rules of Civil Procedure, Rule 43 (b).
32. 3 WIGMORE, EVIDENCE § 899 (3d ed. 1940).
Section 5.10 of the proposed code deals with impeachment and rehabilitation. Only those pertinent parts of the section which deal with proposed changes in the existing law will be dealt with herein.

First, where written statements contrary to a witness' testimony are used to impeach that witness, it is proposed:

"... such statements, if in writing, need not be shown or read to him except when it is desired to introduce the statement in evidence upon the identification of the witness himself."

Missouri, at present, seems to follow the so called "Queens Rule," laid down in The Queen's Case in 1820 by the House of Lords.1 The rule requires that when a witness is to be asked on cross-examination as to the terms of a document written or signed by him, the document must be at that time shown or read aloud to him, before he can be asked as to its contents. It has been held that, where the witness is allowed to see his signature on the paper only and not the contents, it is error to allow such paper to be introduced for the purpose of impeachment.2 The basis for the objection in one case was that the witness be allowed to see such writing to determine whether it had been changed or altered.3 Even where the witness is asked to read the paper aloud to the jury, it has been held that the counsel for the party presenting such witness has a right to inspect such paper, but he may waive that right by failing to object to such reading.4 In the latter case, an objectionable reference was made in the writing to the existence of an insurance policy. The case of Couch v. St. Louis Public Service Co. may present an exception to the existing rule.5 It was there announced that the rule is well established that:

"... a transcript which is to be employed in the cross-examination of a witness need not be first submitted for the witness' approval before the witness may be interrogated regarding its contents."

However, it must be noted that, not only was this a transcript, a statement under oath, but the witness referred to was the plaintiff in the case and such statement would constitute an admission.

Wherever the question has been passed upon in the United States, the "Queens Rule" has been followed,6 though the rule was condemned in England by the bar and repudiated by statute in 1854.7 Wigmore deplores the rule as misguided, and a frustration to effective cross-examination.8 Be that as it may, the Missouri cases

1. 2 B. & B. 284 (1820).
5. 173 S.W. 2d 617, 622 (Mo. App. 1943).
6. 4 Wigmore, Evidence § 1263 (3d ed. 1940).
7. St. 17 & 18 Vict., c. 125, § 24 (1854).
8. 4 Wigmore, Evidence § 1259 (3d ed. 1940).
referred to above supply two good reasons for the retention of the rule. It allows
the witness to determine whether there have been any erasures, and, under
the Missouri form of the rule, the opposing counsel has an opportunity to prevent the
inadvertent admission of otherwise objectionable evidence.

Second, this proposed section embodies safeguards for the accused in a crim-
ipal case who appears as a witness. Under the present Missouri law, merely by
taking the stand he subjects himself to impeachment by evidence of his traits for
truthfulness and veracity as that reflects on his credibility as a witness. The
proposed section would make it a condition precedent to such impeachment that
the accused first offer character and reputation evidence to support his credibility
as a witness. This proposal may be considered the natural culmination of the
development of Missouri law on this subject. Originally, it was held that an accused
might be impeached as a witness by evidence that his general reputation for morality
was bad—the so called “morality rule.” Without specifically abrogating this rule,
the courts tended to hold that if such evidence would reflect upon the guilt or
innocence of such witness as the accused, then it was inadmissible. Finally, the
“morality rule” was specifically overruled.

The majority of the other jurisdictions follow the present Missouri law, while
some still stick to the “morality rule.” When an accused takes the stand, he
places himself in the double position of defendant and witness. Though, under the
present Missouri and majority rules, his character as a defendant may not be at-
tacked if he does not first offer evidence to support such character, his character
as a witness may be impeached as to his truth and veracity. If he is impeached as
a witness, he will undoubtedly be prejudiced as the accused. The proposed section
takes cognizance of this and permits the defendant as a witness to exercise the same
option he has as the accused. Thus, a just balance is reached between permitting
the accused to testify and allowing his credibility as a witness to be impeached. Of
necessity, this provision reverses the present Missouri and general rule that as a
witness the accused may not offer his good character until he is impeached and then
only as to his truth and veracity.

If the accused does put his credibility as a witness in issue, he is further pro-
tected by the proposed section in that no previous convictions of crimes may be
used to impeach him unless they involve untruthfulness or false statement. Such

9. State v. Ferguson, 353 Mo. 46, 182 S.W. 2d 38 (1944); State v. Williams,
337 Mo. 884, 87 S.W. 2d 175 (1935).
10. State v. Scott, 332 Mo. 255, 58 S.W. 2d 275 (1933) (announces rule, but
deplores its existence).
Scott, note 10 supra).
12. State v. Williams, note 9 supra (Ellison, in an excellent opinion, reviews
the entire history of the rule in Missouri).
13. WIGMORE, EVIDENCE § 2277 (3d ed. 1940).
15. State v. Fogg, 206 Mo. 696, 105 S.W. 618 (1907); see note 13 supra.
16. There is a proposed amendment to change the words “false statement” to
“dishonesty.” The effect of such change might be to broaden the proposed rule.
convictions could be shown on cross-examination, or by the introduction of extrinsic evidence. Protection in the proposed rule is extended to all witnesses. The existing Missouri statute which has been interpreted to apply to a defendant taking the stand in his own behalf in a criminal case, reads as follows:

"Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer."

With the exception of convictions for violations of city ordinances, which may not be introduced, the decisions allow almost any type of crime to impeach a witness. It matters not whether it was a felony or misdemeanor, or whether it involved truthfulness and veracity. There seem to exist three rules in other jurisdictions, but it must be noted that the decisions within a single jurisdiction may be inconsistent in themselves. Most jurisdictions allow the conviction of any offense to be used for impeachment purposes. Others allow only those crimes indicating lack of veracity, while still others allow offenses formerly treated as disqualifying one entirely as a witness. The apparent reason for the present Missouri and majority rule is that any crime involves immorality, and, therefore, tends to impeach the truth telling desire of the witness. This rule and reason prevails though the so called "morality rule" has been abolished. Therefore, its retention is both inconsistent and illogical. It is difficult to see how a conviction for assault and battery has anything to do with credibility as a witness.

Third, the proposed section changes the present Missouri rule regarding impeachment of a witness by collateral specific instances of misconduct. Under the existing rule a witness may be impeached by asking him on cross-examination of his past misconduct which, though collateral to the issues in the case, serves to reflect on his credibility as a witness. Considerable latitude is allowed in eliciting these collateral matters, but such matters should not be allowed to distract the attention of the jurors from the issues upon which they must decide, or prejudice them against either party. The party asking about these collateral instances of misconduct is bound by the witness' answer, and, unless his testimony would be material to the

17. State v. Alexander, 315 Mo. 199, 285 S.W. 984 (1926); State v. White, 299 Mo. 599, 254 S.W. 724 (1923); State v. Taylor, 266 S.W. 1017 (Mo. App. 1924).
22. 3 WIGMORE, EVIDENCE § 980 (3d ed. 1940); Id. § 987 (cases compiled in note).
23. Note 20 supra; Asadorian Rug Co. v. Chandeysson, 144 S.W. 2d 199 (Mo. App. 1940).
25. Bellovich v. Griese, 100 S.W. 2d 261 (Mo. 1936).
26. State v. Hayes, 356 Mo. 1033, 204 S.W. 2d 723 (1947); note 20 supra.
issues, the party may not offer other witnesses to contradict such answer.27 This limitation would be removed by the proposed section. A party cross-examining a witness, other than an accused in a criminal case, as to collateral instances of misconduct would not be bound by such witness' answer, but might offer extrinsic evidence. The trial court could exclude such collateral evidence, "if such evidence would necessitate an undue consumption of time, would cause a confusion of issues, or would result in an unfair surprise of an adverse party."

The general rule in other jurisdictions is that particular acts of misconduct of a witness used to impeach him are not provable by extrinsic testimony.28 Wigmore states the reasons behind the exclusion of such evidence are that such evidence would confuse the issues, and that its introduction would unfairly surprise the party presenting the witness.29 These reasons are embodied in the exceptions to the proposed rule as quoted above. Therefore, if, in fact the admission of such extrinsic evidence would give rise to the evils suggested by Wigmore, the trial court could exclude such evidence. It is suggested that the proposed rule would be employed more frequently to impeach parties as witnesses than witnesses other than parties. In this connection, it should be noted that an accused on trial appearing as a witness is excluded from the application of the rule, except as to his past convictions, and hence the general policy of Section 5.10 to protect such party is carried through.

An alternative amendment to proposed Section 5.10 has been suggested (but not adopted as yet) which would change the present Missouri rule that prior contrary and consistent rehabilitating statements of a witness, relating to the merits, constitute impeaching evidence only. The exceptions to the existing rule are where the statements were made under oath and subject to cross-examination, and where they were made by a party to a particular lawsuit. In such instances, the testimony constitutes substantial evidence. These exceptions would be broadened under the proposed amendment to allow all such statements admitted as substantial evidence if they related to the merits.

Nedwyn R. Nelkin

**Expert and Opinion Evidence**

Decisions as to the admissibility of opinion evidence in the courts of the United States are very confused and inconsistently applied. This rule has frequently been condemned and criticized as one of the most impractical, abused, and misunderstood rules in the law of evidence. It is a product of the American jury system and is not found on the continent. According to Wigmore,3 the opinion rule in America is merely the logical technical development of a misunderstood term, and will eventually in substance disappear from our law. The more liberal

27. State v. Thompson, 338 Mo. 897, 92 S.W. 2d 892 (1936).
28. 3 Wigmore, Evidence § 979 (3d ed. 1940).
29. Ibid.
1. 7 Wigmore, Evidence § 1929 (3d ed. 1940).
courts have already done away with it to a large extent, and most of the modern evidence codes propose to do the same.

As pointed out by Wigmore in his treatise on Evidence,2 the present application and construction of the opinion rule is considerably changed from its original and proper application. This rule is based on the idea that the witness' testimony must be based on facts or personal knowledge and not be mere guesswork, conjecture or speculation. This is neither a new principle nor an independent "opinion rule," but merely a recognition that a witness to be competent must have personal knowledge. Section 10.01 (a) of the proposed Missouri Evidence Code3 is merely a restatement of this basic concept and is a codification of the almost universal law concerning testimonial qualifications of witnesses. It does not change the present Missouri law on this subject.4

From this background came the modern exclusionary opinion evidence rule which in substance is this: Where the facts observed can be exactly and fully reproduced by the witness so that the jury can equally well draw any inference from them, the witness' opinion is excluded.5 For the most part, at least until comparatively recently, this rule was strictly followed, and opinion evidence was allowed in only a very few cases. The practical aspect of this rule, that in a vast number of cases it is impossible for a witness or observer to state the data and impressions which influenced his opinion so that another could form as accurate an opinion from the narration as can the witness, came to be realized by more and more courts. With the more liberal courts leading the way, opinion evidence of the lay witness was admitted in the case of many subjects from which it had been previously excluded. However, the majority of courts still apply this rule illiberally and inconsistently, and in most jurisdictions there is a great need for clarification and liberalization of this particular rule of evidence.

The reasons most commonly offered by the courts for excluding opinion is that to permit the witness to give his opinion would usurp the function or invade the province of the jury. However, a close study of the history of this rule and the authorities6 will show that the real reason behind the rule is the exclusion of superfluous testimony. It is designed to limit the witness to the presentation of those matters upon which the jury is qualified to pass judgment. The so-called

2. 7 WIGMORE, EVIDENCE § 1917.
3. "Section 10.01. Opinion Evidence, Basic Rule: When Excluded or Admitted. a. Testimony which is 'mere opinion' in the sense that it is based on speculation, guesswork or conjecture, and not based upon a witness' own observation (what he has perceived) or upon his own special knowledge, skill, experience or training, is not admissible."
4. Masonic Home of Missouri v. Windsor, 338 Mo. 877, 92 S.W. 2d 713 (1936); Scanlon v. Kansas City, 325 Mo. 125, 28 S.W. 2d 84 (1930); McCreey v. United Rys. Co., 221 Mo. 18, 120 S.W. 24 (1909); Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 S.W. 48 (1907); Nelson Mfg. Co. v. Mitchell, 38 Mo. App. 321 (1889).
5. 1 GREENLEAF, EVIDENCE §§ 441 b (16th ed. 1899); 7 WIGMORE, EVIDENCE §§ 1917, 1918.
6. Supra note 5.
exception to the rule, admission of the opinion of the expert, is allowed because the jury is not qualified to pass judgment and the opinion of the expert is helpful to the jury. So really admission of expert testimony is not an exception to, but merely a necessary extension of, the opinion rule.

Missouri courts early recognized the opinion rule in its strictest sense—that witnesses must state facts and not opinions. However, it was gradually recognized that opinion evidence was admissible when the matter is one which witnesses of ordinary intelligence can understand, and their conclusions or deductions are based on facts not capable of being properly or accurately described. At first this modification was rather limited in its application, but gradually admission of opinions of lay witnesses was extended to include a great variety of subjects.

The later more liberal Missouri decisions recognize the real basis for the opinion rule—that opinions are not excluded because they are harmful or dangerous, but because they are superfluous and unnecessarily impede the judicial processes. Section 10.01 (b) (1) of the proposed Missouri Evidence Code is merely a restatement and codification of these liberal decisions permitting the use of opinion evidence where it is necessary or helpful to the jury or fact finder.

As pointed out above, the courts early recognized the necessity for the admission of the testimony of experts in the form of opinions. This was brought about by the practical consideration that the expert is much better equipped than the layman in connection with certain matters involving scientific learning, knowledge peculiar to certain trades and professions, or unusual experience to understand the significance of certain evidence dealing therewith and its relation to the factual issues. This became increasingly evident as civilization progressed and society

7. Wetherell v. Patterson, 31 Mo. 458 (1862); Sparr v. Wellman, 11 Mo. 230 (1847).
9. Robertson v. Wabash, St. L. & P. Ry., 84 Mo. 119 (1884) (ability to see); Lindsay v. Kansas City, 195 Mo. 166, 95 S.W. 273 (1906) (bodily condition); Southern Iron & Equipment Co. v. Smith, 257 Mo. 226, 165 S.W. 804 (1914) (nature and condition of objects; Hartman v. Fleming, 264 S.W. 873 (Mo. 1924) (rate of speed); State ex rel. Higgins v. Stanton, 220 Mo. App. 919, 296 S.W. 190 (1927) (value of personal property); and many others.
11. Section 10.01:
   “b. A witness’ own observation (what he has perceived) or his own special knowledge, skill, experience, or training may be testified to in the form of inferences (opinions) providing such inferences (opinions) will materially assist the trier of fact in the determination of the matters in issue:
   1. In the case of a witness’ own observation (what he has perceived) if the nature of the subject matter or data observed by the witness is such that it cannot be adequately and accurately communicated to the trier of fact by merely detailing the data, then the witness may use in testifying whatever logical and relevant inferences (opinions) there are arising from such data as are necessary to communicate adequately the perceived data to the trier of fact.”
became more complex, specialized, and complicated. Many tests have been advanced by the courts to determine when expert testimony should be allowed, but the only one which can be used with accuracy is the one underlying the opinion evidence rule as suggested by Wigmore: "On this subject can a jury from this person receive appreciable help?" There has been much less confusion and inconsistency in the application of this rule than in the case of the opinion evidence rule relating to laymen. In most jurisdictions, including Missouri, expert opinions are receivable when the trier of fact has not the special knowledge, skill, experience, or training to comprehend the matter in issue; and the qualifications of the expert is left to the discretion of the trial court. Except for the last sentence, sub-paragraph 2, paragraph b of Section 10.0114 of the proposed Missouri Evidence Code merely restates existing Missouri law. The sentence referred to makes the use of the hypothetical optional instead of mandatory in getting the opinion of the expert. This is a change in present Missouri law.

If an expert has personally observed the facts upon which he bases his opinion, then it is unnecessary to phrase the question in hypothetical form; in fact, this requirement would be detrimental, since the expert could draw a more accurate conclusion from personal observation than from second-hand narration. In the case of an expert who has not personally observed the facts on which his opinion is based, the required method is to incorporate in a hypothetical question all the facts upon which the expert is expected to base his opinion. This is the general rule in this country today, although it has been criticized by many as being subject to great abuse. Being permitted to use as few facts as he desires a lawyer can, by concealment of some and emphasis of other facts, mislead the jury; the opinion of the witness will be remembered by the jury, but the realization that it was based on only part of the facts will be forgotten. Also, as a practical matter, it is difficult to erase the impression of the expert’s first opinion from a juror’s mind even by subsequent cross-examination of the witness. To remedy these evils Missouri14 and

12. 7 Wigmore, Evidence § 1923.
14. Section 10.01 (b):
   "2. In the case of a witness possessing special knowledge, skill, experience or training (the expert), if the nature of the subject matter in issue is such that the trier of fact could not comprehend it because of a lack of special knowledge, skill, experience or training, then a witness, properly qualified in the trial court’s discretion, may testify in terms of inferences (opinions), and this whether the data on which he bases his opinion have been observed by him or stated to him, or both. It is not mandatory that a hypothetical question be propounded to an expert in order to permit him to give his opinion."
15. It is not mandatory that a hypothetical question be propounded to an expert in order to permit him to give his opinion.
a few other states require the hypothetical question to contain all undisputed facts material to the issue. While this is an improvement, it is also undesirable in that it tends to increase greatly the disputes as to sufficiency of the hypothesis, and too often results in questions so lengthy and unwieldy as to be meaningless to the jury.

In theory the hypothetical question was a logical device to enable a jury intelligently to apply the expert's special knowledge to the facts of the case. It has failed completely in practice, however, and become an obstruction to justice rather than an aid. Its use has been severely criticized by both legal writers and judges.\(^\text{17}\) Several remedies have been suggested to eliminate these evils, but the one generally advocated is that advanced by Wigmore\(^\text{18}\) and exemplified by the American Law Institute Model Code of Evidence:\(^\text{19}\) Dispense with the requirement of using the hypothetical form, and accord the proponent the option of using it at the discretion of the trial court; and permit the opposing party on cross-examination to call for hypothetical specification of the data on which the expert based his opinion. The proposed Missouri Evidence Code differs in one respect from this. It does not give the trial judge discretion as to the use of the hypothetical, and, in this respect, the Missouri code seems inferior to the American Law Institute Model Code and Wigmore's suggestion. Granted that in some cases the hypothetical may be the clearest and best way to obtain the experts opinion, it seems that the disinterested trial judge would be a better judge of its need and use than the partisan counsel of one of the parties. If the judge had this discretion he could in all cases prevent abuse by use of the hypothetical, and, at the same time, permit its use when desirable and of benefit in helping the jury adopt the expert's opinion to the facts of the case.

Section 10.01 of the proposed Missouri Evidence Code for the most part is like Rule 4.01 of the American Law Institute Model Code of Evidence. It does differ in one important aspect: The Model Code, Rule 4.01, leaves the admission of opinion testimony entirely to the discretion of the trial judge. In the proposed Missouri code, in conformity with the more conservative Missouri law, certain so-called "dangerous" or misleading types of opinion evidence, such as lay opinions on handwritings and unsoundness of mind, are recognized and made the subject of more restrictive exclusionary rules in Section 10.04 (1) (2).

Except for paragraph 2, Section 10.04 is merely a restatement of the Missouri law dealing with limitations on the use and reception of opinion evidence. The framers evidently thought that the American Law Institute Model Code of Evidence was too radical in giving the trial judge such wide discretion as to the admission of opinion evidence, and so inserted in the proposed Missouri code certain limitations

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17. 2 Wigmore, Evidence § 686; Judge Learned Hand, New York Bar Association Lectures on Legal Topics (1921-1922); Morgan, Foreword to Model Code of Evidence, p. 25.
18. 2 Wigmore, Evidence § 686.
to conform with the well established Missouri law. The first limitation is imposed upon lay witness opinions as to unsoundness of mind and is contained in paragraph 1.\footnote{20} This paragraph, in conformance with Missouri cases,\footnote{21} requires the witness in such cases to (a) detail facts upon which he bases his opinion, and (b) detail the length and nature of his acquaintanceship with the person observed.

Paragraph 2 of Section 10.04\footnote{22} embodies the only change in Missouri law to be found in this section. This paragraph deals with lay witness testimony as to genuineness of a handwriting in issue. The general rule in this country is that opinion evidence is admissible to prove handwriting, and a person is qualified to testify to such when he has seen the person whose handwriting is in question write, has become familiar with such person's handwriting, or is an expert in the subject of handwriting; and, according to the modern rule, comparison of disputed writing with the standards produced in court may be made by witnesses, or by the court and jury.\footnote{23} The first part of this rule, that one is qualified to give an opinion on hand-

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\footnote{20} "Section 10.04. Limitations on the Use and Reception of Opinion Evidence. Generally, a witness, if permitted to give an opinion by the foregoing sections, may do so without preliminary examination or without restriction as to the form of the opinion. The following limitations (though not exclusive) are noted, however:

1. Before a lay witness will be permitted to give his opinion that a person is or was of unsound mind, the witness must:
   (a) Detail some of the significant facts or data upon which he bases his opinion, which facts and data must be within his own knowledge and inconsistent with sanity, and
   (b) Detail the length and nature of his acquaintanceship with the person observed.

The sufficiency of this preliminary foundation is within the discretion of the trial judge."

\footnote{21} Heinbach v. Heinbach, \textit{supra} note 8; Kaechelen v. Barringer, 19 S.W. 2d 1033 (1929); Fields v. Luck, 335 Mo. 765, 74 S.W. 2d 35 (1934); Lee v. Ullery, 346 Mo. 236, 140 S.W. 2d 5 (1940).

\footnote{22} Section 10.04:

"2. A lay witness will not be permitted to testify to the genuineness or non-genuineness of a handwriting in issue by comparison unless a visual comparison is made with another writing in evidence (which may be introduced for such purpose) which other writing has been either admitted, or proved to the satisfaction of the trial judge to be genuine, except that such comparison with another writing in evidence shall not be necessary when
   (a) the trial judge is satisfied that there are no such other genuine writings reasonably available for comparison, or
   (b) the witness is testifying either to the genuineness or non-genuineness of handwriting claimed to be his own handwriting or to the genuineness or non-genuineness of handwriting claimed to be that of another person which the witness is claimed to have witnessed, acknowledged or attested, or
   (c) the proof of the disputed handwriting is only collaterally in issue, is a mere formal matter, is involved in a default proceeding, is otherwise authorized by a particular statute, or is permitted by agreement or waiver of parties."

writing if he has seen the person write or is familiar with his handwriting, developed early before the evolution of the science of handwritings and was a direct result of the judge's distrust of so-called handwriting experts. Since the development of this science, it is generally recognized that the testimony of experts as to handwriting is much more reliable than that of lay witnesses. Experiments have proved this beyond a doubt.24 The pertinent provisions of paragraph 2 require that there must be a visual comparison with a genuine writing by a lay witness before he can testify as to the genuineness of a handwriting in issue unless there is no genuine handwriting available for comparison; or the witness is testifying either to genuineness of his own handwriting or handwriting of a person claimed to have been witnessed, acknowledged, or attested by him. This rule is intended to eliminate the Missouri rule,25 in accord with the general United States rule, allowing lay witness opinion as to handwriting to be based on seeing the person write or being familiar with his writing, except in cases where there can be no comparison, and so no other way of proof. Thus this very unreliable and antiquated method of identification is abolished in most cases, giving way to the more reliable methods mentioned above.

Other paragraphs of Section 10.04 do nothing more than state present Missouri law concerning expert witnesses and hypothetical questions and neither add to nor change Missouri evidence rules concerning such.

As has been pointed out previously, the necessity for the admission of expert testimony in the form of opinions was early recognized. As civilization advanced and life became more and more complex this need for expert opinion greatly increased. Today the necessity for expert opinion testimony is almost universally recognized, but the method by which it is utilized in our judicial system makes it often a detriment rather than an aid to the jury or trier of fact in determining the issues. There is a long recognized need for reform in this aspect of judicial administration.

In this country, including Missouri, we have the adversary system of trial in which opposing parties, not the judge, have the responsibility for, and initiative in, finding and presenting proof. One of the main disadvantages of this system, in its present application, is the procurement and presentation of expert testimony. Under this system the experts are selected by the adversary parties and then give their opinions either from observed data or from testimony and facts presented in the form of a hypothetical question. Very often this produces diametrically opposed opinions of two experts, each testifying for one of the parties to the suit. There are several objections to the present system the most important of which are set out below:

(1) Experience has shown that flatly contradictory testimony can be obtained in almost every case.

(2) The jury very often is incapable of understanding the highly technical questions and answers and are confused rather than helped by conflicting opinions given by supposedly equally skilled experts.

(3) Expert witnesses are necessarily biased in favor of the side they represent and their testimony is usually very partisan.

(4) The choice of the witnesses by the parties results in use of not the best expert but the “best witness,” the one who will give the most favorable opinion for his side.

These weaknesses and objections have been at least partially overcome by Section 10.05 of the proposed Missouri Evidence Code, as will be discussed below.

Some states by statute and others by decision have recognized the right of the court to call expert witnesses, but this has in most cases been a limited right, and seldom exercised by the judges. The proposed Missouri code Section 10.05

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27. State v. Horne, 171 N.C. 787, 88 S.E. 433 (1916); Fullerton v. Fordyce, 144 Mo. 519, 44 S.W. 1053 (1897); 2 Wigmore, Evidence § 563.


"a. Appointment of Experts by Court, When.—Whenever, in a civil or criminal proceeding, issues arise upon which expert evidence is desirable and admissible to assist the trier of fact, the court during trial (either on its own motion or on the request of any party) or prior to trial (on its own motion) may, or prior to trial on the request of any party shall, appoint one or more experts, not exceeding three on each issue, to make examinations and inspection of the person or subject matter involved and to testify as to their findings, and opinions [See note 29, infra.]. Experts appointed by the court shall be permitted access to the persons, things or places under investigation for the purpose of examination and inspection.

"b. Notice, When. Agreement of Parties.—The appointment of experts by the court prior to the trial shall be made only after reasonable notice to the parties in the proceeding of the names and addresses of the experts proposed for appointment. Before appointing such experts the court shall seek to bring the parties to an agreement as to the experts desired and if the parties agree, the experts so selected shall be appointed.

"c. Written Reports of Experts. Furnished to Court and Parties.—Each expert appointed by the court under this section shall prepare a written report under oath upon the subject he has examined and inspected setting forth not only the findings of the expert, but also his opinions thereon [See note 29, infra.]. The experts appointed under this section may make either joint or separate examinations and inspections, may confer with each other and two or more of such experts may unite in a joint written report under oath if they are in accord with respect to their findings and opinions [See note 29, infra.]. The court and each party shall be furnished with a copy of said written report or reports as soon as practicable after the examination and inspection and prior to the time that the expert testifies with respect thereto.

"d. Experts as Witnesses. Written Reports Admissible.—The court or any party may call as a witness any expert appointed by the court. The fact that he was appointed and designated by the court, or agreed to by the parties, may be made known to the jury (in a jury trial) by the
closely follows the Uniform Expert Testimony Act. It provides that in any case the court upon its own motion, or upon request of any party may, after notice, appoint up to three experts on each issue to make examinations and inspection of the matter involved and testify as to their findings and opinions. It also provides that, if the parties agree upon an expert, he shall be appointed by the court. An important concession is made to the established method of party selection of experts, by allowing them to call experts of their own. It is further provided that the witness may make known the fact he was appointed by the court or agreed to by the parties. These provisions should go a long way toward eliminating the witness and he shall be subject to examination and cross-examination by any party on his qualifications and the subject of his testimony. Any party to the proceedings may also call other expert witnesses. The written report of an expert witness, furnished to the court and to the parties, may be read in evidence as a part of the testimony of the expert, subject to the same objections as to the admissibility if offered as oral testimony by the witness. An expert witness may be asked to state his inferences (his findings, and opinions) whether based on the witness’ personal observation, on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the questions the data on which such inferences are based but an expert witness may be required either on direct or cross-examination to specify the data on which his inferences are based.

Compensation of Expert Witnesses. Court Costs.—The compensation of expert witnesses appointed by the court under this section shall be fixed by the court at a reasonable amount. In a civil proceeding the compensation of expert witnesses as fixed by the court shall be borne initially (1) by the party requesting same unless the parties agree on such experts in which latter event such compensation shall be borne initially in equal amounts by the parties, or (2) by the county if the expert be appointed on the court’s own initiative unless the parties agree on such experts in which latter event such compensation shall be borne initially in equal amounts by the parties; but such compensation shall be taxed finally as costs against the losing party to the litigation. The payment of compensation by the parties on behalf of expert witnesses as herein provided shall be made to the clerk of the court who, in turn, shall make payment to the expert witnesses. In a criminal proceeding the compensation of experts as fixed by the court shall be borne by the county in which the court is held and paid through the clerk of the court but in the event of the conviction of the defendant such compensation paid shall be taxed as costs against such defendant unless the court permitted the defendant to defend or obtain such testimony as a poor person. The receipt by any witness appointed by the court under this section of any compensation other than as fixed by the court hereunder, and the payment of, or the offer or promise by any person to pay such other compensation, shall be unlawful. The fee of an expert witness called by a party or appointed by the court other than under this section shall be paid by the party calling or seeking the appointment of such expert, shall not be taxed as costs and shall be disclosed if requested upon examination or cross-examination of the witness.”

This paragraph as originally proposed read “findings, conclusions, and opinions”; it has been thought best to delete “conclusions.” Section 10.05 (a), supra note 28.

Section 10.05, a, b, supra note 28.

Supra note 29.
evils of the hired partisan expert witness. This clearly gives the judge power to appoint his own experts and would encourage and bolster timid judges in their appointment whenever the expert would be of help. The fact that the jury may be told that the expert is court appointed, and so presumably non-partisan, should result in the jury’s giving his testimony decisive weight. This and the added expense of employing a private expert will make it likely that the parties will very seldom avail themselves of their right to have their own expert. However it does stand as a safeguard against unqualified or incompetent experts who might be appointed as political handouts, or against arbitrary or mistaken opinions of the court’s witness.

Another serious objection to the use of a court-appointed expert is that in some cases he will not have the opportunities of informing himself about the case that would be available to the partisan expert. Paragraph (a) partially meets this objection by providing that experts appointed by the court shall be permitted access to the persons, things, or places under investigation for the purpose of examination and inspection. However there is no provision for the examination of privileged material and it probably will be exempt.

While the use of court-appointed expert witnesses will tend to exclude contradictory testimony and the highly partisan expert, it is equally important that a better, more efficient, less contentious method of presentation be adopted. Otherwise the use of complicated hypothetical questions and involved and technical direct and cross-examination in interrogation of the witness may nullify his usefulness entirely. In many cases a well-planned scientific investigation and report can greatly reduce the need for contested trials. To eliminate this evil, the proposed Missouri code provides that each expert shall make such examination and investigation as is necessary and that, before he testifies, he shall submit to the court and to each party a sworn written report of his findings and opinions31a thereon. It also provides that the experts may confer with each other and make separate or joint examinations, inspections, and reports if they are in accord.32 This may often result in a complete agreement which may settle the issue for the parties or at least confine the controversy to practical limits. In addition, at the trial, the written report of an expert witness, furnished to the court and to the parties, may be read as part of his testimony, and he may be cross-examined thereon. As previously stated and discussed, this code makes use of the hypothetical question optional rather than mandatory,33 thus eliminating another objection to the present day practice in regard to expert testimony.

The final paragraph34 of Section 10.05 deals with the fixing of fees of the expert witness which is of great practical importance. After providing that compensation shall be fixed by the court at a reasonable amount, the code distinguishes between

31a. Section 10.05, c, supra note 28.
32. Section 10.05, d, supra note 28.
33. Section 10.05, c, supra note 28.
34. Section 10.05, e, supra note 28.
civil and criminal cases. In civil cases the expert's compensation shall be borne
(1) by the party requesting same, or by both parties equally if the parties agree
on the expert, or (2) by the county if appointed on the court's own initiative
unless the parties agree on such expert, then equally by them; but such compensa-
tion shall be taxed finally as costs against the losing party. In a criminal proceeding
the county pays, but, if defendant is convicted, it is taxed as costs against him.
The compensation of any expert called by the party shall be borne by that party
and must be disclosed, if requested.

This provision of the code is aimed at one of the worst causes of partisan wit-
nesses, the fact that one of the parties is compensating him. This provision protects
the impartiality of the court's expert by stipulating that his fees shall be fixed
by the court and prohibiting the payment to him of additional compensation.

The proposed Missouri Evidence Code follows the Uniform Expert Testimony
Act rather than the longer more involved procedure of the American Law Institute
Model Code. Though the drafters of the Missouri code preferred the shorter,
simpler provisions of the Uniform Act, the American Law Institute Code Rule 403[35]
sets up more rigid standards of fairness for the appointment of experts. Since the
success of court appointed experts depends upon their competence and impar-
tiality, this would seem to be a prime consideration. Also, Rule 405[36] provides
more aid to the court's expert in examination and inspection of subjects of his
testimony, by giving the court power to require all experts, including those who
are partisan, to file reports or to confer with the court's experts and, "if practicable,"
to unite in a written report.

The rules under Article X of the proposed Missouri Evidence Code attack the
public's principal grounds for dissatisfaction with the court's handling of expert
testimony. But the adoption of these rules alone will not abolish all of the existing
evils or bring the Missouri courts up to date in this regard, even if the rules are
freely used. There are still many valid objections to the judicial administration of
expert testimony. Many of the inherent difficulties in this regard spring from the
unsuitability of the jury (usually composed of twelve laymen who are required
to reach a unanimous verdict) as a tribunal for evaluating specialized and scientific
data, and the poor employment by the courts of the resources of technicians and
scientists.

Many solutions to this problem have been suggested, some of which appear

35. AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE, Rule 403 (1942).
36. AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE, Rule 405 (1942).
37. Beuscher, The Use of Experts by The Courts, 54 HARV. L. REV. 1105
(1941). (1) Revive the special or struck jury selected from groups with experience
in matters involved in the case. (2) Extend to other non-jury cases the practice
adopted in British and limited American admiralty practice—use of experts as
assessors to sit with the judge and help him interpret and evaluate technical testi-
mony. (3) Permit freer intervention in civil actions by public administrative
agencies so they may aid the court with their special experience involving their own
rules and decisions. (4) Expand the use of experts as referees to hear evidence
and report not as witnesses but as agents of the courts.

Learned Hand, Historical and Practical Consideration Regarding Expert Testi-
to go much further than codes such as these in bringing this phase of the law up to date. Let one thing remain clear, however. Although such a code as this is a long and welcome step forward, there is still much room for improvement. If the judiciary is to perform its function, it must change and progress to meet changing conditions of our complex, rapidly changing civilization. This code should be only a beginning in the greater utilization of expert testimony, not the ultimate. The Bar and courts of Missouri should strive continually for improvement in this phase of judicial administration.

GENE S. MARTIN

STATEMENTS OF A MENTAL OR PHYSICAL CONDITION

Section 11.03 of the proposed Missouri Evidence Code provides that statements (self-serving or otherwise) of a person of his then present internal or subjective mental or physical condition, when such condition is in issue, or when such condition is explanatory of acts or conduct then in issue, are admissible in evidence. Included in this are "statements of intent, plan, motive, design, state of mind, physical or mental feeling or sensation or lack of same, and bodily health." Subsection c reserves to the trial judge, when he reasonably believes the statements to be untrustworthy, the right to exclude this evidence.

This section deals with one exception to the hearsay rule of evidence, statements of mental or physical condition; however, many courts, including Missouri, have attempted to divide this exception into four points. First, the Missouri courts have said there are two types of statements, self-serving and non-self-serving. This classification has been further broken down into statements of physical condition and statements of mental condition. Under the current Missouri decisions self-serving hearsay statements of a present physical condition are admissible. Also

mony, 15 HARV. L. REV. 40 (1902). Allow the court, in addition to experts summoned by both sides, to summon experts of its own who should review the whole testimony and evidence of the experts called by the litigants and let this decision be either final or merely additional evidence for the jury to decide.

1. Baumhoer v. McLaughlin, 205 S.W. 2d 274 (Mo. 1947). A physician may give in evidence the declarations of a patient as to the present existing pain or malady, but statements with respect to past physical conditions are hearsay and inadmissible. Evans v. Missouri Pac. R. R., 342 Mo. 420, 116 S.W. 2d 8 (1937); Schulz v. St. Louis-S. F. Ry., 319 Mo. 8, 4 S.W. 2d 762 (1928); Gladney v. Mutual Life Ins. Co. of New York, 186 S.W. 2d 538 (Mo. 1945). Likewise statements of present physical condition made to non-expert, admissible. McMahon v. United Rys. Co. of St. Louis, 203 S.W. 500 (Mo. 1918); Lindsay v. Kansas City, 195 Mo. 166, 93 S.W. 273 (1906); McHugh v. St. Louis Transit Co., 190 Mo. 85, 88 S.W. 853 (1905). If these statements are "made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not on that account rejected." 1 GREENLEAF, EVIDENCE § 162 b, p. 255 (16th ed. 1899). A few states such as Massachusetts use the distinction between professional and non-professional to enlarge this exception to the hearsay rule and to admit statements of past suffering if made to a physician. Roosa v. Boston Loan Co., 132 Mass. 439 (1882).
non-self-serving statements of a present physical condition are admissible on the theory that they are statements against interest.\(^2\) Non-self-serving statements of a mental condition are admitted,\(^3\) but self-serving hearsay statements of a mental condition are excluded.\(^4\) A change to permit in evidence this last type of hearsay has been incorporated into the code in order to remove this unhappy inconsistency.

The breaking down of this broad doctrine in Missouri has been apparently caused by a misunderstanding by the courts of the fundamental principle of this exception. Justice Gray tersely summed up this principle by saying:

"A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written."\(^5\)

Wigmore states the same principle in these words:

"... the judicial doctrine has been that there is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition."\(^6\)

The American Law Institute in its *Model Code of Evidence* made admissible such evidence of a mental or physical condition giving the following statement as a reason for the rule.

"A declaration of a presently existing subjective condition has some quality of spontaneity and is probably more likely to accord with the fact than a recollection of the same condition as later given expression... in an action. This is the theory of the common law rule and is accepted herein."\(^7\)

It is apparent, once this fundamental principle is understood, that to break this theory into several parts, accepting some and refusing others is a poor way to approach the problem. It makes an otherwise simple problem complex, and so thoroughly muddles the existing law that a full understanding is often overly difficult for lawyers and judges alike. The Missouri courts, realizing the unfairness and contradiction in this state of the law at times allowed such evidence to be

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2. Wills v. Berberich's Delivery Co., 339 Mo. 856, 98 S.W. 2d 569 (1936).
4. State v. Gadwood, 116 S.W. 2d 42 (Mo. 1937). Self-serving statements, not a part of res gestae, of intent to avoid trouble held inadmissible. But see 6 Wigmore, *Evidence* p. 101 (3d ed. 1940). State v. Harris, 334 Mo. 38, 64 S.W. 2d 256 (1933); State v. Perkins, 92 S.W. 2d 634 (Mo. 1936), and a long line of decisions banning self-serving declarations, 9 West's Missouri Digest, Criminal Law, Key 413, p. 213.
7. American Law Institute, *Model Code of Evidence*, Rule 513, p. 266 (1942). In the leading case of Aveson v. Kinnaird, 6 East 188, 102 Eng. Rep. 1238 (1805), decided by Lord Ellenborough, the Court of Kings Bench held such statements admissible, saying such utterances "must be resorted to from the very nature of the thing."
admitted by erroneously treating the statements as part of the res gestae.\textsuperscript{8} This is clearly a weak and poorly reasoned method of admitting this evidence, and it is to remove the necessity for such fictions and contradictions that this section has been proposed.

Professor Wigmore shows all of the weaknesses and fallacies of the present state of the Missouri law as follows:

"... it is further suggested that at any rate the accused, if guilty, \textit{may} have falsely uttered these sentiments in order to furnish in advance evidence to exonerate him from a contemplated crime. But here the singular fallacy is committed of taking the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty; in other words, the fundamental idea of the Presumption of Innocence is repudiated. We elaborate this presumption in painful and quibbling detail; we expend upon it pages of judicial rhetoric; we further maintain, with sentimental excess, the privilege against self-crimination; in short, we exhaust the resources of reasoning and strain the principles of common sense to protect an accused person against an assumption of guilt until proof is irresistible; and yet, at the present point, we throw these fixed principles to the winds and make this presumption of guilt in the most violent form. Because (we say) this accused person \textit{might} be guilty and therefore \textit{might} have contrived these false utterances, therefore we shall exclude them, although without this assumption they indicate feelings wholly inconsistent with guilt, and although, if he is innocent, their exclusion is a cruel deprivation of a most natural and effective sort of evidence. To hold that every expression of hatred, malice, and bravado is to be received, while no expression of fear, good-will, friendship, or the like, can be considered, is to exhibit ourselves the victims of a narrow whimsicality, which might be expected in the tribunal of a Jeffreys, going down from London to Taunton with his list of intended victims already in his pocket, or on a bench 'condemning to order,' as Zola said of Dreyfus' military judges. But it was not to have been anticipated in a legal system which makes so showy a parade of the presumption of innocence and the rights of the accused.—This question-begging fallacy about 'making evidence for himself' runs through much of the judicial treatment. There is no reason why a declaration of an existing state of mind, if it would be admissible against the accused, should not also be admissible in his favor, except so far as the circumstances indicate plainly a motive to deceive."\textsuperscript{9}

This provision of the proposed code is, in the writer's opinion, removing a weak and poorly reasoned conception from the law of Missouri, and replacing it with a modern and liberal rule that will do much to make the law of evidence in Missouri truly a vehicle of justice.

\textit{Jeremiah Nixon}

\textsuperscript{8} Edwards v. Ethyl Gasoline Corp., 112 S.W. 2d 555 (Mo. 1937); Koonse v. Missouri Pac. R. R., 18 S.W. 2d 467 (Mo. 1929); State v. Young, 119 Mo. 495, 24 S.W. 1038 (1894). Murder action: Statement of accused almost a month before homicide of intention to go to father's home to get clothes; rebutting secrecy of visit. Held admissible; court erroneously treated as part of res gestae.

\textsuperscript{9} 6 Wigmore, \textit{Evidence} p. 102 (3d ed. 1940), cited with approval in Worth v. Worth, 48 Wyo. 441, 49 P. 2d 649 (1935).
MISSOURI LAW REVIEW

STATEMENTS AND REPUTATION CONCERNING POSSESSION AND BOUNDARIES

Section 11.05 of the proposed Missouri Evidence Code allows statements concerning possession and boundaries to be admitted, not only when the declarant is dead, as under present Missouri law, but also when the declarant is insane or otherwise unavailable as a witness.

The basis for the general exception to the hearsay rule which admitted this type of evidence is clearly stated by Parker, C. J. in Smith v. Powers. It is true that the decisions in England seem to restrict the evidence of the declarations of deceased persons respecting boundaries to what the deceased said relative to the public opinion respecting the boundary. But the testimony has not been limited in this country the declarations of a person deceased, who appeared to have had means of knowledge, and no interest in making the declarations, are competent evidence upon a question of boundary, even in a case of a private right.

American Jurisprudence sums up the reason as follows: "This, like other exceptions to the hearsay-evidence rule, is based upon the uncertainty, confusion, and indistinctiveness generally of private boundaries in the United States."

And Wigmore says: "The principle of Necessity was found in the usual lack of other sufficient evidence for proving boundaries. The perishable nature of the landmarks, and the incompleteness of the records, rendered it necessary to resort to

1. Ejectment; particular statements of private boundaries, rather than reputation, admissible by person in possession or shown to have knowledge. Lemmon v. Hartsook, 80 Mo. 13 (1883). However, in England the courts have refused to allow such evidence of private boundaries, restricting the rule to boundaries of general or public interest; as the boundaries of manors; Doe v. Thomas, 14 East 323, 104 Eng. Rep. 625 (1811). See also Earl of Dunraven v. Llewellyn, 15 Q. B. 791, 117 Eng. Rep. 657 (1850). But see McKelvey, Evidence §§ 270-272, p. 486 (5th ed. 1944), where the author explains that, although there were no manors in America, there was ownership of large tracts. These tracts were divided and subdivided until the single original boundary became of common interest to many people. "Under these circumstances, the courts showed an inclination to extend the exception to questions of private boundary." Norton v. Kowazek, 193 S.W. 556 (Mo. 1917), ejectment, and quiet title; declaration in deed showing whether predecessor claimed title admissible. Such declarations are never admissible to show title, but simply to show possession where there is a dispute between owners of adjoining lands as to the boundary line. Heynbrock v. Hormann, 256 Mo. 21, 164 S.W. 547 (1914), to show a claim of adverse possession to indicate the extent of the declarant's claim. Akins v. Adams, 256 Mo. 2, 164 S.W. 603 (1914); Willis v. Robinson, 237 S.W. 1030 (Mo. 1922), showing a lack of distinction between public and private boundaries. Jordan v. Parsons, 199 S.W. 2d 881 (Mo. 1947); St. Louis Public Schools v. Risley's Heirs, 40 Mo. 356 (1867); Young v. Kansas City, Ft. S. & M. R. R., 39 Mo. App. 52 (1890).

2. 15 N. H. 546 (1884). However a few states follow the peculiar Massachusetts rule that further provides that the declarant must have been on the land and engaged in pointing out the boundaries mentioned. Also the declarant must have been in possession of the land as owner. 1 Greenleaf, Evidence § 140a, p. 229 (16th ed. 1899); 5 Wigmore, Evidence § 1567, p. 425 (3d ed. 1940).

such statements, oral or written, as could be had from deceased persons having competent knowledge. Though the changed conditions of life in the later history of our communities have greatly diminished this necessity, it sufficed in the beginning to establish the exception in the law."

In the foregoing statements the existing law of Missouri and the weight of judicial authority of the United States and England have been summed up. This authority limits the rule to hearsay statements made by one who is now deceased. In fact, all of the cases demand that the declarant be deceased. "... it was never required that the absence of other satisfactory evidence should in a given case be shown. That absence being assumed to be a general feature commonly existing, the only requirement was that the decease of the specific person whose declarations were offered should be shown."

In the proposed Missouri Code of Evidence, Section 11.05 extends this exception to situations when the declarant is "insane or otherwise unavailable."

On its face this proposal appears as a liberal and proper extension of this principle; however, upon a closer examination one great weakness appears; there is little or no judicial authority upon which to base this principle. While it is true that there is a smattering of text authority on this subject, it is not as conclusive as many writers appear to think. For instance, Wigmore's code of evidence is cited in support of this principle; however, Mr. Wigmore plainly states in a footnote that there is no judicial authority for this principle (Wigmore's code was written in 1915). Then in 1940, in the third edition of his work on Evidence, Wigmore states clearly and unequivocally:

"It would seem, however, that insanity or absence from the jurisdiction, would not here suffice (as it does for some other exception to the hearsay rule); because the necessity in general is predicated of [sic] titles and boundaries of long standing, for which the lapse of time has operated to destroy other evidence; and hence if the matter is one of the present generation or if the evidence in question comes from the present generation (as it would if the declarant were merely absent), this necessity could hardly be presumed to exist."

4. 5 WIGMORE, EVIDENCE § 1567, p. 424 (3d ed. 1940) and many cases cited there.
5. 5 WIGMORE, EVIDENCE § 1567, p. 424 (3d ed. 1940). In the footnote Wigmore says, "This is mentioned in all the cases."
6. City of Hartford v. Maslen, 76 Conn. 599, 57 Atl. 740 (1904). This case extended the rule to admission of statements of deceased or unavailable witnesses, citing 1 GREENLEAF, EVIDENCE §§ 128-130 (13th ed. 1876). However, in this citation Greenleaf limited the rule to deceased persons.
7. WIGMORE'S CODE OF EVIDENCE, Rule 144, p. 243 (1915). "Statements about Private Boundaries. A statement as to the location of a boundary of private land, by a disinterested person, is admissible; subject to the following provisions: Art. 1... The declarant must be deceased, (out of the jurisdiction, or otherwise unavailable)." Wigmore says there is no authority for this.
8. 5 WIGMORE, EVIDENCE § 1567, p. 424 (3d ed. 1940). Mr. McKelvey also says "Where specific declarations are offered, it must clearly appear that the declarant is dead, before they will be received." McKELVEY, EVIDENCE § 273, p. 490 (5th ed. 1944). It should be borne in mind that Wigmore was the author of 1
It appears that between 1915 and 1940 Mr. Wigmore changed his mind concerning the admissibility of such evidence. Why? It is this writer's opinion that it became apparent to Mr. Wigmore that the reason there were no cases concerning this problem was because the "evidence came from the present generation" and therefore the necessity to let it in did not exist.

The Model Code of Evidence of the American Law Institute cannot be considered as authority on this point since it simply "does away with the hearsay rule and its exceptions which have developed over the years based on experience and authorizes the introduction of hearsay evidence . . . without any real limitation."9

The Chairman of the Evidence Code Committee of the Missouri Bar, Mr. Charles L. Carr, states in the Foreword to the Proposed Code:

"The Missouri Code is conservative, based on Missouri decisions and present day Missouri Law except in those few instances where it is recognized (italics added) that a given rule should be modified or changed to render the evidence rules more efficient or to advance the administration of justice."10

This writer believes that there is no recognized necessity for this change, that there is neither judicial nor text authority of sufficient weight upon which to base it, and that this modification does not meet the general requirement as to the necessity for change as laid down by the Chairman of the Committee on Evidence and therefore should not be incorporated into law. It would be better to let the courts decide this point if such a case should ever arise, on the merits of that case, rather than to bind the court now on a rule that is at best based primarily on abstract considerations.

JEREMIAH NIXON

STATEMENTS AND REPUTATION CONCERNING FAMILY HISTORY AND PEDIGREE

Through this provision evidence of hearsay statements, regardless of the character of the action in which introduced2 will be admitted even though the person making the statement is not related to the declarant by blood or marriage. If the declarant is "so intimately associated with such other person, or his family, as to be likely to know the facts stated" then the statements will be admitted.

The common law rule required that the declarant be related to the family

GREENLEAF, EVIDENCE, 16th ed., and that in his 1940 work Wigmore apparently changed his mind on his former statements in Greenleaf, where he said, "... the declarant must be deceased; though perhaps other cases of non-availability would be recognized." GREENLEAF, supra note 2, p. 228.

10. Supra note 9.

1. Gordon v. Metropolitan Life Ins. Co., 176 S.W. 2d 506 (Mo. 1943). This case removed an earlier conflict in the law in Missouri as to whether hearsay evidence concerning pedigree was admissible in a case where that was not the primary issue. This conflict was caused by State v. Marshall, 137 Mo. 463, 36 S.W. 619 (1896) and Rauch v. Metz, 212 S.W. 357 (Mo. 1919).
by blood or marriage, but it is not essential that the declarant belong to the same branch of the family as the person to whom the declaration relates; nor does the precise degree of relation have to be made out, if some relationship is shown. This rule demanding the declarant be related to the family about which he speaks is a requirement primarily based on a desire to be reasonably sure that the declarant knows what he is talking about, and the statement is true, or as Mansfield, C. J. said:

"General rights are naturally talked of in the neighbourhood; and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true." 

In the famous and now classical words of Lord Eldon he states the reason in this way:

"Declarations in the family, descriptions in Wills . . . monuments . . . Bibles . . . Registry Books, all are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth."

Wigmore says:

"The circumstantial indication of trustworthiness has been found in the probability that the 'natural effusions' (to use Lord Eldon's often-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy, and should be given weight by the judges and juries, as they are in the ordinary affairs of life."

These citations seem to clearly indicate that the thing the courts are most demanding of in this sort of evidence is some basis upon which to find that the evidence is trustworthy. In making this rule (common law and present Missouri) they have placed a rigid requirement in the path of a true test of dependability. To explain; suppose statements of X, a second cousin to B are offered concerning some family affair which X had heard discussed briefly at some previous time. His testimony would be admitted. However, suppose statements of Y, a family servant of many years is offered; it would be refused automatically even though Y

2. Vantine v. Butler, 240 Mo. 521, 144 S.W. 807 (1912); Osmak v. American Car & Foundry Co., 328 Mo. 159, 40 S.W. 2d 714 (1931); In re Imboden's Estate, 111 Mo. App. 220, 86 S.W. 263 (1905); Smith v. Patterson, 95 Mo. 525, 8 S.W. 567 (1888) (inscription on a tombstone showing date of death). The headnote in Vantine v. Butler, supra, sums the elements of this rule as follows, "In order that the declarations of a person since deceased may be admissible to prove pedigree, it must appear that the statement was made ante litem motam, that the declarant is dead, and that some proof independent of the statement itself has been offered that the declarant was related to the family to which the declaration related." Shrewsbury Peerage Case, 7 H.L.C. 1, 11 Eng. Rep. 1 (1858); Vowles v. Young, 13 Ves. 140, 33 Eng. Rep. 247 (1806).

3. 31 C.J. § 229, p. 977.

4. Berkeley Peerage Case, 4 Camp. 401, 416 (1811).


6. 5 WIGMORE, EVIDENCE § 1482, p. 297 (3d ed. 1940).
may have lived for years with the family and had known intimately all of the facts concerning the family that is in issue. The courts say they ask only for trustworthiness, and then instead of adopting a liberal and flexible rule, that will allow the judge to consider each case on its merits, they approve a mechanical rule that in a majority of the cases proves accurate, but which occasionally (as many such rules do) completely fails to cover those unusual situations that are forever coming up.

The only requirement that should be made as to the declarant's qualifications should be that he is a person "likely to know the facts," or holding a relation rendering it very probable that he would learn them truly."

It "seems too much to say that only those who have this immediate property interest in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants and intimate friends may, in cases, be equally and sufficiently informed."

Jeremiah Nixon

Business Entries and the Like

The following section regarding the admission in evidence of business records and the like is included in the proposed Missouri Evidence Code:

1. A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition, if
   1. Such writing is not privileged and was made in the regular course of a business and in relation thereto, at the time of the act, event or condition, or within a reasonable time thereafter;
   2. It was the regular course of business for an employee or representative of such business with personal knowledge of such act, event or condition and based on such personal knowledge either (a) to make such memorandum or record, or (b) to transmit information thereof to be included in such a memorandum or record; and
   3. Such memorandum or record is not subject to reasonable suspicion or, if so, such suspicion is reasonably explained.

"b. The original permanent writing must be produced unless it be lost or destroyed or its absence otherwise satisfactorily explained.
"c. Evidence of the absence of a memorandum or record of an asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of such act, event or the non-existence of such condition in that business, if it be shown that it was the regular course of that business to make such memoranda or records of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

8. 5 Wigmore, Evidence § 1487, p. 305 (3d ed. 1940).

"d. The word ‘business’ as used in this section includes every kind of occupation and regular organized activity, whether conducted for profit or not.

e. Such memorandum or record shall be competent evidence if the entrant, custodian or other qualified witness testifies as to the identity and mode of preparation of the memorandum or record in accordance with the provisions of this section even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility to be given to such memorandum or record but shall not affect its admissibility. Such custodian or other qualified witness may likewise testify as to the absence of a business memorandum or record.

"f. The court before which any action for the recovery of any sum or balance due on account, and where the matter at issue and on trial is a proper and usual subject of charge on books of account, may require either party to produce, at the trial, either his ledger or original book of entries, or both; and no disputed account shall be allowed upon the oath of the party, when it shall appear that he has a book of original entries, unless such book shall be produced upon reasonable request."

This proposed section deals with a subject upon which there is a maze of conflicting decisions, and a subject upon which the courts have consistently applied rules which are greatly outdated in our modern legal system. To clearly understand the advantage to be gained by the proposed statute it would be well to examine the common law rules on the admission in evidence of writings or records which are offered to prove the happening of an act or event.

Writings are often used in connection with evidence either for present recollection revived or past recollection recorded. Writings or records may be used to refresh a witness’ memory when the witness is for the moment unable to recall the matter desired, but he can revive his recollection by referring to some memorandum or other paper, and thereby enable him to testify to the facts independently of the memoranda. This situation is labeled present recollection revived. If reference to the record revives the witness’ recollection he testifies to the transaction from his own revived personal knowledge. It is the testimony of the witness and not the record which becomes evidence in the case.

Another situation, past recollection recorded, occurs if a witness is on the stand, and, having forgotten matters of which he has had personal knowledge, attempts unsuccessfully to revive his memory by referring to a business record. The records then may be admitted under the following conditions:

1. Entries must be fair on the face and made concomitantly with the happening of the facts.
2. The witness must have had personal knowledge of facts.
3. The witness must testify that the writing correctly sets forth the recollection of the witness when the writing was made.4

It should be noted that present recollection revived and past recollection recorded are covered in a separate section of the present proposed code,5 and are not, strictly speaking, subjects to be discussed under the present section, but, because these matters are often confused with the admission in evidence of writings which are admitted as regular entries or party-account books (infra), the distinction between the different types of evidence should be observed.

The instant section presents a uniform method of admitting in evidence those writings or records which were admitted by the common law as an exception to the rule against hearsay6 and were labeled by the courts as the regular entries exception and the parties-account book or shop-book exception.7 The recent cases

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4. Wattenmaker v. United States, 34 F. 2d 741 (C.C.A. 3d 1929); Woerheide v. Kelly, 243 S.W. 158 (Mo. 1922); Lyons v. Corder, 253 Mo. 539, 162 S.W. 606 (1913).
5. Sec. 5.06, p. 71.
6. The principles that are the basis of this exception are those which underlie all the exceptions to the rule against hearsay, that is,
   1. Necessity—by reason of unavailability of the witness in the case of regular entries, while the parties-account book exception it is the disqualification of the witness to take the stand, and the conditions in early times which left the shop-book the only evidence of a transaction the party had available.
   2. Circumstantial probability of trustworthiness—
      a. A system of preparing such writings calls for accuracy through the interest and purpose of the entrant, and the influence of such a system may be relied upon to prevent mistakes.
      b. Entries made in the regular course of a business are not apt to go unchallenged long by those dealing with entrant.
      c. There is a duty by the entrant by virtue of his employment to make such entries without error.
   See 5 WIGMORE, EVIDENCE §§ 1521, 1522, 1537, 1546 (3d ed. 1940).
7. The distinction between the shop-book or parties-account book exception and regular entries is clearly defined in 5 WIGMORE, EVIDENCE §§ 1517-1561 (3d ed. 1940).
   1. The shop-book rule admitted books which were kept by the party in the regular course of business if the proper foundation was laid, of which the requirements are:
      a. Not admissible where a clerk was kept.
      b. Accounts did not cover cash payments or loans.
      c. The books were the account books of the party, were kept in the regular course of business, and the entry was made contemporaneously with the transaction.
   2. Regular entries in general covered those entries which were not kept by the party himself, but by his clerk, and also the books of third persons, not parties to the suit. The proper foundation of allowing such books involved proving,
      a. Books were kept in regular course of business.
      b. Entry must be honest on face, made at or nera time of transaction, and made by one having personal knowledge of the facts recorded in the regular course of business.
      c. The entrant, and those contributing to his knowledge, had to be produced on the stand to testify to the genuineness of the document.
are not so explicit in drawing an actual distinction between these two exceptions, possibly because the importance of the regular-entries exception has grown to such an extent that party-account books are not so important as they used to be. The problems which are commensurate with the regular-entries exception are those which the proposed code attempts to cure, and also are those which the writer shall discuss.

The number one problem that has surrounded this exception is the matter covered by section (e) of the proposed code and relates to the necessary qualifications of the witness who testifies to the identity of the writing or record. The discussions in the federal courts are not harmonious on this subject, but the tendency of the recent cases is not to require personal knowledge of the facts by the witness who attempted to prove the admissibility of the document. The recently enacted federal statute does not specifically eliminate the necessity of personal knowledge on the part of the witness, as the proposed code of Missouri would do in section (e), but the courts in interpreting the statute have given it an effect similar to the requirements of section (e).

unless excused by death or insanity (later cases also added, "ex- by practical necessity").

See also Hellenbrand, Admissibility of Business Entries, 11 Brooklyn L. Rev. 78 (1941); McKelvey, Evidence §§ 235-250, pp. 442-459 (5th ed. 1944).


10. "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.


The Missouri cases also are not in accord on this point.\textsuperscript{12} Two very recent decisions take conflicting views on this matter. In \textit{Missouri Forged Tool Co. v. St. Louis Car Co.},\textsuperscript{13} involving the admission in evidence of records purporting to show that certain manufactured goods were approved by naval inspectors as fulfilling requirements of a war contract, the St. Louis Court of Appeals declared such records were admissible in evidence if proved by persons who made them, unless such persons are unavailable by reason of death, insanity, illness preventing attendance, or absence from the jurisdiction; but in \textit{Bedwell v. Capitol Mutual Ass’n},\textsuperscript{14} involving the admission in evidence of time cards made up from memoranda made by numerous time-keepers, the Kansas City Court of Appeals rejected the evidence upon the ground that there was no proof to show that such records were properly made up and kept, but the court indicated that had the person, under whose direction the records were made, been produced to testify to the regularity of their preparation the records would be admissible.

Neither the Federal Code,\textsuperscript{15} the \textit{Model Code of Evidence},\textsuperscript{16} nor the Uniform

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  \item United States, 143 F. 2d 795 (C.C.A. 8th 1944); Schmeller v. United States, 143 F. 2d 544 (C.C.A. 6th 1944); Hoffman v. Palmer, 129 F. 2d 976 (C.C.A. 2d 1942); Landay v. United States, 108 F. 2d 698 (C.C.A. 6th 1939).
  \item 12. The following cases indicate that the witness who actually made the entry or one who had personal knowledge of the transaction must testify as to the identity and mode of preparation of the memorandum: Mann v. Stewart Sand Co., 211 Mo. App. 256, 243 S.W. 406 (1922); Moore v. St. Louis & S. F. R. R., 143 Mo. App. 675, 127 S.W. 921 (1910); Meriwether v. Quincy, O. & K. C. R. R., 128 Mo. App. 647, 107 S.W. 434 (1908); Einstein v. Holladay-Klotz Land & Lumber Co., 118 Mo. App. 184, 94 S.W. 296 (1906). \textit{Contra}: Welch-Sandler Cement Co. v. Mullins, 31 S.W. 2d 86 (Mo. App. 1930); Stetina v. Bergstein, 231 S.W. 1059 (Mo. App. 1921); Masonic Mutual Ben. Soc. v. Lackland, 97 Mo. 137, 10 S.W. 895 (1889).
  \item 13. 205 S.W. 2d 298 (Mo. App. 1947).
  \item 14. 66 S.W. 2d 155 (Mo. App. 1933).
  \item 15. \textit{Supra}, n. 10.
  \item 16. Rule 514, p. 270. “(1) A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such an act, event or condition to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event or condition or within a reasonable time thereafter.
    \begin{itemize}
      \item “(2) Evidence of the absence of a memorandum or record of an asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.
      \item “(3) The word business as used in Paragraphs (1) and (2) includes every kind of occupation and regular organized activity, whether conducted for profit or not.”
    \end{itemize}

http://scholarship.law.missouri.edu/mlr/vol14/iss3/2
Business Records as Evidence Act have a provision similar to section (e) of the proposed Missouri code. The purpose of passing a code broadening the common law on this subject is to do away with some of the strict foundational requirements required to admit in evidence writings and records. Now if the act itself does not declare that the custodian, or other qualified witness, can testify that the provisions of the act have been fulfilled, then the purpose of the act may be circumvented by the courts in requiring that there be direct testimony by one having personal knowledge of the facts that such writing was made in the "regular course of business" or "contemporaneous with the act or event."

Another problem of great importance which has arisen in connection with the use of business records in evidence is the amount of personal knowledge of the facts the entrant must have when making the entry in the regular course of business. Some of the early cases declared that the entrant must have personal knowledge of the facts or the entry would not be admissible. The reason advanced for this rule is that the chance of error is much less if the entrant has personal knowledge of the entire transaction than if the entrant must rely upon receiving the information from others who have personal knowledge. Such a requirement in modern business practice, where large numbers of clerks and employees are associated with the making of every single transaction, would render business records valueless as evidence. Although such a stringent requirement as this should not be required, we should keep in mind that one of the original reasons for allowing in evidence business records as an exception to the rule against hearsay was the circumstantial probability of trustworthiness. The greater we relax the requirements upon the one making the entry, the less trustworthy the entry becomes. The Uniform Business Records Act does not place any requirement upon the entrant—not even to the effect that he be acting in the regular course of business when making the entry—but merely requires that the record be made in the regular course of business. It may well be argued that such leniency might admit statements of doubtful veracity. It would seem the safer and better view on this matter would be to take somewhat of a middle ground, which is the view ex-

17. "§ 1 Definition.—The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

"§ 2 Business Records.—A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." 9 U.L.A. 264 (adopted by 14 states).

18. Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593 (1876); Chaffee & Co. v. United States, 85 U. S. 516 (1873); Hill v. Johnson, 38 Mo. App. 383 (1889); Lyons v. Corder, 253 Mo. 539, 162 S.W. 606 (1913). Also see Missouri Forged Tool Co. v. St. Louis Car Co., supra n. 13, a very recent case which indicates that entrant must have personal knowledge of the facts.

19. 5 WIGMORE, EVIDENCE § 1530, p. 376 (3d ed. 1940).

20. See note 6 supra.

21. See note 17 supra.
pressed in section a-2 of the proposed Missouri code. Such a position would require that either the entrant have personal knowledge of the facts or that one transmitting the information have such knowledge, and that this person shall make such entry or transmit such information in the regular course of business which would impose a duty on this person to perform such business without error by virtue of the fact that it is the regular course of business for the employee to perform the act. To satisfy the requirement that such a record is trustworthy we must require that the one having personal knowledge of the facts also is under a duty to transmit this information correctly. It can readily be seen that if the one transmitting the information is not acting in his regular course of business such a duty is not present.

The two important features which have been discussed are those which have presented the greatest difficulty in the courts. The proposed code also gives a broad definition of the word "business," and includes within such term non-profit activities. In conclusion, it is the writer's opinion that the proposed code presents a very satisfactory method of allowing business records or writings in evidence.

NORMAN R. JONES

DYING DECLARATIONS

The following section regarding the admission in evidence of dying declarations is included in the proposed Missouri Evidence Code.

"The dying declaration of a deceased person shall be admissible in evidence in civil and criminal trials and other proceedings to the same extent and for the same purposes that it would have been admissible had the deceased survived and been sworn as a witness in such trial or proceeding, but under the following restrictions:

1. At the time of the making of such declaration the declarant was of sound mind, was conscious of approaching death and believed that there was no hope of recovery; and

2. Such declaration was made voluntarily and not in answer to interrogatories calculated to lead the deceased to make any particular statement."

Under the common law the general rule was that declarations of a deceased person were not admissible in evidence because such statements were mere hearsay, but in certain instances those statements of the deceased which were made as dying declarations were admitted in evidence as an exception to the rule against hearsay. During the early development of this exception, by misconstruing the


2. The bases of this exception are those which are applicable to most of the hearsay exceptions.

1. Necessity, by reason of the unavailability of the witness;
2. Circumstantial probability of trustworthiness, by reason of the fact that the state of mind of the person who approaches death is said to be one free from all intention to misstate the facts.

See 5 Wigmore, Evidence §§ 1431, 1438 (3d ed. 1940).
words of a treatise writer, the admission in evidence of dying declarations was limited to criminal actions in a majority of jurisdictions, including Missouri.

In addition to the rule that dying declarations are admissible in evidence only in criminal cases, several other requirements have been imposed by the courts. First, the type of case in which such declarations can be used has been further limited to homicide cases. Second is the requirement that when the statement was made the declarant must have been approaching death, and the statement must have been made in the belief of pending death with all hope of recovery gone. It is not necessary that the person expressly state, at the time that the declarations are made, that they are made under a sense of pending death, as that fact may be proved from the circumstances of each case. The length of time intervening between the time of making the statement and death is not a determining factor of the admissibility of the evidence. Rapid succession of death is not necessary.

A third requirement which a dying declaration must fulfill to be admissible in evidence is that the declaration must specifically concern the facts leading up to or causing the act which finally results in the declarant's death. The Missouri courts have held that statements such as "deceased had never made any threats against defendant in his life" and declarations relative to decedent's knife which he said he did not have at time of shooting relate to facts anterior to the killing and are inadmissible.

A fourth requirement is that the statement must be one which would be admissible had the declarant survived and been sworn in as a witness on the stand. And finally the courts require that the declarant must have been of sound mind when making the statement, and that the statement was made voluntarily.
The trend of the modern statutory law is to abolish many of the strict foundational requirements which have been imposed upon the admission of dying declarations. One state has completely abolished the technicality that dying declarations be limited only to criminal cases and has extended the admissibility of such statements to civil cases even without the aid of a statute. Missouri has by statute extended the admissibility in evidence of dying declarations to prosecutions for abortion. This statute is peculiar to this state and it requires that a conviction cannot stand on the dying declaration alone, but must be corroborated by other evidence. Ordinarily where a dying declaration is admissible, no further evidence of any sort is necessary to corroborate the declaration in order to secure a conviction.

The greatest advantage to be derived from the proposed Missouri statute is the removal of the bar established by the common law which excludes dying declarations in all but certain criminal actions. This useless rule established during the early development of the law on this subject finds no basis in reason or justice. Dying declarations should be as reliable in civil cases as they are in criminal cases, and the result of the further refinement which restricts the use of such declarations to cases of homicide is to substantially impede and often defeat the wheels of justice. The fallacy of such a rule is illustrated by the fact that a dying declaration may be of such value in evidence as to convict a person of a capital crime for which such person shall pay the extreme penalty; but in a civil action an identical declaration would not be of sufficient value in evidence to convict one of an offense which would subject that person to a mere money judgment. This

15. See Colo. Laws 1937, c. 145, § 1, which is practically identical to the proposed Missouri statute: “Section 1. The dying declarations of a deceased person shall be admissible in evidence in all civil and criminal trials and other proceedings before Courts, Commissions and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings under the following restrictions:

To render the declarations of the deceased competent evidence, it must be satisfactorily proved: 1, that at the time of the making of such declaration he was conscious of approaching death and believed there was no hope of recovery; 2, that such declaration was voluntarily made, and not through the persuasion of any person; 3, that such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement; 4, that he was of sound mind at the time of making the declaration.”


18. For an interesting discussion of what evidence the Missouri courts require to corroborate the dying declaration see 30 J. Crim. L. 617 (1940).
19. 5 Wigmore, Evidence § 1451 (3d ed. 1940).
rule has been strongly criticized by Dean Wigmore\textsuperscript{20} who refers to it as a "heresy" and established by the "shackles of irrational tradition."

In conclusion, the proposed statute would abolish a much criticized rule of law which prevails in this state; such a change would coincide with the present tendency of progressive state legislatures to abolish this rule by statutory enactment.

\textbf{Norman R. Jones}