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Opinion Rule as a Rule of Preference: Application to Extrajudicial Declarations, The

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COMMENT

THE OPINION RULE AS A RULE OF PREFERENCE: APPLICATION TO EXTRAJUDICIAL DECLARATIONS

I. INTRODUCTION

The Anglo-American evidentiary system insists upon evidence from the most reliable sources. When the factfinder takes a human utterance as the basis of belief that the matter related is true, he impliedly attributes certain processes to the witness. Professor Wigmore has posed the example of A (the witness) testifying that B struck X.1 By accepting the statement as true, the tribunal impliedly attributes the processes of observation, recollection, and communication to A. The witness must have observed the affray and received impressions therefrom, he must have a recollection of the impressions, and he must communicate these recollections to the factfinder.

Rules applied to limit the acceptance of testimonial assertions should have their bases in one or more of the processes of observation, recollection, or communication.2 The Opinion Rule, which operates to limit acceptance of testimonial assertions, is the subject of this comment.3 Herein, the historical development of the rule will be traced, the firsthand knowledge requirement and the fundamental facts rule will be discussed and contrasted, the application of the fundamental facts rule, as a rule of preference and not as a rule of exclusion will be posed and the application of the rule to extrajudicial statements will be reviewed by a discussion of illustrative Missouri cases.4

1. 2 J. Wigmore, Evidence § 478 (3d ed. 1940) [hereinafter cited as Wigmore].
2. Id.
3. Formulation of a single definition of the Opinion Rule is difficult. Commentators most often formulate the rule to coincide with their theory of the proper operation of the rule. Most often the Opinion Rule refers to the rule invoked by courts to exclude declarations because they are opinion in form. As used herein the Opinion Rule is viewed as a rule which, when applicable, requires the witness to relate the most fundamental facts to the tribunal. See generally C. McCormick, Evidence § 11 (2d ed. 1972) [hereinafter cited as McCormick]; 2 E. Morgan, Basic Problems of Evidence 191 (1957) [hereinafter cited as Morgan]; Wigmore, supra note 1, § 1917 et. seq.
4. Expert or skilled witness testimony is beyond the scope of this comment. See generally McCormick, supra note 3, §§ 13-14; Wigmore, supra note 1, §§ 555-71.

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II. HISTORICAL DEVELOPMENT

The first disparaging references to "opinion" appeared in case reports prior to the 1700's. Wigmore concluded that the early cases not accepting "mere opinion" into evidence were referring to instances where a witness had no facts to contribute. The disparaging references to opinion were not directed toward the form of the testimony. The objection was that the witness had no knowledge of the matter, i.e., he was a "guesser" not a "knower." The fundamental flaw in the testimony offered in these cases was that a basic testimonial qualification, that of observation or knowledge, was not met. A witness who did not observe the matter related was of no value to the tribunal. At this stage there was no new exclusionary "Opinion Rule." The courts were applying the longstanding requirement of personal observation of the matters related for a witness to be competent to testify.

In the 1800's a distinct rule of a new dimension appeared. English judges began to exclude opinion testimony not on the ground of lack of knowledge, but because the witness was relating inferences drawn from the facts he had observed. The factfinder having heard the facts should draw his own inferences from these facts; the inferences of the witness were superfluous. It was this test which American judges extended. The extension progressed to the point where the exclusionary doctrine was applied, without regard to the superflousness of the testimony, to lay witnesses speaking from personal observations but expressed in the form of inferences, conclusions, or opinion. American courts distorted the phrase "mere opinion" (meaning testimony not based upon observed data) is not evidence" into "opinion is not evidence." The argument for excluding "opinion evidence" was based upon case precedent rather than upon principle and reasoned logic. In short, the exclusionary Opinion Rule came into being through what Professor Wigmore called an "historical blunder."

III. THE OPINION RULE AND THE FIRSTHAND KNOWLEDGE REQUIREMENT

History shows that the extension of the exclusionary doctrine, now referred to as the Opinion Rule, to inferences of lay witnesses speaking from personal observation was not the result of well-based logic but rather imprecise use of words. Just as imprecise use of words led to the extension,

5. Lord Coke in Adams v. Canom, 1 Dy. 53b, 73 Eng. Rep. 117, 118 (1622) stated: "That it is not satisfactory for the witness to say, that he thinks or persuadeth himself. . . ."
6. WIGMORE, supra note 1, § 1917.
7. Id.
8. Id. Professor Wigmore concluded that this extension of the rule was a peculiarly American doctrine in that there appeared to be no English rulings which indicated that the Opinion Rule had been used to exclude inferences which a witness had made from the data he laid before the jury.
9. Id.
10. J. WIGMORE, EVIDENCE 156 (Student's ed. 1935).
a like imprecision has persisted the exclusionary application. The ease with which the shibboleth "opinion is not evidence" could be applied to human utterances acted to entrench the rule. A proper perspective of application of the Opinion Rule is best achieved if distinctions between the firsthand knowledge requirement and the rule requiring witnesses to relate the most fundamental facts are borne in mind. Failure to recognize this distinction has confused and extended the application of the Opinion Rule.

The "firsthand knowledge" requirement rejects *speculation*. It relates to the process of observation and impressions formed from observations. A witness who did not observe can only guess and should not be heard. On the other hand, the "fundamental facts" rule speaks to the *form* of the testimony. A witness who observed the matters related, formed impressions from this observation, and recalls these impressions is asked to communicate them to the jury in the most fundamental fact form. The deficiency of the nonobserving witness who is guessing is substantially different from any deficiency of the witness who observed an event but is expressing the observations in an opinion form. The witness who did not observe the matter will always be a "guesser." However, a skillful examiner often will be able to elicit the more fundamental facts from the witness who observed the event in question.

The rationale underlying the firsthand knowledge requirement relates to the testimonial qualification of the witness. The "fundamental facts" requirement is directed at the form of the testimony given by a qualified witness. Using the same shibboleth (*i.e.*, "opinion is not evidence") as a basis to exclude both classes of testimony obscures the different rationales of the two principles and often produces undesirable results. When a witness meets the firsthand knowledge requirement but his testimony is excluded because "opinion is not evidence," the factfinder may be deprived of helpful and relevant facts that should have come before the tribunal. Exclusion of testimony where the witness has no firsthand knowledge on the grounds that "opinion is not evidence" does not in itself produce an undesirable result. The testimony of the "guesser" is properly excluded, but the reason given is not proper. However, in some instances testimony which should be excluded because the witness is a "guesser" is admitted because of mistaken reliance on the "opinion is not evidence" shibboleth. The converse of "opinion is not evidence" is "a fact is evidence." The existence of a dichotomy between a statement of fact and a statement of opinion has been sharply questioned. Yet courts often recognize such a

11. The personal knowledge requirement refers to the observation process of witnesses. The requirement has been variously phrased as "firsthand knowledge" or "personal knowledge."
12. Mccormick, supra note 3, §§ 10-11. There are some exceptions to the requirement, e.g., admissions of a party opponent.
14. It has been convincingly noted that the line between what is "fact" and
IV. THE OPINION RULE AS A RULE OF PREFERENCE

A. In-Court Testimony

The rule calling for fundamental facts is designed to elicit testimony in a preferred form. Testimony in the form of an opinion or conclusion is not inherently unreliable; it is merely not in the best form for use by the jury. A witness with firsthand knowledge who expresses testimony in a less preferable opinion or conclusion form may nevertheless be a reliable conveyor of information to the jury.

A basic distinction must be drawn as to the type of testimony being elicited from a witness. A witness relating statements made out of court by himself or another can relate only the statement made. He cannot now change the form of the statement but must instead attempt to relate the precise language used. If the statements contain, or are completely in the form of opinions, the court must either accept the testimony in that form or exclude it altogether. For simplicity, this type of testimony will be referred to in this article as "extrajudicial declarations" as distinguished from "in-court statements" (even though, of course, all testimony occurs in court). "In-court statements," as used in this article, are all responses of a witness in court to the examiner's questions other than responses relating extrajudicial declarations made by himself or another. In-court statements are fundamentally different from extrajudicial declarations in that, upon proper objection, a flaw in the form of the in-court statement may be cured by a skillful examiner and the fundamental facts can be brought before the tribunal in the proper form.

The fundamental facts rule should be applied to in-court testimony as a rule of preference and not as a rule of exclusion. With this approach testimony which is opinion in form will not be excluded if it is the only available form.

An example of testimony which is admissible, although opinion in form, because it is the only available form is provided by the facts in Brown v. Kruger Co. 15 This was a personal injury case arising from injuries re-

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15. 358 S.W.2d 429 (Spr. Mo. App. 1962).

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what is "opinion" is difficult to discern. Professor McCormick states that the assumption that "fact" and "opinion" can be segregated in declarations is an illusion. McCORMICK, supra note 3, § 11. See also 7 WIGMORE, supra note 1, § 1919.
received when a bottle fell from a carton and broke, cutting the plaintiff's leg. Testimony describing the carton was that it "was discolored like it had been wet." Objection was made that the testimony was a conclusion which invaded the province of the jury. The testimony was ruled to be admissible. In this instance the testimony as given was essentially the only available form. It was extremely difficult, if not impossible, for the witness to reformulate the testimony into a more fundamental fact form which would communicate the actual condition of the carton to the jury.

Contrasted with the above example where the opinion form testimony is the only available form is the situation involved in a many line-of-sight cases. For example, testimony that a motorist could not see an approaching train from a particular location on the roadway may be objectionable. The in-court witness should establish his familiarity with the grade crossing, and fully describe the nature and location of any existing obstructions to a view of an approaching train. Mere testimony that a motorist could not see an approaching train is not the only available form for the testimony and the more preferable fundamental fact form is properly demanded.

The fundamental facts requirement is underpinned with two rationales. First, inferences and conclusions of nonexpert witnesses giving in-court testimony are superfluous because when the facts are before the jury any inferences and conclusions to be drawn from the facts can be drawn by the jury. In this first instance the witness' inferences and conclusions are not needed. The second rationale relates not to the uselessness of a witness' inferences or conclusions but rather the possibility that they will be misused by the jury. It is this rationale that prompts courts to note that inferences and conclusions drawn by lay witnesses "invade the province of the jury." Inherent in this second rationale is that the jury is to determine the facts, and to determine them from the evidence and the reasonable inferences arising from such evidence. A witness may very well be drawing his inferences from matters that are not evidence, hence an added danger exists in accepting inferences from a lay witness. This rationale is closely tied to the legal relevancy requirement. In balancing

16. Wigmore, supra note 1, §§ 1447, 1569.
17. Relevant evidence is evidence that in some degree advances the inquiry, and thus has probative value. However, relevancy in this sense is not always enough. There are several counterbalancing factors which may move a court to exclude evidence that is logically relevant if the counterbalancing factors outweigh the evidence's probative value. There must be a balancing of probative values against probative dangers inherent in admitting the evidence. The process of excluding evidence having probative value, i.e. logically relevant in that it moves the inquiry forward, by reason of counterbalancing cost factors is often described as the application of a standard of "legal relevancy." Although Professor McCormick states that it would be better to discard the term legal relevancy altogether, it is useful in this article in that it points to the existence of cost factors often present in testimonial evidence containing inferences, opinions, or conclusions. Rule 403 of the Federal Rules of Evidence lists the cost factors which may operate to exclude relevant evidence as the danger of unfair prejudice, confusion of issues, or misleading the jury; or the causing of undue delay, waste of time, or the needless
the perceived probative value of such testimony against the possible harm resulting from its misuse then the court should properly reject the testimony. However, the reason given for the rejection should not be the Opinion Rule but rather the fact that the testimony failed to pass the balancing test of the legal relevancy requirement.

When possible, the witness should be required to give the jury the facts and not the inferences and conclusions he has drawn from the facts. However, when the witness cannot adequately describe the event, condition, or occurrence he has observed so the jury will picture it as fully and completely as does the witness then the jury cannot be as adequately equipped as the witness to draw inferences. The tribunal demands the fundamental facts only if to do so is consistent with efficient use of the court’s time and is consistent with good communication.

Either of two variables may compel the acceptance of in-court conclusion or opinion form in testimony—an infirmity of the witness or the nature of the event, condition, or occurrence observed by the witness. A witness who is a child or is mentally deficient often will not realize the need to communicate by the use of basic facts. In such instances the trial judge should have discretion to admit testimony which is in the form of conclusions. Testimony by such “handicapped” witnesses who meet basic testimonial qualifications should not be excluded solely because other men could recount the event in a more fundamental fact form.

If the statement of an in-court witness is a mere shorthand way of expressing a relevant personal observation the testimony should be received. Many events, conditions, or occurrences can be described only after the person observing has made mental deductions and conclusions. Testimony relating to identity, resemblance, odor, and space are examples of instances where a most fundamental fact description can be made only with great difficulty. For example, the statement that an odor “smelled like rotten eggs” may not be a most fundamental facts description of a given odor but a more fundamental facts form which would communicate the nature of the odor to the jury would be very difficult if not impossible to formulate. This “short-hand facts” exception recognizes that good communication requires the use of conclusions in testimony relating to these and similar items.

Both the “short-hand facts” and the “handicapped witness” exceptions demonstrate the application of the Opinion Rule as a rule which prefers but does not always demand testimony be in a basic fact form. Even under current application of the Opinion Rule to in-court testimony, the rule is often applied as a rule of preference and not as a rule of exclusion.

presentation of cumulative evidence. See generally MCCORMICK, supra note 3, §§184-85.

B. Extrajudicial Declarations

Acceptance of the premise that the Opinion Rule should be applied as a rule of preference means that the rule should never be applied to exclude an extrajudicial declaration which is otherwise admissible as nonhearsay or under an exception to the hearsay rule. Applied to in-court declarants, the harshness of the overextended Opinion Rule may be mitigated if the examiner can cause the witness to recall and relate the more fundamental facts underlying his objectionable inferences or conclusions. Unlike the in-court declarant, the extrajudicial declarant cannot modify the declaration to fit the more fundamental fact form. When the extrajudicial declarant made his statement, no examiner was present to explain the need to state the most fundamental facts.

As with in-court statements, the admissibility of extrajudicial declarations is confused by the failure to distinguish between a lack of knowledge and the fundamental facts rule. If B makes a statement to A and A is relating the statement to the tribunal, the fact that B did not observe the matter related makes A’s testimony objectionable. The objection is that the declarant, B, lacked the testimonial qualification of knowledge. The form of the declaration, whether in fact or opinion form should be immaterial. The objection is that B is a “guesser.” Even if B were before the tribunal his testimony would be objectionable; he lacks firsthand knowledge of the matters related.

Where the extrajudicial declarant had personal knowledge of the matter being related to the tribunal, the testimony may be wrongfully excluded under the overextended Opinion Rule if the rule is applied as a rule of exclusion. When a court excludes such testimony it does so because the extrajudicial declarant chose the wrong form for his declaration. The declarant spoke in terms of inferences, conclusions, or opinions, therefore the declaration is not admissible under the exclusionary Opinion Rule. This harsh aspect of the Opinion Rule as a rule of exclusion has persuaded many commentators that the Opinion Rule should have no application to extrajudicial declarations.

The first step toward a proper application of the Opinion Rule to either in-court or extrajudicial declarations is to recognize that it is really two rules, and that, as such, the phrase “Opinion Rule” is not definitive enough to be useful in evidentiary terminology. The fundamental facts rule is properly applied, if at all, only after the witness has met the

19. The basis for accepting certain hearsay testimony is beyond the scope of this comment. See generally MCCORMICK, supra note 3, § 254 et. seg.

20. See, e.g., Carpenter v. Davis, 435 S.W.2d 382 (Mo. En Banc 1968); Wright v. Quattrochi, 380 Mo. 174, 49 S.W.2d 3 (1932); State v. Wilks, 287 Mo. 481, 213 S.W. 118 (1919); Walsh v. Table Rock Asphalt Constr. Co., 522 S.W.2d 116 (Mo. App., D. Spr. 1975).

21. MCCORMICK, supra note 3, § 18.

22. See part III of this comment.
firsthand knowledge requirement. Once it is determined that the witness is a "knower" and not a "guesser," then it is proper to test in-court testimony against the fundamental facts rule as a rule of preference. At this point it is proper to ask, "Is the testimony in the most fundamental fact form?" If the testimony contains inferences, conclusions, or opinions arrived at through reasoning from more fundamental facts, it is proper to apply the fundamental facts rule. This means if the witness possesses more fundamental facts, then the tribunal requires him to relate those facts to the extent reasonably consistent with good communication. Of course, when the witness is relating extrajudicial declarations he will not possess more fundamental facts because he is only attempting to relate the precise words spoken and not the factual stimulus which caused the words to be uttered.

As a rule of preference the fundamental facts rule does not automatically exclude testimony; it requires the testimony in its objectionable form to be measured against the rule. If the witness is able to rephrase his testimony into the more fundamental fact form, he should be required to do so. The process of testing extrajudicial statements against the fundamental facts rule as a rule of preference would proceed as follows:

1) The declaration being related is not in the most fundamental fact form, it contains inferences, conclusions, or opinions drawn from more fundamental facts.

2) The court prefers that the more fundamental facts be related if the witness possesses the more fundamental facts and is able to reasonably communicate them to the tribunal.

3) In this instance the witness relating extrajudicial declarations does not possess more fundamental facts because he is being asked to relate the precise words spoken.

4) Therefore, the testimony, while not in the preferred form, (if relevant) will be admitted.

Applied in the above manner, confusion presently surrounding the over-extended Opinion Rule would be eliminated.

V. APPLICATION OF THE OPINION RULE TO EXTRAJUDICIAL DECLARATIONS

Extrajudicial declaration exceptions to the hearsay rule include declarations against interest, dying declarations, excited utterances, and admissions. Each class of statements is deemed to lack certain dangers attendant to hearsay statements in general or to possess certain attributes which increase the trustworthiness of the statement. In this section illustrative Missouri cases dealing with extrajudicial declarations and the Opinion

23. See note 17 supra.
24. MCCORMICK, supra note 3, §§ 276-80.
25. Id. §§ 281-87.
26. Id. § 297.
27. Id. §§ 262-75.
Rule, in the form of the either firsthand knowledge rule or the fundamental facts rule, will be discussed.

As noted previously, the fundamental facts rule as a rule of preference should not exclude an otherwise admissible hearsay statement. Yet the reported cases in Missouri contain many instances where an extrajudicial declaration is deemed to meet the requirements for an exception to the hearsay rule but is excluded from evidence because it fails to meet the requirements of the courts’ interpretation of the Opinion Rule.

A. Declarations Against Interest

In Carpenter v. Davis the Missouri Supreme Court held that an opinion as to fault for an automobile collision is not admissible as a declaration against interest. The action was brought by Mr. Carpenter for the wrongful death of his wife in an intersection collision. The car in which Mrs. Carpenter was a passenger collided with a truck driven by defendant Grothoff. At trial Mr. Grothoff testified that after the collision he had a conversation with Mrs. Carpenter at the scene. Over objection, Mr. Grothoff testified that he said, “I’m sorry, lady, you pulled right out in front of me,” to which Mrs. Carpenter replied, “Yes, I know, it’s not your fault.” Plaintiff’s attorney objected on the grounds that the proffered statement constituted a legal conclusion. After a defendant’s verdict, plaintiff appealed claiming reversible error in admitting in evidence the statement attributed to Mrs. Carpenter by Grothoff. The Missouri Supreme Court held that on retrial the “statement of fact,” “Yes, I know,” would be admissible as a declaration against interest. The remainder of the statement was deemed an opinion as to fault, and therefore inadmissible as a declaration against interest. The court conceded that if Mrs. Carpenter had survived and was a party to the action the entire statement would have been within the admissions exception to the hearsay rule and therefore properly admissible.

Judge Seiler, in one of three separate dissenting opinions, challenged the majority’s exclusion of the statement. The dissent indicated that Mrs. Carpenter’s entire statement contained the necessary circumstantial probability of trustworthiness to make it admissible under the declaration against interest exception to the hearsay rule and that the statement did not run afoul of the Opinion Rule. Judge Seiler cited with approval Wigmore’s admonishment that the Opinion Rule should not apply to extrajudicial statements of deceased persons because to do so would be inconsistent with the theory of the Opinion Rule. According to Wigmore, the theory is that wherever the witness can state specifically the detailed facts observed by

28. See part IV B of this comment.
29. 435 S.W. 2d 382 (Mo. En Banc 1968).
30. Id. at 383.
31. Id. at 384.
32. Id.
33. Id. at 386.
him, the inferences to be drawn from these facts can be drawn equally well by the jury, so that the witness' inferences are not needed. Perhaps a more complete analysis would address the relevancy rationale which also underpins the fundamental facts rule, but Judge Seiler clearly indicated that the probative value of the statement outweighed any possible harm. In this instance the inferences of the out-of-court declarant were relevant, reliable, and helpful to the factfinder, in determining the more fundamental facts on which the declarant's inferences were based. There was no way to elicit more fundamental facts and therefore the statement ought to be heard unless it fails the legal relevancy test. Judge Seiler's dissent recognized the fundamental distinction between the firsthand knowledge requirement and the fundamental facts rule. He also recognized that the fundamental facts rule is properly employed as a rule of preference based upon the availability of more fundamental facts.

Costello v. M.C. Slater, Inc., insofar as it implies that an opinion as to fault is admissible as a declaration against interest was overruled by the Carpenter court. Costello was a personal injury suit arising from a vehicular collision. Immediately after the collision the defendant's driver stated that the accident was his fault, and he also said: "I was too far, over too far on the road." The court held that the quoted statement was a statement of fact which being coupled with the statement, "It was my fault," made by the driver in the same conversation made both such declarations proper evidence for the jury's consideration. It is interesting to note that in holding that an opinion as to fault is not admissible as a declaration against interest the Carpenter court cited no Missouri authority on the point. The majority stated that there were insufficient safeguards to offset the risks of inaccuracy in such statements, citing Wigmore and McKelvey. This indicates that the majority may have been holding that the opinion as to fault failed the legal relevancy balancing test.

B. Dying Declarations

Acceptance of the Opinion Rule as a rule of preference means that the rule should never exclude a dying declaration from evidence. As Judge Seiler noted in his dissent in Carpenter, the same reasons underpin the admission of extrajudicial statements of a decedent regardless of which class of hearsay exception they fit.

As with declarations against interest, if it appears that the declarant of a dying declaration did not have an adequate opportunity to observe the

34. Wigmore, supra note 1, § 1918.
35. 435 S.W.2d at 386.
36. 220 S.W.2d 947 (St. L. Mo. App. 1949).
37. 435 S.W.2d at 385.
38. 220 S.W.2d at 953.
39. 435 S.W.2d at 384.
40. See discussion note 17 supra.
41. 435 S.W.2d at 386.

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facts recounted, then the declaration is properly excluded for failing to meet the testimonial qualification of observation. This want of firsthand knowledge disqualification is again sometimes confused with the fundamental facts rule. The confusion has led some courts to state that "opinions" in dying declarations are to be excluded. In State v. Wilks the Missouri Supreme Court said that "the statement of a declarant which is a mere conclusion or expression of an opinion is always incompetent as a dying declaration." The statement at issue in the case was "Virgil killed me." The court's opinion clearly indicated that it was not the form of the statement but rather the declarant's inability to see who had fired the fatal shot that excluded the testimony. In other words, it was the lack of observation and knowledge by the declarant that rendered the declaration inadmissible. The court's statement that "expression of an opinion is always incompetent" really meant that "mere opinion by a guesser" is not admissible. It was not the declarant's choice of words but his lack of knowledge that rendered the statement inadmissible.

State v. Clift is another case stating "mere expression of opinion ... is inadmissible." The deceased's dying declaration that, "I presume she must have taken this knife with her" was excluded. It is clear from the court's opinion that the deceased did not have firsthand knowledge of what happened to the knife but that he was guessing that his estranged wife had taken it. The case is a firsthand knowledge case and not a fundamental facts case.

In State v. Horn the deceased victim stated that he fired a gun in "self defense" and the court excluded the statement as a "mere conclusion." Quoting from State v. Elkins, the Horn court excluded the statement and said:

Now, we are aware that such general conclusions often drop from a witness and when made by a witness on a witness stand so that there may be a full examination and cross-examination they seldom furnish a ground for reversal of a judgment. But here the witness, who is speaking, could not be examined or cross-examined, and his conclusions as to what transpired in the house are not accompanied with a statement of the facts. All of the facts covered by these conclusions of the deceased are susceptible of narration. ... It was for the jury and not the witness to draw conclusions.

42. 278 Mo. 481, 213 S.W. 118 (1919).
43. Id. at 489, 213 S.W. at 120.
44. Id. at 390, 213 S.W. at 120-21.
45. 285 S.W. 706 (Mo. 1926).
46. Id. at 707-08.
47. 204 Mo. 528, 103 S.W. 69 (1907).
48. Id. at 548, 103 S.W. at 74.
49. 101 Mo. 344, 14 S.W. 116 (1890).
50. 204 Mo. at 549, 103 S.W. at 79.
The quoted case, *State v. Elkins*, involved this statement: "he picked a fuss with me and was running over me, and, because I did not want him to, he killed me. He called me a d——d son of a bitch."\(^5^1\)

From the *Horn* and *Elkins* opinions it appears that both declarants possessed the requisite firsthand knowledge of the matters related and that it was the *form* of the declarations that prompted the court to exclude them. The statements were excluded even though the court specifically recognized that men often speak in conclusive terms.\(^5^2\) As a rule of preference, the fundamental facts aspect of the Opinion Rule would not have excluded either of the declarations; but the Court applied the overextended Opinion Rule as a rule of exclusion and the declarations were not admitted.

Dying declaration cases often state that matters of opinion in dying declarations are inadmissible except where they would be received if the declarant himself were a witness.\(^5^3\) This statement is addressed to the firsthand knowledge requirement. The above statement was used in *State v. Strawther*,\(^5^4\) yet the holding was that the declarations were not barred by "the rule excluding matters of opinion." The court noted that to determine if matters of opinion included in a dying declaration would have been received if the declarant himself were a witness, it is proper to take into consideration not only the statement itself, but also the surrounding circumstances. The court clearly intimates that if the surrounding circumstances show that the declarant is not merely "guessing" as to the matters related then his declaration, although containing conclusions or inferences will be admitted.\(^5^5\)

### C. Excited Utterances\(^5^6\)

A recent Missouri Court of Appeals case, *Walsh v. Table Rock Asphalt Construction Co.*,\(^5^7\) is an example of a misapplication of the Opinion Rule, yet it provides a convenient framework for discussion of the proper application of the Opinion Rule to excited utterances. In *Walsh* the plaintiff's automobile collided with a dump truck owned by Table Rock Asphalt and driven by Donald Hale, an employee of Table Rock. Hale later died of injuries received in the collision. Hale's wife and children combined wrong-

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51. 101 Mo. at 349, 14 S.W. at 117.
52. 204 Mo. at 548, 103 S.W. at 74.
53. *State v. Strawther*, 342 Mo. 618, 116 S.W.2d 133 (1938); *State v. Proctor*, 269 S.W.2d 624 (Mo. 1954).
54. 342 Mo. 618, 626, 116 S.W.2d 133, 138 (1938).
55. *Id.*
56. Various phrases are used by courts and commentators as a label for this exception to the hearsay rule. The labels include: res gestae, spontaneous declarations, spontaneous exclamations, and excited utterances. Of these forms, res gestae is much criticized by commentators and courts. Herein the term "excited utterances" will be used. *See generally* McCORMICK, *supra* note 3, §§ 288 et seq.
57. 522 S.W.2d 116 (Mo. App., D. Spr. 1975).

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ful death claims with Table Rock's subrogation claim under Workmen's Compensation. The circuit court entered judgment on a verdict for defendants and plaintiff perfected an appeal to the Springfield District of the Court of Appeals. 58 The appellate court reversed and remanded the cause for a new trial. The reversal rested on what the court of appeals held to be the erroneous admission of defendants' witness' testimony as to statements made by Hale at the accident scene. The statements attributed by three witnesses to Hale were recognized as hearsay statements. The statements were used as substantive proof of which vehicle was on the wrong side of the road at the time of the collision, the principle fact in issue. 59

The first declaration of Hale was "she [the plaintiff] was goin' too fast to make the curve and lost control of the car and that he [Hale] tried to get out of the way but couldn't." 60 The evidence indicated that five to twenty minutes had elapsed between the collision and the time Hale made the statement to the testifying witness. The court of appeals determined the statements met the spontaneity requirement of the excited utterance exception to the hearsay rule. However, the court added that the opinion and conclusion character of Hale's statement rendered it inadmissible. An opinion was defined as the drawing of inferences from known or assumed facts through the use of reasoning. A conclusion was defined as a "reasoned judgment." 61 The court noted, without citation, that some courts suggest that a declaration may properly be classified as an excited utterance yet be excluded on the separate ground that it contains opinions or conclusions. The Walsh court rejected this view. Based on the above definitions of opinion and conclusion, the court said that a statement containing an opinion or conclusion is the antithesis of an excited utterance. 62

In support of excluding the declarations, the court cited cases which state that assertions that a vehicle's speed is "fast," 63 "awful fast," 64 or "going too fast" 65 are not statements of fact but opinions or conclusions. The statement "too fast to make the curve" was attacked on the additional ground that Hale must have reasoned that the failure to make the curve was not due to the conditions of the road. The court asserted that loss of control of a vehicle is normally something only the operator of the vehicle can sense. 66 The court also said, "Although [out-of-court] utterances are not generally required to correspond with formal testimony in court, the statements should show that the speaker is disclosing facts observed by him as opposed to opinions, conclusions, and suppositions." 67 The reference to

58. Id. at 118.
59. Id. at 122.
60. Id. at 119.
61. Id. at 122.
62. Id.
63. Migneco v. Eckenfels, 397 S.W.2d 682 (Mo. 1965).
66. 522 S.W.2d at 124.
67. Id.
observation and opinions indicates the court failed to distinguish between the personal knowledge qualification and the fundamental facts rule.

A final ground upon which the court excluded "opinions and conclusions" from the evidence was the fear that the jury might give them too much weight. The court cited an annotation stating:

The various factors entering into the observation and self-persuasion of the speaker cannot be reproduced, and a jury is much too likely to shirk a judgment of its own in reliance upon his.68

Here the court seemed to indicate that the fatal flaw in Hale's statement was not his lack of personal observation but rather his failure to include the facts observed in his statements to the witnesses.

The Walsh court cited Sconce v. Jones69 as standing for the proposition that an admissible excited utterance must be neither a mere reflective narration of past events nor an opinion, nor conclusion of fact reached by reasoning from other facts. Sconce involved a statement made by plaintiff prior to being extricated from an overturned truck in which he had been a passenger. Plaintiff was charging negligence related to the defective condition of the truck. His statement at the accident scene was that the truck brakes had locked and caused the truck to slide. The trial court admitted his statement and the appellate court ruled this to be error.70 The Sconce court contrasted the facts in that case with those in Bennette v. Hader,71 which also involved a post-accident statement made by a non-driving participant. The statement in Bennette was "a car crowded us off the road." This statement was deemed by the court in Sconce a "statement of fact, which the person making it had full opportunity to observe and not a conclusion of fact reached by reasoning from other facts."72

The essential difference between the statement in Sconce and that in Bennette was that a witness can clearly see another car approaching on the wrong side of the road but a nondriving participant could not know just how the driver attempted to operate the brakes or feel the reaction and effect of the use of the brakes. The crucial distinction between the two cases was related to the firsthand knowledge requirement. In Bennette the hearsay declarant was a "knower" (he knew the car was on the wrong side of the road); in Sconce the hearsay declarant was a "guesser" (he thought, but did not know, that the brakes locked).

Moore v. St. Louis Public Service Co.73 was also cited in Walsh as authority that the speaker must be disclosing facts observed by him as opposed to

68. Id.
69. 343 Mo. 372, 121 S.W.2d 777 (1938).
70. Id. at 372, 121 S.W.2d at 782.
71. 337 Mo. 977, 87 S.W.2d 413 (1935).
72. 343 Mo. at 370, 121 S.W.2d at 781.
73. 251 S.W.2d 38 (Mo. 1952).
opinions, conclusions, and suppositions. Moore involved personal injuries to a bus passenger allegedly received as a result of a bus driver's negligent operation of the bus. The in-court witness did not see the plaintiff fall in the bus but reported that an unidentified bystander said the driver ought to be reported. There was no evidence of either the in-court witness or the unidentified hearsay declarant having personal knowledge of the actual facts surrounding plaintiff's fall on the bus.74 Like Sconce, Moore is properly viewed as a case involving a lack of firsthand knowledge.

It is difficult to discern the decisive rationale for excluding the statements in Walsh. Was the exclusion based upon Hale's lack of personal knowledge of how and why the plaintiff lost control? Was it based upon the fact that Hale's statement was not in the most fundamental fact form and the jury was therefore likely to accord too much weight to the statement? Or was it based upon the court's determination that the statement contained "reasoned judgments" and therefore could not qualify as an excited utterance? These questions underscore the importance of differentiating between the personal knowledge requirement and the fundamental facts rule. The Walsh opinion also illustrates the desirability of applying the fundamental facts requirement as a rule of preference and not as a rule of exclusion. The deceased driver's extrajudicial declarations at the scene directly bore upon the principle issue before the factfinder. If he met the testimonial qualification of observation, Hale's declarations were excluded because of the form in which they were communicated. As a rule of preference, the fundamental facts rule would prefer matters related in the most fundamental fact form. However, if Hale is deemed to have personal knowledge and the legal relevancy test is met,75 his statements should not be excluded merely because of the form of the statements. If Hale had lived, he undoubtedly could have taken the stand and testified as to his observations immediately before and at the time of the collision. In that instance, the fundamental facts rule would require that Hale relate the observations in a most fundamental fact form; but it seems clear that the firsthand knowledge requirement is met. The exclusion of Hale's extrajudicial declarations contrasted with the probable admissibility of his testimony had he lived points to the undesirability of applying the fundamental facts rule to extrajudicial declarations.

D. Admissions

The admissions exception to the hearsay rule is in a sense sui generis. The Anglo-American system has evolved three conditions under which witnesses ordinarily will be required to testify: oath, personal presence at trial, and cross-examination. The rule against hearsay is directed toward trying to insure compliance with the above ideal conditions. As to admissions of a party opponent, however, the rationale underpinning the gener-

74. Id. at 39.
75. See discussion in note 17 supra.
ally required ideal conditions breaks down. A party can hardly object that he had no opportunity to cross-examine himself when he made the declaration that he now wishes he had not made. Nor can he very well claim that he is unworthy of credence except under oath.\(^6\) For these reasons certain restrictions generally applicable to testimonial evidence are not applied to admissions.

*Carpenter v. Davis* involved a declaration against interest, yet the majority expressly recognized that if Mrs. Carpenter had survived the collision and was a party to the action, Grothoff's testimony would have been admitted into evidence as an admission of Mrs. Carpenter. This apparently is the state of the law in Missouri.\(^7\) The Opinion Rule does not exclude a statement qualifying as an admission. However, there are cases which ostensibly hold otherwise that have not been specifically overturned.\(^8\)

While the Missouri position has not always been certain, it appears that an admission, unlike other forms of extrajudicial declarations, is generally competent even though the declarant lacked personal knowledge of the matter related.\(^9\) Commentators have cited the general inapplicability of the firsthand knowledge requirement to bolster their argument that the Opinion Rule should never exclude admissions.\(^10\) The *Carpenter* court cited two cases involving admissions in the form of opinions.\(^11\) The court concluded that the cited cases represent the recognition that in an adversary proceeding, a party should be held responsible for statements of fact or opinion, previously made, which conflict with the position taken by him in the judicial proceeding. The clear intimation by the majority was that the firsthand knowledge rule was not generally applicable to extrajudicial declarations which are admissions.

Despite fairly clear assertions that the Opinion Rule will not exclude admissions, there is a confusing line of cases which, on the surface, indicate otherwise. This line of cases includes *Wright v. Quattrochi*,\(^12\) *Donnelly v. Goforth*,\(^13\) and *Liebow v. Jones Store Co.*\(^14\)

Wright was a personal injury case. The admissions involved were statements made by the defendant to the plaintiff's father. The defendant

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77. *See, e.g.*, Grodsky v. Consolidated Bag Co., 324 Mo. 1067, 26 S.W.2d 618 (1930); Scherffius v. Orr, 442 S.W.2d 120 (Spr. Mo. App. 1969).
78. *See, e.g.*, Liebow v. Jones Store Co., 303 S.W.2d 660 (Mo. 1957); Donnelly v. Goforth, 284 S.W.2d 462 (Mo. 1955); State v. Shell Pipe Line Corp., 139 S.W.2d 510 (Mo. 1940).
81. Grodsky v. Consolidated Bag Co., 324 Mo. 1067, 26 S.W.2d 618 (1930); Costello v. M.C. Slater, Inc., 220 S.W.2d 947 (St. L. Mo. App. 1949).
82. 330 Mo. 174, 49 S.W.2d 3 (1932).
83. 284 S.W.2d 462 (Mo. 1955).
84. 303 S.W.2d 660 (Mo. 1957).
stated that he had talked with his driver and that the accident was his driver's fault. The defendant was not present at the accident scene and had no personal knowledge of the facts surrounding the accident. The court held that the statements of the defendant were mere conclusions of law and not admissible.85

In Donnelly v. Goforth defendant made the statement that he "may have gone on the wrong side of the road."86 The defendant was a witness in the case and demonstrated an imperfect recollection of the events transpiring immediately prior to the accident. The plaintiff, who was a passenger in defendant's vehicle, suffered retrograde amnesia and was unable to recall events occurring during some indefinite time prior to the accident. The plaintiff did testify that defendant explained the collision to him after the occurrence and that it was at this time that the defendant said he may have gone on the wrong side of the road. The court held that this statement did not have the definite imputation of fact which should be required to constitute substantial evidence of the fact and upheld defendant's directed verdict.87 The case stands for the proposition that a declarant's lack of personal knowledge may be of such a degree that his declaration is not acceptable as an admission. Here the statement was a mere conjecture.

Donnelly may be best understood when contrasted with Scherffius v. Orr.88 In Scherffius a motorist brought an action against a farmer for damage sustained when the motorist swerved to avoid hitting a calf allegedly belonging to the farmer. The defendant farmer made the statement that "These are my cattle. The black cows and calves are mine. I believe I can take you where my calf got out. I think I know where my calf got out." The court admitted the declarations, stating:

[W]here a party believes a fact upon evidence sufficient to convince him of its existence, even though it relates to a fact concerning which he could have no personal knowledge, his declaration of the existence of that fact... is competent evidence against him.89

In Scherffius the defendant did not see the calf enter upon the highway but the surrounding circumstances were sufficient to convince him that it was in fact his calf. In Donnelly the defendant's statement was much less positive. He acknowledged only a possibility that he was on the wrong side of the road, and the surrounding circumstances, including his physical condition at the collision scene and later imperfect recollection of the events leading up to the collision, did nothing to strengthen the contention that he actually believed he was on the wrong side.

Liebow v. Jones Store Co.90 differs from Wright and Donnelly in that the statement made by the plaintiff to the in-court witness was itself based

85. 330 Mo. at 181-82, 49 S.W.2d at 9-10.
86. 284 S.W.2d at 465 (Mo. 1955).
87. Id.
88. 442 S.W.2d 120 (Spr. Mo. App. 1969).
89. Id. at 125.
90. 303 S.W.2d 660 (Mo. 1957).
upon hearsay. The in-court witness testified that the plaintiff told her that someone had told the plaintiff that a child had stopped the escalator. The defendant contended that the statement was admissible as an admission of the plaintiff. The court excluded the statement saying that the general rule is that an admission need not be based upon the personal knowledge of the speaker but that the general rule does not require the reception of an admission which merely concedes that someone else said something.91

Careful scrutiny of these cases indicates that the personal knowledge requirement and not the form of the declarations was in issue. While the above cases may confuse the Missouri stand with respect to the personal knowledge requirement and admissions, they should not be read as indicating that the fundamental facts rule is properly applied to admissions.

VII. CONCLUSION

As currently used, the Opinion Rule is really two separate rules resting upon different rationales. The initial step toward eliminating the resulting confusion and imprecision is for members of the bar and bench to purge the term “Opinion Rule” from their vocabulary. The phrase has come to be so all inclusive that it is seldom useful and often misleading.

It is essential to recognize the firsthand knowledge requirement and the fundamental facts rule as two distinct concepts, each with different, but valid, underlying rationales. The firsthand knowledge requirement is a basic testimonial qualification and operates to reject speculation. It applies with full force to all in-court statements. The requirement also applies with full force to all extrajudicial declarations except those qualifying as admissions. In the case of admissions the firsthand knowledge requirement generally is not applied.

The fundamental facts rule, directed at the form of testimony, is properly applied (if at all) only after a witness has met the firsthand knowledge requirement. Viewed as a rule of preference, the fundamental facts rule will never exclude any extrajudicial declaration.

This article addresses only one aspect of the admissibility of human utterances as evidence. Adoption of the thesis contained herein would not affect other controls (such as relevancy) on the admissibility of testimonial evidence. The form of a statement is properly considered when measuring the statement against the relevancy test. The relevancy test is applied irrespective of the form of the declaration. However, a statement containing opinions, inferences, or conclusions will tend to be of less probative value and therefore may increase the possibility that the jury will misuse the statement as opposed to a statement of fact.92

Elimination of the use of the term “Opinion Rule” and the employment of the firsthand knowledge requirement and the fundamental facts

91. Id. at 664.
92. See discussion in note 17 supra.
rule in the aforementioned manner would not entail a dramatic departure from established precedent. Rather, the proposed approach should aid in classifying and understanding existing precedent and should serve as a better framework within which future cases can be decided.

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