

# EVIDENCE AND THE NEW FEDERAL RULES OF CIVIL PROCEDURE: 2

By CHARLES C. CALLAHAN and EDWIN E. FERGUSON †

IN DRAFTING the new rules for civil procedure in the federal courts the Supreme Court's committee has dealt sparingly with the law of evidence. Rule 44 as set out in the committee's report is designed primarily to clear up the confusion which has existed heretofore with regard to the applicability of state rules of evidence in the federal courts and to avoid any further confusion which might arise from the union of law and equity under the new rules.<sup>1</sup> Of the several possible methods of treating these problems, that chosen by the committee is, it is submitted, best adapted to the situation. A thorough-going revision of the law of evidence resulting in a code which is substantially complete probably is not desirable in any case, certainly not in this. A single general rule, such as one requiring conformity to state law on all matters of evidence, would aid in alleviating the confusion; but to adopt a rule of this nature would be to lose an excellent opportunity for eliminating some of the worst features of the present law of evidence.<sup>2</sup> The alternative followed by the committee is to propose a few rules for specific instances and a general one to cover the great body of evidence questions.

These rules are welcome ones, for they meet pressing needs. The purpose of this article, in view of the likelihood that there will be a standing advisory committee, is to suggest additional specific rules which may well be considered in the future.

Choice of the specific rules to be proposed is not a problem which can be solved solely by abstract reflection on the "justice" or "reasonableness" of a particular evidentiary principle. Two practical considerations are deemed equally important: First, attention should be focused upon those parts of the law of evidence which have proved most difficult to administer in the federal courts, *i.e.*, the rules which have required many appellate court decisions for their interpretation. Second, little is to be gained by proposing rules which are not likely to be adopted. Although lawyers and judges probably are becoming increasingly willing to accept less

---

† Members of the Ohio and Iowa bars respectively. For the first part of this article, see (1936) 45 YALE L. J. 622.

1. REPORT OF THE ADVISORY COMMITTEE OF THE UNITED STATES SUPREME COURT ON RULES FOR CIVIL PROCEDURE (April 1937). Changes in the rules proposed in the April draft are recommended by the committee in its final report. FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (Nov. 1937). References in this article are to the rules set out in the April draft as changed in the Final Report.

2. For a general discussion of the problem of evidence in the Federal Courts in connection with the new rules, see Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure* (1936) 45 YALE L. J. 622.

stringent rules of procedure, any proposal which departs greatly from the immediate past is likely to be defeated.

#### THE GENERAL RULE COVERING ADMISSIBILITY AND COMPETENCY

The questions of admissibility about which no specific recommendations are to be made might easily be answered by adopting a single sweeping rule which would admit all evidence relevant to the issue being tried. There are many who would like to see such a rule promulgated and, on the theoretical side, much may be said for it.<sup>3</sup> Particularly is this true with reference to the federal courts where the presiding judge has extensive powers to comment on the evidence. It is likely that less injustice would be done if all relevant evidence were admitted. But the practical obstacles in the way of establishing such a system seem insuperable. Professor Wigmore has stated them clearly:

“To abolish the bulk of the rules now, in the ordinary courts, would be a futile attempt. To pass a law (supposing this possible, in the hasty manner of our ‘freak’ legislation) would amount to little or nothing. You cannot by fiat legislate away the brain coils of one hundred thousand lawyers and judges; nor the traditions embedded in a hundred thousand recorded decisions and statutes. . . . Any one who knows our profession from within knows that it would be a vain dream to think of abolishing the rules of Evidence, as a system, until all mature practitioners and judges now alive had passed into the grave. And in the meantime, since trials must go on, a new generation will have been bred into the same system.”<sup>4</sup>

It seems, then, that the general rule might better be one which will indicate a point of reference to be used in deciding questions of evidence not treated specifically. This has been the course pursued by the Advisory Committee.

A first suggestion which comes to mind is conformity, *i.e.*, to recommend a rule that, except where specifically provided otherwise, the admissibility of evidence in the federal courts shall be determined by the law of the state in which the court is sitting. This is the easy way out and certainly a workable one. But it ties the future of a considerable part of the federal law of evidence to the whims of forty-eight different court systems; and it may be expected that, for the most part, the states will tend to follow traditional rules of evidence without questioning their present validity. The general rule should permit the federal courts the greatest possible freedom in applying rules of evidence to meet changing conditions and needs.

3. See MORGAN and OTHERS, *THE LAW OF EVIDENCE* (1927) xi.

4. WIGMORE, *EVIDENCE* (2d ed. 1923) 124.

The rule which the Committee has proposed is a very interesting one and worthy of close attention. That part of Rule 44 which deals with the matter at hand is as follows:

"All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

The rule provides for conformity where conformity is necessary in order to render particular evidence admissible. Litigants in the federal courts are assured of the benefit of any liberal rules of evidence which may have been written into the law of the particular state in which the court is sitting. Thus, from the standpoint of a court working under Rule 44, the first question to be answered when a point of admissibility is raised is whether the particular evidence is admissible under the law of the state in which the court is sitting. If the evidence is admissible under the state law, it is admissible *ipso facto* in the federal court. Where, however, the particular evidence is not admissible in the state court, it does not necessarily follow that it will suffer the same fate in the federal court. The rule quoted above, "All evidence shall be admitted which is admissible . . . under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity —," clearly indicates that the law of the state which excludes the evidence is not binding upon the federal court. It has been pointed out elsewhere that in equity suits the federal courts never have been required to conform to state rules of evidence, for the operation of both the Conformity Act and the Rules of Decisions Act is confined to cases on the law side of the court.<sup>5</sup> Not being bound to follow the state law excluding the evidence, the court must then determine whether the evidence would have been admissible in a federal equity suit.

One who goes to the federal equity cases expecting to find a body of evidence law which will inform him whether particular evidence is admissible in such cases is likely to encounter some difficulty. It has been shown that relatively few equity cases discuss points of evidence, since these cases are generally tried without a jury.<sup>6</sup> True, equity opinions may be found which repeat such common rules of evidence as the quali-

---

5. See the discussion under the heading Equity and Admiralty, Callahan and Ferguson, *op. cit. supra* note 2, at 624.

6. *Id.*, at 625.

fications and questioning of expert witnesses,<sup>7</sup> *res gestae*,<sup>8</sup> the admissibility of evidence of prior similar acts,<sup>9</sup> or of self-serving declarations.<sup>10</sup> But these seldom attain the dignity of "holdings"; they are usually only incidental to a discussion of the sufficiency of the proof. In so far as there is any equity evidence law, there is, with one possible exception to be mentioned below, no indication that it is different from that applied in law actions. One old federal case has been found, apparently the only one which mentions the point, saying that the admissibility of evidence generally is the same in equity as at law.<sup>11</sup> Lord Hardwicke made the same statement in three early English cases;<sup>12</sup> and occasionally it is found in legal texts.<sup>13</sup> The exception referred to concerns fraud and trust cases in which there is some indication that chancery may have more liberal admissibility standards than the law courts.<sup>14</sup>

The generalization that the rules of evidence are the same both in equity and at law will be of little help in determining whether particular evidence is admissible under that part of Rule 44 referred to above. Since there is no general agreement as to whether federal courts are required to follow state rules of evidence in law actions, while in equity they clearly are not so bound, it is hardly sound to interpret Rule 44 on the basis that the federal rules of evidence in equity and at law are the same. The federal equity practice has been free not only of the state rules of evidence but also, in large part, from any rules at all; and there is no substantial body of evidence law in federal equity practice.

It is not intended to present a dark picture of the operation of this part of Rule 44; indeed its virtue seems to lie in the fact that it does not restrict courts to a particularized body of rules. As to general questions of admissibility, therefore, the federal courts will have complete freedom to develop their own rules. This may be somewhat of an overstatement. The fact that certain evidence, such as flagrant hearsay or opinion, is not admissible in any court, coupled with the judicial dislike for sudden change, point to the prediction that, although the federal courts will be starting practically with a clean slate so far as rules of

7. *E.g.*, Consolidated Gas Utilities Corporation v. Thompson, 14 F. Supp. 318 (W. D. Tex. 1936).

8. *E.g.*, Montgomery v. Pacific Electric Railway Co., 293 Fed. 680 (C. C. A. 9th, 1923).

9. *E.g.*, United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247 (C. C. E. D. Wis. 1905).

10. *E.g.*, Sawhill v. Lawrence, 69 F. (2d) 194 (C. C. A. 3d, 1934).

11. Harmer v. Gwynne, 11 Fed. Cas. No. 6,075 (C. C. D. Ohio 1851).

12. Manning v. Lechmere, 1 Atk. 453 (1737); Man v. Ward, 2 Atk. 228 (1741); Glynn v. Bank of England, 2 Ves. 38 (1750).

13. See BATES, FEDERAL EQUITY PROCEDURE (1901) 441; FLETCHER, EQUITY PLEADING AND PRACTICE (1902) at 650.

14. See the opinion of Lord Hardwicks in Man v. Ward, 2 Atk. 228 (1741).

admissibility are concerned, the new body of precedent will be much the same as the old in general outline. But the rule of admissibility as proposed by the Advisory Committee does give the courts a free hand in applying reforms to individual rules, thus keeping them abreast of the times. This is all that can be asked of such a general rule and it is believed likely that the federal courts will so administer the rule that the results will be much more satisfactory than those which might be expected under a conformity requirement.

The last sentence of the above quotation from Rule 44 applies the same test to matters of competency of witnesses. The Competency of Witnesses Act, at present in force, provides that:

"The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the law of the State or Territory in which the court is held."<sup>15</sup>

Since this statute is applicable to suits in equity\* as well as to actions at law,<sup>16</sup> the law of the state in which the federal court is sitting is the criterion of competency under any of the alternatives of Rule 44. The new form of stating the rule does have an advantage, however, in that it makes it clear that any federal competency statutes which may subsequently be adopted will control over the state law without conflicting with the rule.

The present draft as well as the preliminary one imply approval of the present state of the law with regard to competency, and this approval seems in general to be justified. True, rules of competency, or more precisely of "incompetency", remain which may be criticized as outmoded and vestigial; but the last century has seen the abandonment, by statutes, of so much that was senseless that a "common law" of competency scarcely can be said to exist today.

Although the state competency statutes are generally satisfactory, there is one notorious exception which requires special attention. Most states have seen fit to enact statutes whose devious forms clothe the common principle that the survivor of a transaction with a deceased or incompetent person may not testify as to that transaction against the legal representatives of such a person. The statutes exist in almost all of the states.<sup>17</sup> When a justification of the rule is attempted, it consists either of the mechanical repetition of the maxim, "If death has closed the lips of the one party, the policy of the law is to close the lips of the other",<sup>18</sup> or of an elaboration of the evils thought to be guarded against:

15. 34 STAT. 618 (1906), 28 U. S. C. A. § 631 (1926).

16. See *Rowland v. Biesecker*, 181 Fed. 128 (C. C. N. Y. 1910), *aff'd* 185 Fed. 515 (C. C. A. 2d, 1911).

17. *E.g.*, CAL. CODE CIV. PROC. (Deering, 1937) § 1880; ILL. REV. STAT. (Smith-Hurd, 1935) Ch. 51, par. 2; N. Y. CIV. PRAC. ACT § 347; PA. STAT. ANN. (Purdon, 1936) tit. 28 § 322.

18. See *Louis v. Easton*, 50 Ala. 470, 471 (1873).

“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.”<sup>19</sup>

The implications of this argument are obvious: (1) the number of persons who will perjure themselves in order to gain an undue advantage in the settlement of an estate is so great that we are justified in barring from the witness stand all those who have honest claims or defenses against estates, thus making the proof of the honest matter difficult and often impossible, (2) those dishonest survivors will be such consummate liars that cross examination will be powerless to expose them, and (3) the court and jury will be incompetent to weigh the credibility of such persons' testimony.<sup>20</sup> Thus stated, the argument refutes itself. Another fallacy in the reasoning behind the rule, if indeed more need be pointed out, has been suggested.<sup>21</sup> When a claimant is willing to commit perjury he is likely also to be willing to suborn perjury. The statutes which apply only to surviving parties and not to disinterested witnesses would thus be ineffective against the perjurer and effective only against the honest claimant.

But the indictment of the “dead man” statutes need not rest solely on considerations of their shortcomings in theory. In practice the statutes have cluttered up the dockets of appellate courts ever since their enactment, and a large number of decisions has been required for their interpretation. The situation in New York is typical.<sup>22</sup> A survey by the evidence committee of the Commonwealth Fund indicates that, up to 1921, the New York statute had been before the appellate courts three hundred twenty-four times. Moreover, the North Carolina statute, to 1919, had been considered in two hundred and twenty-one cases; and the Minnesota statute, to 1917, had been up before the highest court of that state one hundred and thirty-two times.<sup>23</sup> The federal courts, since they are required to follow the state laws as to competency, have similarly had their share of the labor of interpreting these statutes.<sup>24</sup>

19. See *Owens v. Owens*, 14 W. Va. 88, 95 (1878).

20. See WIGMORE, *EVIDENCE* (2d ed. 1923) § 578; MORGAN and OTHERS, *op. cit. supra* note 3, at 24 *et seq.*

21. MORGAN and OTHERS, *loc. cit. supra* note 20.

22. GREENFIELD, *A TREATISE ON TESTIMONY UNDER § 347, CIVIL PRACTICE ACT* (1923).

23. MORGAN and OTHERS, *op. cit. supra* note 3, at 27.

24. See, *e.g.*, *Martin v. Luster*, 85 F (2d) 833 (C. C. A. 7th, 1936) (Wisconsin); *Northern Trust Co. v. Elman*, 72 F. (2d) 169 (C. C. A. 6th, 1934) (Ohio).

The results of their labors have been catalogued in the Federal Digest under 139 separate headings. On the other hand, the more liberal statutes enacted in a few states have evoked few interpretive appellate court decisions.<sup>25</sup>

The "dead man" statutes are thus untenable both in theory and practice, and it seems highly desirable that the new federal rules should eliminate them. The abrogation of the "dead man" rule in the federal courts not only would promote justice and relieve congestion in these courts themselves but also would be an excellent start toward overcoming the inertia in the states.<sup>26</sup>

But what form should the rule take? Under all the state statutes which admit the testimony of an interested survivor some antidote is prescribed in order to protect the estate of the deceased. As has been stated, the danger to the estate of the deceased is not believed actually to be great. But if some protection can be provided without introducing an offsetting or overbalancing injustice and without prejudice to the practical operation of the rule, it should, of course, be introduced. The method of the Virginia and New Mexico statutes, which allow the interested survivor to testify as to transactions with the deceased but refuse him a judgment unless his testimony is corroborated, is open both to theoretical and practical objection.<sup>27</sup> One of the principal indictments of the stringent "dead man" statutes is that the proof of an honest claim often is made difficult or impossible when the surviving party cannot testify. To allow him to testify but to require that his testimony be corroborated is to place the same stumbling block in his path, unless the degree of corroboration required is very slight. A second criticism arises from the term "corroboration". It is impossible to define this concept in such a way as to avoid squabbling over the amount of corroboration necessary to support a judgment for the survivor. This had been the experience in both Virginia and New Mexico.<sup>28</sup> Another method, allowing the testimony of the interested survivor to be admitted only when, in the discretion of the trial judge, justice demands it, is employed in a fashion which subjects it to much the same sort of objection. Appellate tribunals immediately begin to formulate and lay down rules for the guidance of the trial court in the exercise of its discretion.<sup>29</sup> On the other hand, little difficulty has been experienced by the states whose statutes allow the testimony of the interested survivor to come in freely and protect the estates of deceased persons by also admitting in evidence the relevant

---

25. See MORGAN and OTHERS, *op. cit. supra* note 3, at 29.

26. Legis. (1935) 46 HARV. L. REV. 834, 838.

27. VA. CODE (Michie, 1936) § 6209; N. MEX. STAT. ANN. (1929) § 45-601.

28. See, *e.g.*, Ratliff v. Jewell, 153 Va. 149 S. E. 409 (1929); *In re Cardoner's Estate*, 27 N. Mex. 105, 196 Pac. 327 (1921).

29. *E.g.*, Harvey v. Hilliard, 47 N. H. 551 (1867).

entries, memoranda and declarations of the deceased. In the survey conducted by the Commonwealth Fund Committee, lawyers and judges who had had experience in a "great many" cases involving the Connecticut statute voted six to one to retain such a statute unamended.<sup>30</sup> Under this plan the honest interested survivor is in no way hampered in the proof of his case, and the dishonest one may find himself embarrassed in establishing his fraudulent claim. On the whole this method of handling the problem seems quite satisfactory and far superior to the other types of statutory regulation of the "dead man" situation. The rule here suggested is that of conformity to state practice, proposed by the Committee, with an exception which follows, in content, the Connecticut statute:<sup>31</sup>

*Competency of Witnesses.* In actions or proceedings by or against the representatives of deceased or incompetent persons no person shall be disqualified, by reason of such death or incompetency, to testify as to any matter relevant to the issue or issues being tried [and no statement or declaration, whether written or oral, of the deceased or incompetent person shall be excluded from evidence as hearsay, provided that the court shall first find that the statement or declaration was in fact made by the deceased or incompetent person in good faith and on personal knowledge]. In other respects the competency of a witness to testify shall be determined by the law of the state in which the court is held.<sup>32</sup>

#### THE RULE THAT A PARTY MAY NOT IMPEACH HIS OWN WITNESS

The specific rules of evidence recommended by the committee in Rule 44 are confined to those relating to examination and credibility of witnesses. The Rule allows impeachment of any witness by proof of contradictory statements; adverse parties may be called, interrogated by leading questions and impeached; hostile witnesses may be interrogated by leading questions; and cross-examination may extend to all the material issues of the action except where the witness is an adverse party.

It has already been adequately demonstrated that the principle of evidence which prohibits a party's impeaching his own witness is without sound theoretical justification.<sup>33</sup> It may be pointed out, however, that the attacks upon the principle have not been wholly of an academic

30. MORGAN and OTHERS, *op. cit. supra* note 3, at 89 *et seq.*

31. A rule of this nature was approved by the Committee of the Commonwealth Fund. *Id.* at 35; see also Legis. (1935) 46 HARV. L. REV. 834.

32. If the rule set out *infra* p. 207, which makes all hearsay statements of deceased or incompetent persons admissible in any action, is adopted the portion of this rule which is enclosed in brackets will be superfluous.

33. See Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69; MORGAN and OTHERS, *op. cit. supra* note 3, at xvi, n. 1; *cf.* WIGMORE, EVIDENCE (2d ed. 1923) § 899.



nature and that the courts, as well as the legislatures, have become increasingly aware of its uselessness.

A party may wish to do one of several things when he finds himself in the position of having called a witness whose testimony is damaging to the party's case:

First, he may wish to impeach the character of the witness. This he clearly cannot do under the rule now in force;<sup>34</sup> and federal decisions have held that he may not even be heard to argue that his witness is unworthy of belief.<sup>35</sup>

Second, he may wish to show that his witness is biased against him by reason of his interest in the outcome of the action or through corruption. Professor Wigmore states that this is usually included within the general prohibition against impeachment; but the cases in support of his view are few and no federal decisions bearing directly upon the point have been found.<sup>36</sup>

Third, a party may wish to show that a witness previously has made statements which differ from those made on the stand. It is around this point that most of the decisions have turned and around which most of the confusion centers. Usually the courts have taken a position of compromise between the free admission and the absolute exclusion of such evidence. One such compromise prohibits the introduction of any independent evidence of such contradictory statements but allows the witness to be questioned about them in order to refresh his recollection and induce him to make a correction.<sup>37</sup> A second rule permits the witness to be questioned about the prior statement and also allows outside testimony to be offered if the witness proves "hostile".<sup>38</sup> The most common form of the rule relative to prior contradictory statements is that which allows such statements to be shown if the party has been "surprised"; this is the view maintained in most of the federal cases.<sup>39</sup>

A fourth alternative is cross examination of the witnesses giving the unfavorable testimony. This is closely connected with the third alternative, but is concerned with the form of the examination rather than with the matters touched upon.<sup>40</sup>

34. See *id.*, at § 900.

35. See *Ashley v. Board of Supervisors of Presque Isle County*, 83 Fed. 534 (C. C. A. 6th, 1897); *Choctaw & Memphis Railroad Co. v. Newton*, 140 Fed. 225, 250 (C. C. A. 8th, 1905).

36. WIGMORE, EVIDENCE (2d ed. 1923) § 901 and cases there cited; see also Ladd, *op. cit. supra* note 33, at 83, n. 65.

37. See, *e.g.*, *Babcock v. People*, 13 Colo. 515 (1889) (the qualification that the party must be "surprised" is also added.)

38. WIGMORE, EVIDENCE (2d ed. 1923) § 904.

39. *Swift & Co. v. Short*, 92 Fed. 567 (C. C. A. 8th, 1899); *Hickory v. United States*, 151 U. S. 303 (1894).

40. *Cf. St. Clair v. United States*, 154 U. S. 134 (1894).

Several jurisdictions have dealt by statute with the problem of impeaching one's own witness. Indeed the prohibition of impeachment had been established only about fifty years when the first of the statutes restricting the scope of the rule was enacted.<sup>41</sup> In 1854 a statute was enacted in England which provided:

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement."<sup>42</sup>

Statutes similar to this one are found in Florida, New Mexico, Vermont, and Virginia.<sup>43</sup> The element of surprise has been embodied in the statutes of Georgia and the District of Columbia.<sup>44</sup> Some ten states have statutes allowing impeachment by proof of prior inconsistent statements without any requirement that the witness be adverse or that the party calling him be surprised.<sup>45</sup> In addition to allowing proof of contradictory statements in any situation, the Indiana statute allows impeachment by evidence of bad character when it was indispensable that the party should produce the witness or when there is "manifest surprise".

A suggested statute in New York goes farther than any of the other state rules toward the complete abolition of the common law doctrine of impeachment. It allows impeachment by showing contradictory statements, by showing bias or corruption and by showing the bad character of the witness. Only in the latter instance is its operation limited.<sup>46</sup>

Which policy should the federal rules adopt? It will be noted that the proposed Rule 44 expressly permits impeachment only by proof of contradictory statements, thereby conforming to most of the statutes mentioned above.<sup>47</sup> Under the Rule as proposed by the Advisory Com-

41. See WIGMORE, EVIDENCE (2d ed. 1923) § 896.

42. 17 & 18 Vict. c. 125, § 22 (1854). See the history of the legislation in Ladd, *loc. cit. supra* note 33.

43. FLA. COMP. GEN. LAWS ANN. (1927) § 4377; N. M. STAT. ANN. (Courtright, 1929) § 45-607; VT. PUB. LAWS (1934) § 1702; VA. CODE (Michie, 1936) § 6215.

44. GA. CODE ANN. (Michie, 1933) § 38-1801 ("entrapped" substituted for "surprised"); D. C. CODE (1929) tit. 9, § 21.

45. *E.g.*, IND. STAT. ANN. (Burns, 1933) § 2-1726; see also TEX. ANN. CODE CRIM. PROC. (Vernon, 1926) Art. 732.

46. REPORT OF THE COMMISSION OF THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE (1934) 299.

47. "The earlier legislation stopped far short of an adequate treatment of the problem by dealing only with impeachment by prior inconsistent statements." Ladd, *op. cit. supra* note 33, at 91.

mittee a witness who is unwilling or hostile may be asked leading questions, but the party should likewise be left free to show bias interest or corruption by independent evidence if he wishes to do so.<sup>48</sup> There are no valid reasons of policy which operate to exclude such evidence.

That a party should be permitted to impeach the character of his own witness is not so clear. Here a point of policy does exist. If a party may attack the character of a witness whom he has called, he may bring pressure to bear upon the witness. This matter of policy was strong enough to induce the framers of most of the state statutes mentioned above expressly to exclude such impeachment. But this policy argument breaks down when it is remembered that even though a witness testify favorably to the party calling him under fear of an attack upon his character it is likely that the attack will nevertheless be made by the opposite side.<sup>49</sup> It is not often that a party will want to attack the character of his own witness; the impression created is likely to react too strongly against the party's case. But when a situation arises in which a litigant is willing to assume this risk, rather than to leave unchallenged testimony which is damaging and believed to be false, the testimony should be admitted. It is proposed that the common law rule against a party's impeaching his own witness should be discarded. Since most jurisdictions have already made inroads on the rule, there are no great practical obstacles preventing the adoption of a proposal such as the following:

"A party may impeach any witness by proof of contradictory statements or by evidence of bias or corruption or in any other manner."

#### STATEMENTS OF PERSONS UNAVAILABLE AS WITNESSES

The hearsay rule and its exceptions have been said to comprise the largest part of what truly belongs to the law of evidence.<sup>50</sup> An assumption implicit in most exclusionary rules is that human testimony is so likely to be untrustworthy that the jury or the court, should be permitted to hear it only after every available safeguard against untruth has been erected. Oaths are required of witnesses and penalties are provided for perjury; the atmosphere of the court room is one of solemnity; the rights of confrontation and cross-examination are guarded jealously. These safeguards are looked upon as so important that, as a general rule, no testimony however pertinent or important is allowed to come in if it is not subject to them. The fact that hearsay testimony generally is not so safeguarded is the reason generally given for its exclusion.<sup>51</sup> Another

48. WIGMORE, EVIDENCE § 901.

49. See *id.*, at § 899.

50. THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898) 518.

51. WIGMORE, EVIDENCE § 1362; Strahorn, *Extra-Legal Materials and Evidence* (1934) 29 ILL. L. REV. 300, 312.

reason is the common sense one that the trustworthiness of a story decreases in inverse ratio to the number of times it is told.<sup>52</sup>

The supposed advantages of the hearsay rule in guarding the trustworthiness of testimony are, however, probably much over-estimated, while its harm in excluding relevant and important testimony appears considerable. The best argument against the hearsay rule, though, lies in the great number of exceptions to it as well as in the amount of difficulty, and consequent "law", which they have engendered. The fact that almost the entire third volume of Professor Wigmore's monumental work on evidence discusses the exceptions to this rule is indicative of the great amount of judicial administration which the mass of hearsay rules requires.

The numerous exceptions to the hearsay rule are diverse in character and apply, in many instances, to rather unimportant situations. But there is, to some degree, a logical connection among them; they apply to situations in which, for one reason or another, the hearsay is believed likely to be trustworthy, even though it is not subjected, or is subjected only partially, to the safeguards mentioned above. An additional element common to the hearsay exceptions is that they operate only when necessity demands it. The "necessity", however, is of varying degrees. In all instances it is true, and rightly so, that the hearsay cannot come in if the person who made the statement is himself present and available as a witness. In order to admit dying declarations, statements against interest, statements of pedigree, and documentary witnesses, proof of absolute impossibility of obtaining the testimony from the original source is necessary; a common requirement is the death of the person in question, although in some instances other reasons are accepted. But something less than impossibility of obtaining the original person's testimony is sufficient in the exceptions for official statements, statements of mental or physical condition and spontaneous exclamations.<sup>53</sup>

Criticism of the hearsay rule may be directed at the limited and diverse character of its exceptions. The fact is that there is no reason, other than the accidents of history, to explain the limits of these exceptions. As a matter of history they are not, in fact, true exceptions, but are, in many instances, independent rules as old or older than the hearsay rule itself.<sup>54</sup> To suggest further exceptions to meet specific problems is unthinkable; they are already so numerous as to be unmanageable. They must either remain as they are or be telescoped and simplified, so far as possible, in one or more broad generalizations. Happily the present exceptions have a common ground which makes the

---

52. This theory or reason is said by Wigmore to be spurious or merely supplementary. EVIDENCE § 1363.

53. See under the separate discussion of these exceptions, 3 WIGMORE, EVIDENCE.

54. THAYER, *op. cit. supra* note 58, at 519, 520. See WIGMORE, EVIDENCE § 1426.

latter course possible: the unavailability of the original declarant as a witness.<sup>55</sup> It may be said that the unavailability of the original declarant is not the only test for the hearsay exceptions, that there is the requirement that the circumstances of the declaration be such that it is likely to be true. To this there are two answers. First, the rule may, and probably should, provide that before such hearsay testimony is admitted it shall be found by the court that the statement was made by the declarant in good faith, on his own personal knowledge, and before the instant action was begun. Second, the guarantee of truth supposed to be inherent in the present exceptions has been shown to be largely an illusion.<sup>56</sup>

The suggestion that a rule making hearsay statements of deceased persons admissible be put into effect is not purely a theoretical one. A statute to this effect has been in force in Massachusetts for nearly forty years. Its present form is substantially the same as that of the original:

"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."<sup>57</sup>

In proposing a rule similar to that of Massachusetts for the federal courts we can be reassured by the experience of that state that this statute is not only sound in theory but workable in practice. It has undoubtedly liberalized the rules governing the admissibility of evidence in Massachusetts.<sup>58</sup> It has, moreover, the unqualified approval of those who work under it. The answers received to a questionnaire sent to lawyers and judges indicated that evidence coming in under the statute is important in a large number of cases and that an overwhelming majority favored its retention. About three-fourths of the lawyers who had considerable experience with the statute felt that it aids in determining the truth rather than encouraging perjury.<sup>59</sup>

But to enact the rule in the form of the Massachusetts statute would be to leave a job only partly done. Why should the admission of hearsay declarations be limited to those made by persons who are unavailable as witnesses because they are dead? The necessity for resorting to secondary evidence in instances of insanity is just as great as in cases where the declarant is dead; indeed in all their pertinent aspects the situations of death and insanity are identical.<sup>60</sup> The question then arises,

55. WIGMORE, EVIDENCE, at § 1427.

56. MORGAN and OTHERS, *op. cit. supra* note 3, at 38.

57. MASS. GEN. LAWS (1932) c. 233, § 65. The original statute is Acts 1898, c. 535.

58. See *e.g.*, *In re Keenan*, 287 Mass. 577, 192 N. E. 65 (1934).

59. MORGAN and OTHERS, *op. cit. supra* note 3, at 40 *et seq.*

60. The statute recommended by the Committee of the Commonwealth Fund places death and insanity on an equal footing in this regard. MORGAN and OTHERS, *op. cit. supra* note 3, at 49.

should not the rule allow the reception of the testimony when it is shown that for any good reason it is either impossible or highly impracticable to secure the attendance of the witness in person or to take his deposition? It is the *fact* that the witness is unavailable which is of importance; the cause of his unavailability is irrelevant. Of course, a party should not be permitted to present hearsay testimony merely upon the allegation that the declarant is not available, since there is always the danger that a witness will not be produced in order to avoid his being cross-examined. But if the court were to admit hearsay testimony only after being convinced that the declarant was in fact unavailable and that his absence was *bona-fide*, little of this danger would remain.<sup>61</sup>

The effect of liberalizing the operation of the hearsay rule along the lines indicated above would clear up much of the confusion resulting from the present multiplicity of exceptions. The following rule is believed to be a practicable one for improving the justice, and at the same time facilitating the administration, of the hearsay rule:

*Statements or Declarations of Persons Unavailable as Witnesses.*

No statement or declaration, whether written or oral, shall be excluded from evidence as hearsay in any proceeding under these rules if the court shall find (1) that the declarant is dead or insane or that after due diligence the party offering such testimony is unable to produce the declarant in court and is unable to take his deposition and (2) that such statement or declaration was made in good faith before the commencement of the proceeding and on the declarant's personal knowledge.

#### THE PHYSICIAN-PATIENT PRIVILEGE

Communications between physician and patient were not privileged at the common law.<sup>62</sup> It was not until 1828 that the statutory innovation established a privilege for such communications in New York;<sup>63</sup> the revisers felt that "unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense."<sup>64</sup> Their fears seem to have been based more upon an early English dictum than upon observation and experience.<sup>65</sup> But whatever the basis may have been, the New York statute was subsequently adopted by thirty states.<sup>66</sup>

61. If the evidence is objectionable on any ground other than hearsay it could not, of course, come in under such a rule.

62. 5 WIGMORE, EVIDENCE § 2380.

63. 2 N. Y. REV. STAT. (1828) 406.

64. 3 COMMISSIONERS ON REVISION OF THE STATUTES OF NEW YORK (1836) 737.

65. See Purrington, *An Abused Privilege* (1906) 6 COL. L. REV. 388, 392-393.

66. *E.g.*, CAL. CODE CIV. PROC. (Deering, 1937) § 1881, par. 4; MICH. COMP. LAWS (1929) § 14216; N. Y. C. P. A. (Parson, 1936) § 352; PA. STAT. ANN. (Purdon, 1936) Tit. 28, § 328.

It is not intended here to repeat the virulent and justifiable attacks which have been made upon the privilege. Professor Wigmore has thoroughly summed up the case against it, and concludes that "the adoption of it in any other jurisdictions is earnestly to be deprecated".<sup>67</sup>

That the states which have sanctioned the privilege are beginning to realize their mistake is borne out by the statutory restrictions prevailing in many jurisdictions. Nearly all the statutes make a provision for waiver.<sup>68</sup> Most Workmen's Compensation Acts specifically provide that a physician who has examined the employee-claimant may be required to testify.<sup>69</sup> Several states except from the privilege testimony in malpractice actions.<sup>70</sup> There are a few statutes excepting personal injury actions.<sup>71</sup> And a Washington statute provides for the appointment by the court of a physician to examine an injured party for the purpose of qualifying himself to testify concerning personal injuries.<sup>72</sup> In Colorado the offer of a physician as a witness is deemed a waiver.<sup>73</sup> An Oklahoma statute makes it unlawful for a physician knowingly to conceal, withhold or misrepresent facts concerning health, age, cause of death or other material information regarding the insured, in an action on a policy issued by a mutual benefit association;<sup>74</sup> this has been held to override the general privilege statute in such actions.<sup>75</sup> The present Wisconsin statute excepts lunacy inquiries, and homicide prosecutions when the disclosure relates directly to the fact, or immediate circumstances, of the homicide. It also sanctions waiver of the privilege by a beneficiary of an insurance policy.<sup>76</sup>

A Pennsylvania statute creates a privilege only for communications which tend to malign the character of the patient.<sup>77</sup> The courts of that state have further narrowed the application of the privilege statute by

67. 5 WIGMORE, EVIDENCE § 2380.

68. Only those of Arkansas, Indiana, Missouri, and North Carolina contain no waiver provision. In the three states first named, waiver is nevertheless allowed. *Schirmer v. Baldwin*, 182 Ark. 581, 32 S. W. (2d) 162 (1930); *Becknell v. Hosier*, 10 Ind. App. 5, 37 N. E. 580 (1894); *Groll v. Tower*, 85 Mo. 249 (1884). A proviso in the North Carolina statute makes a waiver provision unnecessary. See text p. 209 *infra*.

69. *E.g.*, ALA. CODE ANN. (Michie, 1928) § 7567; MICH. COMP. LAWS (1929) § 8435.

70. *E.g.*, COLO. ANN. STAT. (Mills, 1930) c. 177, § 9; *cf.* NEV. COMP. LAWS (Hillyer, 1930) § 8974.

71. *E.g.*, CAL. CODE CIV. PROC. (Deering, 1937) § 1881, par. 4; PA. STAT. ANN. (Purdon, 1936) Tit. 28, § 328. See WIGMORE, EVIDENCE (2d ed. 1923) §§ 2380(4), 2389.

72. WASH. REV. STAT. ANN. (Remington, 1932) § 1230-1.

73. COLO. STAT. ANN. (Mills, 1930) c. 177, § 10.

74. OKLA. STAT. ANN. (Harlow, 1931) § 272.

75. *Oklahoma Protective Ass'n v. Montgomery*, 160 Okla. 135, 16 P. (2d) 135 (1932).

76. WIS. STAT. (1935) § 325.21. See *In re Gallum's Estate*, 215 Wis. 314, 254 N. W. 542 (1934).

77. PA. STAT. ANN. (Purdon, 1936) Tit. 28, § 328.

refusing to extend it to criminal cases.<sup>78</sup> The North Carolina legislators have attempted to avoid the injustices inherent in other privilege statutes by adding the proviso: "that the presiding judge of a superior court may compel such disclosure if in his opinion the same is necessary to a proper administration of justice."<sup>79</sup> And California, starting in 1872 with legislative enactment of the usual privilege rule, has whittled down the scope of the rule to a point where the only important group of cases within the privilege is that involving actions on insurance policies, and here the insurer may protect himself by inserting a waiver clause in the application or the policy.<sup>80</sup>

It is assumed by some writers and jurists that the physician-patient privilege does have a proper, though restricted, sphere of operation.<sup>81</sup> This assumption is postulated upon a belief that one who desires secrecy should not, for that reason, be deterred from seeking medical aid. But there are actually few instances in which secrecy is seriously desired. Wigmore mentions venereal disease and criminal abortion cases in this connection.<sup>82</sup> But it is exceedingly doubtful whether the privilege ever makes for a fuller disclosure by the patient. Rarely does the patient foresee the future litigation in which the injury will assume importance.<sup>83</sup>

Probably the strongest argument against the physician-patient privilege lies in the fact that in eighteen states it has never been sanctioned by either the legislature or the courts,<sup>84</sup> and a very few decisions have been found in these jurisdictions in which an attempt was made to invoke the privilege.<sup>85</sup> It is, moreover, significant that little or nothing has been written to defend this rule of evidence against the increasing number of attacks against it. A proposal for the abolition of the privilege has

78. *Commonwealth v. Edwards*, 318 Pa. 1, 178 Atl. 20 (1935).

79. N. C. CODE ANN. (Michie, 1935) § 1798. The finding of necessity must appear in the record, in order that the physician will be protected from criticism for his disclosure. *Metropolitan Life Ins. Co. v. Boddie*, 194 N. C. 199, 139 S. E. 228 (1927). Compare (1937) 46 YALE L. J. 703, 706 (attorney-client privilege).

80. See Comment (1936) 9 So. CAL. L. REV. 148.

81. See (1927) 164 L. T. 10.

82. 5 WIGMORE, EVIDENCE § 2380(4). One might, too, wish his physical condition to be kept secret for a legitimate reason, business, family or social.

83. Purrington, *op. cit. supra* note 65, at 396; Emory, *Waiver of Patient's Privileges* (1931) 6 WASH. L. REV. 71, 72; Comment (1936) 9 So. CAL. L. REV. 149, 150.

84. The eighteen states are: Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Virginia.

85. The Kentucky court has held that the rejection of a physician's testimony on an objection of privilege was error, for the reason that the common law rule obtained. There was no further comment. *Louisville & Nashville R. Co. v. Crockett's Adm'x*, 232 Ky. 726, 24 S. W. (2d) 580 (1930). In 1935, the privilege was held properly denied in Connecticut: "information acquired by physicians in their professional capacity has never been privileged in Connecticut." Again, no further comment. *Zeiner v. Zeiner*, 120 Conn. 161, 179 Atl. 644 (1935).



in fact been made in the very state which passed the first privilege statute.<sup>86</sup> The proposal that the privilege be abolished in the federal courts will meet with a great many objections. It is true that one of the arguments for uniformity of evidence rules in the federal courts has little weight here: litigation involving the physician-patient privilege is generally of a private and local nature, and is of no great public importance. It is also true that a rule abolishing the privilege would conflict with the declared "public policy" of many of the states. Moreover, as a consequence of the rule, there might be some increase in litigation, where cases come within federal jurisdiction. But the hardships created by the privilege should be an ample answer to any suggestion of conformity. As to the "public policy" argument, it would seem that the actual design of the legislation has been furthered not a whit. And a possible increase of litigation in the federal courts is a small price to pay for the abrogation of a rule which seems to work only injustice. Furthermore, action by the Supreme Court might well set an example for the states to follow. The following rule is therefore proposed:

*Communications to Physicians, Surgeons or Nurses.* The testimony of a physician, surgeon, or nurse<sup>87</sup> shall not be excluded on the ground that the information of the witness was acquired through a communication made to him in his professional capacity.

#### JUDICIAL NOTICE

Despite the absence of a survey of cases applying the process of judicial notice to determine the extent to which it is employed, there is general agreement that this principle is not being used to full advantage, and it is apparent that many undesirable restrictions have crystallized.<sup>88</sup>

Judicially cognizable matters may be grouped into two broad divisions: phenomena which are actually or in theory known to the judge in the exercise of his judicial function, and factual matters which, were it not for their "notoriety" or "capability of unquestionable demonstration", ordinarily would be subjects of proof before a jury or a judge sitting as a fact-trier.<sup>89</sup> It is elementary that the federal courts will notice federal and state statutes and decisions. But, in keeping with the distinctions made in state decisions, federal courts have refused to take judicial notice of foreign law, private statutes, or municipal ordinances.<sup>90</sup> Gen-

86. A. B. C. N. Y. YEAR BOOK (1930) 247.

87. The privilege statutes of several states extend to nurses. *E.g.*, N. M. STAT. ANN. (Courtright, 1929) §45-512 as amended N. M. STAT. ANN. (Courtright, 1933) c. 33; N. Y. C. P. A. (Parson, 1936) § 352.

88. See 5 WIGMORE, EVIDENCE § 2583.

89. See Strahorn, *The Process of Judicial Notice* (1928) 14 VA. L. REV. 544.

90. See, *e.g.*, Booth Fisheries Co. v. Comm'r of Internal Revenue, 84 F (2d) 49 (C. C. A. 7th, 1936). Foreign law will be noticed in so far as it is international. The

erally, they will notice the rules and regulations of federal executive departments,<sup>91</sup> but the cases are not uniform.<sup>92</sup> Why the distinctions? No one can seriously contend that those legal phenomena which courts refuse judicially to notice have any inherent characteristics justifying distinct treatment. The explanation would seem to lie in the availability or non-availability of source material. Thus, courts have had ready access to public statutes and decisions and departmental regulations either in their own or nearby libraries, but private statutes, municipal ordinances, and material of value on foreign law have not been so easily obtainable.

The increasing availability to the courts of source material is the most important single factor responsible for the gradually increasing scope of the state rules upon judicial notice of legal phenomena — an evolution which is characterized chiefly by statutes requiring or permitting judicial notice of private law,<sup>93</sup> of laws of other states,<sup>94</sup> and of foreign law,<sup>95</sup> and by various statutory half-liberalizations of the general rule against judicial notice of municipal ordinances.<sup>96</sup> Acquisition of source material may be a burden on the court, but this fact should be no ground for refusing notice if counsel's brief is adequate.<sup>97</sup> Nor should this procedure result in unfair advantage over an adversary. It has been pointed out that an opponent seldom if ever would fail to discern from the pleadings which points of law were going to be relied on at the trial.<sup>98</sup> In any case, it is difficult to see how there could be any greater degree of surprise in these instances than when the public law of

Scotia, 14 Wall. 170 (U. S. 1871). U. S. v. Chaves, 159 U. S. 452 (1895). No case has been found in which state statutes requiring judicial notice of foreign law have been dealt with in the Federal courts, although it would seem that the courts would be bound to follow the state law under the conformity acts. See *Seattle R. & S. Ry. Co. v. City of Seattle*, 190 Fed. 75 (C. C. W. D. Wash. 1911) (state statute requiring judicial notice of municipal ordinances followed upon pleading by reference).

91. See, *e.g.*, *Anderson v. Akers*, 7 F. Supp. 924 (D. C. Ky. 1934).

92. In *Nagle v. United States*, 145 Fed. 302 (C. C. A. 2d, 1906) the court refused to notice post-office regulations because the burden of investigation would be too great. See also *Thompson v. Missouri Pac. R. Co.*, 15 F. (2d) 28, 31 (C. C. A. 8th, 1926).

93. See, *e.g.*, CAL. CODE CIV. PROC. (Deering, 1937) § 1875(3); CONN. GEN. STAT. (1930) § 5599. Other states provide for notice of private statutes upon pleading by reference. *E.g.*, MO. STAT. ANN. (Vernon, 1932) § 804; N. C. CODE ANN. (Michie, 1935) § 541.

94. *E.g.*, CAL. CODE CIV. PROC. (Deering, 1937) § 1875(3); CONN. GEN. STAT. (1930) §§ 5599, 5600. See Comments (1930) 10 B. U. L. REV. 417; (1928) 42 HARV. L. REV. 130.

95. See, *e.g.*, CONN. GEN. STAT. (1930) §§ 5599, 5600.

96. *E.g.*, ILL. REV. STAT. (Smith-Hurd, 1935) c. 51, § 48a; N. Y. CONSOL. L. (Cahill, 1930) c. 6, § 32. By statute or decision, municipal courts are often permitted to notice ordinances of their respective cities despite any contrary rule applicable to state courts. *E.g.*, ILL. REV. STAT. (Smith-Hurd, 1935) c. 37, § 414.

97. *Strahorn, op. cit. supra* note 89, at 555-556.

98. Comment (1933) 46 HARV. L. REV. 1019, 1021.

another state is noticed under the present rule. The surprise, if any, would be due to counsel's carelessness rather than to any defect in rule. Is it because counsel cannot be trusted? Hardly, when opposing counsel is permitted to check his every statement, and when a wilful falsehood may mean disbarment. Argument by opposing attorneys is used every day in cases involving judicial notice of federal and state law. An extension to foreign law, private statutes, and municipal ordinances does not appear to be unwarranted.

Of course, it would be unwise to require a federal court to notice foreign law, private statutes, and ordinances. Counsels' briefs may be inadequate. It is well known that municipal records are generally in a disorderly and unsystematized condition.<sup>99</sup> Foreign law based on a different system of jurisprudence may require more than mere statement and argument; the court should not be called upon to make unreasonable researches, and in such cases might rightfully require proof. Where the court has no sufficient basis for making a ruling favorable to the judicial cognition of the particular law before it and therefore requires proof, such proof should be made to the court and not to a jury.<sup>100</sup>

It is generally understood that judicially noticeable facts must have the qualities of notoriety and such certainty as to foreclose any *bona fide* dispute.<sup>101</sup> Yet where a matter is capable of unquestionable demonstration the federal courts, on the whole, have shown little hesitancy in dropping the yardstick of notoriety.<sup>102</sup> This is as it should be. If counsel can show from reliable sources that a matter is true, whether or not notorious, the matter should be judicially noticed.<sup>103</sup> The reliability of such sources may of course be questioned; in such an instance the court can call for further proof. Is there any way of insuring to litigants in federal courts a consistently liberal attitude toward the notice of factual matters? A general rule stating broad classifications into which judicially noticeable facts fall would likely prove an empty and futile gesture: empty, because it would utter mere platitudes every law student knows; futile, because every instance will be decided on its own particular merits without regard to precedent or authority except insofar as they contain guiding principles.<sup>104</sup> A detailed rule,<sup>105</sup> pointing out specifically various

99. See (1920) 29 YALE L. J. 460.

100. Cf. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1935) 285.

101. See *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223 (1919).

102. See, *e.g.*, *United States v. Fifty-two One Gallon Cans*, 16 F. Supp. 385 (D. Conn. 1935).

103. Several state statutes provide that historical books, books of science or art, and published maps and charts are "prima facie evidence of facts of general notoriety and interest." See, *e.g.*, ALA. CODE (Michie, 1928) § 7720.

104. General statutes of this nature are found in several states. See, *e.g.*, CAL. CODE CIV. PROC. (Deering, 1937) § 1875.

facts which could be judicially noticed would be most unwieldy; it is impossible to provide a rule for every contingency. What is now considered fact may some day be considered disputable, and *vice versa*. One cannot provide by rule for these unpredictables. But one can, by rule, impress upon the court that it is not to be bound, nor necessarily to be guided, by precedent, that it may notice matters which are only locally or specially notorious, and further, that it may take judicial notice of many matters which could not be said to be notorious, if they are capable of such positive and exact proof that no imposition is likely.<sup>106</sup> It might be argued that a trend toward liberalization of this rule of evidence would increase the number of cases in which judicial notice is taken of facts whose demonstrable trust is questionable.<sup>107</sup> But there is no reason to believe a court would accept probabilities knowing them to be only such. Further, the process of judicial notice allows for rebuttal, and if the fact is disputed, it becomes matter for proof. The following rule is therefore proposed:

*Judicial Notice.* (a) *Foreign and Domestic Law.* The court may take judicial notice of the law of a foreign State, colony or other possession thereof, of the rules and regulations adopted under authority by executive departments of the United States, and the several States, Territories, and other jurisdictions of the United States, and of private statutes and municipal ordinances. For the purpose of ascertaining the same, the court may refer to such sources as may be deemed authentic, including briefs of counsel, and may otherwise require the assistance of counsel; or the court may require such evidence by testimony or otherwise as may seem proper. In all cases it shall be the function of the court, and not of a jury, to determine the existence and effect of law.

(b) *Matters of Common Knowledge.* The court shall take judicial notice of any matter of common knowledge within the jurisdiction or within the jurisdiction from which a case is brought, and of any other matter not capable of *bona fide* dispute. For the purpose of ascertaining whether a matter is of common knowledge, or not capable of *bona fide* dispute, the court may refer to such sources as may be deemed authentic, and may require the assistance of counsel.

The rules which have been proposed above are few; they cover situations urgently in need of attention and they are not without precedent. It is believed that it will not be very difficult to secure their adoption and that their application will increase greatly the efficiency of the federal courts.

105. See N. D. COMP. LAWS ANN. (1913) §§ 7937, 7938, which list seventy-six items to be judicially noticed.

106. See 5 WIGMORE, EVIDENCE 579, 599-600.

107. See (1935) 15 B. U. L. REV. 385.