

## THE HEARSAY RULE AND ITS EXCEPTIONS

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### THE NATURE OF HEARSAY

Article VIII of the Uniform Rules of Evidence deals with hearsay.<sup>1</sup> Rule 63 states a general policy of exclusion which is then qualified by thirty-one subsections containing exceptions. This rule follows Wigmore<sup>2</sup> in defining hearsay as a "statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated."

Relevant oral and written expressions made out of court may be offered for an infinite variety of purposes other than to prove the facts asserted.<sup>3</sup> When this is so, the hearsay rule is not a bar.<sup>4</sup> Thus, *Hanson v. Johnson*<sup>5</sup> involved an action to recover damages for conversion of corn which the plaintiff as landlord claimed as his share of the crop. He offered evidence that the tenant pointed out to him the corn in question and said, ". . . [H]ere is you share for this year's corn; this belongs to you, Mr. Hanson." The court said:<sup>6</sup>

"There is no question but that plaintiff owned some corn. It was necessary to identify it. The division made his share definite. This division and identity was made by the acts of tenant in husking the corn and putting it in separate cribs and then his telling Hanson which was his share and the latter's acquiescence therein. The language of the tenant was the very fact necessary to be proved. . . . The words were the verbal acts. . . . There could be no division without words or gestures identifying the respective shares. This was a fact to be shown in the chain of proof of title."

Other cases illustrate the same principle.<sup>7</sup>

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1. Among the significant discussions of Article VIII are the following: Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43 (1954); McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 Tex. L. Rev. 599 (1955); Comment, *A Symposium on the Uniform Rules of Evidence*, 49 Nw. U. L. Rev. 481 (1954).

Professor McCormick's excellent text discusses the Uniform Rules at pertinent places. McCormick, *Evidence* 455-634 (1954).

2. 5 Wigmore, *Evidence* § 1361 (3d ed. 1940) (hereinafter cited as Wigmore).

3. Many courts, including the Minnesota Supreme Court, deal with these situations by invoking the ubiquitous phrase *res gestae*. This solution is not only unnecessary but does affirmative harm by paralyzing analysis. See the excellent Note, 22 Minn. L. Rev. 391, 393 (1938). But see Slough, *Res Gestae*, 2 Kan. L. Rev. 44, 121, 246 (1954).

4. 6 Wigmore § 1766.

5. 161 Minn. 229, 201 N. W. 322 (1924).

6. *Id.* at 230, 201 N. W. at 322.

7. *E.g.*, *Patterson-Stocking, Inc. v. Dunn Bros.*, 201 Minn. 308, 276 N. W. 737 (1937) (evidence of instruction given driver introduced to show

Utterances or writings may also be offered to show an effect on the hearer or reader. The purpose is to prove circumstantially the state of mind of the person to whom the statement is made, such as notice, knowledge,<sup>8</sup> motive, or to show the information he had as bearing on the reasonableness or good faith of his subsequent conduct. For example, in *Trainor v. Buchanan Coal Co.*,<sup>9</sup> a credit report about the buyer was held admissible to show the seller's good faith in refusing to ship goods. Also, under a plea of self-defense, communicated threats are admissible to show reasonable apprehension of danger on the part of the defendant.<sup>10</sup>

In addition, declarations may be offered to show circumstantially the feelings or state of mind of the declarant without offending the hearsay rule. For example, in *Peterson v. Pete-Erickson Co.*,<sup>11</sup> an action was brought by a husband to recover damages for the wrongful death of his wife. A friend of the deceased wife was called as a witness and testified, over objection, to a conversation wherein the wife referred complainingly to her husband's drinking and indicated she was considering a divorce. It was held that these declarations of the deceased wife tended to show the character of the relation between husband and wife and were not objectionable as hearsay but admissible as part of the *res gestae*.

Is the hearsay rule limited to what someone has previously said or written or does it apply as well to conduct (including silence) when offered to show belief to prove the fact believed? Rule 62(1) defines "statement" as including "not only an oral or written expression but also non-verbal conduct of a person intended as a substitute for words in expressing the matter stated." Where the conduct is obviously intended by the actor to be "a substitute for words," as where he has pointed for identification<sup>12</sup> or has used signals or sign language, the behavior should be treated precisely as verbal assertions and the Rule seems to so provide. On the other hand, the language of the Rule would abrogate the orthodox doctrine which excludes evidence of non-verbal and non-assertive conduct if its

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whether latter was in scope of employment, admissible as "part of the very fact in issue"), *State v. Sweeney*, 180 Minn. 450, 231 N. W 225 (1930) (Bribery prosecution, evidence of conversations between co-conspirator and third persons admissible as verbal acts and utterances "within the issue"), *Elwood v. Saterlie*, 68 Minn. 173, 71 N. W 13 (1897) (statements by one in possession as to who the owner is, admissible in cases involving title as "part of the *res gestae*").

8. *Keller v. Wolf*, 239 Minn. 397, 58 N. W 891 (1953), *Mardorf v. Duluth-Superior Transit Co.*, 196 Minn. 347, 265 N. W 32 (1936).

9. 154 Minn. 204, 191 N. W 431 (1923).

10. *State v. Dee*, 14 Minn. (Gil. 27) 35 (1869), *State v. Dumphrey*, 4 Minn. (Gil. 340) 438 (1860).

11. 186 Minn. 583, 244 N. W 68 (1932).

12. See *State v. Findling*, 123 Minn. 413, 144 N. W 142 (1913)

relevancy depends upon inferences flowing from the conduct to the belief of the actor, and finally to the truth of the fact believed. This conduct, under conventional theory, amounts to an "implied assertion" of the fact it is offered to prove and must be excluded wherever an express assertion would be excluded as hearsay.<sup>13</sup> For example, it is sometimes held that a defendant charged with crime may not show in exoneration that another took refuge in flight after the crime was committed. Evidence that this third person had made an express confession would be excluded by most courts.<sup>14</sup> Therefore, on the same ground, some courts have called the flight-evidence "hearsay" and have excluded it.<sup>15</sup>

In addition to instances of affirmative conduct, there are more numerous situations where silence or passive behavior is offered to show belief in order to prove the fact believed. In *Sullivan v. Minneapolis Street Ry.*,<sup>16</sup> the plaintiff brought suit to recover damages sustained when a street car in which she was a standing passenger came to an emergency stop to avoid collision. She claimed the car was crowded and many passengers who were standing were hurled forward and fell. Defendant, through a claim agent, was permitted to show that no other claim for damages arising out of the same accident was filed. It should be noted that the claim agent was, in effect, testifying that various persons had told him they had sustained no injuries. After stressing the breadth of the trial judge's discretion, the court said:<sup>17</sup>

13. *Wright v. Tatham*, 7 Ad. & Ell. 313 (Ex. Ch. 1837), *aff'd*, 5 Cl. & Fin. 670, 7 Eng. Rep. 559 (H.L. 1838).

14. *Donnelly v. U. S.*, 228 U. S. 243 (1913). See Note, 21 Minn. L. Rev. 181 (1937).

15. *State v. Minella*, 177 Iowa 283, 158 N. W. 645 (1916); *McCormick*, Evidence 473 (1954). I have found no Minnesota cases on this point. However, the court does admit evidence of the flight of the *accused*, not on the theory that his conduct is hearsay but within the admissions exception, but on the ground that it is circumstantial evidence showing "consciousness of guilt." *State v. McTague*, 190 Minn. 449, 252 N. W. 446 (1934).

Other examples of implied hearsay gleaned from *Wright v. Tatham* are as follows: (1) Proof that the underwriters have paid the amount of the policy, as evidence of the loss of a ship; (2) Proof of payment of a wager, as evidence of the happening of the event which was the subject of the bet; (3) Precautions of the family, to show the person involved was a lunatic; (4) The conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel embarked in it with his family.

In general, see McCormick, *The Borderland of Hearsay*, 39 Yale L. J. 489 (1930); Morgan, *Hearsay and Non-Hearsay*, 48 Harv. L. Rev. 1138 (1935), *The Hearsay Rule*, 12 Wash. L. Rev. 1 (1937), *Some Suggestions for Defining and Classifying Hearsay*, 86 U. Pa. L. Rev. 258 (1938), *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1948).

16. 161 Minn. 45, 200 N. W. 922 (1924).

17. *Id.* at 50, 200 N. W. 924 at 924. See also *Albertson v. Chicago R. R.*, 64 N. W. 2d 175 (Minn. 1954); *Nubbe v. Hardy Cont. Hotel*, 225 Minn. 496, 31 N. W. 2d 332 (1948).

"In view of the claims of plaintiff, this testimony had some bearing upon the improbability of the accident happening as she claimed. That bearing may have been remote and of little weight, but with that we are not concerned. This testimony related to a collateral fact, and in the discretion of the trial court was admissible. It had a direct tendency to show that the statements of a witness on one side were more reasonable, and therefore more credible, than the statements of a witness on the other side. Such testimony is admissible, but obviously must be received with caution."

The cases involving silence rarely recognize the hearsay problem. Where they do, the majority exclude.<sup>18</sup>

The Uniform Rules would apparently treat conduct, including silence, not reasonably intended to be communicative as circumstantial evidence rather than hearsay. Admissibility would thus depend upon the standard of relevancy by which all circumstantial evidence is tested. This would be in accord with the general approach of the Minnesota Supreme Court.

#### EXCEPTIONS

##### *Previous Statements of Witnesses*

Rule 63(1) would make a substantial change in Minnesota law. It would admit as an exception to the hearsay rule

"A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness."

The argument in favor of such a rule has been forcefully stated by Wigmore as follows:<sup>19</sup>

"[T]he witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis of his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other, and everyday experience outside of courtrooms is in accord."

18. *Menard v. Cashman*, 94 N. H. 428, 55 A. 2d 156 (1947), *McCormick*, Evidence 478 (1954), *Falkner*, *Silence as Hearsay*, 89 U. Pa. L. Rev. 192 (1940).

19. 3 Wigmore § 1018. Other distinguished authorities have expressed similar views. Maguire, *Evidence*. Common Sense and Common Law 59-63 (1947). McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 573, 576 (1947). Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192 (1948).

The English Evidence Act of 1938 makes admissible, as proof of the fact stated, any prior written statement of a witness with personal knowledge. 1 & 2 Geo. VI, c. 28, sec. 1.

Nevertheless, the prevailing view still holds prior inconsistent or consistent statements of a witness not usable as substantive evidence of the facts stated; they may be received only for impeachment or rehabilitation. Indeed, the leading decision supporting the orthodox position is the Minnesota case of *State v. Saporen*.<sup>20</sup> Professor McCormick has undertaken to summarize and answer the arguments made in that decision, as follows:<sup>21</sup>

"First, the oath and liability to punishment for perjury are wanting.

This must be granted, and the question is whether the want is fatal in view of (1) the fact that the prior statement was nearer to the event, and hence fresher in memory, than the present testimony and (2) the opportunity to cross-examine.

Second, the 'principle virtue' of cross-examination 'is in its immediate application of the testing process.' There was no *immediate* opportunity of cross-examination of the previous statement.

But another virtue of cross-examination is in its opportunity to require the witness to explain the discrepancies of conflicting statements, and when this process is afforded, it seems that the earlier statement should at least stand equal with the later.

Third, the unrestricted use as evidence of impeaching statements would 'increase both temptation and opportunity for the manufacture of evidence.'

But it must be remembered that this temptation exists almost equally under the orthodox rule, since the statements will come in to impeach and will be considered by the jury as evidence, regardless of contrary instructions, if there is an issue of fact to submit.

Fourth, if the hearsay rule is satisfied as to prior contradictory statements, it is equally so as to statements consistent with his testimony, and would lead to their admission as substantive evidence, and this, presumably, he would argue, would still further open the door to the evil last mentioned, that of manufacturing evidence, by securing successive statements from the witnesses.

To this it may be answered that the extension suggested seems a logical one, and it is accepted in the provisions of the English Evidence Act of 1938 and the Uniform Rule. Such an extension may encourage further the early taking of written statements from the witnesses, and the securing so far as possible of additional statements on fact-questions later revealed in the progress of investigation. These practices, however, are precisely those followed by diligent parties and counsel under the present system."

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20. 205 Minn. 258, 285 N. W. 898 (1939). See also *State v. McClain*, 208 Minn. 91, 292 N. W. 753 (1940).

21. McCormick, *Evidence* 81 (1954).

Rule 63(1) would permit substantive use of both prior consistent<sup>22</sup> and inconsistent statements. The former present fewer difficulties than the latter.<sup>22a</sup> First of all, the declarant has personal knowledge of the event described and remembers it since the prior statement is, by hypothesis, consistent with his trial testimony. Cross-examination at the trial is fully as adequate as it would have been at the time the prior statement was made.<sup>23</sup> Furthermore, under Rule 45, the trial judge is given discretion to exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will "(a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered." Unless there has been substantial impeachment of the witness his prior consistent statements would add very little to his trial testimony and it is likely that they would be excluded by the trial judge under Rule 45.

Both Professors McCormick<sup>24</sup> and Falknor<sup>25</sup> have reservations with respect to prior inconsistent statements. If the witness remembers the event to which the statement relates and admits making it then cross-examination at the trial would seem adequate. But suppose that he denies making it and insists that he does not remember the event to which it refers and denies that he observed the event. Both McCormick and Falknor would require a showing that the declarant had an opportunity to observe the facts stated<sup>26</sup> and also strong assurance that the prior statement was actually made.<sup>27</sup> This could be established by a writing<sup>28</sup> or the admission of the declarant as a witness.

These suggested modifications of Rule 63(1) may make it

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22. Apparently, in Minnesota, prior consistent statements can be used to rehabilitate a witness only when he has been impeached by prior inconsistent statements coupled with a claim that the present testimony of the witness is a "recent contrivance." This is more restrictive than the usual rule. See Note, 36 Minn. L. Rev. 724, 729 (1952).

22a. For a view with "reservations" on this change see companion article by DeParcq at p. 338 *et seq.*

23. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43, 52 (1954).

24. McCormick, *Evidence* 82 (1954).

25. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43, 53 (1954).

26. Falknor would require a judicial finding of personal knowledge. See Falknor, *supra* note 25 at 54.

27. Falknor, *supra* note 25, at 82.

28. This is the requirement of the English Evidence Act of 1938. See note 19, *supra*.

more palatable in states where its effect would be a drastic modification of existing practice. But, if the witness claims to have no recollection or knowledge of the event, the need for the evidence is just as great as if he were "unavailable" because of death, illness, absence, or exempt from testifying on the ground of privilege.<sup>29</sup> "Moreover both the adversary and the jury are in a more advantageous position to evaluate the evidence than they would be if the declarant were not subject to present cross-examination. They need not rely solely upon the witness who reports the declaration; they have him and the declarant before them, and can make up their minds whether to believe either or neither of them."<sup>30</sup>

Under existing doctrine which limits the use of prior statements to the question of credibility it is doubtful whether a cautionary instruction is any more than a mere ritual and futile gesture. Practically, the jurors decide which story is true and give it substantive weight. If these assumptions as to jury behavior are correct, then the most important change by Rule 63(1) would be one of the sufficiency rather than the admissibility of the evidence. Under the present view, no case is made out when the only evidence on a material matter is the witness's prior statement.<sup>31</sup> Upon proper motion the case is taken from the jury or its verdict set aside. Rule 63(1) authorizes a contrary result.

#### *Depositions and Prior Testimony*

Clause (a) of Rule 63(3) does not require that a deponent be unavailable as a witness in order for the deposition to be used at the trial of the action in which the deposition was taken. This would conflict with Rule 26.04 of the Minnesota Rules of Civil Procedure which make unavailability a prerequisite unless "such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."<sup>32</sup> In criminal cases, there would be a serious question as to whether clause (a), as well as the remainder of Rule 63(3), would not violate Article 1, Section 6 of the Minne-

29. For a discussion of loss of memory as a ground of unavailability see McCormick, Evidence 494 (1954). Rule 62(7) of the Uniform Rules does not list this as a ground. In *Stein v. Swenson*, 46 Minn. 360, 49 N. W. 55 (1891) it was held that the failure of a witness to recollect the particular facts, "short of imbecility," will not justify proving his testimony on a former trial.

30. Model Code of Evidence 234 (1942).

31. McCormick, Evidence 77 (1954). Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43, 54 (1954).

32. Minn. R. Civ. P. Rule 26.04. See also Fed. R. Civ. P. Rule 26(d).

sota Constitution ensuring the right of confrontation in criminal prosecution.<sup>33</sup>

Clause (b) would admit former testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action if the judge finds that the declarant is unavailable as a witness<sup>34</sup>

“when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered.”

The two traditional reasons for excluding hearsay—that declarant was not under oath and that the adversary had no opportunity to cross-examine him, are absent where the statements sought to be introduced were given by a witness as testimony in a former trial of the same issues between the same parties. If the witness has died prior to the second trial all courts will admit his testimony, and most will do so even though his unavailability results from other causes. When, however, either issues or parties are dissimilar, there is no agreement as to whether former testimony is admissible. The strict common law rule demanded substantial identity of both, a requirement occasionally phrased in terms of mutuality or reciprocity<sup>35</sup> This requirement was severely criticized by Wigmore<sup>36</sup>

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33. The Uniform Rules do not consider the problem of confrontation. In the comment to Rule 63(3) it is stated. “As in several other areas, the constitutional question may or may not be a barrier to the use of the testimony. We are dealing in this rule with the question of hearsay and with that subject only.” The problem is discussed in McCormick, *Evidence* 482 (1954).

34. Rule 62(7) is as follows “‘Unavailable as a witness’ includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such party, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such desposition.”

35. Annot., 142 A. L. R. 673 (1943).

36. 5 Wigmore § 1388.



and has been rejected in some jurisdictions, including Minnesota.<sup>37</sup>

The Uniform Rules not only abolish the mutuality requirement but would admit former testimony if "the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered." This "natural next step"<sup>38</sup> has been taken by Minnesota and a few other courts.<sup>39</sup> In *Cox v. Selover*,<sup>40</sup> testimony taken in a former trial against a guarantor of a note was held admissible in a later trial against the principal maker of the note, who had intervened after the first trial. The court said:

"While it is obvious that appellants are not the same parties, their interests are substantially the same, especially as to the outcome of the litigation. . . . There was a substantial identity of parties and . . . the issues were the same, and to have excluded the proffered testimony would have been error."<sup>41</sup>

*Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally*

Rule 63(4) proposes three hearsay exceptions.

"A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action."

37. *Palon v. Great Northern Ry.*, 135 Minn. 154, 160 N. W. 670 (1916), 1 Minn. L. Rev. 183 (1917). See also *Lougee v. Bray*, 42 Minn. 323, 44 N. W. 194 (1890).

38. McCormick, *Evidence* 489 (1954). Professor McCormick feels that neither identity of parties nor privity between parties is essential. "These are merely means to an end. Consequently, if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party. Identity of interest, in the sense of motive, rather than technical identity of cause of action or title, is the test."

39. *Bartlett v. Kansas Pub. Serv. Co.*, 349 Mo. 13, 160 S. W. 2d 740 (1942). Professor Morgan has referred to this case as "a sensible extension of the established rule." Morgan, *The Law of Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 552 (1946).

Professor Falknor, while conceding the irrationality of the mutuality principle, questions the wisdom of dispensing with the requirement of identity of opponent. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43, 58 (1954).

40. 171 Minn. 216, 213 N. W. 902 (1927).

41. *Id.* at 218, 219, 213 N. W. at 903.

Clause (b) will be discussed first since it is a codification of the well established "excited utterances" exception. It is based on the belief that considerations of self-interest are suspended at times of physical or mental shock so that statements made under these circumstances are likely to be true. It has long been accepted by the Minnesota Court with the following requirements<sup>42</sup>

"To render the statement admissible, there must be a startling occasion, that is, some shock startling enough to produce nervous excitement and to render the utterance spontaneous and instinctive, the statement must be made before there is time or opportunity to design or contrive or devise anything to the speaker's own advantage and while the nervous excitement still dominates the reflective power, that is, the mental shock must extend without interruption from the moment of the event to the moment of the statement or exclamation, the language must relate to the circumstances which prompted it."

Clause (a) dispenses with the requirement of a "startling event" so long as the statement was spontaneous and accompanied perception. Contemporaneity is the essential thing. Professor Morgan, the leading advocate of this exception, has explained its rationale as follows<sup>43</sup>

"What substitutes for the oath and cross-examination can be found to give it reliability? A statement by a person as to external events then and there being perceived by his senses is worthy of credence for two reasons. First, it is in essence a declaration of a presently existing state of mind, for it is nothing more than an assertion of his presently existing sense impressions. As such it has the quality of spontaneity. Second, since the statement is contemporaneous with the event, it is made at the place of the event. Consequently the event is open to perception by the senses of the person to whom the declaration is made and by whom it is usually reported on the witness stand. The witness is subject to cross-examination concerning that event as well as the fact and content of the utterance, so that the extra-judicial statement does not depend solely upon the credit of the declarant. Unless exact contemporaneousness is insisted upon, the first of these guaranties is partially lacking and the second is weakened. Therefore no such amplification of the definition of contemporaneous can be tolerated. It is to be noted that the spontaneity of the utterance is warranted by its contemporaneousness with the event and by the presence of another capable of observing the phenomena which the declarant is reporting. Consequently it is not at all essential that the event

42. *Lambrecht v. Schreyer*, 129 Minn. 271, 275, 152 N. W. 645, 646 (1915). See also the excellent discussion in Note, 22 Minn. L. Rev. 391 (1938)

43. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L. J. 229, 236, 237 (1922).

should be of startling or exciting nature or that it should shock or alarm the declarant."

No Minnesota case has been found recognizing this proposed exception and it has been recognized by only a minority of courts.<sup>44</sup>

Clause (c) would admit a hearsay statement made by an unavailable declarant<sup>45</sup> if the judge finds that it was made at a time when the event or condition "had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action."

In 1898, Massachusetts passed a statute providing for the admissibility of declarations of deceased persons. The text of the statute, as amended in 1943, is quoted below.<sup>46</sup> A survey, conducted in 1922 by the Commonwealth Fund Research Committee, as to the operation of the statute showed overwhelmingly favorable results. The committee concluded that it "has given rise to virtually no technical trouble and stands today as endorsed by forty years of trial experience."<sup>47</sup>

Clause (c) is broader than the Massachusetts statute in that unavailability for any reason mentioned in Rule 62(7) is a basis for admissibility whereas the Massachusetts statute is limited to declarations of deceased persons. Furthermore the Massachusetts statute is applicable only in civil proceedings while the proposed rule would apply in both criminal and civil actions. On the other hand, the proposed rule requires that the statement shall have been made before the commencement of the action, a requirement eliminated from the Massachusetts statute in 1943.

In the comments to clause (c) it is stated that "there is a vital

44. Annot., 140 A. L. R. 874 (1942); see Note, 46 Colum. L. Rev. 430 (1946). The application of the exception is well illustrated by *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S. W. 2d 474 (1942), which concerned a collision between an automobile driven by plaintiff and the defendant's truck. A witness testified that, as plaintiff's car passed hers on the highway, she remarked to her companions, "they must have been drunk . . . we would find them somewhere on the road wrecked if they kept up that rate of speed." The court held the statement admissible, reasoning that it was sufficiently spontaneous to afford little time to forget or fabricate, and that one is unlikely to misstate a fact to another who has reasonable opportunity to observe it.

45. The definition of "unavailability" contained in Rule 62(7) is quoted at length in note 34, *supra*. Falknor criticizes this rule as not making it clear that there must be a judicial determination of unavailability. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43, 64 (1954). It seems to this writer that the rule and the comments thereto do make it clear.

46. "In any action or other civil judicial proceeding, 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 and upon the personal knowledge of the declarant." Mass. Ann. Laws c. 233, § 65 (Supp. 1953).

47. Morgan, *The Law of Evidence: Some Proposals for Its Reform*, c. 4 (1927). See also concurring opinion of Chief Justice Vanderbilt in *Robertson v. Hackensack Trust Co.*, 1 N. J. 304, 63 A. 2d 515 (1949).

need for a provision such as this to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available." Although no reference is made to specific types of cases it is clear that this extension of the exception is most needed when a claim for workmen's compensation or for accident insurance benefits rests upon a mortal injury observed only by the person injured.

There is still another justification for the exception created in clause (c) Rule 7, which abolishes all general disqualifications of witnesses,<sup>48</sup> would nullify existing dead man's statutes,<sup>49</sup> by making all interested persons competent to testify in suits involving transactions with deceased persons, the same as they are in other suits. Clause (c) attains mutuality of testimony by admitting the decedent's version of the transaction in the form of hearsay declarations to refute the claims of the survivor.

Clause (c) would not drastically affect Minnesota law, at least in Workmen's Compensation cases. In *Jacobs v. Village of Buhl*,<sup>50</sup> a statement by deceased to a fellow-employee, made about 45 minutes after the accident, saying that he had fallen that evening, was held admissible as part of the *res gestae*. The court said<sup>51</sup>

" to give a strict application of the *res gestae* rule in compensation cases would defeat the intent of the workmen's compensation law. The purpose of that law is to make each industry take the burden of caring for the casualties caused in its operations. We cannot limit this purpose to cases in which employees who have died from injuries sustained in the line of duty can produce an eyewitness to their accidental injuries. This would defeat both the letter and spirit of the compensation law.

It is natural that an injured person would be occupied and absorbed by the experience of his recent injury and that he would make a statement relative thereto to the first fellow employee that he happened to meet. Such a declaration would, in the ordinary run of life, be accepted as a true statement of what occurred. We should not set up technical rules to exclude as evidence what would be accepted as true in the ordinary run of life."

48. Rule 7 provides as follows

"Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

49. Minn. Stat. § 585.04 (1953).

50. 199 Minn. 572, 273 N. W. 245 (1937), Note, 22 Minn. L. Rev. 391 (1938).

51. *Jacobs v. Village of Buhl*, 199 Minn. 572, 577, 581-82, 273 N. W. 245, 248, 250 (1937).

Clause (c) is carefully safeguarded by specifying the findings the judge must make before admitting the statements and these appear to afford sufficient assurance of trustworthiness to permit their use in other types of litigation as well as Workmen's Compensation cases.

### *Dying Declarations*

Rule 63(5) would make admissible

"A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery."

This expands the existing exception which limits the use of dying declarations to criminal prosecutions for the homicide of the declarant. The proposed rule would admit them, not only in any criminal prosecution but in any civil action as well. Minnesota appears to follow the traditional restriction.<sup>52</sup> Under this presently prevailing rule, dying declarations are admissible only insofar as they relate to the circumstances of the killing, *i.e.*, the *res gestae* of the killing. Under this limitation declarations about previous quarrels between the accused and his victim are excluded.<sup>53</sup> The proposed rule would apparently admit any statement relevant to any issue in the case.

Orthodox doctrine rejects a dying declaration if it appears that the declarant did not have adequate opportunity to observe the facts recounted.<sup>54</sup> The proposed rule imposes no such requirements of personal knowledge<sup>55</sup> and I quite agree with Professor Falknor's criticism that the exception should be revised to make this explicit.<sup>56</sup>

52. *State v. Brown*, 209 Minn. 478, 296 N. W. 582 (1941), *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, *rehearing den.*, 56 Minn. 239, 57 N. W. 1065 (1894).

53. McCormick, *Evidence* 558 (1954). See also *State v. Elias*, 205 Minn. 156, 158, 285 N. W. 475, 476 (1939) ("... declarations . . . as to the cause of his injury or as to the circumstances which resulted in the injury . . .").

54. McCormick, *Evidence* 558 (1954).

55. Compare Rule 63(4)(c) requiring that the declarant had "recently perceived" the event or condition.

As Professor Falknor points out there is considerable overlapping between Rule 63(4)(c) and Rule 63(5). "The principal points of variation seem to be these: Rule 63(5) does not require, as does Rule 63(4)(c), a finding of 'recency' of observation or 'clear recollection' when the statement was made, or that the statement have been made *ante litem motam*; on the other hand, Rule 63(5) requires, as the other rule does not, that the declarant, to his knowledge, was in a dying condition when the statement was made. It is to be remembered that Rule 63(4)(c) is to be applicable in criminal as well as in civil actions. Rule 2. Accordingly, the necessity of Rule 63(5) may be questionable." Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. L. C. A. L. Rev. 43, 65 n. 74 (1954).

56. *Id.* at 67.

It has been well argued that the opinion rule should not be applicable to a dying declaration for the reason that it is now impossible to obtain from the declarant the detailed facts observed by him, that the opinion rule, designed as a regulation of the form of questioning a witness in court, is inappropriate as a restriction upon out-of-court statements.<sup>57</sup> However, most courts and apparently Minnesota<sup>58</sup> apply the opinion rule. Rule 56, dealing with the opinion rule, seems to be limited to testimony in court. Since the same problem arises in connection with other exceptions to the hearsay rule the definition of "Statement" in Rule 62(1) should be revised to include expressions of opinion.

### *Confessions*

Rule 63(6) would make admissible

"In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same."

This rule appears to conform to existing Minnesota law on confessions. Clause (a) would exclude a confession induced by infliction or threats of infliction of "suffering" upon the accused "or another." In the early case of *State v Staley*,<sup>59</sup> the court stated that the "rule seems well settled, that if any advantage is held out, or harm threatened, of a temporal or worldly nature, by a person in authority, the confession induced thereby must be excluded." Although no case has been found dealing with threats to "another" the theory of the *Staley* case and the tenor of the statute relating to confessions<sup>60</sup> would seem to include them. The comments to the rule seem to limit the phrase "another" to members of the declarant's family. The rule itself makes no such limitation. It would seem that a threat

57. McCormick, *Evidence* 559 (1954), 5 *Wigmore* § 1447

58. *State v. Mueller*, 122 Minn. 91, 141 N. W 1113 (1913)

59. 14 Minn. (Gil. 75, 79, 80) 105, 110 (1869)

60. See Minn. Stat. § 634.03 (1953) "A confession of the defendant shall not be given in evidence against him whether made in the course of judicial proceedings or to a private person when made under the influence of fear produced by threats."

to a confederate not a member of the declarant's family should fall within the ban.

Clause (a) would also exclude a confession obtained "by prolonged interrogation under such circumstances as to render the statement involuntary." The comment states that this provision is designed to "bring the exception more in line with *Ashcraft v. Tennessee*, 322 U. S. 143 (1944)." This would also appear to be in accord with Minnesota law in view of the decision in *State v. Schabert*.<sup>61</sup>

Although Rule 63(6) is entitled "Confessions" the text refers to "a previous statement by him relative to the offense charged." This raises the question of the difference between a confession and an admission. "A confession is a complete acknowledgment of guilt of the crime on trial. An admission is any other statement of a fact, relevant to the charge, made by the accused and offered against him as evidence of the fact."<sup>62</sup> Two additional problems arise, one of substance and one of procedure. The first is whether an involuntary admission should be treated the same as an involuntary confession and excluded from evidence. Whether the rationale of the rule excluding involuntary confessions be the deterrence of unlawful police practices or the untrustworthiness of the confession there seems to be no reason for treating involuntary admissions any differently. It must be admitted, however, that the Supreme Court's interpretation of the due process clause does not make it clear that both be excluded.<sup>63</sup>

61. 218 Minn. 1, 15 N. W. 2d 585 (1944). Defendant in a homicide case was a feeble-minded woman who had been arrested and held incommunicado for over two days prior to arraignment. Her requests for her parents, lawyer, priest and doctor were not complied with. The confession admitted in evidence was obtained on the second day, after extensive and repeated questioning. The court held there was a violation of due process.

For an excellent discussion of the Supreme Court cases involving the use of confessions in state criminal trials, see Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411 (1954). For a discussion of some of the problems arising when the lie-detector or drugs are used, see Dession & Associates, *Drug-Induced Revelation and Criminal Investigation*, 62 Yale L. J. 315 (1953).

62. McCormick, *Evidence* 234 (1954). See also *State v. Mims*, 26 Minn. 183, 26 N. W. 683 (1879), 6 Minn. L. Rev. 524 (1922).

63. Compare *Ashcraft v. Tennessee*, 327 U. S. 274 (1946) (must be excluded), with *Stein v. New York*, 346 U. S. 156, 162 n. 5 (1953) ("Although New York may impose the same requirements for admissibility of an admission as it does a confession . . . such utterances are not usually subject to the same restrictions on admissibility as are confessions. . . . In the face of the weight of authority to the contrary, it cannot be said than any such requirement is imposed by the Fourteenth Amendment.")

See also Notes, "Involuntary Admissions Should Not Be Competent Evidence," 19 Temple L. Q. 485 (1946), *Validity of the Admission-Confession Distinction for Purposes of Admissibility*, 39 J. Crim. L. & Criminology 743 (1949).

On the procedural side, when the state offers a confession the defendant may object on the ground that it has not been shown to have been voluntary and, if he does, the state has the duty of producing proof of voluntariness in a preliminary hearing where the defendant may offer counter-evidence.<sup>64</sup> Should the state have the same burden if the accused objects to the offer of an admission on the ground of involuntariness? Professor McCormick argues that in this situation the accused should have the burden of producing evidence of undue pressure since an admission is usually less damaging to him and less likely to have been induced by undue pressure.<sup>65</sup> But this is not necessarily the case. McCormick himself admits that "admissions range from those which are as persuasive of guilt as a confession itself would be and those which merely acknowledge subordinate facts not crucial to the state, which could usually find other evidence of the fact."<sup>66</sup> In either event, it would seem that the burden of persuasion on the issue of voluntariness should rest on the state. In the first instance because of the affinity to a confession, in the latter because of the state's superior access to the relevant evidence.<sup>67</sup>

### *Admissions*

The comments to Rule 63(7)(8) and (9) recite that they adopt the policy of Model Code Rules 506, 507 and 508. Reference, therefore, to the comments of its draftsmen will be helpful in considering the Uniform Rules dealing with admissions.<sup>68</sup>

#### (1) *Personal Admissions.*

Rule 63(7) would admit

"As against himself a statement by a person who is a party to the action in his individual or representative capacity and if the latter, who was acting in such representative capacity in making the statement."

The draftsmen of the Model Code in commenting upon Rule 506<sup>69</sup> say

"This states the common law rule as to admissions made by a party personally. While a few dicta may be found to the effect

64. McCormick, *Evidence* 235 (1954). And see *State v. Schabert*, 218 Minn. 1, 15 N. W. 2d 585 (1944), discussing the allocation of responsibility between judge and jury.

65. McCormick, *Evidence* 235 (1954).

66. *Ibid.*

67. For a penetrating discussion see Meltzer, *Involuntary Confessions: The Allocation of Responsibility between Judge and Jury*, 21 U. Chi. L. Rev. 317 (1954).

68. For a general discussion see Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 Yale L. J. 355 (1921), *Admissions*, 1 U. C. L. A. L. Rev. 18 (1953).

69. Model Code of Evidence 245, 246 (1942).



that an admission is receivable only as impeaching evidence, the decisions are almost unanimous that it is admissible also as tending to prove the truth of the matter stated in it. Furthermore, it is received where testimony by the admitter as a witness would be rejected because of lack of personal knowledge. The Rule excluding opinion is likewise usually held to have no application."

In Minnesota, an admission is treated as "substantive" and "affirmative" evidence.<sup>70</sup> Although personal knowledge by the declarant is not required as a prerequisite to admissibility,<sup>71</sup> he must have had minimal powers of recollection and narration.<sup>72</sup> On the other hand, the opinion rule is apparently applicable to admissions.<sup>73</sup> But the opinion rule should not apply to out-of-court statements that are usually made without thought of form. In the courtroom counsel may reframe questions to meet an opinion objection. If applied to out-of-court statements the effect is exclusion. It should be noted that it is the reference to the comments to the Model Code which would make the opinion rule inapplicable. The Uniform Rules themselves are not clear on this.

As pointed out before, the term "statement" includes non-verbal conduct as well as verbal. Such conduct if intended as a substitute for words and if offered to prove the truth of what is asserted is hearsay. If offered against a party it falls within the admissions exception. For example, evidence of flight by the defendant is admissible.<sup>74</sup> Other conduct which might be considered an admission is specifically excluded by the rules because of overriding policies. Thus, Rule 51 excludes evidence of subsequent repairs when offered to prove negligence.<sup>75</sup> Rule 52 excludes evidence of offers to compromise.<sup>76</sup>

70. *Aide v. Taylor*, 214 Minn. 212, 7 N. W. 2d 757 (1953); *Litman v. Peper*, 214 Minn. 127, 7 N. W. 2d 334 (1943); *Boyen v. Bauer*, 211 Minn. 140, 300 N. W. 451 (1941); *Williams v. Jayne*, 210 Minn. 594, 299 N. W. 853 (1941).

71. *Binewicz v. Haglin*, 103 Minn. 297, 115 N. W. 271 (1908). This view is followed by the majority of courts on the theory that when a man speaks against his own interest it is supposed that he has made an adequate investigation and informed himself. McCormick, *Evidence* 507 (1954).

72. *Ammundson v. Falk*, 228 Minn. 115, 36 N. W. 2d 521 (1949), *Aide v. Taylor*, 214 Minn. 212, 7 N. W. 2d 757 (1943).

73. *Albertson v. Chicago R. R.*, 64 N. W. 2d 175 (Minn. 1954), *Binewicz v. Haglin*, 103 Minn. 297, 115 N. W. 271 (1908).

74. *State v. McTague*, 190 Minn. 449, 252 N. W. 446 (1934); see note 15, *supra*.

75. *Lunde v. National Citizens Bank*, 213 Minn. 278, 6 N. W. 2d 809 (1942); *Morse v. Minneapolis & St. L. Ry.*, 30 Minn. 465, 16 N. W. 358 (1883).

76. *Esser v. Brophy*, 212 Minn. 194, 3 N. W. 2d 3 (1942). See also *Schiro v. Raymond*, 237 Minn. 271, 54 N. W. 2d 329 (1952). And see Minn. R. Civ. P., Rule 68.01 and Rule 68.02.

(2) *Authorized and Adoptive Admissions.*

Rule 63(8) would admit as against a party a statement

“(a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth.”

Clause (a) is a generally accepted extension of the admissions exception.<sup>77</sup> Clause (b), likewise, states the orthodox rule on “adoptive” admissions. Of course, if one expressly adopts another’s statement as his own there is an explicit admission and the situation should be treated as an authorized admission discussed in clause (a). Clause (b), however, deals with more ambiguous conduct. The question of adoption often arises in suits on life and accident policies when the insurance company offers against the beneficiary the statements which the beneficiary has attached to the proof of death or disability, such as the statements of the attending physician.<sup>78</sup>

If a statement is made by another person in the presence of a party to the action and it contain assertions which, if untrue, the party would under all the circumstances reasonably be expected to deny, his failure to speak is circumstantial evidence that he believes the statement to be true and his conduct is an adoptive admission. This is especially serious in the case of a person suspected of crime who is confronted with accusations or statements of others implicating him.<sup>79</sup> It seems particularly unjust to admit evidence of silence when the suspect is under arrest, because of a common belief that

<sup>77</sup> Model Code of Evidence 246 (1942).

<sup>78</sup> In *Laury v. Northwestern Mutual Life Ins. Co.*, 180 Minn. 205, 212, 213, 230 N. W. 648, 651, 652, *aff'd on rehearing*, 180 Minn. 215, 231 N. W. 824 (1930) the court said.

“The law is well settled that proofs of death are admissible in an action to recover on the policy and may be used as admissions against the plaintiff, the beneficiary, even though the statements therein contained did not come to the plaintiff’s knowledge. The statements therein found are not conclusive, they may be explained and even contradicted, but are admissible for what they may be worth in view of the other testimony.

Although an attending physician’s statements in the proofs of death, presented by the beneficiary in an insurance policy, may be used as admissions against interest, still, when such statements on their face show that they are pure hearsay and the evidence discloses that the beneficiary neither knew of the hearsay part nor authorized anyone to report the hearsay to the physician, the insurer should not be heard to claim them to be evidence tending to establish as facts that which some unauthorized party told the attending physician.”

See also *Elness v. Prudential Insurance Co.*, 190 Minn. 169, 251 N. W. 183 (1933).

<sup>79</sup> *State v. Postal*, 215 Minn. 427, 10 N. W. 2d 373 (1943), *State v. Rediker*, 214 Minn. 470, 8 N. W. 2d 527 (1943), *State v. Quirk*, 101 Minn. 334, 112 N. W. 409 (1907).

one need say nothing; in addition there is a natural reluctance to get involved in a word-battle with accusers and the police.<sup>80</sup>

(3) *Vicarious Admissions.*

Rule 63(9) provides that as against a party there shall be admissible,

"a statement which would be admissible if made by the declarant at the hearing of (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability."

Minnesota adheres to the usual rule that admissions by an agent made within the scope of his authority are binding on the principal,<sup>81</sup> but they must be statements of fact and not mere conclusions or opinions.<sup>82</sup> It should be noted that clause (a) extends traditional doctrine in the following manner:<sup>83</sup>

"... [W]hereas present orthodox doctrine requires a showing of 'speaking' authority, the proposed rule, in effect, implies such an authority in respect to any declaration concerning or describing authorized conduct, if made before the termination of the agency. Thus, in the typical accident case, the rule would make admissible, as against defendant, any subsequent statement of the driver of his car concerning the circumstances of the accident, if the declarant was authorized to *drive*, and if the statement was made before his employment was terminated."

80. But see *State v. Brown*, 209 Minn. 478, 482, 296 N. W. 582, 585 (1941) (dictum: "There is high authority for the proposition that the mere fact of arrest renders inadmissible a defendant's silence in the face of accusatory statements made in his presence and hearing. The arrest is deemed to place such restraint on the accused as to destroy the basis for an inference of acquiescence by silence or failure to controvert.")

See also *State v. Gulbrandsen*, 238 Minn. 508, 57 N. W. 2d 419 (1953). This problem is considered in 29 N. Y. U. L. Rev. 1266 (1954); 15 U. Pitt. L. Rev. 376 (1954).

The Minnesota court has also held that under certain circumstances, failure to reply to a letter may constitute an adoptive admission. *Sonnesyn v. Hawbaker*, 127 Minn. 15, 148 N. W. 476 (1914). See McCormick, *Evidence* 531 (1954).

81. *Rosenberger v. H. E. Wilcox Motor Co.*, 145 Minn. 408, 177 N. W. 625 (1920). Minnesota has also enacted the Uniform Partnership Act, which makes the admission of a partner concerning partnership affairs within the scope of his authority, admissible against the partnership. Minn. Stat. § 323.10 (1953).

82. *Albertson v. Chicago R. R.*, 64 N. W. 2d 175 (Minn. 1954); *Smith v. The Emporium Mercantile Co.*, 190 Minn. 294, 251 N. W. 265 (1933).

83. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43, 71. See also McCormick, *Evidence*, 519 (1954).

Many courts have reached the same result by applying the so-called *res gestae* doctrine,<sup>84</sup> and this has been true on at least one occasion in Minnesota. In *Lunderoth v. Kieffer*<sup>85</sup> post-accident admissions of a driver were held admissible against his employer

"Although they cannot be regarded as authorized, the declarations and admissions of an agent or servant may be put in evidence whenever they constitute part of the *res gestae*. Their admissibility does not necessarily depend on the law of agency. They are received under a rule of evidence which is as applicable in a proper case to one not an agent at all as to one who was an agent."<sup>86</sup>

Clause (b) extends slightly the admissibility of co-conspirators' admissions, since it allows in any statement "relevant to the plan or its subject matter and made while the plan was in existence and before its complete execution or other termination." Minnesota doctrine is in line with this insofar as it bars statements made after the conspiracy is over.<sup>87</sup> But most of the Minnesota cases also require, as do many jurisdictions, that the statements themselves be in furtherance of the conspiracy, the "common purpose" or the "common design."<sup>88</sup> This would not be necessary under the proposed rule.<sup>89</sup>

#### *Declaration Against Interest*

Orthodox doctrine requires that two main conditions be met before this exception to the hearsay rule is satisfied first, the declaration must state facts which are against the pecuniary or proprietary interest of the declarant at the time made, second, the declarant must be unavailable at the time of trial.<sup>90</sup> Rule 63(10) broadens considerably this exception. It makes admissible not only statements by a declarant against pecuniary or proprietary interest but also those which the judge finds

"so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true."

84. Model Code of Evidence 250 (1952).

85. 162 Minn. 440, 203 N. W. 415 (1925).

86. *Id.* at 443, 203 N. W. at 416.

87. *State v. Sweeney*, 180 Minn. 450, 231 N. W. 225 (1930).

88. *State v. Lyons*, 144 Minn. 348, 175 N. W. 689 (1919), *State v. Dunn*, 140 Minn. 308, 168 N. W. 2 (1918), *Nicolay v. Mallery*, 62 Minn. 119, 64 N. W. 108 (1895). See also *State v. Kahner*, 217 Minn. 574, 15 N. W. 2d 105 (1944).

89. Model Code of Evidence 250 (1942).

90. For able general discussions see Morgan, *Declaration Against Interest*, 5 Vand. L. Rev. 451 (1952), Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1 (1944).

The theory of trustworthiness upon which this exception rests is that a person will not concede even to himself the existence of a fact which will cause him substantial harm unless he believes that the fact does exist. If this theory is plausible there seems no valid reason for not extending the exception to include statements against penal interest<sup>91</sup> and those which would subject the declarant to hatred, ridicule, contempt or social ostracism. As Professor Morgan puts it, "it requires no argument to convince that the realization of such a consequence is generally a much more powerful influence upon conduct than the realization of legal responsibility for a sum of money."<sup>92</sup>

Although Minnesota has thus far adhered to the majority rule limiting the exception to statements against pecuniary and proprietary interest, it has given a liberal interpretation to pecuniary interest by including acknowledgment of facts which would give rise to a liability for unliquidated damages for tort.<sup>93</sup>

Another substantial change which Rule 63(10) proposes is the elimination of the unavailability requirement. The reasoning which admits the admissions of a party, excited utterances, and the declarations of present mental or bodily state, without regard to availability seems equally applicable to declarations against interest. The theory dispensing with unavailability as a prerequisite to their admission, is that they are just as credible and trustworthy as testimony on the witness stand would be. Hence there is no necessity for showing the declarant to be unavailable as a witness.<sup>94</sup>

#### *Statement of Physical or Mental Condition of Declarant*

Rule 63(12) would admit

"Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician con-

91. See *Donnelly v. United States*, 228 U. S. 243, 272 (1913) (Holmes, Lurton, and Hughes, J.J., dissenting); *State v. Voges*, 197 Minn. 85, 89, 266 N. W. 265, 267 (1936) (Hilton, J., dissenting), Note, 21 Minn. L. Rev. 181 (1937). See also *In re Forsythe*, 221 Minn. 303, 312, n. 3, 22 N. W. 2d 19, 25, n. 3 (1946).

92. Morgan, *Declaration Against Interest*, 5 Vand. L. Rev. 451, 475 (1952).

93. *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18, 91 N. W. 28 (1902). See also *Windorski v. Doyle*, 219 Minn. 402, 18 N. W. 2d 142 (1945).

94. Model Code of Evidence 258 (1942).

sulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition."

Inasmuch as this exception is perhaps the most complex and difficult of all it will be discussed according to Professor McCormick's textual arrangement of the problem.<sup>95</sup>

(1) *Declarations of bodily condition.*

That declarations of present bodily condition and symptoms, including pain and other feelings, are admissible to evidence the facts asserted, is a well established exception to the hearsay rule.<sup>96</sup> Since they describe an existing condition and are probably sincere their spontaneous quality gives them a special reliability. Indeed, their spontaneity is thought to give them a greater probative value than present testimony from the witness stand. Under the prevailing view these declarations are received even though made to members of the family, friends or other persons.<sup>97</sup> *A fortiori*, statements of presently existing condition made by a patient to a doctor consulted for treatment are almost universally admitted as evidence of the facts stated.<sup>98</sup> Although these statements are likely to be less spontaneous than those made to friends and relatives since they are usually given in response to questions, they have the added factor of reliability that the patient knows that the kind of treatment he will receive and its value may depend largely upon the accuracy of the information he gives the doctor.<sup>99</sup> That portion of clause (a) dealing with existing physical conditions is in accord with generally accepted doctrine.

The situation in Minnesota is, however, rather obscure and vague. Three early decisions recognized the general doctrine that statements of existing physical condition are admissible to whomsoever made.<sup>100</sup> However, in 1897, the supreme court undertook a careful analysis of this problem and made a number of distinctions.<sup>101</sup> First of all, a distinction was made between ejaculatory utterances "which are the spontaneous manifestations of distress, and which naturally and instinctively accompany and furnish evidence of existing suffering" and "mere descriptive statements of pain.

95. McCormick, Evidence 561-578 (1954).

96. Northern Pac. R. R. v. Urlin, 158 U. S. 271 (1895), McCormick, Evidence 561 (1954), 6 Wigmore § 1714.

97. McCormick, Evidence 562 (1954).

98. McCormick, Evidence 563 (1954)

99. *Ibid.*

100. Firkins v. Chicago G. W. Ry., 61 Minn. 31, 63 N. W. 172 (1895), Johnson v. Northern Pac. R. R., 47 Minn. 430, 50 N. W. 473 (1891), Holly v. Bennett, 46 Minn. 386, 49 N. W. 189 (1891).

101. Williams v. Great No. Ry., 68 Minn. 55, 70 N. W. 860 (1897) See also Berg v. Ullevig, 70 N. W. 2d 133 (Minn. 1955)

or other subjective symptoms of a malady which furnish no intrinsic evidence of their existence."<sup>102</sup> It is only the first type of statement that is admissible to whomsoever made. Descriptive or narrative statements, on the other hand, are admissible only under the following circumstances:<sup>103</sup>

"First, they must have been made to a medical attendant for the purposes of medical treatment. Second, they must relate to existing pain or other symptoms from which the patient is suffering at the time, and must not relate to past transactions or symptoms, however, closely related to the present sickness. . . Third, such statements are admissible only when the medical attendant is called upon to give an expert opinion based in part on them. He cannot merely testify to the statements, and then stop. In the absence of any expert opinion based on the statements, they stand on the same footing as if made to a nonexpert witness."

This distinction between ejaculatory and narrative expressions is a most difficult one to administer. It is often impossible to distinguish rationally between an inarticulate cry or groan and a statement such as: "That hurts." "The warrant for the admission of both is the same; the lack of opportunity or motive for fabrication upon an unexpected occasion to which the declarant responds immediately, and without reflection."<sup>104</sup>

The further restriction that narrative statements of existing symptoms to a doctor are admissible only when the doctor is called upon to give an expert opinion based in part on them is also difficult to justify. Inasmuch as treatment will depend in part upon what is disclosed, the patient has the best of motives to disclose the truth. Indeed, it is doubtful whether the hearsay rule is applicable at all. If the statements are presented merely as a basis for an expert opinion, they are not evidence of the matter stated but merely explanatory of the opinion, enabling the jury to weigh it in the light of its basis.<sup>105</sup>

The argument that a patient's statements made in consultation for treatment have a special reliability is a strong one and has induced some courts to extend the scope of the hearsay exception to include statements of *past* symptoms, when made to a doctor for treatment.<sup>106</sup> This is the view of clause (b) of Rule 63(12). How-

102. *Williams v. Great No. Ry.*, 68 Minn. 55, 59, 60, 70 N. W. 860, 862 (1897).

103. *Id.* at 61, 62, 70 N. W. at 863. See also *Berg v. Ullevig*, 70 N. W. 2d 133 (Minn. 1955).

104. See *Meaney v. United States*, 112 F. 2d 538, 539 (2d Cir. 1940) (opinion by L. Hand, J.).

105. 6 *Wigmore* § 1720.

106. *Meaney v. United States*, 112 F. 2d 538 (2d Cir. 1940).

ever, this would change Minnesota law. The Minnesota court has consistently held that a doctor is not permitted to testify to statements of past symptoms, "however closely these may be related to the present sickness or the present suffering from the injury."<sup>107</sup>

Many courts draw a sharp line between physicians consulted for treatment and those consulted solely as prospective expert witnesses. Special restrictions are frequently imposed as to the latter. In Minnesota, descriptive statements of neither past nor present physical pains and symptoms are admissible as substantive evidence and, in addition, the expert is barred from giving an opinion based upon past history recounted to him.<sup>108</sup> The preliminary requirement in Rule 63(12) that the judge find that the statement was made in good faith would seem to give more desirable flexibility of decision than the rigid restrictions now imposed.

## (2) *Declarations of Mental State.*

The portion of clause (a) referring to an existing state of mind recognizes an exception that was an outgrowth of the exception for declarations of existing physical condition. As with the latter, the special reliability lies in their spontaneity and probable sincerity. The substantive law often makes the existence of a state of mind an operative fact upon which a cause of action or defense depends. When an existing state of mind is thus an issue in the case, declarations describing it are freely admitted.<sup>109</sup> But the exception is not restricted to statements of a then-existing state of mind. It may be used as a basis of inferring its continuance into the future or its existence in the past. For example, in *Troseth v. Troseth*,<sup>110</sup> declarations of the grantor in a deed made both before and after its date were admissible on the issue of delivery.

Clause (a) would also permit statements of intention to be used as a basis for inferring subsequent conduct of the declarant. The

107. *Berg v. Ullevig*, 70 N. W. 2d 133, 138 (Minn. 1955). See also *Sund v. Chicago Ry.*, 164 Minn. 24, 204 N. W. 628 (1925), *Edlund v. St. Paul City Ry.*, 78 Minn. 434, 81 N. W. 214 (1899), *Williams v. Great No. Ry.*, 68 Minn. 55, 70 N. W. 860 (1897).

108. *Preveden v. Metropolitan Life Ins. Co.*, 200 Minn. 523, 274 N. W. 685 (1937), *Faltico v. Minneapolis Street Ry.*, 198 Minn. 88, 268 N. W. 857 (1936), *Sund v. Chicago Ry.*, 164 Minn. 24, 204 N. W. 628 (1925).

However, the hypothetical question may afford an escape from these restrictions. *Lee v. Minneapolis Street Ry.*, 230 Minn. 315, 41 N. W. 2d 433 (1950), *Berg v. Ullevig*, 70 N. W. 2d 133 (Minn. 1955).

109. *McCormick*, Evidence 568 (1954). And see *Rockwell v. Rockwell*, 181 Minn. 13, 231 N. W. 718 (1930) (action for alienation of affections. Letters between spouses admissible to show the state of affection between them).

110. 224 Minn. 35, 28 N. W. 2d 65 (1947). Other examples are given in *McCormick*, Evidence, 568 (1954).



leading case on this point is *Mutual Life Insurance Co. v. Hillmon*,<sup>111</sup> where the defense to an action on a policy on the life of Hillmon was that Hillmon was not dead but that the body claimed to be his was that of one Walters. On this issue, it was held that letters of Walters to his family announcing his intention of going as an employee with Hillmon to the locality where the body was later actually found, were admissible.<sup>112</sup> The Minnesota Court has followed the *Hillmon* doctrine in a number of cases.<sup>113</sup>

If declarations of an existing state of mind are receivable to show later acts, are they admissible to show previous conduct? The same court that decided the *Hillmon* case has given a negative answer.<sup>114</sup> Clause (a) apparently accepts this same view by specifically excepting "memory or belief to prove the fact remembered or believed." However, the comments to the clause are ambiguous. They refer to the hesitation to infer an antecedent condition but recognize that "in multitudes of wills cases dealing with issues of revocation and undue influence the evidence is received." This is certainly an accurate description of existing law. In will cases, for example, it is generally established that a testator's statements made after the alleged event are admissible to show that he has or has not made a will, or a will of a particular purport, or has or has not revoked his will.<sup>115</sup> It is not clear just what clause (a) would do to these decisions.

111. 145 U. S. 285 (1892). See Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 Harv. L. Rev. 709 (1925).

112. Clause (a) is perhaps narrower than the *Hillmon* doctrine since the statement is limited to proving or explaining the conduct of the declarant. In *Hillmon* the letters of Walters not only permitted an inference that Walters went to Crooked Creek but that he went with and was accompanied by Hillmon.

113. *E.g.*, *State v. Hayward*, 62 Minn. 474, 65 N. W. 63 (1895) (statement of deceased that she had appointment with defendant the evening of alleged homicide); *Matthews v. Great No. Ry.*, 81 Minn. 363, 84 N. W. 101 (1900) (declarations of deceased as to reasons for boarding train); *State v. Hunter*, 131 Minn. 252, 154 N. W. 1083 (1915) and *State v. Doty*, 167 Minn. 164, 208 N. W. 760 (1926) (statements of deceased that she was going to defendant for abortion); *Scott v. Prudential Ins. Co.*, 203 Minn. 547, 282 N. W. 467 (1938) (statements which negated likelihood of suicide).

The connection between the statement and the conduct must not be too remote. *Hale v. Life Indemnity & Inv. Co.*, 65 Minn. 548, 68 N. W. 182 (1896).

There is a conflict as to whether uncommunicated threats are admissible to show that declarant rather than the accused was the aggressor. They are apparently inadmissible in Minnesota. *State v. Dumphey*, 4 Minn. (Gil. 340) 438 (1860). See McCormick, *Evidence* 573 (1954); 35 Minn. L. Rev. 315 (1951).

114. *Shephard v. United States*, 290 U. S. 96 (1933).

115. See *Atherton v. Gaslin*, 194 Ky. 460, 239 S. W. 771 (1922). The problems are discussed and the cases classified in 6 Wigmore § 1736.

*Miscellaneous Exceptions*

In addition to the exceptions already discussed the Uniform Rules recognize some 20 more. Limitations of space forbid any extended treatment of them but most of them will be briefly noted.

(1) *Business Entries.* Rule 63(13) embodies the substance of the Uniform Business Records as Evidence Act which was adopted in Minnesota in 1939<sup>116</sup> Rule 63(14) makes explicit the admissibility of evidence of the "absence" of an entry in a business record which is probably already Minnesota law<sup>117</sup>

(2) *Reports and Findings of Public Officials.* Rule 63(15) would admit written reports or findings of fact of any federal or state official if the judge finds that it was made within the scope of the official's duty "and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation."<sup>118</sup> Clause (c) goes beyond the common law in that it admits statements not within the personal knowledge of the reporter or of the recorder.<sup>119</sup> It would change Minnesota law<sup>120</sup>

(3) *Reports by Persons Exclusively Authorized.* The comment to Rule 63(16) shows it would admit written reports required to be made by "persons who are sometimes said to be *ad hoc* public officials, such as physicians, undertakers and ministers of the gospel but it is not confined to them."<sup>121</sup>

116. See Minn. Stat. §§ 600.01-600.04 (1953). The Note in 24 Minn. L. Rev. 958 (1940) discusses the adoption of this statute.

117. *Topinka v. Minnesota Mutual Life Ins. Co.*, 189 Minn. 75, 248 N. W. 660 (1933), *Schoonover v. Prudential Ins. Co.*, 187 Minn. 343, 245 N. W. 476 (1932).

118. See Minn. Stat. § 600.13 "The original record made by any public officer in the performance of his official duty shall be prima facie evidence of the facts required or permitted by law to be by him recorded." And see Corstvet, *Trial Manual of Minnesota Evidence*, §§ 5326 et seq. (1944).

119. *McCormick, Evidence* 617 (1954). The Commissioners state in the comment that adequate protection is given the adverse party by Rule 64 which provides that any writing admissible under exceptions (15), (16), (17), (18), and (19) shall be "received only if the party offering such writing has delivered a copy of it or so much thereof, as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy."

120. See *Barnes v. Northwest Airlines, Inc.*, 233 Minn. 410, 47 N. W. 2d 180 (1951), *Backstrom v. New York Life Ins.*, 183 Minn. 384, 236 N. W. 708 (1931), 16 Minn. L. Rev. 209 (1932). See also 25 Minn. L. Rev. 949 (1941).

121. See *Krema v. Great No. Life Ins. Co.*, 204 Minn. 186, 282 N. W. 822 (1938), *Miller v. McCarthy*, 198 Minn. 497, 270 N. W. 559 (1936), *In re Olson*, 176 Minn. 360, 223 N. W. 677 (1929)

(4) *Certificate of Marriage.* A certificate of marriage is made admissible by Rule 63(18) to prove the truth of its recitals if the maker was authorized to perform marriage ceremonies and the certificate was issued at the time of the ceremony or within a reasonable time thereafter.

(5) *Records of Documents Affecting Property.* An official record of a document "purporting to establish or effect an interest in property" is made admissible by Rule 63(19) as evidence of "the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed."

(6) *Judgment of Previous Felony Conviction.* Rule 63(20) would admit evidence "of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment." As the comments to this Rule point out, a judgment of conviction is analytically hearsay when offered against the person convicted in a later civil case involving some of the same issues. Although most courts deny admissibility,<sup>122</sup> they have done so, not on the theory of hearsay, but upon a principle similar to that of *res judicata*. Consequently, the findings are received only where there is a similarity of parties and of issues. When they are received they come in, not as evidence merely but as conclusive determinations of the issues.<sup>123</sup> Nevertheless, a growing minority of courts have departed from the older rule and have admitted the judgment of conviction as evidence of the facts on which the judgment was based.<sup>124</sup> This view was embodied in the Model Code provision that would admit a judgment of conviction "of a crime or a misdemeanor."<sup>125</sup> The comments to the Model Code provision give the following reasons for the exception:<sup>126</sup>

"Where a person has had an opportunity to defend himself and has entered a plea of *nolo contendere* or a plea of guilty or has been found guilty beyond a reasonable doubt, the judgment entered on the plea or verdict certainly has sufficient value to

122. McCormick, Evidence 618 (1954); 4 Wigmore § 1346a; 5 Wigmore § 1671a. This is apparently the Minnesota view also. *Warren v. Marsh*, 215 Minn. 615, 11 N. W. 2d 528 (1943); *Mills v. Harstead*, 189 Minn. 193, 248 N. W. 705 (1933); *True v. Citizens Ins. Co.*, 187 Minn. 636, 246 N. W. 474 (1933).

It is also specifically provided by statute in Minnesota that convictions under the Highway Traffic Regulation Act shall not be admissible as evidence "in any court in any civil action." Minn. Stat. § 169.94 (1953). And see *Warren v. Marsh*, *supra*.

123. McCormick, Evidence 618 (1954).

124. McCormick, Evidence 619 (1954). And see *Nofo*, 39 Va. L. Rev. 995 (1953) and *Annot.*, 18 A. L. R. 2d 1287 (1951).

125. Model Code of Evidence, Rule 521 (1942).

126. *Id.* at 281.

be worth consideration by a trier of fact, and necessarily includes a finding of all facts essential to sustain the judgment in the particular case."

It has been pointed out that the principles on which is founded the official written statements exception to the hearsay rule would justify an exception for judgments of conviction.<sup>127</sup>

Rule 63(20) does not go as far as the Model Code but limits the exception to felony convictions. The Commissioners' comment recognized a "widespread opposition to opening the door to let in evidence of convictions of traffic violations in actions which later develop over responsibility for damages. In other words, trials and convictions in traffic courts and possibly in misdemeanor cases generally, often do not have about them the tags of trustworthiness as they often are the result of expediency or compromise."

(7) *Commercial Lists and Learned Treatises*. Rule 63(30) would admit "evidence of matters of interest to persons engaged in an occupation contained in" commercial lists and the like "if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them."<sup>128</sup> Rule 63(31) would admit, if the judge finds it a "reliable authority in the subject," treatises, periodicals or pamphlets on subjects of "history, science or art to prove the truth of a matter stated therein."<sup>129</sup>

(8) *Remaining exceptions*. Rule 63(21) makes admissible, in behalf of the judgment debtor in an action for indemnity, evidence of the prior judgment "to prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor." Rule 63(22) makes admissible, "to prove any fact which was essential to the judgment," evidence of a final judgment "determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land." Rules 63(23), 63(24), 63(25) and 63(26) relate to pedigree declarations.<sup>130</sup> Rule 63(27) would admit evidence of community reputation concerning bound-

127 McCormick, Evidence 619 (1954).

128. See *Bartl v. City of New Ulm*, 72 N. W. 2d 303 (Minn. 1955), *Whitcomb v. Automobile Ins. Co.*, 167 Minn. 362, 209 N. W. 27 (1926), 20 Minn. L. Rev. 680 (1936), 7 Minn. L. Rev. 412 (1923).

129. Learned treatises are not admissible as substantive evidence in Minnesota nor in most states. They may be used on cross-examination to impeach an expert. See 39 Minn. L. Rev. 905 (1955).

130. For cases involving the pedigree and family history exception in Minnesota see *In re Gravunder*, 195 Minn. 487, 263 N. W. 458 (1935), *Geisler v. Geisler*, 160 Minn. 463, 200 N. W. 472 (1924), *Hoyt v. Lightbody*, 98 Minn. 189, 108 N. W. 843 (1906), *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892), *Backdahl v. Grand Lodge*, 46 Minn. 61, 48 N. W. 454 (1891), *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891).

aries,<sup>131</sup> general history, and family history of persons resident in the community. Rule 63(28) provides that if a trait of a person's character is material, evidence of reputation not only in the community in which he lives but "in a group with which he then habitually associated," is allowed. Finally, Rule 63(29) would admit recitals in dispositive documents as proof of the matter stated. It makes no distinction based on the age of the document. It does not appear that any of these rules would make any significant change in Minnesota law.

#### CONCLUSION

On the whole, the Uniform Rules treat the hearsay rule conservatively. The traditional exceptions are retained. A few are liberalized and extended. The adoption of the rules, however, would make a number of changes in Minnesota law. The most important are as follows:

1. Rule 63(1) would let in the prior consistent or inconsistent statements of a person present as a witness and available for cross-examination as substantive evidence of the facts stated.

2. Rule 63(4)(a) would admit contemporaneous statements made while the declarant was actually perceiving the event or condition described even though the event was not a "startling" one.

3. Rule 63(5) would extend the use of dying declarations to all kinds of actions whether civil or criminal.

4. Rule 63(10) would admit declarations against interest without a showing of unavailability and would embrace declarations acknowledging civil or criminal liability or affecting social interests.

5. Rule 63(12) would admit statements of existing physical and mental condition to whomsoever made and would admit a patient's declaration of his past pain or symptoms when made to a physician consulted for treatment.

6. Rule 63(15) would admit official reports by officers who did not observe the facts but who had a duty to investigate the facts and report their findings.

7. Rule 63(20) would permit the use of a judgment of conviction of a felony to prove any fact essential to sustain the judgment.

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131. See *Minneapolis & St. L. Ry. v. Ellsworth*, 237 Minn. 439, 54 N. W. 2d 800 (1952); *Thoen v. Roche*, 57 Minn. 135, 58 N. W. 686 (1894).

