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The Uniform Rules of Evidence and the North Dakota Law of Evidence

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THE UNIFORM RULES OF EVIDENCE AND THE NORTH DAKOTA LAW OF EVIDENCE*

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Introduction

AT a time when the lawyers of this State are considering the adoption of new rules of civil procedure,[1] it is equally appropriate that we should turn our attention to the consideration of a related and important subject of law reform — the Uniform Rules of Evidence adopted by the Conference of Commissioners on Uniform State Laws in 1953.[2] In many respects, pleading and evidence both have a similar objective. Each has been the subject of similar struggles to throw off the bounds of the pre-twentieth century formalistic procedural era when the rules were applied with a rigid adherence to precedent resulting in the acceptance of principles without questioning their merits or effectiveness in the trial of issues of fact. Each has been the subject of frequent revision and proposals for reform by qualified judges, lawyers and teachers who have endeavored to translate the workable and unworkable of experience into acceptable criteria for the future. However, the similarity fades noticeably when one compares the interim experiential development of the two. The Field Code, the Federal Rules of Civil and Criminal Procedure and contemporary procedural reforms in many of the states highlight the search for workable rules governing pleading and practice. With the exception of a few isolated instances of piecemeal revision, progress in the reform of the law of evidence has indeed been slow. The Uniform Rules is but the latest in a series of *proposals* for change that have been made from time to time.

The English reformer, Jeremy Bentham, was one of the first to advocate a departure from the rigid exclusionary principle governing the admissibility of evidence.[3] James Bradley Thayer,[4] Roscoe

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* This is the first in a series of articles devoted to this subject.

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1. See, *e.g.*, Holtzoff, *New Civil Procedure in North Dakota*, 32 N. Dak. L. Rev. 81 (1956); Crum, *The Proposed North Dakota Rules of Civil Procedure*, 32 N. Dak. L. Rev. 88 (1956).

2. Handbook of the National Conferance of Commissioners On Uniform State Laws, 102-103 (1953). See Handbook at 164 *et seq.* for the complete text of the Rules.

3. Bentham, A Treatise On Judicial Evidence (Dumont 1825).

4. Thayer A Preliminary Treatise On The Law Of Exidence 509 (1898).

Pound,[5] John H. Wigmore,[6] and many others have followed him in speaking out against the illogicalities and inconsistencies inherent in the rigid application of the exclusionary rules. One of the early organizational efforts in this country to secure changes in the law of evidence was the work of a committee headed by Professor Edmund M. Morgan under the auspices of the Commonwealth Fund.[7] The Committee dismissed as impractical the early suggestion of a single reform either by abolishing the rules of evidence generally or the preparation of a model code of evidence. Rather it dealt with specific reforms and finally recommended the passage of five uniform statutes.[8] But after nine years very few states had adopted even these modest recommendation of the Committee.[9] In 1937 a committee of the section of Judicial Administration of the American Bar Association conducted a study directed toward revision.[10] In its report submitted a year later the Committee recognized the value of the rules of evidence in their skeletal framework, but criticized the petty elaboration and distinction that had crept into the law.[11] Its report dealt with recommendations both as to general features of procedure in the administration of rules of evidence and changes in specific rules governing the admissibiity of evidence which it deemed most necessary, feasible and simple.[12] Although the American Bar Association approved these recommendations,[13] there are no specific changes in the law which appear to have resulted directly from the work of this Committee.

The first major project began in 1939 when the Director of the American Law Institute announced the appropriation of funds by the Carnegie Corporation for the drafting of a model code.[14] The original intention of the Institute had been to restate the law of evidence. However, the ultimate conclusion was that the existing defects and confusions could be remedied only by legislative action. Professor Morgan was named Reporter with Professor John M.

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5. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A.Rep. 395 (Pt. I 1906), reprinted, 20 J.Am.Jud. Soc. 178 (1937), with an introduction by Wigmore, *Roscoe Pound's St. Paul Address of 1906—The Spark That Kindled the White Flame of Progress* at 176.
6. Wigmore, Evidence xiv (3d ed. 1940), (hereinafter cited as Wigmore).
7. Morgan, The Law of Evidence: Some Proposals For Its Reform (1927).
8. *Id.* at xix-xx.
9. Tracy, *What Progress in Reform of Evidence Rules?*, 20 J.Am. Jud. Soc., 80,81 (1936). See also, Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev., 909 (1937).
10. 62 A.B.A.Rep. 58 (1937).
11. 63 A.B.A.Rep. 570, 576 (1938).
12. *Id.* at 571 *et seq.*
13. *Id.* at 154.
14. 16 Proc. Am. Law Inst. 46 (1939).

Maguire as his Chief Assistant and Professor Wigmore as Chief Consultant.[15] The Model Code of Evidence was completed and approved by the Institute in 1942.[16] During the three year period of drafting, the Reporter and his assistants had the benefit of debate by the members of the Institute and suggestions and criticisms of judges and lawyers composing the Evidence Editorial group of the Institute, as well as those of various lawyers throughout the country at bar association meetings where the proposed Code was discussed.[17] However, soon after its approval it became apparent that the Model Code would not be accepted by the profession generally. The principal criticism centered around the liberal modification of the exclusionary rules and the resultant discretion given to the trial judge.[18] The Reporter and Committee did not expect universal and immediate acceptance although the ultimate hope was that the Model Code would find more general acceptance than it has.[19]

In 1943 the Committee on Jurisprudence and Law Reform of the American Bar Association was charged with the duty of studying the need for improving the law of evidence in the federal courts. Among other proposals for reform, it was to consider the Model Code as a basis.[20] The Committee reported back in 1944 and the House of Delegates approved its proposal that the American Bar Association recommend a study of the Model Code by the Advisory Committee on the Rules of Civil and Criminal Procedure of the Supreme Court to determine the extent to which its provisions should be adopted as rules of procedure.[21] This proposal has not resulted in any elaboration on Rule 43 of the Federal Rules of Civil Procedure governing the admissibility of evidence in the federal courts.[22] The Model Code has not been enacted into law in any jurisdiction.

During the period 1920-1949, the Conference of Commissioners on Uniform State Laws also devoted considerable attention to the

15. *Ibid.*
16. 19 Proc. Am. Law Inst. (1942).
17. Model Code of Evidence, ix-xii (1942). For transcripts of the debates by the Institute, see 17 Proc. Am. Law Inst. 66-148 (1940) (Tentative Draft No. 1); 18 Proc. Am. Law Inst. 84-252 (1941) (Tentative Draft No. 2); 19 Proc. Am. Law Inst. 74-257 (1942) (Proposed Final Draft).
18. 20 Proc. Am. Law Inst. 49-52 (1943). See also, Wigmore, *The American Law Institute Code of Evidence Rules A Dissent*, 28 A.B. A.J. 23 (1941); *Panel Discussion, Spotlight on Evidence*, 27 J. Am. Jud. Soc. 113, 114 (1943).
19. 20 Proc. Am. Law Inst. 49-52 (1943).
20. 68 A.B.A.Rep. 146 (1943).
21. 69 A.B.A.Rep. 185 (1944).
22. Clark, *Foreward to Symposium on Uniform Rules of Evidence*, 10 Rutgers L. Rev. 479, 482 (1956); Morgan, *Future of the Law of Evidence*, 29 Tex. L. Rev. 587 (1951); Armstrong, *Proposed Amendments to Federal Rules for Civil Procedure*, 4 F.R.D. 124, 138 (1946).

law of evidence. A number of uniform and model acts designed to remedy specific evidentiary problems were promulgated by the Conference.[23] Its efforts have received a measure of success by the adoption of these acts in one or more of the various states.[24] However, in view of the unfavorable reception given to the Model Code and the still recognized need for general legislative revision, the Executive Committee recommended in 1948 that the Conference cooperate with the American Law Institute in adopting or revising the Model Code or otherwise establishing uniform rules of evidence.[25] This proposal was referred to the Civil Procedure Acts Section of the Conference.[26] A special section committee was then appointed to study and prepare the drafts.[27] The Committee included Judge Spencer A. Gard of Iola, Kansas, as Chairman, three practitioners and three law teachers.[28] Later a committee under the chairmanship of Professor Morgan was appointed to represent the American Law Institute to advise with the Conference committee to the end that the Uniform Rules might receive the approval of the Institute.[29] Initially, the Conference committee recognized the value of the thorough and candid work of those responsible for the drafting of the Model Code and based its preparation of the Uniform rules on this proposal. However, experience had shown that the far reaching changes manifested in the Model Code were not acceptable to the profession generally. It was then determined that each of the Model Code rules should be tested by the criteria of acceptability and uniformity. The rules meeting these tests were retained; those that did not were either modified, revised, or rejected.[30] The final draft of the Uniform Rules was submitted to and approved by the Conference on August 22, 1953.[31] They were then approved by the American Bar Association.[32] The American Law Institute gave its approval in 1954.[33] The Uniform Rules have

23. For a list of these model and uniform acts with the adopting states, see Handbook of Nat'l Conf. of Comm. on Uniform State Laws 303-304 (1955).
24. *Ibid.*
25. Handbook of Nat'l Conf. of Comm. on Uniform State Laws 92 (1948).
26. Handbook of Nat'l Conf. of Comm. on Uniform State Laws 46 (1949).
27. *Id.* at 190
28. Joe E. Estes, Dallas, Texas; John Carlisle Pryor, Burlington, Iowa; Robert E. Woodside, Attorney General, Harrisburg, Pennsylvania; Dean Mason Ladd, University of Iowa Law School; Charles T. McCormick, Professor of Law, Uiversity of Texas; and Maynard E. Pirsig Professor of Law, University of Minnesota.
29. Handbook of Nat'l Conf. of Comm. on Uniform State Laws 162 (1953).
30. *Id.* at 161-163 for a complete summary of the Conference committee approach and its work.
31. *Id.* at 102-103. For interim reports of the Conference committee see Handbook of The Nat'l. Conf. of Comm. on Uniform State Laws For 1951 and 1952.
32. 78 A.B.A. Rep. 134 (1953).
33. The Proposed Act thus has overwhelming professional approval.

attracted considerable attention throughout the country.[34] It appears that they may soon be enacted into law in at least two jurisdictions — New Jersey and Puerto Rico.[35]

The foregoing highlights the struggle for evidence reform in the United States. There are few areas of the law in which there has been more agitation, more scholarly effort and more money expended toward reform than in the law of evidence. Yet today the law remains unchanged generally. The influence of precedent, the natural inclination to cling to the familiar and the burden of learning "new rules and procedures" reflect the reluctance of the lawyer to accept change. The fact that judges and lawyers may apply the existing evidentiary rules with considerable common sense in the trial of issues of fact in the large majority of cases may also explain partly the satisfaction with the status quo.[36] Notwithstanding, the Uniform Rules represent the latest expression of the cumulative effort of many qualified lawyers in the devising of a system of rules designed to improve rather than retard the administration of justice.

It is also true that the Uniform Rules have not as yet been subjected to the test of application. In a few instances, previously promulgated model and uniform acts — the substance of which are now found in some of the Uniform Rules — have been adopted in some states,[37] including North Dakota.[38] But even though the Uniform Rules have not had significant application, they are still supported by the same wealth of scholarship and experience that attended the Federal Rules when they were adopted in 1938. Experience has demonstrated the value of this procedural reform generally.[39] This is not to suggest that the one gives rise to the conclusive validity of the other because the problems are not the

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34. *Symposium on Minnesota and the Uniform Rules of Evidence* 40 Minn. L. Rev. 297 (1956); *A Symposium on the Uniform Rules of Evidence,* 10 Rutgers L. Rev. 479 (1956); McCormick *Some High Lights of the Uniform Evidence Rules,* 33 Tex. L. Rev. 559 (1955); Gard, *Kansas Law and the New Uniform Rules of Evidence* 2 Kan. L. Rev. 333 (1954); *Symposium on the "Uniform Rules" and the California Law of Evidence,* 2 U.C.L.A. L. Rev. 1 (1956); *Symposium on Uniform Rule of Evidence and Illinois Evidence Law,* 49 Nw. U.L. Rev. 481 (1954).

35. Clark, *Foreward to Symposium on the Uniform Rules of Evidence,* 10 Rutgers L. Rev. 479 (1956).

36. *Id.* at 480.

37. See note 23 *supra.*

38. Handbook of The Nat'l Conf. of Comm. on Uniform State Laws 328 (1955): Business Records as Evidence Act, (1937); Judicial Notice of Foreign Law Act, (1937); Official Reports as Evidence Act, (1937); and Photographic Copies of Business and Public Records as Evidence Act, (1951).

39. For example, see Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use,* 15 F.R.D. 155 (1954); Hawkins, Discovery and Rule 34; *What's So Wrong About Surprise?,* 39 A.B.A.J. 1075 (1953).

same in every case. It does suggest that the Uniform Rules deserve serious attention in the various jurisdictions.

In 1954 the Committee on Uniform Laws of the North Dakota Bar Association gave its endorsement to the Uniform Rules and recommended that they be introduced in the Legislature.[40] A Judicial Council committee was appointed later in the year by Justice James Morris with Dean O. H. Thormodsgard as Chairman to study the Uniform Rules and determine the desirability of their adoption in this State.[41] The following — together with the subsequant installments — is in the nature of a report to the Committee and the lawyers of this State. The subject will be dealt with in three basic divisions: (1) a comparative analysis of the Uniform Rules and the North Dakota law; (2) the conclusions derived from the comparative analysis; and (3) some observations on the methods of promulgation.

ORGANIZATION AND FORM OF THE UNIFORM RULES

The Uniform Rules consist of seventy-two rules grouped in nine articles: I. General Provisions; II. Judicial Notice; III. Presumptions; IV. Witnesses; V. Privileges; VI. Extrinsic Policies Affecting Admissibility; VII. Expert and Other Opinion Testimony; VIII. Hearsay Evidence; and IX. Authentication and Content of Writings. The American Law Institute's Model Code contains the same basic organization — the only change made in the Uniform Rules is in the order of the articles.[42] The Model Code contains one-hundred thirteen rules as against seventy-two in the Uniform Rules. This difference is due in part to the treatment of some of the material — particularly in connection with the exceptions to the hearsay rule — as subdivisions to a particular Uniform Rule rather than as separate rules as in the Model Code. However, word volume in the Uniform Rules has been reduced by changes in language and the rearrangement of materials.

One of the basic questions confronting the American Law Institute in the drafting of the Model Code dealt with method and style. For this purpose, Professor Wigmore submitted six postulates which the Institute should agree upon: (1) the rules of evidence should be stated as they ought to be and might practically be made; (2) the rules should furnish a complete code; (3) the rules should

40. 30 N. Dak. L. Rev. 361 (1954).
41. The other members of the committee are: Philip R. Bangs, Grand Forks; Judge O. B. Burtness, Grand Forks; Paul C. Matthews, Professor of Law, University of North Dakota Law School; and Norman G. Tenneson, Fargo.
42. Model Code of Evidence xviii-xxii (1943).

not contain scientific generalizations in terms of expression which were complex, novel and unfamiliar to the bench and bar; (4) the rules should not deal with abstraction, but with all the specific rules exemplifying the abstraction; (5) any changes in an existing rule should be expressly stated and not left to implication; and (6) the comments should not contain any statement amounting to a rule of practice additional to the text of the rule.[43] With the exception of the fourth, agreement was reached generally on all of the foregoing postulates, although there is some disagreement as to whether the Model Code as finally written manifested the spirit of them.[44] The Uniform Rules do follow the first and third postulates more closely than does the Model Code. The only other difference of significance to us here in connection with the two proposals arises in connection with the fourth postulate.

The importance of the fourth postulate is evident by the degree of attention which was drawn to it in debate by the members of the Institute.[45] Should the Model Code be stated in detail and embody all of the concrete rules exemplifying the application of an abstraction? Should the Code be stated in generalities as exemplified by the Federal Rules of Civil Procedure? Or, should a compromise position be adopted? The first — or Wigmore — view was directed toward providing a code of detailed directory provisions for the guidance of the Bench and Bar.[46] The second — or Clark — view is characterized as the other extreme. Judge Clark argued that every detailed statement results in an additional opportunity for litigation, necessitates judical construction of all the language used, and stymies further development in the law of evidence.[47] Also, the Wigmore approach inevitably results in an almost unworkable mass of rules which—when applied to future unanticipated circumstances — may also result in the same sort of illogical and inconsistent application that evidence reform is designed to overcome.

However the Clark view is not entirely free of difficulaties. Generality in treatment often necessitates judicial elaboration. Judge Clark has recognized this problem as it relates to the Federal Rules of Civil Procedure and suggests that it may only be overcome by frequent revision based upon experience in working with the

43. 17 Proc. Am. Law Inst. 66-87 (1940).
44. Wigmore, *The American Law Institute Code of Evidence Rules*: A Dissent, 28 A.B.A. J. 23 (1941).
45. 17 Proc. Am. Law Inst. 70-87 (1940).
46. For example, see Wigmore, Code of Evidence (2nd ed. 1935).
47. *Id.* at 81-84.

rules.[48] In-so-far as evidence may be characterized as procedural, the problem as presented is one of finding a system rigid enough to secure equality in treatment and systematize the disposition of litigation, yet flexible enough to provide for individuality in treatment and give due regard to the substantive rights of the parties in specific cases.[49] The American Law Institute resolved this basic problem in drafting by accepting the Morgan view which represented a compromise in the two extremes. The approach in the drafting of the Uniform Rules leans more in the direction of the Clark view. This underlying policy consideration should be kept in mind in our consideration of the Uniform Rules. We shall have occasion to refer to it again when we consider the methods of adoption.[50]

GENERAL PROVISIONS

Rule 1 contains the definitions. These are set forth in the footnotes and no attempt will be made here to present a discussion of their content.[51] The definitions which need further elaboration will be dealt with in the discussion of other rules where they are relevant.

48. Clark, *Special Problems in Drafting and Interpreting Procedural Codes,* 3 Van. L. Rev. 493, 507 (1950).

49. 2 Holdsworth, History of English Law 251 (3d ed. 1923); Clark, *The Handmaid of Justice,* 23 Wash. U.L. Q. 297, 300 (1938).

50. See the discussion in a later installment dealing with observations on the promulgation of the Uniform Rules.

51. Rule 1. *Definitions.*

(1) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals and includes testimoy in the form of opinion, and hearsay.

(2) "Relevant evidence" means evidence having any tendency in reason to prove any material fact.

(3) "Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.

(4) "Burden of Proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a prepoderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

(6) "Conduct" includes all active and passive behavior, both verbal and non-verbal.

(7) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact" means the determination from proof or judical notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state.

(9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent (or of a sui juris person having a guardian) and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(10) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.

(11) "Trier of fact" includes a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence.

(12) "Verbal" includes both oral and written words.

(13) "Writing" means handwriting, typewriting, printing, photostating, photographing and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, picture, sounds or symbols, or combinations thereof.

Rule 2 provides that the Uniform Rules shall apply in all court proceedings, both civil and criminal.[52] The rule also encourages the uninhibited admissibility of evidence by providing that the Uniform Rules should not modify other procedural rules which relax the rules of evidence for specified purposes.[53]

> RULE 3. *Exclusionary Rules Not to Apply to Undisputed Matter.* If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any other valid claim of privilege.

This rule eliminates the necessity for the strict observance of the rules in the proof of matters which do not involve a real dispute even though they may be in issue in the pleadings. Under Rule 45, it is subject to the discretion of the judge to exclude evidence where its probative value is substantially outweighed by the risk that its admission will unduly consume time, create a substantial danger of prejudice, confuse the issues, mislead the jury or unfairly and harmfully surprise a party. It is also subject to a valid claim of privilege. The rule is motivated by the same policy considerations giving rise to the provisions for the simplification of substantive issues in pre-trial procedure under Rule 16 of the Proposed Rules of Civil Procedure. To otherwise insist upon a strict application of the evidentiary rules in the absence of a bona fide dispute is to encourage a waste of the time of the courts and impose unnecessary expense on the litigants and the public. Such a rule has been urged previously by the Commonwealth Fund Committee,[54] the American Bar Association,[55] and the American Law Institute in its Model Code.[56]

> RULE 4. *Effect of Erroneous Admission of Evidence.* A verdict or finding shall not be set aside, nor shall the judgement or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a

52. Rule 2. *Scope of Rules.* "Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

53. *Ibid.*

54. See note 7 *supra* at 1 *et seq.*

55. See note 11 *supra* at 596.

56. Model Code of Evidence rule 3 is the same in substance. The Model Code rules will be hereinafter cited as the Model Code.

substantial influence in bringing about the verdict or finding.[57]

This rule and the analogous Rule 5—set out in the footnotes—dealing with the erroneous exclusion of evidence reject the early English rule permitting reversals for errors which *might* have affected the result.[58] Conversely, they do not manifest the extreme view of forbidding reversals except when the court is convinced the error was of controlling importance.[59] The court is required to exercise its judgment as to the effect of the error on the finding and reverse if it probably had a substantial influence in bringing about the result. Both rules also require an entry in the record of the objection to the admission of the evidence or the substance of the evidence sought to be introduced. The tenor of these rules is among the proposals adopted by the American Bar Association in 1937.[60]

In North Dakota the erroneous admission or exclusion of evidence does not constitute reversible error unless it is prejudicial.[61] An early decision of the Supreme Court defined prejudice to mean that it must actually appear or the presumption must be strong, that the party seeking a reversal was injured by reason of the error in some substantial interest or right involved in the proceeding.[62] Later decisions have determined the question of prejudice by examining the record to ascertain whether the errors affected the jury[63] or were such as to destroy the probability of a fair trial.[64] These holdings are in accord with the result which the farmers of the Uniform Rules contemplate under Rules 4 and 5.[65] While the

57. The analogous rule 5 dealing with the erroneous exclusion of evidence is as follows: "Rule 5. *Effect of Erroneous Exclusion of Evidence.* A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding."

58. Rules 4 and 5 of Uniform Rule are the same as Model Code rules 6 and 7.

59. Model Code of Evidence 79-80 (1942).

60. See note 11 *supra* at 575.

61. *Admission*: Bale v. Brudevig, 77 N.D. 494, 43 N. W. 2d 753 (1950); Kohler v. Stephens, 74 N.D. 655, 24 N.W.2d 64 (1946); Zilke v. Johnson, 22 N.D. 75, 132 N.W. 640 (1911); McGregor v. Harm, 19 N.D. 599, 125 N.W. 885 (1910). *Exclusions* Wipperman Mercantile Co. v. Robbins, 23 N.D. 208, 135 N.W. 785 (1912); Cockrane v. National Elevator Co., 20 N.D. 169, 127 N.W. 725 (1910); State to use of Hart-Parr Co. v. Robb-Lawrence Co., 17 N.D. 257, 115 N.W. 846 (1908).

62. Burdick v. Haggart, 4 Dak. Rep. 13, 22 N.W. 589 (1885). Prior to the decision in the Burdick case, North Dakota adhered to the old English rule. People v. Wintermute, 1 Dak. Rep. 63, 46 N.W. 694 (1875); Yankton Co. v. Rossteuscher, 1 Dak. Rep. 125, 46 N.W. 575 (1875).

63. Olson v. Wetzstein 58 N.D. 263, 225 N.W. 459 (1929).

64. First National Bank v. Davidson, 48 N.D. 944, 188 N.W. 194 (1922).

65. Handbook of The Nat'l. Conf. of Comm. on Uniform State Laws 166-167 (1953).

Supreme Court appears to have applied the old English rule in at least one later case,[66] the recent decision in *Bale v. Brudevig* indicates a more consistent application of the rule as it is embodied in the Uniform Rules.[67]

The requirements in Rules 4 and 5 for record notice of the erroneous admission or exclusion of evidence as a condition precedent to reversal are not novel in North Dakota. The party complaining of the erroneous admission of evidence must make a timely objection[68] and the grounds or reasons which render the evidence inadmissible must be specified.[69] Pursuant to Section 28-2728 of the Code, it is not necessary to take any exceptions or settle a statement of the case when the error upon which a review is sought appears upon the face of the record.[70] However, in the absence of this circumstance, a party appealing from a judgment of the trial court must prepare a concise statement of the specifications of error on the admission of evidence and point out wherein it was erroneous or prejudicial.[71] The Supreme Court will not review where the duty is placed upon it of exploring the record to find the claimed error.[72]

A consistent application of the well recognized North Dakota rule requiring an offer of proof where it is claimed evidence has been erroneously excluded would follow if Rule 5 were adopted. The rule that a party must offer to prove the facts sought to be elicited by the challenged evidence before error can be assigned has been consistently followed in this State.[73] If the purpose and purport of the testimony sought to be elicited is apparent from the record then strict compliance with the rule of offer of proof is

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66. Stoskoff v. Wicklund, 49 N.D. 708, 193 N.W. 312, 315 (1923): "There is no question but that very wide latitude and discretion must be permitted the trial court, but, notwithstading the trial court's determination in this particular matter, we believe that the examination may have been so prejudicial in its effect that on account of the same a mistrial should have been declared."

67. 77 N.D. 494, 43 N.W.2d 753 (1950).

68. Grant v. Jacobs, 76 N.D. 1, 32 N.W. 881 (1948); Acker v. Jardine, 58 N.D. 430 226 N.W. 483 (1929); State v. Dahlquist, 17 N.D. 40, 115 N.W. 81 (1908).

69. Smith v. Knutson, 78 N.D. 43, 47 N.W.2d 537 (1951); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897).

70. N.D. Rev. Code of 1943. See Morris, *A Memorandum on Appellate Practice*, 29 N. Dak. L. Rev. 219, 222 (1953).

71. N.D. Rev. Code § 28-1809 (1943). O'Dell v. Hiney, 49 N.D. 160, 190 N.W. 774 (1922). Morris, *supra* note 70, at 222-223.

72. O'Dell. v. Hiney, *supra* note 71; State v. Dahlquist, 17 N.D. 40, 115 N.W. 81 (1908). See Newton, *Appellate Practice and Procedure in North Dakota*, 27 N. Dak. L. Rev. 155, 166 (1951).

73. Froh v. Hein, 76 N.D. 701, 39 N.W.2d 11 (1949); Whittier v. Leifert, 72 N.D. 528, 9 N.W2d 402 (1943); Stair v. Hibbs, 52 N.D. 910, 204 N.W. 621 (1925); Farmer v. Holmes, 35 N.D. 344, 160 N.W. 143 (1916).

relaxed.[74] In either case, Rule 5 would not change the existing law. In this connection, it is significant to note that Rule 43(c) of the Proposed Rules of Civil Procedure also deals with the record of excluded evidence.[75] The procedure for the offer of proof under this rule is basically the same—although more detailed—as provided in Rule 5 of the Uniform Rules. However, Rule 43(c) goes on to provide that in actions tried without a jury". . . the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged." While Rule 5 applies to both jury and non-jury actions,[76] it does not contain this proviso which obligates—as distinguished from the discretionary tenor of Rule 5—the court in non-jury actions to report the excluded evidence in full upon request.[77] Depending upon the future of the proposed rules in this State, some attention should be given to this inconsistency. Perhaps Rule 43(c) is better. One of the purposes of the latter would appear to be to encourage the making of complete record in the first instance in non-jury actions and thus avoid delay in the final disposition of the case resulting from a return of the case to the trial court to take excluded evidence.[78]

RULE 6. *Limited Admissibility.* When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

This is a restatement of the well recognized doctrine that evidence admissible for one purpose which satisfies all the rules applicable to it in that capacity is not inadmissible because it does not satisfy the rules applicable to it in some other capacity.[79] The rule is followed in both civil and criminal cases in North Dakota.[80] As is required in Rule 6, the Supreme Court of North Dakota has held that the party must point out the purpose for which the evidence is not admissible and request the court to limit the jury's

74. International Shoe Co. v. Hawkinson, 72 N.D. 622, 10 N.W. 2d 590 (1943): Foot Schulze & Co. v. Skeffigton, 52 N.D. 307, 202 N.W. 642 (1925). For an application of the exception to the rule in criminal actions, see State v. Michelski, 66 N. D. 760, 268 N.W. 713 (1936).

75. Proposed Rules of Civil Procedure, Rule 43 (c).

76. See note 52 *supra.*

77. See note 57 *supra.*

78. N.D. Rev. Code § 28-2732. See also, Rule 28 of the Rules of Practice in Causes in the Supreme Court of North Dakota, 76 N.D., xvii, xxvii (1950).

79. McCormick, Evidence § 59 (1954). hereinafter cited as McCormick. 1 Wigmore § 13 (3d ed. 1940).

80. Smith v. Knutson, 78 N.D. 43, 47 N.W.2d 537 (1951); Janssen v. Kohler, 71 N.D. 247, 299 N.W. 900 (1941); Krogh v. Great West Life Assurance Co., 55 N.D. 722, 214 N.W. 897 (1927); Starke v. Stewart, 33 N.D. 359, 157 N.W. 302 (1916). As to criminal action, see State v. Gimmick, 70 N.D. 463, 296 N.W. 146 (1941).

consideration to the purpose for which it is admissible.[81] The effect of a failure to request the court to instruct the jury to restrict the evidence to its proper scope under Rule 6 would necessarily result in a waiver of the right to an instruction on limited admissibility. It has been so held in North Dakota.[82] If the danger exists that the jury would ignore the judge's instruction, he would have the right under Rule 45 to exclude the evidence where its admission might create a substantial danger of undue prejudice or of confusing the issues or misleading the jury.[83] The trial court has the same discretion in North Dakota.[84]

Rule 6 has already been the object of some criticism by a Minnesota writer as involving the use of evidence to the prejudice of a party concerning whom it is inadmissible, such as a co-defendant.[85] Thus, the jury should not be led to believe that an admission admissible as to one party is admissible as to the other. However, the salutary results that are often achieved through the joinder of claims should not result in the abandonment of a doctrine which is indispensable as a practical rule, particularly when, for example, under the existing North Dakota law or under the Proposed Rules of Civil Procedure separate trials may be ordered to avoid prejudice to the parties.[86] But this presents only one application of the rule. Its practical indispensability is seen more clearly in those instances where the evidence has more than one purpose, but only one for which it can be admitted. For example, evidence of repairs and alterations may not properly be admitted to prove antecedent negligence, although it may be admissible to explain or rebut other evidence.[87] There is no more of an argument available for the exclusion of the evidence on the ground of its aptitude to show the unauthorized fact than there is for its admission to prove another authorized fact. The rule of limited admissibility involves certain dangers, but its effective control can only arise through proper instructions to the jury.[88] In this respect, the criticisms of the Minnesota writer are more convincing.

He argues that the effect of Rule 6 is to prohibit the explanation of the effect of limited admissibility to the jury until the court

81. Smith v. Knutson, *supra* note 80.
82. Smith v. Knutson, *supra* note 80.
83. Handbook of The Nat'l. Conf. of Comm. on Uniform State Laws 167 (1953).
84. Krogh v. Great West Life Assurance Co., 55 N.D. 722, 214 N.W. 897 (1927).
85. Geer and Adamson, *The Uniform Rules of Evidence: A Defendant's View*, 40 Minn. L. Rev. 347-348 (1956).
86. N.D. Rev. Code § 28-1213 (1943). Proposed Rules of Civil Procedure Rule 43(b).
87. Smith v. Knutson, 78 N.D. 43, 47 N.W.2d 537 (1951).
88. Wigmore, § 13 (3d ed. 1940).

gives its instructions. If the terminology in Rule 6 is used in the technical sense then a literal interpretation of the rule calls for this result. He argues that the trial judge should". . . explain to the jury the reason for the admission of the evidence *at the time* it is presented to the jury."[89] Due to the human element this might provide a greater protection against the jury giving the evidence more scope than it would be entitled.[90] The effect of an instruction at the end of the trial might be lost in the many matters of law to which the jury must give its attention at that time. There would seem to be no objection to informing the jury on both occasions. The most recent North Dakota case may be taken as supporting either or both procedures.[91]

Finally, it should also be mentioned that Rule 6 is the only rule in the Uniform Rules which touches upon the much discussed question of the right of a judge to comment to the jury upon the evidence. Rule 8 of the Model Code of Evidence authorizes a judge to sum up and comment to the jury upon the weight of the evidence and the credibility of witnesses.[92] However, it has not found universal acceptance even though it is the historic rule and is adhered to in England, the Federal Courts and some states. Studies have demonstrated that such a rule is supported by good reasons for its acceptance.[93] However, the Uniform Rules would not abolish the recognized rules in North Dakota that a judge—during the course of a trial,[94] or in giving the charge to the jury[95] — may not comment upon the weight of evidence or the credibility of witnesses.

RULE 7. *General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.* Except as otherwise provided in these Rules, (a) every person is qualified to

89. See note 85 *supra* at 348.
90. See note 83 *supra*.
91. Smith v. Knutson, 78 N.D. 43, 47 N.W.2d 537 (1951).
92. Model Code rule 8: *"Comment by Judge.* After the close of the evidence and arguments of counsel the judge may sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and are not bound by the judge's comment thereon."
93. Morgan, The Law of Evidence 9-21 (1927). "(1) It saves time and expense by bringing quicker verdicts, reducing the number of disagreements, and diminishing the number of new trials and applications for new trials. (2) It has an appreciable effect upon a substantial percentage of attorneys in making them spend less time in examining prospective jurors. In this connection, it is interesting to note that in England there is practically no expenditure of time in selecting a jury, and to ponder whether the privilege of comment, so vigorously used there, is not a contributing cause to this desirable end. (3) It operates to a considerable degree to induce the trial judge to pay close attention to the conduct of the trial."
94. Hennenfent v. Flath, 66 N.W.2d 533 (N.D. 1954).
95. See Section 28-1411 pertaining to civil proceedings and Section 29-2130 pertaining to criminal proceedings which, in effect, limit the trial court's instructions to matters of law. N.D. Rev. Code (1943).

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.

This is perhaps the most significant of the eight rules in Article I.[96] The effect of this rule is to abolish every restriction upon the receipt of relevant evidence, irrespective of its source, except as is otherwise provided by the restrictive provisions in other articles of the Uniform Rules. Such a rule is essential to any comprehensive revision of the law of evidence. The basic premise upon which the Uniform Rules have been drafted is that ascertainment of truth in legal controversy requires that the trier of fact have access to all relevant evidence. A code—or rules—of evidence may not concern itself with tests of relevancy; these can only be found in logic and experience. It may only deal conveniently and practically with questions of admissibility. To paraphrase Professor Thayer, all evidence that is logically probative is admissible unless excluded by a rule of law founded upon some paramount policy consideration.[97] Public policy may require the exclusion of privileged communications. Some evidence may be lacking in probative value, such as hearsay. Some evidence may be misused or overestimated by the trier of fact, such as offers to compromise a wrongful act. Thus Rule 7 adopts the basic premise of Professor Thayer and others, and follows the pattern of the Model Code, by providing generally for the admissibility of all relevant evidence and then in subsequent articles imposes limitations upon this admissibility.[98] These restrictive rules are of five classes, each of which is treated in a separate article: (1) qualification of witnesses; (2) personal privileges; (3) extrinsic public policy rules; (4) hearsay; and (5) authentication of writings.

Second, this rule has the effect of invalidating all prior law, thus permitting the comprehensive formulation of exclusionary rules uninhibited by prior statutory and case precedents. As will be seen later, the exclusionary rules in subsequent Articles operating as

96. For a discussion of the approach taken in drafting the Uniform Rules in light of Rule 7, see Gard, *Kansas Law and the New Uniform Rules of Evidence*, 2 Kan. L. Rev. 333, 336-337 (1954).

97. Thayer, A Preliminary Treatise on Evidence 265 (1898). See also, Model Code of Evidence 11 (1942). For at least one practicing attorney's approval, see DeParcq, *The Uniform Rules of Evidence: A Plaintiff's View*, 40 Minn. L. Rev. 301, 305 (1956).

98. Thayer, *op. cit. supra* note 97; Model Code rule 9.

a limitation on Rule 7 will not result in too many novel changes in the law of North Dakota. The extent to which the Uniform Rules result in a non-recognition of present North Dakota rules can be made clearer following a comparison of the two systems.

> RULE 8. *Preliminary Inquiry by Judge.* When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

This rule focuses attention upon a problem that has often created considerable difficulty for the courts in reconciling the respective functions of judge and jury in the trial of issues of fact.[99] It is universally recognized that the admissibility of evidence is to be determined by the judge if the relevancy or competency of a fact does not depend upon the existence or non-existenc of another disputed fact. Such is the rule in North Dakota.[100] However, the courts have not always agreed upon who must decide a disputed question of fact which conditions the admissibility of the evidence.[101] An analysis of the problem, the Uniform rule and the law of North Dakota can best be considered by dividing our treatment of the subject into preliminary questions of fact dealing with competency and those dealing with relevance. Questions of competency involve a determination of whether relevant facts shall be excluded under applicable exclusionary rules. For example, suppose A seeks to offer in evidence a copy of a writing under Rule 70 of the Uniform Rules. B objects on the grounds of the failure to meet the condition under Rule 70 that a copy of an original may not be introduced where the latter is destroyed with a fraudulent intent. If this is true the evidence may not be received. Who is to decide whether the fact exists: judge or jury? The traditional view is that the judge shall decide questions of competency and—as has been

99. See Morgan, *Function of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165 (1929); Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927).
100. King v. Hanson, 13 N.D. 85, 99 N.W. 1085 (1904).
101. See note 99 *supra*.

seen—it is incorporated in Rule 8. It appears that the problem may be treated differently in North Dakota. In *King v. Hanson,* the Supreme Court said:

> "The rule which meets our approval—and it is one entirely consistent with the separate functions of judge and jury, and is adapted to sound practice—is that when the question of admissibility rests upon disputed facts, the court may submit the evidence to the jury with proper hypothetical instructions."[102]

The language of the court here and elsewhere in its opinion leaves little doubt that it is in the discretion of the trial judge as to whether he will decide the question or leave it to the jury. However, where the competency of evidence is in question sound reasons support the Uniform rule. Indeed, while the Supreme Court of North Dakota has more recently approved of the rule as laid down in the *King* case, it stated that it should be narrowly confined and took notice of the criticisms of the practice as outlined in Professor Wigmore's treatise.[103] The practice of leaving such questions to the jury requires of jurors the almost impossible task of separating preliminary questions from ultimate questions; it requires of them the task of ruling upon questions of admissibility, then erasing the objectionable evidence from its mind and basing its verdict only upon the admissible evidence; and it frustrates the chief objectives of the exclusionary rules particularly where the policy of protection of an interest is involved.[104] In the words of Professor Morgan, "(i)n short, there is no argument for departure from the orthodox practice of permitting the jury to decide the question which does not strike at the validity of the exclusionary rules themselves."[105]

A different problem arises when the admissibility of evidence depends upon its relevancy. A sues B to recover for services rendered under an alleged contract for the sale of land. B seeks to offer evidence of a different contract based upon negotiations with C which took place in A's office. The relevancy of the evidence depends upon whether C is the authorized agent of A.[106] Is this preliminary fact determined by the judge as a condition to the admissibility of the evidence of a different contract or should the conditionally relevant fact be admitted and the question of agency left to the jury for determination? A decision on the question of agency is

102. See note 100 *supra.*
103. Schmidt v. Stone, 50 N.D. 91, 194 N.W. 917 (1923). See Wigmore, § 2550 (3d ed. 1940); McCormick, § 53 (1954).
104. Morgan, *supra* note 99 at 168-169.
105. Morgan, supra note 99 at 189.
106. See Huston v. Johnson, 29 N.D. 546, 151 N.W. 774 (1915).

but an element in deciding upon the probative value of the evidence of the contract offered by B which is a proper question for the jury.[107] Here, the reasons for requiring the judge to determine disputed preliminary questions of fact relating to competency do not apply. The conditionally relevant fact should be admitted after which the adversary may then offer evidence in rebuttal. The jury would then resolve the dispute.[108] The Uniform Rules deal with rules of exclusion—or the competency of evidence—and do not purport to consider problems in relevancy. Rule 8 would appear to apply only to preliminary questions of fact conditioning competency. Thus, under the Uniform Rules preliminary questions of fact conditioning relevancy are jury questions. Although no recent North Dakota decisions have been found an early case is in accord with this rule.[109]

Rule 8 represents an extensive modification of the corresponding Rule 11 of the Model Code particularly in connection with leaving the determination on questions of who has the burden of proof and producing evidence in preliminary questions of fact to the discretion of the judge rather than to a rule of thumb. Two additional new features in Rule 8 are requiring—when a request is made—hearings on confessions to be held out of the presence of the jury and incorporating a saving clause to insure that the jury is entitled to hear weaknesses in admitted evidence.

(To Be Continued)

107. See McCormick, §53 (1954).
108. Huston v. Johnson, *supra* note 9.
109. Huston v. Johnson, *supra* note 9.