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OBJECTIONS, MOTIONS AND FOUNDATION TESTIMONY

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The rules of admission and exclusion of evidence are not self-operative in our adversary system of trial. As important as the rules are, counsel for litigants must be alert to obtain their benefits and to employ with nicety recognized methods both to exclude improper evidence and to secure the admission of acceptable evidence.

Objections and motions to strike provide the means of excluding improper evidence; also for controlling the method of examination of witnesses and the order of introduction of proof by an adversary.[1] On the other hand, paving the way for admissibility of evidence requires the use of foundation testimony which in a larger sense is basic to the admission of all evidence. Some foundation testimony is not formally designated as such but the foundation aspect is so interrelated with the rules of evidence that it goes to the very heart of admissibility.

The broader conception of foundation testimony includes any preliminary inquiries which help the expected testimony to escape from the rules of exclusion or to be more highly evaluated when admitted. Thayer's observation that all relevant evidence is admissible unless barred by one of the rules of exclusion presupposes the necessity of laying proper foundation or making such preliminary inquiries as are required to avoid, or to show the inapplicability of, the rules of exclusion.[2] As the anticipation of pertinent objections prescribes the course of foundation testimony, the methods to exclude and the process to gain admission of evidence may profitably be considered together. Objections, motions and the methods of laying foundation testimony are a part of the law of evidence but are so often absorbed in the study of the principles of admissibility that their independent significance is obscured.

† See Contributors' Section, Masthead, p. 659, for biographical data.

1 For excellent discussion of the purposes served by objection and practical suggestions as to their use, see Keeton, Trial Tactics and Methods c. 4 (1954).

2 Thayer, Preliminary Treatise 265 (1898).

OBJECTIONS

A. Preliminary Observations

If an objection is not urged, evidence is admitted for what effect it may have in the solution of the fact issues.[3] Evidence is classified generally in the area of adjective law as distinguished from substantive law. Accordingly, a rule of evidence is waived unless asserted.[4] Therefore, a litigant must urge these rules if he is to benefit from them. A party is bound by the objections which he specifies when the evidence is offered in the trial court and is regarded as having waived all objections other than those specifically pointed out.[5] The trial judge considers only those objections which counsel urge and is not required to search for other objections which have not been revealed. Although counsel indicates his desire to exclude the evidence by making any objection to its admissibility, he must select the proper specific ground to obtain exclusion. From the aspect of appeal the rule is a logical one. Appeals in law actions are based upon errors committed by the trial court which counsel assign as grounds for reversal. If the wrong objection has been urged the trial court has committed no error in overruling it. As a result the same consequence is given to urging the wrong objection that is given to making no objection at all—subject to certain exceptions.

The failure of counsel to object to inadmissible evidence does not necessarily mean that he has failed to discover or to properly analyze objectionable aspects of the evidence. There is much inadmissible evidence which can do no harm. In fact, it is good practice for counsel to object as little as possible, because constant objections may lead the jury to believe that counsel is attempting to withhold important evidence from them, when it may actually be of little value. Upon close questions of admissibility, in which the damage from the evidence cannot be great, counsel may regard it advisable not to risk an adverse

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[3] Meridian Hatcheries v. Troutman, 93 So. 2d 472 (Miss. 1957); San Francisco Unified School District v. Board of National Missions, 129 Cal. App. 2d 236, 276 P.2d 829 (1954).

[4] 1 Wigmore, Evidence § 18, at 321 (3d ed. 1940).

[5] Knight v. Loveman, Joseph and Loeb, 217 F.2d 717 (5th Cir. 1954) (interprets Federal Rule of Civil Procedure 46 as having this effect); Federal Rule 46 provides:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made the absence of an objection does not thereafter prejudice him.

Forest Preserve District of Cook County v. Lehmann Estate, Inc., 388 Ill. 416, 58 N.E.2d 538 (1944); Eggermont v. Central Surety & Insurance Corp., 238 Iowa 28, 24 N.W.2d 809 (1947); Wright v. Bubar, 151 Me. 85, 115 A.2d 722 (1955); Warren v. Warren, 93 Va. 73, 24 S.E. 913 (1896).

ruling which sometimes causes the jury to give the evidence, when admitted, much more attention than it would have otherwise received. If the damage of an anticipated answer to a question appears to be substantial, then the question must be analyzed to discover the exact point of attack and to select the specific rule of evidence to invoke. The use of objections, therefore, requires a sense of evaluation and the exercise of careful judgment, as well as a knowledge of the rules and the methods of applying them.[6] The dangers of over-objection are legally recognized by the rule that if a proper objection has been urged and overruled, counsel is not required to make further objections to preserve his right of appeal when a question is asked raising the same issue subsequently in the course of the trial.[7]

It is conceivable that the law of evidence might have taken a different course and required only that counsel indicate dissatisfaction with offered evidence by simply indicating that he objected to its admission. It would then be for the trial judge to discover on his own whether, out of the entire law of evidence, some rule of exclusion was applicable and to determine accordingly. It would then become the duty of the court to ascertain the grounds for an objection rather than the counsel's duty to specify them.

From the tactics of lawyers occasionally observed in the courtroom it would appear that in some localities they regard this to be the rule. The simple statement, "I object," with no reasons given, has at times become almost a habit with apparently no concern for perfecting a record for appeal. This is bad practice even if it is intended as a general objection to the competency, relevancy and materiality of the offered evidence because it communicates no idea to the court of what is regarded as wrong. It represents the inarticulate mental frustration of a fearful attorney who will probably be disappointed in the ruling and might as well not have made the objection.

The strong tendency today is to emphasize the demand for specific objections. The Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws, taking the same position as the American Law Institute in its Model Code of Evidence, provides

[6] See Ladd, "Common Mistakes in the Technique of Trial," 22 Iowa L. Rev. 609, 611-19 (1937).

[7] "The repetition of an objection is needless where the same or similar evidence, already duly objected to, is again offered; the prior objection suffices, if the Court's ruling has indicated that an objection to such evidence will definitely be overruled. But where a piece of evidence has been duly objected to and the objection has been properly overruled at the time, and afterwards it appears that the evidence was inadmissible, a motion to strike out, i.e., a renewal of the objection, must be made." 1 Wigmore, Evidence § 18, at 331 (3d ed. 1940); Metropolitan National Bank v. Commercial State Bank, 104 Iowa 682, 74 N.W. 26 (1898).

that a verdict shall not be set aside nor shall there be a reversal of a case because 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. . . ."[8] This provision cannot be read otherwise than to eliminate the use of an objection without a reason.

B. The General Objection

With the requirement of specific objections the question may be raised whether there is a place in the law of evidence for the general objection. The label "general objection" is misleading because what is designated as a general objection is in fact a very specific objection, commonly used to test relevancy and materiality. The usual form used in urging the general objection is that the evidence is "incompetent, irrelevant and immaterial," although other wording is frequently employed.[9] While the wording may appear to be a "catch-all," it strikes basically at the materiality of offered proof and its relevancy. It is questionable whether other words could be more specific to raise these issues than those employed in the general objection.[10]

The term "incompetent" seems to be surplusage in the phrase "incompetent, irrelevant and immaterial" and means no more than a claim that the evidence is inadmissible.[11] In order to actually challenge competency, the term "incompetent" is not sufficient; the objection must be more specific. For example, hearsay is regarded as incompetent evidence yet

[8] The Uniform Rules of Evidence, Rule 4. See also, The Model Code of Evidence, Rule 6.

[9] Insufficient, Huntsville Knitting Mills v. Butner, 200 Ala. 288, 76 So. 54 (1917); illegal, Johnston v. Johnston, 174 Ala. 220, 57 So. 450 (1912); illegal, irrelevant and incompetent, Bufford v. Little, 159 Ala. 300, 48 So. 697 (1909); "I object," Aetna Life Insurance Co. v. Norman, 196 Ark. 381, 117 S.W.2d 728 (1938); irrelevant, immaterial and inadmissible, Loften v. Carroll County Board of Education, 72 Ga. App. 823, 35 S.E.2d 309 (1945); inadmissible, incompetent, irrelevant, Hogan v. Hogan, 196 Ga. 822, 28 S.E.2d 74 (1943); "on all the grounds ever known or heard of," Johnston v. Clements, 25 Kan. 376 (1881); irrelevant and immaterial, Jones v. Lahn, 1 N.J. 358, 63 A.2d 804 (1949); incompetent, irrelevant and inadmissible, Lenihan v. Davis, 152 Pa. Super. 47, 31 A.2d 434 (1943); incompetent, inadmissible and highly prejudicial, Griswold v. Texas Co., 163 S.C. 156, 161 S.E. 409 (1931); inadmissible and immaterial, Crawford v. Hite, 176 Va. 69, 10 S.E.2d 561 (1940).

[10] It has been forcefully argued that the general objection is insufficient to raise any issue and that counsel should be required to point out specifically the weakness of the offered evidence. See Slough, "Relevancy Unraveled," 5 Kan. L. Rev. 1, 5 (1956). Courts have not followed this practice, and to do so would often involve lengthy objections which would simply spell out what the words immaterial and irrelevant mean as applied to the situation. This would be unnecessarily burdensome and in most cases would serve no additional purpose. If the court or counsel fails to see the application they can ask the objector to explain his challenge of relevancy or ask the examiner to state the purpose of the proof which is offered. See McDonald v. Strawn, 78 Okla. 271, 275, 190 Pac. 558, 562 (1920). Objections other than the general objection involve the same practice and the court may ask counsel to explain the meaning of an objection urged, or to argue its application.

[11] Professor McCormick makes the same observation stating, "The word 'incompetent' as applied to evidence means no more than inadmissible, and thus cannot be said to state a ground of objection." McCormick, Evidence 119 (1954).

it is necessary to designate the offered evidence as hearsay in order to raise the issue of its incompetency. Also, secondary evidence of a writing is incompetent if the original document is available. However, to obtain an exclusion of a question asking for secondary evidence, the specific objection that it is not the best evidence or that it violates the best evidence rule, is necessary in order to make a record for reversal if the objection is overruled.[12] Competency is perhaps more commonly thought of in respect to an objection to the competency of witnesses. This requires a specific objection designating the character of the incompetency, such as want of mental capacity or other conditions indicating the inability to understand the obligation of an oath.[13] Thus, competency appears to be only the subject of a specific objection and when the term "competency" is embodied in the general objection it adds no more than an indication of resistance to the offered evidence.

Materiality ordinarily relates to the pertinency of offered evidence to the issue in dispute or to the issue of credibility.[14] An objection that evidence is immaterial specifically raises that point, and additional words add little more. Relevancy on the other hand, relates to the probative value of evidence in relation to the purpose for which it is offered.[15] Although courts have sometimes used materiality and relevancy interchangeably[16] or consider relevancy to include materiality, the general objection embraces both ideas. Therefore, if it is intended by a general objection, to challenge the relevancy and materiality of offered evidence, the rule requiring specific objections would seem to be satisfied.

Other langnage is sometimes used to express the idea of relevancy such as the objection to evidence because it is too remote and prejudicial.[17] Evidence is not ordinarily excluded because it is prejudicial if it has a strong tendency in reason to prove a material matter. There is perhaps nothing more prejudicial than the proof of another robbery by the accused who is on trial for robbery. This evidence, while ordinarily

12 For excellent discussion see Lende v. Ferguson, 237 Iowa 738, 23 N.W.2d 824 (1946).

13 Nunn v. Slemmons' Adm'r, 298 Ky. 315, 318, 182 S.W.2d 888, 889 (1944).

14 See McCormick, Evidence 315 (1954). "We start, then, with the notion of materiality, the inclusion of certain questions or propositions within the range of allowable controversy in the law suit."

15 Ibid. "Relevancy, as employed by judges and lawyers, is the tendency of the evidence to establish a material proposition."

16 For discussion see Ladd, "Determination of Relevancy," 31 Tulane L. Rev. 81, 83-86 (1956).

17 In the First Edition of Morgan & Maguires casebook on evidence, the subject of relevancy was considered under the section title "Problems of Remoteness and Undue Prejudice." An objection that evidence is remote and prejudicial would indicate the character of the challenge equally as well as an objection that it was' immaterial and irrelevant. Either objection would cause a balance of the probative qualities of the evidence as they related to the issue in dispute in comparison to the danger of prejudice which the evidence might cause.

excluded, is clearly admissible to rebut the defense of alibi.[18] In the marginal cases of relevancy, the prejudice created by admission of the evidence becomes important and is balanced against its probative quality in determining admissibility.[19] The general objection that the evidence is irrelevant and immaterial invokes this whole testing process.

The claim that the objection to evidence because it is "incompetent, irrelevant and immaterial" is simply a ritual to voice discontent without direction may appear to have merit because of the frequency of the use of the general objection.[20] Undoubtedly it is used sometimes simply to prevent the witness from answering until counsel can think of the real reason which he then adds to the general objection. This may account in part for the rule that a specific objection merges the general objection when attached to it.[21] The frequency of the use of the general objection, however, is to be expected because relevancy and materiality are potential problems in every question. Courts are not believed to be misled by the use of the objection but look upon it in its double aspect as specifically calling into question either materiality or relevancy, or both.[22]

What is the effect of the court's ruling upon a general objection? If the general objection is sustained, although only a specific objection

18 Greve v. State, 36 Ariz. 325, 285 Pac. 274 (1930); Davis v. State, 182 Ark. 123, 30 S.W.2d 830 (1930).

19 Upon the techniques employed in testing relevancy, see Ladd, "Determination of Relevancy," 31 Tulane L. Rev. 81, 86-90 (1956); Trautman, "Logical or Legal Relevancy —A Conflict in Theory," 5 Vand. L. Rev. 385, 389-90 (1952). The Uniform Rules of Evidence, Rule 45 expressly gives the judge discretion to exclude evidence, "if he finds its probative value is substantially outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice or of confusing the issues or by misleading the jury. . . ."

20 Dean Slough has expressed severe criticism of considering the issues of materiality and relevancy together. He considers that each is so much a different problem that a specific objection should be made upon the ground of one or the other of these reasons, and that the use of them together creates confusion. In his article "Relevancy Unraveled," supra note 10, at 5, he states:

> The terms relevancy and materiality are frequently used conjunctively, if not interchangeably, in such a way as to suggest that they are synonymous. And it is commonplace for members of the legal profession to assert that the terms are so much alike that pointing up a distinction is as needless as it is artificial. Add to this wallow of mediocrity the stock objection "incompetent, irrelevant and immaterial" and the circle of confusion is complete. Acceptance in the market place is scarcely ground for adherence to a rule of thumb whose only function is to gravitate against clear thinking. Simple to remember is the premise that concepts of relevancy and materiality, when viewed separately, do serve useful and distinct purposes in the framework of legal rationalization. Though an evidential fact be relevant under the rules of logic, it is not material unless it has a legitimate and effective bearing on the decision of the ultimate fact in issue.

21 See Ladd, supra note 6, at 629-30.

22 The Uniform Rules of Evidence, Rule 1(2) states as a definition that "'Relevant evidence' means evidence having any tendency in reason to prove any material fact." This definition embraces both ideas that the evidence has probative force, and that it concerns a material fact. As defined by the Uniform Rules, relevancy alone includes materiality. See also McCormick, Evidence 119 (1954).

could properly raise the issue, the decision will be affirmed as the appellate court will assume that the trial court excluded the testimony for the right reason.[23] Practically, it would be useless to reverse the case because counsel would be sure to use the correct specific objection if the case was retried. The existence of this rule may further account for the frequent use of the general objection.

If the reason for the objection is not apparent counsel may urge the general objection in the hope that the trial judge will see more than counsel saw and sustain the ruling. This raises an interesting question. What if the proponent of the evidence asks the trial court to designate the reason for exclusion? The question is answered by the Supreme Court of Wisconsin which carefully discussed the problem. The only objection urged to a number of questions was that they were incompetent, irrelevant and immaterial. The plaintiff requested the defendant's counsel to make the grounds of his objection more specific. The defense counsel said he thought the objection as stated was sufficient, and the objection was sustained. The counsel for the plaintiff appealed to the trial court to inform him of the ground and reason on which the objection was sustained, so that he could ask other questions designed to meet the court's ruling. The court told counsel that counsel would see the grounds of objection if he thought about it. In reversing, the appellate court stated:

> It should be remembered that the object of making objections is not for the sole purpose of enabling the objecting party to insist on error in the appellate court, but that one of the objects is to enable the counsel putting the questions to avoid error, and more effectively prove his case or defense. We think the defendant's counsel should have been required to make more specific objections, if he had any; or, at least, to have been required to state the theory upon which he regarded such questions objectionable. . . . But when counsel on either side is unable to comprehend the ground or reason for excluding evidence, and in good faith appeals to the court to specifically indicate such ground and reason in order that he may frame his questions in such a manner as to meet such ruling, then, in our judgment, it becomes the duty of the court to indicate such ground or reason specifically.[24]

On the same theory, a trial court should inform the proponent of evidence of the reason for which an objection was sustained when several distinct specific grounds were urged.

If the general objection is overruled when a specific objection should have been made, the party urging the objection cannot complain on

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[23] See Mills v. Texas Compensation Insurance Co., 220 F.2d 942 (5th Cir. 1955).

[24] Colburn v. Chicago, St. P. M. & O. Ry. Co., 109 Wis. 377, 383, 85 N.W. 354, 355-356 (1901). See also Rosenberg v. Sheahan, 148 Wis. 92, 133 N.W. 645 (1911). Upon the requirement that a trial court rule upon an objection, see 9 Wis. L. Rev. 316 (1934); 1 Wigmore, Evidence § 19, at 348 (3d ed. 1940).

appeal by asserting a new proper objection at that time.[25] In the frequently cited case of *Tooley v. Bacon*,[26] the court approved this position, ". . . unless there be some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature be incompetent."[27] In another early New York case the court expressed the same idea by stating that "in a case where the objection could not be obviated by any means within the power of the party offering the evidence in order to raise the question of its admissibility it is sufficient to make a general objection thereto."[28] If the offered evidence is in fact immaterial or irrelevant, this situation would be present because lack of its relationship to the issues in dispute could not be obviated, nor could the evidence be given weight if it had none. Therefore, if the general objection is regarded as being specific upon materiality and relevancy, the requirement of a specific objection is satisfied.[29] If the general objection is held effective only for this purpose, it has eliminated the almost impossible task of trying to determine what is in its "essential nature incompetent," or what could or what could not be obviated.

The *Tooley* case commented further in respect to specific objections stating that if ". . . a ground of the objection be specified, the ruling must be sustained upon that ground unless the evidence was in no aspect of the case competent, or could not be made so."[30] Thus, the general objection is given a broader effect than specific objections by being more inclusive when sustained. If the general objection is regarded as a specific objection to materiality and relevancy, overruled specific and general objections when other objections should have been urged have marginal differences, if any, in respect to the right of appeal. Under both types of objections the review of the issue would be denied.

C. Specific Objections

The method of urging specific objections should present little difficulty once the reason for the exclusion is discovered. It then becomes a problem of choice of language to communicate the idea which makes the proof inadmissible. Words of art are not necessary. Any expression

[25] Een v. Consolidated Freightways, 220 F.2d 82 (8th Cir. 1955); Bank of America National Trust and Savings Association v. Taliaferro, 144 Cal. App. 2d 578, 301 P.2d 393 (1956); Kirkpatrick v. Tapo Oil Co., 144 Cal. App. 2d 404, 301 P.2d 274 (1956); People ex rel. New York Central Ry. Co. v. Vincent, 68 N.Y.S.2d 202 (1947).

[26] 70 N.Y. 34 (1877).

[27] Id. at 37. This statement has been enunciated in a number of New York cases, among them Wightman v. Campbell, 217 N.Y. 479, 482, 112 N.E. 184, 185 (1916); Nastasi v. State of New York, 194 Misc. 449, 459, 86 N.Y.S.2d 635, 645 (Ct. Cl.), rev'd, 300 N.Y. 473, 88 N.E.2d 658, 90 N.Y.S.2d 377 (1949); People ex rel. New York Central Ry. Co. v. Vincent, 68 N.Y.S.2d 202, 205 (Sup. Ct. Ontario County 1947).

[28] Holcombe v. Munson, 103 N.Y. 682, 9 N.E. 443, 446 (1886).

[29] McCormick, Evidence 119 (1954).

[30] 70 N.Y. at 37.

which pointedly discloses the vulnerable quality of the proof or the character of the incompetence is sufficient. If the anticipated answer to a question is hearsay the proper objection is that the question calls for hearsay. An equally effective objection is that the witness does not have personal knowledge of the matter about which he is being questioned, or that the witness is being asked to repeat the statement of another person not in court and subject to cross-examination, or, if the declaration was made by a party to litigation favorable to himself, that it is self-serving.[31]

As stated in the Uniform Rules there must be interposed a timely objection, stated in a manner which makes clear the specific ground of the objection.[32] In determining the formal sufficiency of an objection, it is enough if the substance of the defective feature of the evidence offered is made clear by any choice of language. Care must be taken that the objection strike at the very heart of the infirmity. In the federal case of *Een v. Consolidated Freightways*,[33] an action to recover damages for personal injury resulting from a collision between a car and a truck, the plaintiffs made a motion for a new trial because an experienced highway patrolman was allowed to testify that he believed that the collision had occurred on the west side of the highway because of his observations of the position of the cars after the accident. The point of impact was the vital issue of the case. The patrolman did not see the collision but came upon the scene shortly after it occurred. The patrolman's qualifications were established and what he found at the scene of the accident was described. The defendant's counsel then asked him if from his observations he had formed an opinion as to where the impact occurred. He stated that he had and was asked to express it. To this question plaintiff's counsel objected on the grounds that the question was "incompetent, irrelevant, and immaterial, calling for speculation, guess and conjecture, invading the province of the jury and called for a conclusion."[34] The objection was overruled and testimony of the patrolman's opinion which favored the defendant was given.

On appeal to the circuit court, Chief Judge Gardner held that the objections were not sufficiently specific to raise the issue on appeal. No question had been, or perhaps should have been, raised as to the qualification of the witness since the record showed that this patrolman was

[31] The fact that a statement is self-serving is not in itself a ground for objection. A self-serving statement is objectionable because it was hearsay, but the designation that the testimony asked of a party is self-serving, is ordinarily regarded as sufficient. But the real reason for the exclusion is that the statement is hearsay. See Caplan v. Caplan, 83 N.H. 318, 142 Atl. 121 (1928).

[32] See note 8 supra.

[33] 220 F.2d 82 (8th Cir. 1955).

[34] Id. at 87.

qualified if any witness on the issue could be qualified. The omitted point according to the circuit court was that the specific objection did not state "that the question propounded was not a *proper subject* for expert testimony." (Emphasis added.)[35]

The decision may have been overly technical because the trial court in its opinion discussed the matter and concluded that if trained experts would be of sufficient assistance to jurors in arriving at their conclusions, the jurors should have the testimony, even though they might have drawn inferences without the aid of experts.[36] The case shows the extent to which an objection to evidence must raise exactly the theory or principle involved which would cause the exclusion. Plaintiff's counsel tried to include in the objection everything conceivably applicable. He claimed that the question called for speculation, guess and conjecture and that it was a conclusion. He threw in the general objection of incompetence, irrelevance and immateriality for good measure. There was no question that it was a conclusion and conclusions are commonly spoken of as being inadmissible because they invade the province of the jury. But he missed the one point involved, namely, that the facts did not present the kind of subject matter upon which expert testimony can be given.

The dead man statute is another stumbling block for attorneys in framing objections. Some courts are not very generous in trying to understand what attorneys mean when they object to evidence because of "the dead man statute." It is not the evidence that is objectionable; it is the incompetency of the witness to testify as to personal transactions or communications with a person since deceased. If the latter idea is not communicated with articulate language challenging the competency of the witness to answer the particular question because it calls for the kind of testimony about a transaction or communication which is prohibited, some courts regard it not to be specific enough to raise the issue.[37] The difficulty of making a proper objection may be as much in understanding a rule as in selecting language to invoke it.

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[35] Id. at 87-88.

[36] The sum of the history [of the opinion rule] is, then, that the original and orthodox objection to "mere opinion" was that it was the guess of a person who had no personal knowledge, and the "mere opinion" of an expert was admitted as a necessary exception; that the later and changed theory is that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous; and that thus an expert's opinion is received because and whenever his skill is greater than the jury's, while a lay opinion is received because and whenever his facts cannot be told so as to make the jury as able as he to draw the inference.
7 Wigmore, Evidence § 1917, at 10 (3d ed. 1940). For discussion of when expert testimony may be admitted see Ladd, "Expert Testimony," 5 Vand. L. Rev. 414, 417-21 (1952).

[37] Secor v. Siver, 188 Iowa 1126, 161 N.W. 769 (1920). Although courts often require great precision in the framing of such an objection, a more liberal rule would seem reasonable. "While an objection to the competency of a witness need not refer specifically

The many exceptions to the hearsay rule present the question of how to urge an objection when an exception is involved. So much evidence comes in through established exceptions that this glorified hearsay is a regular part of almost any case. When it is questionable whether evidence is within an exception, how should this issue be raised? In the case of *Eggermont v. Central Security and Insurance Corp.*,[38] the question involved the admissibility of a truck driver's statement to the driver of a bus upon which the plaintiff was a passenger. He had said that the accident was absolutely his fault in all ways. The statement was admitted over the plaintiff's objection that it was a conclusion.

On appeal, the issue of whether the statement was admissible as part of the res gestae was argued. In the record there was no testimony as to the time that had elapsed between the collision and the statement. The appellate court held that there was no need to decide the res gestae issue because there was no objection to the evidence on the ground that the statement was hearsay. The objection that the statement was a conclusion was not proper because an admission can be in terms of an inference and the reason for its inadmissibility on other grounds was not challenged.

This case not only shows the need of a proper specific objection, but it also indicates the sufficiency of an objection when the admission of the evidence depends upon one of the exceptions to the hearsay rule. Should the objection in this case have been that the statement offered was not a part of the res gestae or that it was not a spontaneous exclamation? If the same sharp technical analysis of the *Een* case were followed, such objection could conceivably be improper. The real element of exclusion is that the statement is hearsay when used against others than the declarant and the objection that it is hearsay specifically raises the double issue of whether it was hearsay and whether it was within the exceptions. After the hearsay objection is urged the burden is then upon the proponent to show that it comes within the range of some specific exception.[39]

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to the section of the Code which renders him incompetent, it is necessary to raise the question in some way which makes the intention clear. An objection that the witness is incompetent or interested would, perhaps, be sufficient, but the simple objection that the evidence is incompetent is not specific enough to justify a reversal." Hoag v. Wrigbt, 174 N.Y. 36, 39, 66 N.E. 579, 579-80 (1903).

38 238 Iowa 28, 24 N.W.2d 809 (1947).

39 The burden of proving the grounds of an objection is ordinarily not upon the opponent; whether he objects on the ground that the original of a document is not produced, or that an attesting witness ought to be called, or that a dying declarant was not conscious of impending dissolution, the burden of establishing the preliminary facts essential to satisfy any rule of evidence is upon the party offering it. The opponent merely invokes the law; if it is applicable to the evidence, the proponent must make the evidence satisfy the law.

1 Wigmore, Evidence § 18, at 347 (3d ed. 1940).

In the case of the exception of business records the question is usually one of proper foundation to show that the offered evidence is part of a regular system of bookkeeping of a type that is admitted under the exception. The reason for exclusion of the records is that they are hearsay, yet if they are the proper type of hearsay they are admissible. An objection that the records did not meet the standard of regularity, or use of other words pointing out their failure to comply with the requirements of the exception, ought to be a more effective specific objection than merely designating the records as hearsay. Inasmuch as the exceptions are regularly recognized as a means of admission, the demand for specific objections reasonably could require that the objection point out the failure of the offered proof to meet the requirements of an exception rather than merely desiguate the proof as hearsay. A practice better calculated to obtain a favorable ruling by the judge is to object because of hearsay and to also point out wherein the offered proof fails to meet the requirements of the exception through which it must gain admission if admitted at all.

Endless cases discuss the need for specific objections and the inapplicability of a wrong objection which has been urged.[40] However, the cases are scarce which attempt to define how specific and detailed an objection must be when the objection is directed to the right ground but is ambiguous as to its precise application. Uniform Rule 4 simply requires that an objection be so stated as to make clear the ground for specific objection. Uniform Rule 5 is a companion rule which applies when an objection is sustained. It requires the proponent of the evidence to be specific by framing his question so as to disclose the substance of the anticipated answer; it also requires that an offer of proof be made if the question as asked does not disclose the substance of the anticipated answer. Both rules are designed to inform the trial judge specifically of the issue upon which he is to rule.

There is a good deal of latitude in determining which words make clear, and which expressions leave obscure, the reason for which an objection is made. In the brief time that is available for a timely objection the objecting process is frustrating in many situations. A counsel

[40] The requirement for specific objection relates to both the subject matter and the parties to whom it applies. Where several parties are involved in litigation, evidence may be admissible against some, but inadmissible against others. The problem also arises when several cases are tried together. In these situations, a correct objection requires a designation of the party to whom the objection is urged. If the objection is stated in a manner applicable to all parties, and is overruled, it is not subject to appeal. On the other hand, if the court sustained the objection, the proponent of the evidence must request that its admission and application be limited to the proper parties in order to appeal. See Solomon v. Dabrowski, 295 Mass. 358, 3 N.E.2d 744 (1936); Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N.W. 791 (1889).

may sense that a question is objectionable but what is wrong and how to name it creates a double confusion. There is no answer to the problem except to realize that the thing that is wrong must be something very specific and that if it is discovered, any words which describe the objectionable element will meet the requirement of an objection. The use of all rules of exclusion requires a knowledge of the reason for the rules and this understanding is about the only source of discovery of an objection and how to make it.

Motions to Strike Testimony

Motions to strike testimony require a separate consideration from objections to evidence only because of the special rules involved in their use under varying situations. The basic reasons and the requirement for the designation of specific grounds for exclusion are the same as for objections.[41]

An understanding of the theory and the use of motions to strike rests upon a knowledge of our Anglo-American system of trial. Testimony is obtained through the answers of questions asked by counsel or the court. Although witnesses swear to tell the truth, the whole truth, and nothing but the truth, they are to do so only in response to questions directed to them in direct examination, cross-examination or redirect examination. Consequently, we have the rule against voluntary statements by a witness which is simply the counterpart to the requirement of obtaining testimony through answer to questions asked by counsel.

Motions to strike by the counsel who is examining a witness provide the method of control of the testimony so that the answers will be responsive to the questions asked. This is an important weapon in the trial of a case. Either intentionally or because of a want of understanding, there are always witnesses who do not answer the questions asked but volunteer answers in no way responsive to the inquiry. Still the answer given may not be objectionable under any of the rules of exclusion. Since the examining attorney has the right to question a witness on matters of his choice (within the rules of evidence), he also has the right to have unresponsive answers stricken simply because they are unresponsive.[42]

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41 1 Wigmore, Evidence § 18, at 331 (3d ed. 1940).

42 Ridenour v. United States, 14 F.2d 888 (3d Cir. 1926); In re Dunahugh's Will, 130 Iowa 692, 107 N.W. 925 (1906); Ross v. Ross, 140 Iowa 51, 117 N.W. 1105 (1908). Dean Wigmore takes exception to this rule, although recognizing its existence. He feels that any admissible evidence ought to remain in the record whether responsive to the question asked or not, and irrespective of whether the examiner or the opponent moves to strike. The answer to Dean Wigmore's criticism is simply that as a practical matter there would be insufficient control of a witness who constantly sought to inject matters into a case about which no question had been asked. Every trial lawyer has experienced this

This rule provides a method of forcing the witness to answer the exact question asked when he seeks to avoid the question by testifying to matters outside the inquiry. There are times when an obstreperous witness will continue to give answers in avoidance of the question asked even after a motion to strike has been sustained. Then it may be necessary to request the court to admonish the witness to confine his answers to the question. Through use of a motion to strike testimony effective cross-examination is obtained because when the witness gives testimony which he tried to avoid, he may be regarded by the jury as being forced to admit the truth.

These motions to strike because of the unresponsiveness of the witness are also useful in examining witnesses called by the examiner. These witnesses may be inarticulate in their answers or may not comprehend what was contemplated by the question asked. Ordinarily the testimony would be obtained by asking other questions, but not infrequently this motion affords a desirable means of focusing the attention of the witness on the precise point of inquiry.

The problem of motions to strike when made by the examiner of a witness is easily confused with the problem of motions to strike by the opponent of the examiner. In the latter case a totally different set of principles is involved and there are many new factors to consider.[43]

A motion to strike made by the adversary to a question by an examiner of a witness will be sustained only if there is some specific objection to the testimony that has been given.[44] The ground of unresponsiveness of the witness is not sufficient. The reason for this is clear. An opponent is required to make a timely objection to a question when asked. When a question has been asked by the examiner of the witness the opponent must immediately interpose an objection or he has waived whatever claim he may have against the admission of the testimony.[45] An opponent to the examiner cannot withhold an objection with the hope of

practical problem time and again, and realizes the importance of the rule especially in cross-examination. The motion, as commonly used, is very effective as a means of forcing a witness to answer what the examiner wants to find out rather than permit a witness to go on a tangent in his testimony apart from any question asked. If the unresponsive testimony is important it is not lost because opposing counsel may bring it out on cross-examination or make the witness his own and examine him fully as to the matter. It is simply a question as to which is better practice. 3 Wigmore, Evidence § 785(1), at 160 (3d ed. 1940).

[43] 1 Wigmore, Evidence § 18(B), at 331 (3d ed. 1940).

[44] Howell v. Howell, 210 Ala. 429, 98 So. 630 (1923); People v. Carson, 341 Ill. 11, 173 N.E. 97 (1930); Cook v. Sheffield, 181 Okl. 635, 75 P.2d 1101 (1938). It is also important to specify in the motion the particular objectionable testimony, whenever it is included with other testimony not subject to exclusion. Germinder v. Machinery Mut. Ins. Ass'n, 120 Iowa 614, 94 N.W. 1108 (1903); Leech v. Hudson & Manhattan R. Co., 113 N.J.L. 366, 174 Atl. 537 (1934); Lacy v. State, 115 Tex. Crim. 76, 29 S.W.2d 754 (1930).

[45] Watkins Co. v. Brown, 134 Me. 473, 188 Atl. 212 (1936); Forster v. Rogers, 247 Pa. 54, 93 Atl. 26 (1915).

a favorable answer and then urge the objection as a ground for a motion to strike when the answer proves to be damaging.[46]

This idea is fundamental in understanding the techniques to be used by the party adverse to the examiner in making a motion to strike. As an excuse for his failure to object he must assert some ground which the court will accept. If his failure to object was not his fault, he is entitled to a motion to strike the testimony but only if it is in fact objectionable. Otherwise, the examiner could then ask another question calling for the testimony which the witness had volunteered and no objection would be available if the testimony was admissible. The unresponsiveness of the witness in answering the question asked, however, is a very reasonable excuse for not having objected to the question. If the question did not reasonably call for the answer given, the opponent could not be blamed for failure to anticipate it. Under these circumstances it is proper for the opponent to make a motion to strike because the answer is unresponsive, but he must also allege proper specific grounds for the exclusion of the testimony.[47] The difference cannot be overlooked between unresponsiveness as a ground for a motion to strike by the examiner of a witness, and its use by the opponent of the examiner only as an excuse for having failed to interpose a timely objection to the question when asked.

There are, of course, other excuses for failure to object to the question of an adversary. Counsel may not have had time to interpose an objection.[48] Some witnesses answer so rapidly that no one could object in time. Sometimes they do so intentionally seeking to avoid an objection. The lack of time to object affords an excuse for the failure to object which, when accompanied in the motion with the proper specific reason for exclusion, will require the court to sustain the motion.

A motion on this ground involves matters not raised when the excuse is the unresponsiveness of the answer. In the latter case an appellate court in reading the record can determine for itself whether the answer is unresponsive and if so proceed to review the trial court's ruling with respect to the specific objection urged. That is not the case, however, where the excuse is the inability to object to the question for want of time. The appellate court does not know how the trial judge exercised

[46] The object of the rule ". . . is to prevent a party from knowingly withholding his objection until he discovers the effect of the testimony, and then if it turns out to be unfavorable to interpose his objection. Such a course could not be allowed." Marsh v. Hand, 35 Md. 123, 127 (1871); "A party will not be permitted to speculate as to what the testimony will be and then move to strike the answer if not to his liking." Lambert v. United States, 26 F.2d 773, 774 (9th Cir. 1928).

[47] See note 44 supra.

[48] Buckley v. Frankel, 262 Mass. 13, 159 N.E. 459 (1928); Sorenson v. Smith, 65 Ore. 78, 129 Pac. 757, 131 Pac. 1022 (1913); Dawley v. Congdon, 42 R.I. 64, 105 Atl. 393 (1919).

his discretion in determining the time issue. Therefore, if the opponent made a motion to strike because he did not have time to object and because, for example, the answer was hearsay, an appellate court could not review the matter if the record showed only that the motion was overruled. The trial court's action could mean that the judge felt counsel had plenty of time to object, and therefore would not consider the hearsay issue. As there is no basis for determining the reason for the court's action, the appellate court would affirm. Therefore, whenever a motion of this type is overruled, counsel should request the trial judge to state his reason for overruling the motion. If the reason was that counsel had time to object, but didn't, the trial court's ruling is final. But if the court recognized counsel's inability to object but held the hearsay objection to be inapplicable, the issue is squarely presented to the appellate court. The same principles apply when counsel's excuse for not objecting is failure to hear the question[49] or other grounds not apparent in the record.

This leaves open the question of what should be done when counsel does not discover the objection when the question is asked, but does so after the question is answered. In this case it would be very difficult to administer a rule which would permit a motion to strike when no attempt is made to challenge a question which discloses the nature of the intended answer. However, a different question arises when counsel objects for the wrong reason but after the answer is given he sees the right reason and makes a motion to strike the answer upon an additional proper ground. The absence of judicial discussion of this problem is possibly based on the fact that courts have regarded the evidence issue to be properly raised and have proceeded to a discussion of the merits. It is common practice to make such motions; although a motion to strike testimony for the same reason urged in the objections is unnecessary and bad practice.[50] The making of an objection shows that counsel did not gamble on a favorable answer to a bad question and his motion to strike for an additional reason immediately after the answer is given ought to be considered as being timely.

A motion to strike for failure to connect up evidence is an essential part of the process of urging objections. Sometimes the court may withhold a ruling upon an objection because adverse counsel states that he

49 Sprague v. General Electric Co., 213 Mass. 375, 100 N.E. 628 (1913).

50 A motion to strike testimony for the same reason urged in an objection accomplishes nothing more than an exception to the courts' ruling on the objection. The requirement for exceptions to adverse rulings upon evidence has been generally abolished. 1 Wigmore, Evidence § 20, at 355 (3d ed. 1940). The practice is bad as it may become irritating to the court and obnoxious to the jury. This is a method of over-objecting which has a tendency of putting counsel in a bad light with the jury and the court.

will connect up the testimony through further questioning or with the testimony of other witnesses. If the required additional testimony is not given it is necessary for the objecting counsel to make a motion to strike the testimony because of the failure to connect up,[51] unless the testimony first given was of such character that it could not be connected up.[52]

The use of motions to strike is confusing even to experienced lawyers. Yet it presents problems handled fundamentally the same in most jurisdictions. If the methods of interrogating witnesses and the requirements in respect to objecting to evidence are considered in the examination of the rules pertaining to motions, they become simply a logical application of basic principles.[53]

Foundation Testimony

Foundation testimony is profitably considered in connection with objections because a proper foundation may cause many objections to be inapplicable. The conception of foundation testimony in its broadest sense embraces a substantial part of the law of evidence and requires the anticipation of the possible objections which may be urged for the exclusion of evidence. The relationship between objections and foundation testimony may not ordinarily be realized, but the two are interdependent and provide a basis for establishing the admissibility of evidence by eliminating, if possible, the grounds of exclusion. This approach differs from that frequently followed because the admission of testimony and the methods of exclusion are usually thought of as separate problems. A counsel ordinarily directs his attention to the rules of exclusion only when he is attempting to keep evidence out rather than when he is trying to obtain its admission. The persuasiveness of evidence in establishing a fact in dispute may also depend upon the foundation which demonstrates its value.

In many areas foundation testimony is recognized as such and is looked upon as an essential part of the introduction of proof. In the handwriting cases it is always necessary to establish the standard of comparison as being the writing of the person who is alleged to have

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[51] Commonwealtb v. Demboski, 283 Mass. 315, 186 N.E. 589 (1933); Boyd v. Bruce, 163 Minn. 83, 203 N.W. 456 (1925); People v. Smith, 254 Ill. 167, 98 N.E. 281 (1912); Armstrong v. Atlantic Coast Line R. Co., 137 S.C. 113, 133 S.E. 826 (1926). But if the court instructs the jury to disregard the evidence that was not connected up, an overruled motion to strike is not reversible error. Fuller v. Maine Cent. R.R. Co., 78 N.H. 366, 100 Atl. 546 (1917). Compare State v. Freeman, 93 Utah 125, 71 P.2d 196 (1937).

[52] Bryce v. The Chicago, Milwaukee & St. Paul Ry. Co., 129 Iowa 342, 105 N.W. 497 (1906).

[53] For further discussion see Ladd, supra note 6, at 622-26.

written the questioned document.[54] This is foundation testimony in the plainest sense; used to enable the expert to make a comparison and express his opinion concerning it. On the other hand, the qualification of a witness to testify to a perceived fact is not thought of as a question of foundation, and yet the proof of an opportunity to observe is necessary to preclude the objection that the testimony is hearsay. The function of a witness in court is to testify about the things which he knows, not what others have said nor what he may think about the matter. What the witness has heard is excluded as hearsay, what he thinks is excluded as opinion.[55]

In the examination of a witness preliminary inquiry showing that the source of information is personal perception, is, in fact, foundation testimony of the most vital kind. It makes evident the conditions which foreclose the application of the objection. The objection to a question because it calls for an opinion also requires knowledge of the source of the information expressed in terms of inference. The tendency today is to permit a much wider choice of language to communicate an observation than was permitted under the rigid opinion rule of the nineteenth century.[56] The danger presently emphasized is that the inference or opinion may be pure conjecture of the mind rather than a method of expressing observed facts. The rule of exclusion thus becomes a rule of admissibility as well.

This does not mean that questions squarely within the rule of exclusion can be avoided. There is, however, in almost every trial a substantial amount of testimony which may appear to be objectionable but is not in fact. It is the function of foundation testimony to clarify those matters which would otherwise be obstacles to admission. Thus from the purpose of the hearsay and opinion rules of exclusion is found the basic requirement that a witness in giving testimony must show that he had an opportunity to know about the matters of which he speaks. If the testimony of a witness must be founded upon personal observation, foundation testimony discloses this fact.

The exceptions to the hearsay rule are basically a study of foundation testimony. In fact, the grounds of the exception and the requirements for the foundation are so interrelated that they are substantially one

[54] Fredricksen v. Fulmer, 74 Idaho 164, 258 P.2d 1155, 41 ALR2d 567 (1953); Burdick v. Hunt, 43 Ind. 381 (1873); Travis v. Brown, 43 Pa. 9, 82 Am. Dec. 540 (1862); Joffre v. Mynatt, 240 S.W. 319 (Tex. Civ. App., 1922).

[55] Thayer, Preliminary Treatise on Evidence 519-20, 524-25 (1898); McCormick §§ 10, 224 (1954); 5 Wigmore §§ 1360-63; 7 Wigmore, Evidence § 1917, at 2 (3d ed. 1940).

[56] 7 Wigmore § 1917 (3d ed. 1940); Uniform Rules of Evidence, Rules 56-57 (1953); Model Code of Evidence, Rules 329, 332-39 (1942); Ladd, Model Code of Evidence, 27 Iowa L. Rev. 213, 215-20 (1942).

and the same. Dying declarations are admissible because when made the declarant faces the awe of impending death and there is a circumstantial probability of reliability justifying the exception.[57] To establish sufficient proof to justify admission of the declaration, those circumstances which create the exception provide the foundation required for admissibility. Likewise the foundation for res gestae, in the sense of being a spontaneous exclamation, requires a showing of the spontaneity to eliminate the claim that the declaration was made so late that the motive to falsify could dominate the content of the declaration.[58] In determining the admissibility of entries in books of account the system of bookkeeping and the regular use of the procedures constitute the circumstances justifying the exception. The reasons for the exception constitute the detailed requirements of foundation testimony which establishes the admissibility of such records.[59] Even as to those things which cause declarations to escape the hearsay rule as verbal acts or as declarations of a state of mind, foundation testimony must be given to make clear that the conditions have been met which prevent the rule of exclusion from operating.[60] The conditions which authorize the admission of pedigree testimony are essentially foundation testimony. The declaration must be shown to be *ante litem motam*. The relationships must be established, or under the modern view in this country, the declaration of one not related in blood or marriage is admissible if it is otherwise shown that the declarant was so intimately associated with the other's family as to be likely to have accurate information about the matter declared.[61] All of these matters are foundation testimony prerequisite to admissibility.

In most of the thirty-one exceptions to the hearsay rule set out in the Uniform Rules of Evidence it is provided that designated hearsay statements are admissible if the judge first finds specified facts or conditions. These listed findings are the foundation testimony upon which admissibil-

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57 Reizenstein v. State, — Neb. —, 87 N.W.2d 560 (1958); People v. Bartelini, 285 N.Y. 433, 35 N.E.2d 29 (1941); Commonwealth v. Brown, 388 Pa. 613, 131 A.2d 367 (1957); Crow v. State, 147 Tex. Crim. 292, 180 S.W.2d 354 (1944). Dying declarations are ordinarily admitted only in homicide cases as to the cause of death. But in Kansas they are admissible in civil actions as to any relevant matter. Uniform Rule 63(5) adopts the Kansas view if the court finds the declaration to be voluntary and in good faith while the declarant was conscious of his impending death without hope of recovery. Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625 (1914).

58 Showalter v. Western Pac. R. Co., 16 Cal. 2d 460, 106 P.2d 895 (1940).

59 Younker Brothers Inc. v. Meredith, 217 Iowa 1130, 253 N.W. 58 (1934); Shepherdson Co. v. Central Fire Ins. Co. of Baltimore, 220 Minn. 401, 19 N.W.2d 772 (1945).

60 George v. United States, 125 F.2d 559 (D.C. Cir. 1942); Loetsch v. N.Y. Bus Co., 291 N.Y. 308, 52 N.E.2d 448 (1943); Jacobson v. Mutual Benefit Health & Accident Ass'n, 70 N.D. 566, 296 N.W. 545 (1941). See 6 Wigmore c. LX (3d ed. 1940).

61 In re Estate of Corbin, 235 Iowa 654, 17 N.W.2d 417 (1945); In re Garrett's Estate, 371 Pa. 284, 89 A.2d 531 (1952); Uniform Rules of Evidence, Rule 63 (23-24).

ity depends. From the standpoint of the opponent in objecting to the admission of evidence as hearsay their absence will sustain an exclusion. Conversely to the proponent of the evidence they represent conditions to be fulfilled by testimony to enable the declaration to escape the exclusionary rule. Therefore, in the examination of a rule of exclusion and of the method of avoiding it or fitting the offered evidence into an exception, thinking about the rule in the abstract must be correlated to its use in the courtroom, which means no more than determining the foundation testimony required for admission.

In addition to the general concept of foundation testimony which runs through most of the rules of evidence, there are wide areas in which the demand for foundation testimony is a definite and recognized requirement. In each of these areas the elements involved in establishing a foundation could well be the subject of an article in itself and yet they involve an analysis common to all of them. Basically a foundation is required to make the ultimate testimony contemplated relevant and give it strength. Other purposes are served depending upon the type of evidence involved.

When impeaching a witness by showing prior statements inconsistent to testimony given in court, it is necessary to show his denial of the statement as foundation before other witnesses can be called to show that he made it. The requirements for this type of foundation are well stated by Justice Shientag in a New York case:

> Before evidence of a prior inconsistent statement may be given, justice demands that the attention of the witness should be called specifically to the statement and that he be adequately warned on cross-examination that the specific statement he is alleged to have formerly made will be used against him, so that he may have an opportunity to deny having made the statement or to explain it or to change his testimony, if his memory is refreshed and he wishes so to do.[62]

In addition, the foundation questions should raise the time, place and occasion of the statement as well as identify the person to whom it was made.[63]

This situation is to be distinguished from the *Queen's* case in which it was required that the witness be told what he is alleged to have said before he could be asked about the contents of a writing or of an oral declaration.[64] Such a requirement impairs effective cross-examination of the witness who is alleged to have made the statement. However, if other witnesses are to be called to show that a different statement was made from the one given in court, foundation testimony specifying the

62 Wolfe v. Madison Ave. Coach Co., Inc., 13 N.Y.S.2d 741, 743, 171 Misc. 707, 709 (1st Dept., 1939).
63 Uniform Rules of Evidence, Rule 22.
64 2 B. & B. 286, 129 Eng. Rep. 976 (1820).

statement is necessary to establish his denial.[65] Thus, foundation testimony strengthens impeachment if the witness is unwilling to admit that he made the out-of-court statement.

Character testimony is troublesome; its difficulty involves the necessity of foundation testimony and the techniques of examining a character witness. Federal and most state courts permit proof of character as to the trait involved only by reputation testimony.[66] To testify to reputation, foundation testimony is required to show that the person whose character is in issue has a reputation and that the character witness knows what it is. It must be general and community-wide. Therefore, foundation testimony must be given by the character witness showing that he knows of the person, that he knows others who know of him, that they are not members of an isolated group and that they have spoken generally concerning his character. Proof of reputation as distinguished from personal knowledge creates the foundation testimony prerequisite to the question of whether the general reputation of the individual as to the trait involved is good or bad in the community in which he is known. Thus the limitations upon character testimony constitute the foundation for its admissibility which is also the chief area of cross-examination.[67]

Perhaps the most common use of foundation testimony occurs with the use of expert witnesses. The qualification of the expert is foundation testimony. When qualified he must have facts upon which to express an opinion; these facts are foundation testimony. An attending physician testifies as to the factual data on the basis of which he expresses his opinion. The Uniform Rules regard the fact of his attendance of the patient to be enough to authorize his opinon, although he would be subject to cross-examination as to the factual data.[68] However, as a matter of good practice the foundation data would always be first introduced because the foundation testimony gives the jury a basis for understanding and evaluating the opinion. Furthermore, if other experts are used who do not have personal knowledge of the medical facts, the foundation of factual data is indispensable to the use of hypothetical questions through which their testimony is given. The relevance of the expert opinion is dependent upon this source through which their expert knowledge is connected to the particular case.

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65 United States v. Dilliard, 101 F.2d 829 (1938).

66 State v. Ferguson, 222 Iowa 1148, 270 N.W. 874 (1937); Ladd, "Techniques and Theory of Character Testimony," 24 Iowa L. Rev. 498 (1939). The modern view permits proof of character by opinion testimony as well as reputation. But see 1 Wigmore §§ 202-13 (3d ed. 1940); Uniform Rules of Evidence, Rules 46-48; Model Code of Evidence, Rule 305.

67 Michelson v. United States, 335 U.S. 469 (1948).

68 Uniform Rules of Evidence, Rules 56(2)-57.

With the increasing use of demonstrative evidence there is still a greater emphasis on foundation testimony. The use of photographs, X-ray film, models, plates, maps, charts and diagrams have become commonplace in the courtroom. Mechanical recordings, chemical testing, radar speed measuring devices and many types of identification of persons and things through a process of comparison, all involve the common problem of establishing foundation testimony to permit their use. It is the foundation testimony that establishes the relationship of the demonstrative evidence to the particular case. In the case of X-rays, their admissibility is dependent on showing that proper procedure was used in taking them and that they were properly marked for accurate identification.[69] Photographs require a different process because of the ability of a witness to compare it with the object which it represents. While photographs may be distorted, the process of making them or the details in respect to the taking of the picture are not necessarily required for their admissibility. It is sufficient if a witness who had observed the object photographed at the time the legal issue arose, testifies that the photograph or reproduction is a fair and accurate representation or reproduction.[70] Cross-examination may go into all matters to test the accuracy of the photograph but this does not prevent the admissibility if the foundation testimony is sufficient.

The issue involved as to the admissibility of a color photograph is primarily a problem of foundation testimony. The use of color may easily distort the representation if the colors in the exhibit do not correspond to actual colors of the object photographed. If the representation in color is a fair and accurate likeness its admission should be justified as much as any other photograph.[71] The possibility of prejudice should not prevent admissibility if the likeness is real and it meets the tests of relevancy. The admissibility of models for purposes of demonstration depends upon the similarity of the model to the object which it represents. As models are used only for demonstration, they need not be exact replicas. Foundation testimony must show that they are sufficiently like the object represented so that their use would fairly serve the purpose of the demonstration.[72] There is little danger of mis-

[69] Sims v. Weeks, 7 Cal. App. 2d 28, 45 P.2d 350 (1935); Lake Shore Power Co. v. Meyer, 51 Ohio App. 534, 1 N.E.2d 1021 (1935).

[70] Ford v. Missouri Pac. R. Co., 168 Ark. 884, 271 S.W. 967 (1925); Scott Photographic Evidence § 603 (1942); but see Prime v. Squier, 113 Neb. 507, 203 N.W. 582 (1925).

[71] Harris v. Snider, 223 Ala. 94, 134 So. 807 (1931); Green v. Denver, 111 Colo. 390, 142 P.2d 277 (1943); Knox v. City of Granite Falls, 245 Minn. 11, 72 N.W.2d 67, 53 ALR2d 1091 (1955); Scott § 627 (1942); Conrad, Color Photography—An Instrumentality of Proof, 48 J. Crim. L. C. & P. S. 321 (1957).

[72] Beresford v. Pacific Gas and Electric Co., 45 Cal. 2d 738, 290 P.2d 498 (1955); Finch v. W. R. Roach Co., 295 Mich. 589, 295 N.W. 324 (1940); Bloecher v. Duerbeck, 338

leading the jury to believe that the model is identical to the object in question because it is obviously useful only as a means of illustration or explanation.

Mechanical recordings and sound pictures depend on foundation testimony for their admissibility, to show the identity of the representation of what was said or observed.[73] The admissibility of evidence recorded and preserved by use of modern electronic or mechanical devices is well recognized once the authenticity, identity and accuracy have been satisfactorily established through foundation testimony.

In many situations, only some of which have been considered, foundation testimony serves a common purpose. It presupposes that certain other evidence is important to the solution of an issue which is objectionable unless preliminary evidence is introduced either to show its relevancy or to establish the conditions which prevent it from being obnoxious to some exclusionary rule. Whether used to establish materiality and relevancy of demonstrative evidence or to create an escape from an exclusionary rule, its objective is to make meaningful the use of evidence for its intended purpose.

Conclusion

The rules of evidence cover so wide a range of subject matter, each part of which has its own history and rationalization, that no common elements may appear to run through all of them. To say that the law of evidence consists of many separate islands of thought having a totally different atmosphere would be a mistake. If a common principle runs through many of the rules, a recognition of its presence enlarges comprehension of the subject and enables more effective use of the rules as devices to secure a fair and just determination of causes. An analysis of the requirements in urging objections, and in making motions to strike testimony for the purpose of exclusion, in their relationship to foundation testimony required to secure admissibility, shows that the problems are the same although the objectives are different. Foundation testimony, usually considered as serving in a limited number of situations, is present throughout the law of evidence and is essential to confine the rules of exclusion to their proper scope. In these modern times when the rules of exclusion are being narrowed to permit greater admissibility, attention may also be directed to giving more thought to foundation testimony in its broader sense as a means of accomplishing the same end.

Mo. 535, 92 S.W.2d 681 (1935); Young, "Proof of Danger and Safety by Real Evidence and Experiments," 26 Texas L. Rev. 188 (1947).

[73] Schwartz v. Texas, 344 U.S. 199 (1953); People v. Sica, 112 Cal. App. 2d 574, 247 P.2d 72 (1952); People v. Hayes, 21 Cal. App. 2d 320, 71 P.2d 321 (1937); Kennedy, "Motion Pictures in Evidence," 27 Ill. L. Rev. 424 (1932).