Date of Meeting: December 18-19, 1959

Date of Memo: December 10, 1959

Memorandum No. 11

Subject: Uniform Rules of Evidence - Rules 17 and 65A.

Attached is Chadbourn's memo regarding Rule 17. The Commission is deferring consideration of Rule 65A pending an examination of this material.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Introduction

This memo is a study of Rules 17, 18 and 19 which provide as follows:

> "Rule 17. . . . A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses."

> "Rule 18. . . . Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law."

> "Rule 19. . . . As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial."

Under these Rules a witness must:

1. Give his testimony under oath or affirmation (Rule 18), and

2. Possess certain mental competence (Rule 17), and

3. Possess personal knowledge of the matter under investigation (Rule 19).

Today the local law which deals with these three matters is to a large extent in harmony with Rules 17, 18 and 19. Today:

1. Testimony must be under oath or affirmation. C.C.P. § 1846.

2. A witness must possess mental competence. C.C.P. §§ 1879 and 1880, subdivisions (1) and (2).

3. A witness must possess personal knowledge. C.C.P. § 1845.

However, as we proceed to break these general propositions down into specifics, we shall discover significant differences between the mental competence requirement as we know it today and such requirement as stated in Rule 17. Moreover, we shall encounter difficulties respecting one aspect of the knowledge requirement as stated in Rule 19.

We shall begin by summarizing in general terms the mental competence and knowledge requirements as they exist today. Next we shall explore the difficulties presented by Rule 19. Finally we shall discuss the reforms proposed by Rule 17.

Mental Competence and Knowledge Rules: Present Law In General.

C.C.P. § 1879 states the following general rule:

> "All persons . . . who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses."

This means, of course, if one lacks the capacity to perceive or to communicate he may not be a witness. C.C.P. § 1880 makes this proposition specific with reference to insane persons and infants by providing as follows:

> "The following persons cannot be witnesses:
>
> 1. Those who are of unsound mind at the time of their production for examination.
>
> 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

What constitutes the mental soundness which is thus made a requisite of competence to testify? Such competence is composed of the following three elements:

1. Ability to perceive.
2. Ability to recollect.
3. Ability to communicate.[1]

Thus in order to qualify as a witness a person must possess these three qualities. Moreover, he must in addition entertain "some apprehension of the obligation of an oath."[2]

In applying the foregoing standards the "test should be made with special reference to the field of inquiry and character of the subject on which the witness is to give testimony."[3] Furthermore, capacity to perceive must be appraised as of the time of the event respecting which it is proposed to have the witness testify.[4]

Actual perception, however, is not the test. In his recent opinion in People v. McCaughan, Justice Traynor points this up in the following language:

> "It bears emphasis that the witness's competency depends upon his ability to perceive, recollect and communicate . . . [italics in original] whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact."[5]

Although actual perception is not the test of competency, such actual perception does become material in applying the knowledge rule. C.C.P. § 1845 states that rule in the following terms:

> "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions . . ."

The relation between this rule and the mental competency rule is clarified by considering the functions of judge and jury respecting the two rules.

Mental Competence and Knowledge Rules: Present Law Regarding Functions of Judge and Jury.

The functions of judge and jury as respects the mental competence rule differ materially from such functions as respects the knowledge rule. Moreover the parties possess different burdens for the purposes of the two rules. Let us illustrate.

An issue in a case is: Did D forge a certain will? P offers W and proposes to have W testify that W was in D's presence upon the occasion of the alleged forgery and that W then saw D write and sign the document in question. D objects and proposes to show that W was at the time of the alleged forgery a child of five and is therefore incompetent under C.C.P. § 1880 (2) as one "incapable of receiving just

impressions of the facts." The court, upon D's request, holds a preliminary hearing at which P undertakes to establish that at the age of 5 W was a precocious child and D undertakes to establish that at such age W was of average or less than average intelligence. The court is convinced by D's showi and therefore sustains D's objection.

This procedure and this ruling are proper, since the competency of W is in issue and that is a question for the court's final determination.[6] Moreover, had the court been uncertain and unconvinced either way, the ruling should have been D's objection overruled, since D possessed the burden to convince the court of W's incompetency.[7]

By way of contrast, let us now suppose W was an adult of average literacy and intelligence at the time of the alleged forgery. P offers W to testify that W was present on the crucial occasion and that W observed all that D then did. Upon this foundation, P proposes to inquire of W what D did. D objects and requests a preliminary hearing for the purpose of producing his witnesses to testify that W was not present on the occasion in question. D argues his right to make this showing at this point because (he says) the question is a preliminary one relating to the competency of W and is therefore to be decided by the court.

Now it seems clear enough that D's objection should be overruled, his request denied, and his argument rejected, for D is not challenging W's competency (i.e., his capacity to observe, remember and relate) but, rather, D is challenging W's actual observation and memory (i.e., his personal

knowledge). As we have seen, although W's capacities to observe, remember and recount are requisites relating to his competency, W's actual observation and recollection is matter which affects his credibility only.[8]

It would seem, then, that the knowledge requirement differs from the mental competency rule and other rules of disqualification in this respect: under the knowledge rule the disqualifying fact (want of knowledge) is not a question for final determination by the judge, whereas such questions as marriage, infancy, lunacy, etc. are under the other rules questions for the court's final determination.[9]

Insofar as the parties' burdens are concerned: under the knowledge rule the proponent has the burden to make the knowledge of the witness appear, but this burden is merely to make such knowledge prima facie apparent (the burden is not to convince the judge with finality, since the matter is not for the judge's final determination). In other words (and more simply stated): the knowledge of a witness is not assumed and must be established prima facie by the proponent of the witness.[10] On the other hand, the mental competency capacities of the witness are assumed. Hence the opponent has the burden to establish (and, by convincing the judge, finally establish) the incompetency of the witness.[11]

The knowledge requirement, then, does not raise questions which the judge must investigate (hearing evidence pro and con) and finally decide.

If a witness states that he observed an event and that he remembers the same, that in and of itself supplies the foundation for admissibility of the testimony insofar as the knowledge requirement is concerned. In this respect the knowledge requirement operates quite differently from the rule requiring capacity to observe, remember and relate as a condition of competency.

Rule 19: In General.

Lay witnesses. Rule 19 provides in part:

> "As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof. . . . Such evidence may be by the testimony of the witness himself. . . ."

This seems to be a statement of the same principle which is embodied in C.C.P. § 1845.

Note that the Rule simply requires that "there must be evidence" of personal knowledge. This probably requires merely evidence sufficient to warrant a finding or prima facie evidence. Therefore, the knowledge of the witness as required by Rule 19 is not a matter to be decided by the judge under Rule 8.

Expert witnesses. Rule 19 provides in part as follows:

> "As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has . . . experience, training or education if such be required. . . ."

This is probably intended to be a statement of the proposition, well-established today, that if a witness is to give expert testimony

his expertise must be established by the proponent to the satisfaction of the court.[12]

Conditional Ruling. Rule 19 also provides in part as follows:

> "The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial."

C.C.P. § 2042 provides:

> "The order of proof must be regulated by the sound discretion of the court. . ."

In the exercise of such discretion the court may admit an item of evidence provisionally, subject to its being later stricken unless properly "connected up."[13] Such discretion would seem to be broad enough to embrace the kind of provisional admission authorized by Rule 19.[14]

Rule 19, third sentence: rejecting evidence of perception incredible as a matter of law.

As we have seen above, the knowledge requirement as a condition for admissibility seems to require no more than a mere profession by the witness to have observed and to remember. Is this true, however, in all cases whatsoever? The answer of Rule 19 is "No", for the third sentence of that Rule provides as follows:

> "The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter."

What is the rationale for this rule? Is it law today in California? If not, should it become law? We now attempt to answer these questions.

It is axiomatic, of course, that the credibility of evidence is ordinarily a question for the trier of fact. Much commonplace practice is built upon this axiom. Thus the plaintiff should not be nonsuited, because of the judge's disbelief in the credibility of plaintiff's evidence. An appellate court should not substitute its judgment on credibility for that of the trier of fact. The trial judge should not preclude a witness from testifying because he thinks the testimony will be untrue. These familiar dogmas all stem from the basic idea that credibility is for the fact-trier.

Nevertheless there exists a doctrine which in exceptional cases modifies this basic idea, namely the doctrine that evidence may be so incredible that as a matter of law it amounts to no evidence at all. This doctrine is revealed in the following excerpt from the opinion of the court in People v. Headlee,[15] reversing a judgment of conviction for incredibility of the prosecution's evidence:

> "It is not the function of appellate courts to weigh evidence. (People v. Tom Woo, 181 Cal. 315 [184 Pac. 389]; People v. Tedesco, 1 Cal. (2d) 211 [34 Pac. (2d) 467]; People v. Perkins, 8 Cal. (2d) 502 [66 Pac. (2d) 631].) Where, however, the evidence relied upon by the prosecution is so improbable as to be incredible, and amounts to no evidence, a question of law is presented which authorizes an appellate court to set aside a conviction. (People v. Dorland, 2 Cal. (2d) 235 [40 Pac. (2d) 474].) Under such circumstances an appellate court will assume that the verdict was the result of passion and prejudice. (People v. Niino, 183 Cal. 126

> [190 Pac. 626].) To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable. (People v. Braun, 14 Cal. (2d) 1 [92 Pac. (2d) 402]; People v. Moreno, 26 Cal. App. (2d) 334 [79 Pac. (2d) 390].) In this case the inherent improbability of the testimony of the principal witnesses is readily apparent from an examination of the record."

Given the rare case in which the evidence is of this character, should not the trial judge have the power and duty to reject the evidence either by striking it or forbidding it to be given in the first place? That is the question posed by Rule 19, third sentence (and Model Code Rule 104 upon which the third sentence of Rule 19 is based). The Model Code Comment explains as follows the exceptional nature of the judge's power:

> ". . . It is important to note that the question for the judge is not whether the witness did perceive the matter, but whether a jury or other trier of fact could reasonably believe that the witness perceived it. If the witness proposes to testify that he actually perceived a material matter, he must usually be permitted so to testify unless his story is inherently impossible or so fantastic that no rational person could reasonably believe it. The mere fact that the opponent produces or offers to produce contradictory evidence of greater weight is immaterial, unless that evidence is of such overwhelming weight that no jury could reasonably believe that the witness did not perceive the matter. If the testimony may be believed by a jury, it matters not that the judge disbelieves it. What weight, if any, is to be given to it is for the jury."

We do not find that this power of the trial judge has ever been expressly recognized or exercised in California. It is our belief, however, that recognition of the power in the trial court is but the logical extension of the acknowledged existence

of the power on the appellate level. Conceding that the concept of evidence incredible as a matter of law is an extraordinary one, we see no reason to limit its application to review proceedings.

Rule 19: Conclusion.

The Rule seems to be in accord with California law, saving possibly the third sentence of the Rule. If the proposition asserted in that sentence is not present law, it is believed that the law should be changed to bring it into accord with such proposition.

Rule 17: Changes the rule would make in present mental competency requirement.

Above we have noted the current fourfold basis of disqualification, namely inability to (1) perceive (2) recollect (3) communicate (4) apprehend the obligation of an oath.

Now Rule 17 seems to abandon the first and second of these grounds and to preserve only the third and fourth. Thus insofar as Rule 17 is concerned a person is disqualified only if he is wanting in capacity to communicate (17 (a)) or in capacity to understand the duty of a witness to tell the truth (17 (b)).

Rule 17 copies the substance of Model Code Rule 101. The following illustrations contained in the comment on 101 may therefore be safely relied upon as indicative of the intended scope of 17:

> "2. In an action for damages for assault and battery, W, called by P, testifies that he was present at an altercation between P and D and now remembers what occurred. P proposes to

question W about what was then said and done.

. . .

4. P offers W for the purpose described in Illustration 2. Before W gives any testimony, D makes successively the following objections to W's qualification, requesting an opportunity to sustain each objection by giving in a preliminary hearing evidence which would justify the judge in finding what D contends to be the fact.

(a) That W is not qualified as a witness because, although present at the encounter, he was then subject to insane delusions making him unable to perceive correctly the events which occurred. The issue of W's credibility is for the jury and D's offer raises no question for a preliminary hearing.

(b) That W is not qualified as a witness because, although present at the encounter, he has since suffered from a mental disorder which has erased his memory of what was then said and done. Same decision as in (a).

(c) That W is not qualified as a witness because, although present at the encounter, he suffers at the time of trial from a form of insanity which makes him incapable of giving understandable answers to questions about the events in issue. This contention, if established, disqualifies W to be a witness. Consequently the judge should hold a preliminary hearing."

Changes in present law are here involved. Today in the situations described in 4 (a) and (b) D's objections would go to the competency of W and D would be entitled to his requests. Clearly W's capacity to perceive (which is involved in 4 (a)) and capacity to recollect (which is involved in 4 (b)) are under present law capacities affecting competency.

Eliminating capacity to observe and recollect as elements of competency (as Rule 17 does) is, then, a substantial modification of present law. Indeed, if we look only at Rule 17 the

modification is substantial to the point of becoming ridiculous. Suppose an event or condition, personal knowledge of which requires capacity to see (such as the color of a horse). Suppose a man totally blind since birth is obsessed with the honest but naive idea that he can see color. This man claims to have "seen" the color of the horse. Should he be regarded as a competent witness? If Rule 17 requires us to answer this "Yes", this need not disturb us unduly, for the man's statement could be rejected under Rule 19, third sentence, even though insofar as Rule 17 alone is concerned he is properly classified as a "competent" witness.

Rule 17: Evaluation of Rule.

The practical impact of adopting Rule 17 (together with Rule 19) would be to bring about a shift from competence to credibility. Much which would now disqualify a witness altogether would under the new Rules become matter affecting only the witness' credibility. More specifically, under the new system if a proposed witness makes a claim not totally incredible to have observed and to remember an event (this being required by Rule 19 as a condition for admitting his testimony) and if such witness can now communicate intelligently (as required by Rule 17 (a)) and if he can understand his duty to tell the truth (as required by Rule 17 (b)) -- if all these conditions are met, the witness may be heard, notwithstanding he labors (or has labored) under deficiencies of immaturity, derangement or whatnot, which might today disqualify him altogether from testifying.

The modern approach is to remove the ancient bases for disqualifying persons from testifying and to let that which formerly incapacitated them have whatever influence it may upon the credibility of such persons.[16] By this approach the old disqualifications on the score of interest and infamy have been largely abrogated and the disqualification on the score of coverture has been significantly modified.[17] Rules 17 and 19 carry the approach through to the area of disqualification by reason of infancy and to the area of disqualification by reason of mental deficiency. This extension bears the endorsement of leading authorities, including Wigmore. Thus Wigmore commends the effort which Rules 17 and 19 represent in the following terms:

> "§ 501. . . . The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible. The subject is not one which deserves to be brought within the realm of legal principle, and it is profitless to pretend to make it so. Here is a person on the stand; perhaps he is a total imbecile, in manner, but perhaps, also, there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it. The step was long ago advocated by the English commission of judges, in their proposals of reform, and has been approved by two such distinguished writers on the law of Evidence as Mr. Best and Mr. Justice Taylor."

"§ 509. . . . A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure 'a priori' the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable. The desirability of abandoning this attempt and abolishing all grounds of mental or moral incapacity has already been noted, in dealing with mental derangement (ante, § 501). The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come. To be genuinely strict in applying the existing requirement is either impossible or unjust; for our demands are contrary to the facts of child-nature: . . ." [18]

Recommendations as to Rules 17, 18 and 19.

1. No changes in present law would be effected by adopting Rule 18. It is recommended that the same be approved.

2. Adoption of Rule 19 is in harmony with present law, saving (possibly) the third sentence of the Rule (see pp. 8-11, supra). It is recommended that Rule 19 be approved.

3. Adoption of Rule 17 would change the law as explained above on pp. 11-13. It is recommended that Rule 19 be approved.

Respectfully submitted,
James H. Chadbourn

FOOTNOTES

1. The "witness's competency depends upon his ability to perceive, recollect, and communicate." -- Traynor, J., in People v. McCaughan, 49 C.2d 409, 420 (1957) [italics in original]. See, also, Wigmore, §§ 492 - 509; McCormick, § 62.

2. People v. Tyree, 21 C.A. 701, 706 (1913) quoted with apparent approval in People v. McCaughan, 49 C.2d 409, 420 (1957).

3. People v. Tyree, 21 C.A. 701, 706 (1913), quoted with apparent approval in People v. McCaughan, 49 C.2d 409, 420 (1957).

4. "The language of section 1880 is addressed to the time at which a witness is produced for examination, and there is language in several cases suggesting that insanity at the time of the event witnessed is not a matter for consideration in the determination whether or not a proposed witness is competent to testify. [Citations omitted.] The rule is to the contrary . . . [I]f the proposed witness was suffering from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event. Any implication to the contrary in the foregoing cases is disapproved." -- Traynor, J., in People v. McCaughan, 49 C.2d 409, 420-421 (1957).

5. 49 C.2d 409, 420 (1957).

6. McCormick, §§ 53 and 70; Wigmore, §§ 484, 487, 497, 508, 2550.

7. See references in note 6, supra.

8. See McCormick, p. 20 and Justice Traynor's statement quoted above on p. 4.

9. See references in note 6, supra.

10. McCormick, §§ 10 and 70.

11. See references in note 6, supra.

12. Wigmore, § 560.

13. Brea v. McGlashan, 3 C.A.2d 454 (1934); Parrish v. Thurman, 19 C.A.2d 523 (1937). See, also, McCormick, § 58; Wigmore, §§ 14 and 1871.

14. See McCormick, p. 19, note 4.

15. 18 C.2d 266 (1941).

16. McCormick, §§ 61-71.

17. Ibid.

18. See, also, McCormick, § 71 lauding Model Code Rule 101 (on which Rule 17 is based) as "the goal toward which legislators and rule-makers should press."