#34(L) 1/15/64

Memorandum 64-1

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article IV. Witnesses)

The tentative recommendation on witnesses should be approved for printing at the January meeting if we are to remain on schedule. We suggest that you read the tentative recommendation carefully prior to the meeting.

Attached is an additional copy of the tentative recommendation. Please mark your suggested changes in the comments on this copy and turn it in to the staff at the January meeting so that your suggestions may be taken into account when the tentative recommendation is prepared for the printer.

Attached are the comments of the Northern Section (Exhibit I) and Southern Section (Exhibit II) of the State Bar Committee. You will note that the Northern Section approved the tentative recommendation as drafted The Southern Section made a number of objections which are noted below.

Rule 17.

The Southern Section apparently prefers to retain existing California law which requires a finding by the judge that the witness have the ability to perceive and the ability to recollect. See Exhibit II, pink pages, page 1. See the discussion of this matter in the comment on Rule 17 generally (pages 4-7 of the tentative recommendation). The Commission discussed this matter at length in formulating the tentative recommendation. Exhibit III (gold pages) for an extract from Memorandum 63-44 which was before the Commission at the time this matter was previously discussed.

Rule 18.

Both the Northern and Southern Sections approve this rule as revised.

Rule 19.

The Southern Section is concerned about subdivision (1) of Rule 19. See Exhibit II, pages 1-2. See the discussion of subdivision (1) on pages 11-14 of the tentative recommendation. Although the comment of the Southern Section is not entirely clear, it appears that the Southern Section is suggesting that subdivision (1) be revised to read:

> [~~The testimony of a witness concerning a particular matter is inadmissible if no trier of fact could reasonably find~~] As a prerequisite for the testimony of a witness on a particular matter, there must be sufficient evidence to sustain a finding that he has personal knowledge of the matter, but . . .

It is possible, however, that the Southern Section is suggesting that subdivision (1) should provide that the judge must find that the witness has personal knowledge of the matter. In any case, you will recall that --after considerable discussion--the Commission deleted the express statement of the foundational requirement that is found in the URE rule. (See Exhibit IV (green pages) for an extract from Memorandum 63-48 which was before the Commission at the time this matter was previously discussed.) This deletion was not intended, however, to change the rule that the person calling the witness must show that the witness has personal knowledge if an objection is made to his lack of personal knowledge. The comments makes this intent clear.

Without regard to the action that the Commission takes on the above matter, the staff suggests that subdivision (1) be revised to read:

> The testimony of a witness concerning a particular matter is inadmissible if no trier of fact could reasonably find that he has personal knowledge of the matter, but an expert witness may testify concerning matters of which he does not have personal knowledge to the extent [~~provided in Rule 56~~] he is permitted to do so under the applicable statutory or decisional law.

The Commission has revised Rule 56 so that it does not indicate the extent to which an expert must base his opinion on personal knowledge. This question will be determined by decisional law except to the extent that some statute is applicable (as, for example, the tentative recommendation on opinion testimony on the value of property).

Rule 20.

The comments of the Southern Section on this rule are set out on page 2 of Exhibit II. The comments can be outlined as follows:

(1) Three of the five members of the Southern Section who voted on the question voted to keep the present California rule which does not permit a party to impeach a witness he has called in the absence of proper proof of surprise. The Northern Section (or at least a majority of the Northern Section) approved the Commission's draft.

(2) The Southern Section felt that subdivision (b) should be deleted because, by negative implication at least, it suggests that a prior inconsistent statement does not impair the credibility of a witness. This subdivision was included in the revised rule because, under our hearsay evidence recommendation, a prior inconsistent statement is substantive evidence, not merely impeaching evidence. See Revised Rule 63(1). Thus, the language of subdivision (a) of Rule 20 might be construed not to include a prior inconsistent statement where such statement is offered as substantive evidence of the fact to which it relates. Subdivision (b) might be revised to read "(b) proving his prior inconsistent statement."

(3) The Southern Section suggests that evidence of good character be admitted to rehabilitate a witness only if the witness has been impeached by evidence of bad character. In other words, apparently the Southern

Section believes that evidence of good character should not be admissible to rehabilitate a witnesses if, for example, only a prior inconsistent statement if offered to impeach his testimony. There is merit to this position. Why should the party calling the witness be permitted to offer evidence of good character if the character of the witness has not been attacked by evidence of bad character? If this suggestion is accepted by the Commission, it could be stated in the rule by revising the rule to read:

> (1) Subject to subdivisions (2) and (3), the credibility of a witness may be impaired or supported by any party, including the party calling him.
>
> (2) Evidence to support the credibility of a witness is inadmissible unless evidence has been admitted for the purpose of (a) impairing his credibility or (b) proving that he made a prior inconsistent statement.
>
> (3) Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of impairing his credibility.

(4) The Southern Section would limit evidence of a prior consistent statement to cases of rehabilitation after there has been a claim of intervening bias or recent fabrication. Since a prior consistent statement is hearsay, it is admissible only when it meets the requirements of Revised Rule 63(1). In this connection, perhaps Revised Rule 63(1)(b) should be revised to make clear that a prior consistent statement is admissible where there is a charge of intervening bias, although this would seem to be included in the language "recent fabrication." Under existing law, where the impeachment has been on grounds of bias or other improper motive, a statement made prior to the time the bias or motive was alleged to have arisen tends to show that the witness was not influenced by it in testifying at the trial. Accordingly, the prior consistent statement is admissible in rehabilitation. Witkin, California Evidence 727-728 (1958). Perhaps the comment to Rule 63(1) should be expanded to clarify the matter.

Rule 21.

Both Sections approve this rule in its present form. Two members of the Southern Section would go further and eliminate altogether any rule of evidence that would permit impeachment by proof of conviction of any crime. If this suggestion is not accepted, they suggest that the word "dishonesty" be eliminated from subdivision (1)(a).

Rule 22.

Both Sections approve this rule in its present form.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-1 EXHIBIT I

December 20, 1963

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

The Northern Section of the Committee to Consider Uniform Rules of Evidence met on December 17, 1963 to consider Article IV - Witnesses. The Northern Section believes that the changes in California law proposed by Rules 17 - 22 are salutary and should be adopted.

The Northern Section, therefore, approves these Rules as revised by you.

Very truly yours,

Lawrence C. Baker, Chairman
State Bar Committee on
Uniform Rules of Evidence

Memo 64-1

EXHIBIT II

NEWELL & CHESTER

650 South Grand Avenue
Suite 500
Los Angeles 17, California

January 13, 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

The Southern Section of the Committee to Consider Uniform Rules of Evidence met on January 7, 1964, to consider Article IV-Witnesses. Present at the meeting were members Schutzbank, Robinson, Henigson, Westbrook and Newell.

Rule 17

The Committee was troubled by Rule 17's taking away from the trial judge the power to exclude a witness who is of unsound mind. To be competent as a witness, a person must have had the ability to perceive at the time of the event in question and have the present ability to recollect. The Committee could see no reason why a trial judge, in the exercise of his discretion, should not be able to determine conclusively that a witness is not competent to testify.

The Committee recognized that in actual practice there probably would be little difference between the results obtained under the rule proposed by the Law Revision Commission and the Committee's opinion. Nevertheless, the Committee felt that the trial judge should be able to exclude a witness who was incompetent.

Rule 18

This was approved by the Committee.

Rule 19

Regarding Rule 19(1), the Committee felt that the trial judge should have the power to determine as a matter of preliminary fact that a witness lacks personal knowledge of a matter concerning which he purports to testify. Presumably this would usually be raised on an objection that there was no proper foundation. All the trial judge would be required to find was that a witness did in fact have an opportunity to perceive and that he did

perceive. The Committee feels that the trial judge should be able to make these factual determinations.

Rule 20

The Committee was in some disagreement as to Rule 20. Members Westbrook, Henigson and Robinson feel the present California rule is sound in not permitting a party to impeach a witness he has called by reason of an inconsistent statement in the absence of proper proof of surprise. Members Schutzbank and Newell disagreed and feel that a party should be able to impeach his own witness by means of an inconsistent statement without proof of surprise and/or damage. Member Newell would go further and permit impeachment by proof of bad character and bias, although he recognized that the occasions when a litigant might wish to use these tactics would be exceedingly remote.

The Committee was disturbed by the language of Rule 20(a) and (b). It was the feeling of the Committee that, by negative implication at least, subsection (b) suggests that proof of an inconsistent statement does not impair the credibility of a witness. Subsection (a) is all inclusive. Therefore, it was the feeling that the language of subsection (b) should be eliminated from Rule 20.

It was the feeling of the Committee that evidence of good character to rehabilitate a witness should be admissible only if the witness had been impeached by evidence of bad character.

The Committee feels that the present California law regarding rehabilitation by proof of a prior consistent statement is sound. Ordinarily, proof of the prior consistent statement is inadmissible because as a matter of logic it does not rehabilitate. However, proof of a prior consistent statement to rehabilitate should be admissible where there is a claim of intervening bias or recent fabrication.

> Caveat: The Committee is not certain of the present California law on this question. People v Hardenbrook, 48 C 2d 345, enunciates the generally accepted rule; however, an analysis of the facts does not indicate that there was any recent fabrication in that case.

Rule 21

The Committee in general approved of Rule 21. However, members Robinson and Newell would go further and eliminate altogether any rule of evidence that would permit the impeachment of any witness by proof of the conviction of any crime, feeling that it is an anachronism and that it disregards the realities of contemporary criminal jurisprudence particularly in the well-practiced area of "copping pleas", making accomodations with prosecuting authorities and other routine facets of the day-to-day practice of criminal law.

However, if the Commission feels that Rule 21 as it is proposed is sound, members Henigson, Robinson and Newell would eliminate the word "dishonesty" in Rule 21(1)(a) and limit the impeaching crime to one involving a false statement. It was the feeling of these members that it is impossible to define intelligently crimes involving "dishonesty" and would lead to unnecessary confusion and uncertainty in the courts.

Rule 22

The Committee approved.

Very truly yours,

Robert M. Newell, Vice-Chairman

RMN:em

Memo 64-1
#34

EXHIBIT III.

EXTRACT FROM MEMORANDUM 63-44

1/15/64

Consideration should be given to revising Rule 17 to state existing California law. Under existing law, "the witness' competency depends upon his ability to perceive, recollect, and communicate. . . . 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." People v. McCaughan, 49 Cal. 2d 409, 420 (1957). The URE rule dispenses with two of these qualifications--the ability to perceive and the ability to recollect. The change has significance in the case of a witness of very low mentality, a child of tender years or an insane person. Under the URE, the judge is not permitted to disqualify a witness even though under existing law he would not permit the witness to testify because he is pursuaded that the witness did not have the ability to perceive or to recollect. The California cases have been very liberal in permitting children of tender years to testify. See People v. Delaney, 52 Cal. App. 765 (1921) (child of 4); People v. Walker, 112 Cal. App. 146 (1931) (child of 5); People v. Watrous, 7 Cal. App.2d 7 (1935) (child of 4); Cheeseman v. Cheeseman, 99 Cal. App. 290 (1929) (child of 6 1/2); People v. Jori, 99 Cal. App. 280 (1929) (child of 5); People v. Harrison, 46 Cal. App.2d 779, 785 (1941) (child of 9 1/2); People v. Manuel, 94 Cal. App.2d 20, 23 (1949) (child of 5); People v. Ernst, 121 Cal. App.2d 287, 290 (1953) (children of 8 and 9); People v. Lamb, 121 Cal. App.2d 838, 844 (children over 8 and 6). Moreover, the judge may decide that a child has the ability to recollect and narrate even though he cannot remember and narrate some simple facts. People v. Lamb, supra. In fact, in Bradburn v. Peacock, 135 Cal. App.2d 161, 164, where the judge, without any voir dire examination, refused to permit a child to testify, the court stated: "We cannot say that no child of 3 years and 3 months is capable of receiving

just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that no child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5."

In the case of insane persons the test is understanding of the oath and ability to perceive, recollect and communicate; and, if this test is met, a minor degree of mental unsoundness will not disqualify the witness. In People v. McCaughan, 49 Cal.2d 409, a prosecution of a state hospital technician for manslaughter, important prosecution witnesses were mental patients in the victim's ward. In reversing the conviction on other grounds, the court restated certain principles governing qualifications of insane persons:

First, "The witness's competency depends upon his ability to perceive, recollect, and communicate. . . . 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."

Second, the witness must have the ability to perceive the event. "It follows that if 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."

Third, although the trial judge determines competency, "sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not

simply whether or not an act was done but, rather, the manner in which it was done and in which testimony as to details may mean the difference between conviction and acquittal."

The Commission might wish to consider drafting Rule 17 to require that a witness have the ability to perceive, recollect and communicate and to understand the duty of a witness to tell the truth. The rule might make clear that whether a witness had an opportunity to and did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact.

It is conceded that the present California law excludes some testimony that would be permitted under the Uniform Rules. But the preliminary determination of the witness's capacity and understanding of the oath is no different in substance than other preliminary determinations by the judge which are designed to keep unreliable evidence from the trier of fact. The existing law appears to be relatively liberal in permitting children and persons suffering from mental impairment to testify. Is there a case made for changing it?

Memo 64-1

#34(L)

1/15/64

EXHIBIT IV.

EXTRACT FROM MEMORANDUM 63-48

2. Should the preliminary language of Rule 19, requiring personal knowledge to be shown as a prerequisite, be restored?

Rule 19 now requires a witness to have personal knowledge of a matter. The requirement of personal knowledge "as a prerequisite" has been deleted from the rule--but it seems doubtful that it has been eliminated. Rule 4 requires a timely objection to, or motion to strike, inadmissible evidence. Hence, it is incumbent upon a party to object to evidence not based on personal knowledge at his earliest opportunity. If a party lets testimony go into the record where it does not appear that the witness is testifying from personal knowledge, is his later motion to strike timely? There seems to be a good chance that it is not.

And how is the trial court supposed to rule upon an objection of "no personal knowledge" if there is no evidence of personal knowledge in the record? Is he permitted to uphold the objection and require the proponent to show personal knowledge, or is he required to overrule the objection and force the objector to rely on cross-examination to show lack of personal knowledge? If it is the objector's burden to show lack of personal knowledge, the objection is properly overruled and the objector must make a motion to strike after the evidence is in.

Unfortunately, the rule as revised does not solve these problems. If the "prerequisite" language were restored, the matter would be clear. The objection should be made when the question is asked.

This seems to be the existing law. Personal knowledge is foundational. An objection to testimony for failure to show that the witness has personal knowledge is properly sustained. Fildew v. Shattuck & Nimmo Warehouse Co., 39 Cal. App. 42, 46 (1918)("the objection was, nevertheless, properly sustained for the reason that no foundation was laid by showing that the witness had any knowledge"). Of course, on direct examination, the testimony of a witness may appear unobjectionable, in which case the striking of his testimony after cross-examination has revealed lack of personal knowledge is proper. Parker v. Smith, 4 Cal. 105 (1854).

Wigmore explains the matter as follows:

> Analogy would indicate, then, that since the probabilities are all against a particular person, out of all persons, having been one to observe the particular matter in hand, it cannot be assumed that he is one of the few admissible persons, and his qualifications as to observation, or knowledge, must be made to appear beforehand. Such is the generally accepted rule.
>
> Hence, the witness, before he refers to the matter in hand, must make it appear that he had the requisite opportunities to obtain correct impressions on the subject; and the first questions put to him should be and usually are directed to laying this foundation:
>
> [Quotation omitted.]
>
> Where this preliminary inquiry is omitted, the opposing counsel cannot afterwards object to it as a technical violation of rules; this is usually placed on the theory that the knowledge may be presumed, but it is more correct to place it upon the rule (ante, § 18) that a failure to make objection at the proper time is a waiver of the objection. Yet where the subsequent course of the examination develops a total lack of opportunity of knowledge, no doubt the testimony may be struck out, on the ground that the waiver was merely of the requirement of the preliminary burden of proof, and not of the substantial qualifications of the witness. [2 Wigmore, Evidence (3d ed. 1940) 758-59.]

Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704 (1906) illustrates the problems. There the question was whether the decedent knew anything about electricity and its dangers. His mother was called as a witness

and asked this question, to which she said "He had no knowledge." Objection was then made on the ground that there was no showing that the witness was speaking from her own personal knowledge. The objection was overruled and the court said the objector could go into the matter on cross-examination. Lack of personal knowledge was shown on cross-examination and a motion to strike was made. This motion was denied. The Supreme Court reversed the judgment and held that both rulings were erroneous; but it had difficulty with the fact that the objection was made after the answer was in. The court finally decided, with one dissent, that the objection was timely because it was overruled on the merits and, hence, counsel did not have occasion to indicate for the record that the answer was given too quickly for him to have interposed his objection.

Under Rule 19 (as revised), it may be that the original objection--even though timely--would be properly overruled on the ground that the objector should show lack of knowledge on cross-examination. On the other hand, Rule 4 may require the sustaining of the objection.

The matter should be clarified. The staff believes the more desirable rule is to require the foundational showing of knowledge. Forcing a party to wait for cross-examination requires the reception of improper evidence. It requires an instruction to the jury to disregard what they've heard. Making personal knowledge a foundational requirement will tend to exclude incompetent testimony and will avoid the confusion engendered by requiring the jury to pretend they didn't hear what they actually did hear.

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION AND A STUDY

Relating to

The Uniform Rules of Evidence

Article IV. Witnesses

March 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Draft: October 1, 1963

Revised: October 21, 1963

LETTER OF TRANSMITTAL

To His Excellency, Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article IV (Witnesses) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

HERMAN F. SELVIN
Chairman

March 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article IV. Witnesses

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature authorized and directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.[2]

The tentative recommendation of the Commission on Article IV (Witnesses) of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 17 through 22, relates to the competency and credibility of witnesses.

Rules 17 through 19 concern the qualifications of persons offered as witnesses. Rules 20 through 22 concern evidence that may be used to support or impeach the credibility of witnesses. In many respects, these rules restate the present California law. Much of the existing law, however, is nonstatutory; the few statutes that relate to this subject do not reflect the exceptions, qualifications and refinements developed in the cases.

---

1. A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

2. Cal. Stats. 1956, Res. Ch. 42, p. 263.

The Commission tentatively reccmmends that URE Article IV, revised as hereinafter indicated,[3] be enacted as the law in California.

In the material which follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strikeout and italics. Each rule is followed by a comment setting forth the major considerations that influenced those recommendations of the Commission suggesting important substantive changes in the rule or in corresponding California law.

For a detailed analysis of the various rules and the California law relating to the competency and credibility of witnesses, see the research study beginning on page 000. This study was prepared by the Commission's research consultant, Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School.

---

3. The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission .

RULE 17. DISQUALIFICATION OF WITNESS; INTERPRETERS.

(1) A person is disqualified to be a witness if the judge finds that the person is:

(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.

(2) An interpreter is subject to all the provisions of these rules relating to witnesses.

COMMENT

General scheme of Rules 17-19. Uniform Rule 7 declares that "every person is qualified to be a witness" and that "no person is disqualified to testify to any matter." By way of limitation on Rule 7, Rule 17 states the minimum capabilities that a person must possess to be a witness (the ability to communicate and an understanding of the duty to tell the truth), Rule 18 requires that the witness testify under oath (or its equivalent), and Rule 19 requires that a person have personal knowledge or expertise in order to testify concerning a particular matter. Under the URE scheme, therefore, matters that relate to a witness' ability to perceive, his opportunity to perceive, his memory, mental competence, experience, and the like, go to the weight to be given his testimony rather than to his right to testify unless they are so lacking that they negate the existence of personal knowledge (Rule 19) or the qualifications required by Rule 17.[4]

[4] It should be noted that a witness may be disqualified under other provisions of the URE. Thus, disqualification on the ground of privilege is covered by the revised URE article on Privileges, and Rules 42 and 43 limit testimony by judges and jurors.

In many respects, the URE scheme is similar to the present California law, for Code of Civil Procedure Section 1879 declares the general rule that "all persons . . . who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses." This general rule specifically is made subject to the rules of disqualification on the basis of insanity, infancy, and the dead man statute (Code Civ. Proc. § 1880) and privilege (Code Civ. Proc. § 1881). In addition, the witness must take an oath to testify truthfully--or make an affirmation or declaration to the same effect--and must have an understanding of the oath. Code Civ. Proc. §§ 1846 (duty), 2094-2096 (form of oath, affirmation or declaration). Other code sections limit testimony in particular cases or circumstances. Penal Code Section 1321 makes the rules of competency in criminal cases the same as in civil cases unless otherwise specifically provided.

Rule 17 generally. Under existing California law, the competency of a witness depends upon his ability to understand the oath and to perceive, recollect, and communicate. 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. People v. McCaughan, 49 Cal.2d 409, 420 (1957). On the other hand, Rule 17 requires merely the ability to communicate and to understand the duty to tell the truth. The two missing qualifications--the ability to perceive and to recollect--are found only to a very limited extent in Rule 19 which permits the trial judge to exclude the testimony of a witness

where it is obvious that the witness does not have "personal knowledge" (as, for example, where his knowledge of the event is derived solely from the statements of others).

The practical effect of Rule 17 (together with Rule 19) is to change the nature of the inquiry the judge makes to determine the competency of a child or person suffering from mental impairment to testify concerning an event. As the following discussion indicates, in some cases the Uniform Rules permit testimony by children and persons suffering from mental impairment who are disqualified from testifying under existing law. But, in such cases, where a person can communicate adequately, can understand the duty to tell the truth, and has personal knowledge, the sensible course of action is to put the person on the stand and to let him tell his story for what it may be worth. The trier of fact can consider his immaturity or mental condition in determining the credibility of his testimony. The alternative--to exclude the testimony--may deprive the trier of fact of the only testimony available.

Children. Code of Civil Procedure Section 1880(2) provides that "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," are incompetent as witnesses. This section means that a child under 10 must possess sufficient intelligence, understanding and ability to receive and fairly accurately recount his impressions and must have an understanding of the nature of an oath

and a moral sensibility to realize that he should tell the truth and that he is likely to be punished for a falsehood. People v. Burton, 55 Cal.2d 328, 341 (1961). If the judge is not persuaded that the child has these abilities, the child is disqualified as a witness.

Under the Uniform Rules, no similar inquiry is made as to the witness' ability to perceive and to recollect, except to the extent that these matters are necessary to determine whether the child has personal knowledge, and the judge must permit the child to testify if any trier of fact could conclude that the child has the ability to perceive and to recollect. It is unlikely, however, that the difference in the nature of the judge's inquiry would result in any great change in actual practice. Under existing law, as under the Uniform Rule, the person objecting to the testimony of the child has the burden of showing incompetency. People v. Gasser, 34 Cal. App. 541 (1917); People v. Holloway, 28 Cal. App. 214 (1915). Moreover, the determination of competency is primarily within the judge's discretion, and the California cases indicate that children of very tender years are commonly permitted to testify. Witkin, California Evidence 438-39 (1958). See Bradburn v. Pock, 135 Cal. App.2d 161, 164 (1955)(held, it was reversible error to refuse to permit a child to testify without conducting examination to determine his competency. "We cannot say that no child of 3 years and 3 months is capable of receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that no child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5.").

Persons "of unsound mind." Code of Civil Procedure Section 1880 provides that "those who are of unsound mind at the time of their production for examination" cannot be witnesses. But the test is the same as for other witnesses under California law--an understanding of the oath, and the ability to perceive, recollect and communicate; and if, for example, a proposed witness suffers 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. People v. McCaughan, 49 Cal.2d 409, 421 (1957). Although the trial judge determines whether the person is competent as a witness, "sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not simply whether or not an act was done but, rather, the manner in which it was done and in which testimony as to details may mean the difference between conviction and acquittal." Ibid.

Thus, the Uniform Rules would significantly change the nature of the inquiry the judge makes to determine the competency of a person suffering from mental impairment. Under existing law, the judge must be persuaded that a person of "unsound mind" has the ability to perceive and to recollect; whereas, under the URE, the judge must permit such person to testify if any trier of fact could conclude that he has the ability to perceive and to recollect.

The Dead Man Statute. In its tentative recommendation on the Privileges Article, the Commission recommends the repeal of the Dead

Man Statute. Hence, this statute would no longer be a ground for disqualification of a proposed witness.

Interpreters. Subdivision (2) of revised Rule 17 makes the URE rules relating to witnesses applicable to interpreters. This is existing law. People v. Lem Deo, 132 Cal. 199, 200 (1901). See also People v. Mendez, 35 Cal.2d 537 (1958); People v. Salas, 2 Cal. App. 537 (1905).

RULE 18. OATH.

Every witness before testifying shall [~~be required to express his purpose to testify by the oath or affirmation required by law~~] take an oath or make an affirmation or declaration in the form provided in Chapter 3 (commencing with Section 2093) of Title 6 of Part 4 of the Code of Civil Procedure.

COMMENT

This rule states in substance existing California law as found in Section 1846 of the Code of Civil Procedure. The URE rule has been revised to refer specifically to the provisions of the Code of Civil Procedure governing the form of the oath, affirmation or declaration and to state more clearly the purpose of the rule--to require the taking of an oath or the making of an affirmation or declaration whereby the witness commits himself to tell the truth.

RULE 19. [~~PREREQUISITE OF~~] PERSONAL KNOWLEDGE; [~~AND EXPERIENCE~~] QUALIFICATION AS EXPERT WITNESS.

(1) [~~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~~] The testimony of a witness concerning a particular matter is inadmissible if no trier of fact could reasonably find that he has personal knowledge of the matter, but an expert witness may testify concerning matters of which he does not have personal knowledge to the extent provided in Rule 56.

(2) A person may testify as an expert witness if the judge finds that he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the matter.

(3) [~~Such~~] Evidence of personal knowledge, special knowledge, skill, experience, training, and education may be provided 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.~~]

(4) The judge may receive conditionally the testimony of [~~the~~] a witness [~~as to a relevant or material matter~~], subject to the evidence of personal knowledge, special knowledge, skill, experience, training, or education being later supplied in the course of the trial.

COMMENT

Rule 19 relates to qualifications a person, competent to be a witness under Rule 17, must possess in order to testify concerning a particular matter. The rule covers both lay witnesses and expert witnesses. Since

the requisite qualifications are different for the two types of witnesses, the rule has been revised to make the distinction clear.

Subdivision (1)--personal knowledge. Subdivision (1) of the revised rule repeats the requirement of Section 1845 of the Code of Civil Procedure that a witness must have personal knowledge of the subject of his testimony. "Personal knowledge" means an impression derived from the exercise of the witness' own senses. 2 Wigmore, Evidence § 657, p. 762 (3d ed. 1940).

Under the language of the rule as recommended in the URE, it appears that a foundational showing of personal knowledge is required in every instance, for the URE rule requires a showing of personal knowledge "as a prerequisite for the testimony of a witness." The language of the URE is a little misleading, for Rule 4 permits inadmissible evidence to be received and relied on by the court unless there is a timely objection or, under Rule 4 as revised by the Commission, a timely motion to strike. The language of the revised rule indicates somewhat more clearly that the testimony of a witness must be based on personal knowledge, but in the absence of timely objection or motion to strike, the evidence is competent. In this respect, the URE rule and the revised rule are declarative of existing California law. Under existing law, an objection must be made to the testimony of a witness who does not have personal knowledge, and if there is no reasonable opportunity to object during the direct examination, a motion to strike is appropriate after lack of knowledge has been shown on cross-examination. Sneed v. Marysville Gas etc. Co., 149 Cal. 704 (1906) (error to overrule motion to strike testimony after lack of knowledge shown on cross-examination); Parker v. Smith, 4 Cal. 105 (1854) (testimony properly stricken by court when lack of knowledge shown on cross-

examination); Fildew v. Shattuck & Nimmo Warehouse Co., 39 Cal. App. 42 (1918) (objection to question properly sustained when foundational showing of personal knowledge was not made).

Under the revised rule, the requisite showing of personal knowledge must be by evidence from which a trier of fact could reasonably conclude that the witness has personal knowledge, i.e., evidence sufficient to warrant a finding of personal knowledge. The language of the original URE rule is not clear. It requires "evidence" of personal knowledge, but the quantum of evidence is not specified. Apparently, however, the showing contemplated by the rule is a prima facie showing. See Research Study, p. 7, infra; Report of the New Jersey Supreme Court Committee on Evidence, p. 58 (1963). The judge need not be convinced of the personal knowledge of the witness, and his determination to admit the evidence does not bind the jury to find that the witness does have personal knowledge.

Little discussion of the extent of the foundational showing required can be found in the California cases. Apparently, however, a prima facie showing of personal knowledge is all that is required; the question whether the witness actually has personal knowledge being left for the trier of fact to resolve on the issue of credibility. See, for example, People v. McCarthy, 14 Cal. App. 148, 151 (1910). The revised rule will clarify the law in this respect.

The rule is well settled in California that a trial judge may decide an issue of fact for a jury if but one conclusion can reasonably be reached from the evidence. Blank v. Coffin, 20 Cal.2d 457, 461 (1942) ("If the evidence contrary to the existence of the fact is clear, positive,

uncontradicted and of such a nature that it cannot be rationally disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law").

In other jurisdictions, this rule relating to the functions of judge and jury has given rise to the subsidiary rule that if no trier of fact could reasonably conclude that the witness has personal knowledge of the matter in question, the judge may exclude his testimony. See annotations, 21 A.L.R. 141, 8 A.L.R. 798. No appellate case has been found in California applying the rule, although it seems likely that the rule would be applied in an appropriate case as a specific application of the general rule governing the functions of the judge and the jury.

The sentence in the original URE rule permitting the judge to reject the testimony of a witness that he has personal knowledge has been deleted because it is unnecessary in view of the revision of subdivision (1).

An expert witness is, at times, permitted to give testimony that is not based on his personal knowledge. See Code Civ. Proc. § 1845. The extent to which an expert may give testimony not based on personal knowledge will be considered in connection with Rule 56. But, where the

expert's testimony is based on personal knowledge, the requirement of personal knowledge in subdivision (1) applies.

Subdivision (2)--expert witnesses. Subdivision (2) requires that a person offered as an expert witness have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the particular matter. This subdivision states existing law. Code Civ. Proc. § 1870, subdivision 9.

In contrast with subdivision (1), subdivision (2) requires the judge to be persuaded that the proposed witness is an expert; if the judge is not convinced, the qualifications of the witness as an expert are not established and he is not permitted to testify. People v. Pacific Gas & Elec. Co., 27 Cal. App.2d 725 (1938); Bossert v. Southern Pac. Co., 172 Cal. 504 (1916); People v. Haeussler, 41 Cal.2d 252 (1953); Pfingsten v. Westenhaver, 39 Cal.2d 12 (1952).

The judge's determination that a witness qualifies as an expert witness is binding on the trier of fact, but the trier of fact may consider the witness' qualifications as an expert in determining the weight to be given his testimony. Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513 (1895); Pfingsten v. Westenhaver, 39 Cal.2d 12 (1952); Estate of Johnson, 100 Cal. App.2d 73 (1950).

Subdivision (3)--witness' testimony. This subdivision states that the requisite knowledge or special qualifications required of witnesses may be provided by the witness' own testimony, as is the usual case.

Subdivision (4)--conditional rulings. Subdivision (4) provides that, as to both expert and lay witnesses, the judge may receive testimony conditionally, subject to the necessary foundation being supplied later in

the trial. This provision is merely an express statement of the broad power of the judge under Code of Civil Procedure Section 2042 with respect to the order of proof. Unless the foundation is subsequently supplied, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion.

RULE 20. EVIDENCE GENERALLY AFFECTING CREDIBILITY

~~[Subject to Rules 21 and 22 for the purpose of impairing or supporting]~~ The credibility of a witness[~~,~~] may be impaired or supported by any party, including the party calling him; ~~[may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility]~~ but evidence to support the credibility of a witness is inadmissible unless evidence has been admitted for the purpose of (a) impairing his credibility or (b) proving that he made a prior inconsistent statement.

COMMENT

Rule 20 sweeps away the pre-existing limitations on the right to support or impeach the credibility of witnesses. Together with Rule 7 (providing all relevant evidence is admissible), Rule 20 makes all evidence relevant to the issue of the credibility of a witness admissible. The rule, however, is subject to several qualifications on the admissibility of such evidence. Thus, for example, the last clause limits the admissibility of evidence supporting credibility; Rules 21 and 22 limit the admissibility of certain types of evidence relevant to credibility; the rules of privilege and the rules excluding hearsay evidence also operate to exclude evidence that may otherwise be admissible on this issue; and Rule 45 permits the judge to exclude evidence relating to credibility where it would be unduly prejudicial, consume too much time, cause confusion, etc.

Impeaching one's own witness. The URE rule eliminates the present restriction on impeaching one's own witness. Under the present law, a party is precluded from impeaching his own witness unless he has been surprised and damaged by the witness' testimony. Code Civ. Proc. § 2049;

In re Relph's Estate, 192 Cal. 451 (1923). In large part, the present law rests upon the theory that a party producing a witness is bound by his testimony. See Smellie v. Southern Pac. Co., 212 Cal. 540 (1931). This theory has long been abandoned in several jurisdictions where the practical exigencies of litigation have been recognized. See McCormick, Evidence, pages 70-71 (1954). A party has no actual control over a person who witnesses an event and is required to testify to aid the trier of fact in its function of determining the truth. Hence, a party should not be "bound" by the testimony of a witness produced by him. It follows that impeachment of his credibility should be permitted without anachronistic limitations. Moreover, denial of the right to impeach often may work a hardship on a party where by necessity a hostile witness is produced by the party. This is not uncommon in criminal cases, nor, for that matter, is it uncommon where expert testimony is required. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure.

"Collateral matter" limitation. The so-called "collateral matter" limitation on impeachment of the credibility of a witness, where impeaching evidence is excluded unless such evidence is independently relevant to the issue being tried, stems from the sensible approach that trials should be concerned with settling specific disputes between parties. Accordingly, matters that are collateral or too remote to this purpose should be excluded from consideration. Under the present law, this "collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, e.g., People v. Wells, 33 Cal.2d 330 (1949), and cases cited therein at 340.

The effect of the Uniform Rule is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature tending to impeach the credibility of a witness would be admissible. Under Rule 45, the judge has wide discretion in regard to the exclusion of collateral evidence. The effect of the URE rule, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

Support of witnesses. Under the present law, a witness' credibility may not be supported by the party calling him until an attack has been made upon his credibility, i.e., until his credibility is placed in issue by impeachment. Code Civ. Proc. § 2053; People v. Bush, 65 Cal. 129 (1884). Thus, character evidence in support of an unimpeached witness is inadmissible under existing law, probably because of a fear that too many collateral issues would be raised. And evidence of prior consistent statements made by the witness is excluded prior to an attack on the witness' credibility because such statements either are hearsay and cumulative or are irrelevant. See Wigmore, Evidence § 1124. Moreover, admission of prior consistent statements made by an unimpeached witness would permit a party to prove his case by the introduction of statements carefully prepared in advance even though no issue is raised in regard to his present testimony. See Revised Rule 63(1) and the comment thereto in regard to limitations on the admissibility of prior consistent and inconsistent statements of a witness.

Because the principles underlying the present California law are sound, Rule 20 has been revised to continue in effect the rule prohibiting introduction of evidence supporting a witness' credibility until his credibility has been attacked.

RULE 21. LIMITATIONS ON EVIDENCE OF CRIME AS AFFECTING CREDIBILITY.

(1) Evidence of the conviction of a witness for a crime [~~not involving dishonesty or false statement shall be~~] is inadmissible for the purpose of impairing his credibility unless the judge, in proceedings held out of the presence of the jury, finds that:

(a) An essential element of the crime is dishonesty or false statement; and

(b) The party seeking the impairment can produce, if required, competent evidence of the record of conviction.

(2) If the witness [~~be~~] is the [~~accused~~] defendant in a criminal action or proceeding, [~~no~~] evidence of his conviction [~~of~~] for a crime [~~shall be admissible~~] is inadmissible for the [~~sole~~] purpose of impairing his credibility unless he has first introduced evidence [~~admissible solely~~] of his character for honesty or veracity for the purpose of supporting his credibility.

(3) Evidence of the conviction of a witness for a crime is inadmissible for the purpose of impairing his credibility if:

(a) A pardon based on his innocence has been granted the witness by the jurisdiction in which he was convicted.

(b) A certificate of rehabilitation and pardon has been granted the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4 or 1203.4a.

(d) The record of the conviction has been sealed under the provisions of Penal Code Section 1203.45.

(e) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in paragraph (b), (c), or (d).

COMMENT

Rule 21 limits the extent to which evidence of the conviction of crime can be used for impeachment purposes. Evidence of a conviction is inadmissible if it falls within the proscription of any of the three subdivisions.

Rule 22, subdivision (4), provides that evidence of specific acts is inadmissible on the issue of credibility; but the subdivision excepts evidence of the conviction of a crime from its provisions. Hence, evidence of a conviction is admissible under the general provisions of Rules 7 and 20 unless it is made inadmissible by Rule 21.

Subdivision (1). Subdivision (1) of the revised rule follows the recommendation of the Uniform Laws Commissioners by limiting the crimes that may be used for impeachment purposes to crimes involving dishonesty or false statement. The reason is that these crimes have a considerable bearing on credibility whereas others do not. Other crimes are excluded because the probative value of such crimes on the issue of credibility is low and the prejudice that may result from their introduction may be great.

The subdivision will substantially change existing California law. Under existing law, a conviction of a felony may be used for impeachment purposes--even though the crime does not involve the trait of veracity--but a conviction of a misdemeanor may not be used for impeachment purposes--even though the crime involves lying. Code Civ. Proc. § 2051; People v. Carolan, 71 Cal. 195 (1886)(misdemeanor conviction inadmissible). Under existing California law, an offense that is punishable either as a felony or a misdemeanor is deemed a misdemeanor for all purposes if the punishment actually imposed is that applicable to misdemeanors. Pen. C. § 17. Hence, if a person is charged with a felony and is punished with imprisonment in a county jail, the conviction may not be shown for impeachment purposes. People v. Hamilton, 33 Cal.2d 45 (1948). But if, instead of imprisonment, probation is granted, the conviction may be shown for impeachment purposes. People v. Burch, 196 Cal. App.2d 754 (1961).

Thus, under existing law, evidence of considerable significance on the issue of credibility is frequently excluded while much evidence of little probative value on the issue is admitted. The revised rule will remove these anomalies from California law.

Subdivision (1) also requires a party, before impeaching a witness on the basis of prior crimes, to satisfy the judge in a hearing out of the presence of the jury that the crime in question is admissible under Rule 21 and that the witness actually committed the crime. The purpose of the provision is to avoid unfair imputations of crimes that either do not fit within the rule or that are nonexistent.

Subdivision (1) makes any evidence of crime inadmissible unless the appropriate showing has been made to the judge. This includes evidence in the form of testimony from the witness himself. Hence, a party may not ask a witness if he has been convicted of a crime unless he has made the requisite showing to the judge.

Subdivision (1)(b) is based on a proposal made by the Committee on Administration of Justice of the State Bar of California. See 29 Calif. State Bar J. 224, 238 (1954).

Subdivision (2). Subdivision (2) prohibits the impeachment of a criminal defendant who testifies by the introduction of his prior convictions unless the defendant-witness first has introduced evidence in support of his credibility. Under Rule 20 as revised, the defendant may introduce evidence in support of his credibility only after his credibility has been attacked. Under the provisions of subdivision (2), the initial attack on the defendant-witness's credibility cannot include evidence of the conviction of a crime.

Subdivision (2) is based on a recognition that evidence of a defendant's prior conviction is very prejudicial. By limiting the use of such evidence, Rule 21 avoids its excessively prejudicial effect and thus encourages a defendant with a criminal record to take the stand. Rule 21 will remove the only rational justification for a defendant to stay off the witness stand and refuse to explain the evidence against him.

Subdivision (3). Subdivision (3) is a logical extension of the policy expressed in Section 2051 of the Code of Civil Procedure that prohibits the use of a conviction for impeachment purposes if a pardon has been granted upon the basis of a certificate of rehabilitation. Section 2051 is too limited, however, because it excludes a conviction only when a pardon based on a certificate of rehabilitation has been granted. Insofar as other convictions and pardons are concerned, the conviction is admissible for impeachment and the pardon--even though it may be based on the innocence of the defendant and his wrongful conviction of the crime--is admissible merely to mitigate the effect of the conviction. People v. Hardwick, 204 Cal. 582 (1928). Moreover, the certificate of rehabilitation referred to in Section 2051 is available only to felons who have been confined in a state prison or penal institution; it is not available to persons given misdemeanor sentences or to persons granted probation. Pen. C. § 4852.01. Sections 1203.4, 1203.4a and 1203.45 of the Penal Code provide procedures for setting aside the convictions of rehabilitated probationers and misdemeanants. Yet, under Section 2051 of the Code of Civil Procedure, a conviction that has been set aside under Penal Code Section 1203.4 may be shown for impeachment purposes. People v. James, 40 Cal. App.2d 740 (1940). Subdivision (3) eliminates these anachronisms by prohibiting the use of any

conviction for impeachment purposes if the person convicted has been determined to be either innocent or rehabilitated and a pardon has been granted or the conviction has been set aside by court order pursuant to the provisions of the Penal Code or he has been relieved of the penalties and disabilities of the conviction pursuant to a similar procedure provided by the laws of another jurisdiction.

RULE 22. FURTHER LIMITATIONS ON ADMISSIBILITY OF EVIDENCE AFFECTING CREDIBILITY.

As affecting the credibility of a witness:

[~~(a)~~] (1) In examining the witness as to a statement made by him [~~in writing~~] that is inconsistent with any part of his testimony, it [~~shall~~] is not [~~be~~] necessary to disclose to him any information concerning the statement nor, if the statement is in writing, is it necessary to show, [~~or~~] read, or disclose to him any part of the writing. [~~, provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness;~~]

[~~(b)~~] (2) Extrinsic evidence of [~~prior contradictory statements~~] a statement, whether oral or written, made by the witness that is inconsistent with any part of his testimony, may in the discretion of the judge be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to identify, explain, or deny the statement; or

(b) The witness has not been excused from giving further testimony in the proceeding. [~~;~~]

(3) Evidence of traits of his character other than honesty or veracity or their opposites [~~, shall be~~] is inadmissible [~~;~~] .

(4) Evidence of specific instances of his conduct relevant only as tending to prove a trait of his character , other than evidence of his conviction of a crime, [~~shall be~~] is inadmissible.

(5) Evidence of religious belief or lack thereof is inadmissible.

COMMENT

This rule contains further limitations upon the admissibility of evidence affecting the credibility of a witness that otherwise would be admissible

under the provisions of Rules 7 and 20. It is divided into several subdivisions, each of which is discussed below.

Subdivision (1). Under existing California law, a cross-examiner need not disclose to a witness any information concerning a prior inconsistent oral statement of the witness before asking him questions about the statement. People v. Kidd, 56 Cal.2d 759 (1961); People v. Campos, 10 Cal. App.2d 310 (1935). Nor does a party examining his own witness need to make such a disclosure where he is permitted to impeach his witness. People v. Kidd, 56 Cal.2d 759 (1961). But if a witness's prior inconsistent statements are in writing, "they must be shown to the witness before any question is put to him concerning them." Code Civ. Proc. § 2052.

Subdivision (1) eliminates the distinction made in existing law between oral and written statements. Under subdivision (1), a witness may be asked questions concerning prior inconsistent statements even though no disclosure is made to him concerning the prior statement. Whether a foundational showing is required before other evidence of the prior statements may be admitted is not covered in subdivision (1). The prerequisites for the admission of the impeaching evidence are set forth in subdivision (2).

The rule requiring that prior inconsistent written statements be shown to the witness has been eliminated for much the same reason that there is no such requirement in regard to prior oral statements. The requirement of disclosure limits the effectiveness of cross-examination by removing the element of surprise. The forewarning required gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement and thus avoid being exposed. The rule is based on an English common-law rule that has been abandoned in England for over 100 years. The California rule applicable to

prior oral statements is the more desirable rule and should be applicable to all prior inconsistent statements.

Subdivision (2). Present law, embodied in Section 2052 of the Code of Civil Procedure, requires that a proper foundation be laid before evidence of a witness' prior inconsistent statement may be admitted. The foundation required includes giving the witness the opportunity to identify, explain, or deny the contradictory statement. The principle of permitting a witness to explain the circumstances surrounding the making of an inconsistent statement is sound; but this does not compel the conclusion that the explanation must be made before the inconsistent statement is introduced. Accordingly, this subdivision permits the judge to exclude evidence of a prior inconsistent statement only if the witness (a) was not examined so as to give him an opportunity to explain the statement and (b) has been unconditionally excused and is not subject to being recalled.

The revised rule will permit effective cross-examination and impeachment of several collusive witnesses; for under the revised rule there need be no disclosure of the prior inconsistency before all the witnesses have been examined.

Under subdivision (2), the judge in his discretion may permit the impeaching evidence to be admitted even though the witness has been excused and had no opportunity to explain or deny the prior statement. An absolute rule forbidding introduction of the impeaching evidence unless the conditions specified are met may cause hardship in some cases. For example, the party seeking to introduce the prior statement may not have learned of its existence until after the witness has left the court and is no longer available. Hence, the rule grants the trial judge discretion to admit the impeaching evidence where justice so requires.

Subdivision (3). This subdivision limits evidence relating to the character of a witness to the character traits necessarily involved in a proper determination of credibility. Other character traits of the witness are not of sufficient probative value concerning the reliability of the witness' testimony to offset the prejudicial effect that would be caused by their admissibility.

This subdivision is substantially in accord with the present California law insofar as it admits evidence of the witness' bad reputation for "truth, honesty, or integrity." Code Civ. Proc. § 2051. Insofar as the URE rule would permit opinion evidence on this subject, it represents a change in the present law. As to this, the opinion evidence that may be offered by those persons intimately familiar with the witness would appear to be of more probative value than the generally admissible evidence of reputation. See, e.g., Wigmore, Evidence § 1986.

Subdivision (4). Under this subdivision, specific instances of conduct are inadmissible to prove a trait of character for the purpose of impairing or supporting the credibility of a witness. This is in accord with the present California law. Code Civ. Proc. § 2051. This subdivision has been revised to make clear its relationship to Rule 21 relating to the conviction of the witness for a crime.

Subdivision (5). This subdivision has been added to restate the present California law as expressed in People v. Copsey, 71 Cal. 548 (1887), where the Supreme Court held that evidence relating to a witness' religious belief or lack thereof is incompetent on the issue of credibility.

AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of existing statutes relating to the competency and credibility of witnesses that should be revised or repealed in light of the Commission's tentative recommendation concerning Article IV (Witnesses) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

In many cases where it is hereafter stated that an existing statute is superseded by a provision in the Uniform Rules of Evidence, the provision replacing the existing statute may be somewhat narrower or broader than the existing statute. In these cases, the Commission believes that the proposed provision is a better rule, although in a given case it be broader or narrower than the existing law.

Code of Civil Procedure

Section 1845 provides:

> 1845. TESTIMONY CONFINED TO PERSONAL KNOWLEDGE. A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

This section should be repealed. It is superseded by Rule 19, subdivision (a).

Section 1846 should be revised to read:

> 1846. TESTIMONY TO BE IN PRESENCE OF PERSONS AFFECTED. A witness ~~can be heard only upon oath or affirmation, and~~ upon a trial [~~He~~] can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

The language in strikeout type states the requirement of an oath or affirmation and is superseded by Rule 18. The section as amended preserves the right of confrontation.

Subdivision 16 of Section 1870 provides:

> 1870. FACTS WHICH MAY BE PROVED ON TRIAL. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> * * *
>
> 16. Such facts as serve to show the credibility of a witness, as explained in Section 1847.

This subdivision is superseded by Rule 20 and should be deleted.

Section 1879 provides:

> 1879. ALL PERSONS CAPABLE OF PERCEPTION AND COMMUNICATION MAY BE WITNESSES. All persons, without exception, otherwise than is specified

in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case the credibility of the witness may be drawn in question, as provided in Section 1847.

This section should be repealed. Insofar as it declares all persons to be competent witnesses, it is superseded by Rule 17; insofar as it requires perception and recollection on the part of the witness, it is superseded in part by Rule 19. Insofar as it is not superseded by the revised rules, it treats matters of credibility as matters of competency and is, therefore, disapproved.

Section 1880 provides as follows:

1880. PERSONS INCOMPETENT TO BE WITNESSES. 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.

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.

This section should be repealed. Subdivisions (1) and (2) are superseded by Rules 17 and 19. Subdivision (3) is the Dead Man Statute in California and its repeal is elsewhere recommended by the Commission. See Tentative Recommendation Relating to the Privileges Article, p. 104.

Section 2049 provides:

2049. PARTY PRODUCING NOT ALLOWED TO LEAD WITNESS. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 2052.

This section should be repealed. It is superseded by Rule 20.

Section 2051 provides:

2051. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

This section should be repealed. The first clause is inconsistent with Rule 20. The second clause is superseded by Rule 22. The remainder of the section is inconsistent with Rule 21, dealing with convictions of crime for purposes of impeaching credibility.

Section 2052 provides:

2052. SAME. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related

to him with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

This section should be repealed. It is inconsistent with subdivisions (1) and (2) of Rule 22.

Section 2053 provides:

2053. EVIDENCE OF GOOD CHARACTER, WHEN ALLOWED. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

This section should be repealed. Insofar as it deals with the inability to support a witness' credibility until it has been impeached, it is superseded by Rule 20. Insofar as the section deals with the inadmissibility of character evidence in a civil action, it is superseded by Rules 46 and 47 as revised by the Commission.

Section 2054 should be revised to read:

2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and no question [~~must~~] may be put the witness concerning a writing shown to him until [~~it has been so shown to him~~] the opposite party has been given an opportunity to inspect the writing.

This section has been revised to avoid any inconsistency with Rule 22, subdivision (1), which eliminates the requirement that an inconsistent writing must be shown to the witness before he is examined concerning it for the purpose of impairing his credibility.

Section 2065 should be revised to read:

2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give any answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the the fact in issue would be presumed. [~~But a witness must answer as~~

~~to-the-fact-of-his-previous-conviction-for-felony-unless-he-has previously-received-a-full-and-unconditional-pardon,-based-upon-a certificate-of-rehabilitation.~~]

The deleted portion is inconsistent with Rule 21.