I N T R O D U C T I O N

This memo is a study of Rule 23, subdivisions (1), (3) and (4) and of Rules 24 and 25 - all dealing with the privilege against self-incrimination. Rules 37, 38 and 39 are also considered insofar as these rules relate to the incrimination privilege.

The text of the Rules just mentioned is as follows:

> "Rule 23. (1) Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify. . . .
>
> (3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.
>
> (4) If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom."

> "Rule 24. A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation."

> "Rule 25. Subject to Rules 23 and 37, every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule,

(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; and

(b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; and

(c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and

(d) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; and

(e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; and

(f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; and

(g) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action."

"Rule 37. A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that

matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

"Rule 38. Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."

"Rule 39. Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege."

G E N E R A L C O N S I D E R A T I O N S

U.R.E. Rule 7 provides in part as follows:

"Except as otherwise provided in these Rules . . . No person has a privilege to refuse to be a witness, and . . . no person has a privilege to refuse to disclose any matter or to produce any object or writing. . ."

The Commissioners explain as follows the purpose of Rule 7 and its place in the U.R.E. scheme:

"This rule is essential to the general policy and plan of this work. It wipes the slate clean of all disqualifications of witnesses, privileges and limitations on the admissibility of relevant evidence. [Italics added.] Then harmony and uniformity are achieved by writing back on to the slate the limitations and exceptions desired."

If Rule 7 were adopted in any state as legislation (or as a rule of court under the rule-making power), the Rule would not, of course, affect any constitutional rule of privilege in force in the State or any constitutional rule of limitation on the admissibility of evidence. As the Commissioners say:

> "Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

In California the privilege against self-incrimination is a constitutional privilege (Calif. Const. Art. I, § 13). It would therefore be possible to accept and to enact Rule 7 as legislation in this State and at the same time to reject and refuse to enact any or all of the U.R.E. provisions or any comparable provisions concerning the privilege against self-incrimination. The effect of this course would be to leave intact all of the current rules and principles respecting the privilege insofar as such rules and principles are (as most of them are) deduced from Art. I, § 13.

This course, we say, would be possible. This is not, however, the necessary course. There is open to us the alternative of a statutory affirmation of the privilege consistent with Art. I, § 13 and in the form of an exception to the general statutory abrogation of privileges (Rule 7).

It follows from the foregoing observations that in evaluating the U.R.E. Rules respecting privilege vs. self-incrimination, we should bear in mind that in a State like California having the constitutional privilege the U.R.E. incrimination Rules are not a necessary part of the U.R.E. scheme. Conceivably, even

if we adopt the U.R.E. Rules in general it might be the part of wisdom to omit the incrimination Rules. It follows, too, that if it is deemed the part of wisdom to propose any or all of the incrimination Rules, we must be prepared to support the constitutionality of the same to the extent that what is proposed would be other than a mere legislative declaration of existing constitutional doctrine.

As we proceed with this study we shall discover that most of the U.R.E. incrimination Rules would, if enacted in this State, constitute mere legislative declarations of what our courts have held to be the meaning and intent of Art. I, § 13. In a few instances, however, we shall encounter areas in which the U.R.E. provisions would contravene Art. I, § 13 as construed by our courts. We shall also encounter a few areas in which our courts have not had occasion to rule.

We shall develop the study by considering the Rules in question in their numerical order (with minor variations). We shall note as to each Rule or subdivision thereof whether it clearly declares or departs from existing law or whether it covers an area in which existing law is unclear or undecided. In the end and after reviewing the Rules we shall attempt to formulate a recommendation respecting them.

RULE 23

Rule 23, subdivision (1) - Accused's Privilege.

Rule 23 (1) provides: "Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify."[1]

Cal. Const. Art. I, § 13 provides in part as follows: " . . . No person shall be . . . compelled, in any criminal case, to be a witness against himself."

Note that 23 (1) explicitly embraces both a privilege "not to testify" and a privilege "not to be called as a witness." The latter privilege is not directly and explicitly stated either in Art. I, § 13 or in any of our statutes. However, certain of our statutes have been construed as forbidding the prosecution to call defendant. These statutes and this construction are revealed in the following excerpt from People v. Talle:[2]

> "It is . . . perfectly clear that, unless a defendant requests the privilege of testifying, he is incompetent as a witness, and that the prosecution has no legal right to ask him to testify. In this state there is an express statute that provides that those accused of crime are competent as witnesses only at their own request and not otherwise. This statute was first passed in 1865. . . . section [one] provides: 'In the trial of or examination upon all indictments, complaints, and other proceedings before any Court, Magistrate, Grand Jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so accused or charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the Magistrate, Grand Jury, or other tribunal before which such testimony may be given.'
>
> Section two as originally enacted, and as it now reads, provides: 'Nothing herein contained shall be construed as compelling any such person to testify.'
>
> This statute . . . has never been repealed. . . .[3] This type of statute is common to the federal government and to many states. The purpose of such statutes was to abrogate, in criminal cases, the original common law rule that made the accused incompetent as a witness even on his own behalf.

> Professor Wigmore interprets statutes such as the . . . one here involved as forbidding the calling of the accused by the prosecution. He states (vol. 8, 3d ed., p. 393): 'By the express tenor, in most jurisdictions, of the statute qualifying the accused, he is declared to be a competent witness "at his own request, but not otherwise" . . . Whether this form of words was chosen with a view to its present bearing can only be surmised; but its evident effect is to forbid the calling of the accused by the prosecution.'"[4]

We conclude that present California law is in accord with Rule 23, subdivision (1).[5]

Rule 23, subdivision (3) - Requiring accused to exhibit body or engage in demonstration at the hearing.

This subdivision is as follows:

> "(3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify."

California law seems to be in accord with the principle stated in this subdivision. Thus it has long been settled that upon the trial of the accused ordering him to stand for identification is not "compelling the defendant to become a witness against himself in any respect within the meaning of the constitutional provision."[6]

By analogy, it would seem no violation of defendant's privilege to order him to "submit his body to examination" in the sense of 23 (3) (e.g., to roll up his sleeve so that judge and jury could see tatoo marks or scars) or "to do [an] act" in the sense of 23 (3) (e.g., walk across the courtroom so that judge and jury could see that he limps). Although no direct local holdings have been found other than the standing-for-identification cases, it seems reasonable to assume that considering the view California has

taken of the scope of the privilege in out-of-court proceedings (see pp. 22 - 38 infra) California would agree with the limitations upon in-court privilege stated in subdivision (3). Some cases - though not directly involving the scope of the in-court privilege - quote the following from Wigmore with apparent approval:

> "Looking back at the history of the privilege . . . and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. . . .
>
> In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The one idea is as essential as the other."7. . .
>
> "If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.
>
> "The limit of the privilege is a plain one. From the general principle . . . it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, i.e. upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action--as when he is required to take off his shoes or roll up his sleeve--is immaterial,--unless all bodily action were synonymous with testimonial utterance; for, as already observed . . ., not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself . . . . Unless some attempt is made to secure

> a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. . . .
>
> Both principle and practical good sense forbid any larger interpretation of the privilege in this application."8

Rule 23, subdivision (4) - Comment on Accused's Exercise of Privilege.

Rule 39 provides in part as follows: "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . ., either in the action or with respect to particular matters, . . . the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom . . . ." Generally, then, under Rule 39 there is to be no comment and there is to be no inference at the trial based upon the exercise of a privilege during such trial. However, paragraph (4) of Rule 23 gives us the following exception to the general rule of Rule 39:

> "If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom."

Calif. Const. Art. I, § 13 provides in part as follows:

> ". . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Now there may be several important, substantive differences between the comment-inference scheme set up by Rules 39 and 23 (4)

and that provided by Art. I, § 13 and our decisions thereunder. Let us explore these possible differences by considering the hypothetical cases, which follow:

> Case One: Criminal action. Defendant does not testify. In charging jury judge comments on defendant's failure to testify and instructs jury they may consider same.

Clearly Art. I, § 13 permits comment by the court. On the other hand it may be that the U.R.E. - either designedly or fortuitously - prohibit such comment. As we noted above Rule 39 provides in part that: "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . . the judge . . . may not comment thereon . . ." [italics added] Rule 39 thus sets up a rule of no-comment by judge save as such comment may be permitted by 23 (4) and turning to 23 (4) we find that it refers only to comment by counsel. Whether it was the intention of the U.R.E. draftsmen thus to prohibit court-comment may be doubtful. Their commentary on 23 (4) - which follows - seems to us to be somewhat equivocal:

> "The right of comment upon the accused's failure to testify is here limited to comment in argument of counsel . . . while these rules do not cover comment by the judge, the right of comment by counsel seems to be so closely related to the considerations of admissibility as to require notice here."

The doubt whether the U.R.E. provisions prohibit court-comment creates in turn doubt as to the constitutionality of such provisions if adopted as legislation in this State, for, as pointed out above, Art. I, § 13 clearly permits such comment. Note that our

constitutional provision is not one simply and solely empowering the legislature to provide for comment (If it were the legislature could provide for lesser comment than the constitution authorizes but, of course, not for more). The Constitution itself sets forth the rule as a self-executing provision not requiring implementing legislation. Since the constitutional provision is of this character, legislation more restrictive of comment than that specifically stated to be valid in the constitution would be void to the extent that it is more restrictive.

> Case Two: Bunco charge against defendant. Alleged victim Evans testifies in detail to transactions with defendant. Defendant testifies he did not know Evans and never saw Evans until after the present charge against defendant. Defendant does not otherwise deny the various transactions to which Evans testified. In summing up to jury D.A. comments upon defendant's failure to deny Evans' testimony point by point.

The case stated is People v. Mayen,[9] in which the D.A.'s comment was approved on the following grounds:

> "All [defendant] testified to was that he did not know Evans and that he never saw him until long after the time of the alleged offense. This was equivalent to denying that he had any of the transactions with Evans testified to by witnesses for the prosecution. To test his denial of acquaintance with Evans it would be proper cross-examination to question him as to every alleged transaction claimed to have occurred between him and Evans. . . . We see no reason why on such testimony, within the scope that may be covered by cross-examination, comment should not be made as to the unsatisfactory nature of the defendant's testimony and the degree to which it fails to satisfactorily meet the testimony for the prosecution for which it was offered as a denial.

'If the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses.' . . ."

How would this case be decided under the U.R.E.? Note that the D.A.'s comment could not be justified under 23 (4) for that in terms is applicable only "if an accused in a criminal action does not testify." Nevertheless the propriety of the comment could be deduced by holding that Rule 39 (the general no-comment Rule) is inapplicable. This Rule in terms forbids comment only "if a privilege is exercised". Here it could be plausibly held that defendant's election to testify by way of general rather than specific denial was not the "exercise" of a "privilege" (self-incrimination or any other) in the sense of Rule 39 and hence the general rule of no-comment is inapplicable.

What, however, is the situation if defendant's refusal to testify to a matter is expressly put on incrimination grounds and the court sustains the claim and the D.A. comments? This is our Case Three which follows:

Case Three: Robbery. Defendant testifies that on a date following the alleged robbery officers visited defendant's San Francisco hotel; that defendant then left San Francisco and returned at a much later date. On cross-examination defendant is asked as to places he visited while absent from San Francisco. Defendant claims incrimination privilege. It

appearing that defendant was on parole and that departure from the State would make him a parole violator, defendant's claim is sustained.

Query: would comment on this exercise of privilege be proper today? The answer to the query is, we believe, "Yes". Our authority is People v. Richardson,[10] There the precise question was whether the court, though not requested, erred in failing to instruct the jury not to draw any unfavorable inference against defendant from his claim of privilege. In holding as follows that the charge should not have been given the court, by dictum, indicates that inference (and presumably comment) would have been proper under the circumstances:

> "[T]here was no error here in failing to give an instruction that no unfavorable inference to defendant could be drawn from his claim of the privilege against self-incrimination when testifying as a witness in his own behalf. In People v. Adamson, 27 Cal. 2d 478 [165 P.2d 3], an accused failed to take the stand and explain evidence introduced against him. . . . With respect to the weight which the jury could give to the fact that the defendant failed to take the stand, . . . the court said: 'The failure of the accused to testify becomes significant because of the presence of evidence that he might "explain or to deny by his testimony" . . . , for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it.'. . .
>
> [I]f it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.' These inferences which the jury may draw with respect to evidence when the accused fails to

take the stand are equally probative and no more subject to any constitutional prohibition when the question involves the defendant's claim of privilege as a witness.

It should be noted, however, that the court is not deciding whether or not the trial court properly allowed the claim of privilege in view of the defendant's testimony on direct examination which in some instances might be considered a waiver of his claim of privilege."

How would our query in this case be answered under the U.R.E. system? Again (as in Case Two) comment could not be supported by Rule 23 (4). Could it be supported (as in Case Two) on the ground that Rule 39 is inapplicable? Possibly so by construing Rule 39 as follows: (a) Rule 39 in terms applies only "if a privilege is exercised". (b) This means validly exercised. (c) Here there was no valid exercise since under Rule 25 (g) defendant had waived his privilege.

Even under this interpretation of Rule 39, deducing the conclusion that comment in Case Three is permissible under the U.R.E. is a roundabout and doubtful process, whereas under Art. I, § 13 the approach is direct and clearly points to the conclusion that comment is proper.

It appears from the foregoing discussion that to the extent that Rule 23 (4) may differ from Art. I, § 13 the difference may be that the former is more restrictive than the latter in the sense that 23 (4) (taken in connection with Rule 39) prohibits what Art. I, § 13 permits. If 23 (4) is thus more restrictive it would be unconstitutional if adopted in this State in the form of legislation.

Art. I, § 13 seems to be a satisfactory solution of the problem in question. Rule 23 (4) would therefore seem to be of

no utility in this State and of doubtful constitutionality. We recommend its disapproval.

R U L E 2 5

Rule 25 consists of a general rule and seven exceptions to that Rule. In the discussion which follows we first break down the general rule into several of its parts, discussing each part. Thereafter we consider the seven exceptions to the general rule.

Rule 25 - General rule - witnesses in judicial proceedings.

Rule 25 provides, in part, as follows: " . . . every natural person has a privilege, which he may claim, to refuse to disclose in an action . . . any matter that will incriminate him . . ." In the appended footnote we recommend striking "in an action" and substituting therefor "in any judicial proceeding".[11] In the discussion which follows we shall assume the amendment to have been made.

This differs from Rule 23 (1) in two respects as follows: Firstly, 23 (1) deals only with the privilege of "an accused" in the "criminal action" in which he is such accused. That part of 25 immediately under consideration deals with the privilege of "every natural person" in any judicial proceeding." [Italics added] Secondly, 23 (1) gives the accused the privilege (a) "not to be called as a witness," and (b) "not to testify". On the other hand, 25 omits altogether the privilege not to be called and extends the privilege not to testify only to the privilege "to refuse to disclose matter that will incriminate". Thus under 23 (1) the accused should not be called by the prosecution and if

(in violation of this privilege) he is so called, he still has the privilege to refuse to testify in any respect whatsoever. On the other hand, the natural persons (i.e. witnesses in general) referred to in Rule 25 may under that Rule properly be called in any proceeding and under that Rule they may be required to testify to all matters save only those matters that will incriminate them. These basic distinctions between the privilege of the accused and the privilege of other natural persons are, of course, recognized in California practice. (See, for example, In re Lemon, 15 C.A.2d 82 (1936) recognizing the distinction between "the status of a witness in any proceeding, civil or criminal" and "the status of a party defendant in a criminal proceeding brought against such defendant" and expounding the differences in the privileges accompanying each status.)

Furthermore in California both the privilege of the accused and that of the ordinary witness are derived from Art. I, § 13. Literally and strictly construed this section would extend the privilege only to the defendant in a criminal case. The construction, however, has been otherwise as is revealed in the following excerpt from the leading case of In re Tahbel:[12]

> ". . . The constitution of this state has limited the extent to which the legislature may exercise its power, and has given the individual protection against its exercise by providing, in article I, section 13, that 'no person shall be compelled in a criminal case to be a witness against himself.'. . .
>
> The words 'criminal case,' as used in section 13 of article 1 of the constitution, are broader than 'criminal prosecution.' To bring a person within the immunity of this provision, it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him,

> or that a criminal proceeding should have been commenced and be actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law, and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured him against any use in a criminal prosecution of the evidence he may give, . . ."[13]

We conclude that that portion of the general rule of Rule 25 examined in this section is in accord with current California law.

Rule 25 - General rule - incrimination before governmental agencies.

Rule 25 provides in part: ". . . every natural person has a privilege, which he may claim, to refuse to disclose . . . to . . . any governmental agency or division thereof any matter that will incriminate him . . ."

This states the view prevailing generally[14] and in California. Thus, for example, a person possesses the privilege to refuse to incriminate himself in a hearing held by the Senate Interim Committee on Social Welfare[15] or in a hearing before the Contractors' State License Board[16] or in a disbarment proceeding.[17]

Rule 25 - General rule - incrimination before public officials.

Rule 25 provides in part as follows: " . . . every natural person has a privilege, which he may claim, to refuse to disclose . . . to a public official of this state . . . any matter that will incriminate him . . ." Rule 25 is based on A.L.I. Code Rule 203, one of the official illustrations of the latter being as follows:

"While investigating a homicide of A who was found dead in a small room, the police ask W whether he was present in the room at the time of the killing. W is entitled to refuse to answer on the ground of self-incrimination." [Italics added.]

It seems clear that California agrees with this view of the privilege. As is said in the recent case of People v. Clemmans:[18] "In California it is recognized that the privilege against self-incrimination goes to and is with the citizen in the police station."

What, however, are some of the consequences of this U.R.E.-California view of the privilege? For instance what is the relation between the proposition of Rule 25 that "every natural person has a privilege . . . to refuse to disclose . . . to a public official of this state . . . any matter that will incriminate him" and the proposition of Rule 63 (8) (b) making admissible as "against a party, a statement . . . of which the party . . . has by words or other conduct manifested . . . his belief in its truth"? Let us suppose police confront a suspect with an alleged confederate; the confederate makes a full statement acknowledging his guilt and implicating the suspect. Asked by the police what he has to say, the suspect replies "I stand on my privilege against self-incrimination". Logically (it seems to us) this is conduct indicative of belief in the truth of the accusation and considering only 63 (8) (b) the evidence would be admissible. However, under Rule 25 our suspect possessed and claimed privilege and under Rule 39 the claim may not be made the basis of an

"adverse inference". It seems, therefore, that Rules 25 and 39 would here override 63 (8) (b) and the evidence would be inadmissible.

Today we have a comparable situation in California. Our present counterpart of Rule 25 is our police station view of the privilege. Our present counterpart of 63 (8) (b) is that portion of C.C.P. § 1870 (subdivision three) which makes admissible against a party an "act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." Upon the authority of People v. Simmons[19] it seems clear (to us) that the case stated would be resolved in the same way as under the U.R.E. In People v. Simmons defendant's response to police accusations was: "I have told you all I am going to tell you. I have nothing more to say." Held: That in such cases the trial judge should consider inter alia "whether [defendant's] conduct . . . indicated a desire to avail himself of the rule against self-incrimination"[20] and in the instant case "it is obvious that defendant was attempting to exercise his constitutional privilege against self-incrimination" and, therefore, "it was an abuse of discretion on the part of the trial court to admit the evidence."[21]

What, however, would be the result if our suspect had said nothing whatsoever? Should this be regarded as a claim of privilege within the rule of People v. Simmons? Possibly this is an open question today.[22] If so, it would it seems likewise be an open question under U.R.E. Rules 63 (8) (b), 25 and 39. In other words since these U.R.E. rules do no more than state the general principles presently prevailing (police station privilege,

no comment on exercise thereof, adoptive admissions) enactment of these Rules would not solve questions presently open under presently prevailing principles.[23]

Returning to the main point of this section, we conclude that the principle stated in that part of the general rule of Rule 25 examined in this section is in accord with prevalent California principle.

Rule 25 - General rule - corporations.

Rule 7, subdivision (d) provides as follows:

> "Except as otherwise provided in these Rules . . . (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing . . ."

The expression "person" is here used, it seems, in the broad sense including both natural and artificial persons. Hence the meaning of 7 (d) is that no natural person and no artificial person has any privilege of the character stated unless some other rule gives such person such privilege. Now the introductory part of Rule 25 prescribes a privilege as to incriminating matter but vests such privilege only in a "natural person". Since therefore 25 does not extend the privilege thus stated to corporations and since no other rule gives corporations any privilege against self-incrimination, it follows that under Rule 7 (d) corporations have no privilege to refuse to disclose "any matter" even though the matter be incriminating and have no privilege to refuse to produce "any object or writing" even though the same be incriminating.

This, however, merely carries forward the traditional (and California) view that corporations possess no privilege against self-incrimination.[24]

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Having completed discussion of that portion of Rule 25 which we have called the general rule, we now take up the seven exceptions to that Rule.

Rule 25 - exceptions - subdivision (a).

This exception is as follows:

> "(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; . . ."

Rule 25, general rule, is that "every natural person" is possessed of the privilege there stated "which he may claim". Unless we had exception (a) above to this general rule it might be thought that every such person could decide for himself in every instance whether or not the privilege applied. This exception is desirable therefore to make clear the perpetuation of the present practice of judicial determination of the applicability of the privilege. Where procedures are available for such determination[25] the judge decides the claim and is not, of course, bound by the claimant's protestations.[26]

Observe that exception (a) in terms applies only when the privilege is claimed "in an action". This, it seems, is too narrow. Today it is possible to have a witness claiming privilege and the judge denying such claim before any action is commenced - e.g., in a grand jury investigation.[27] We, of course, should wish to continue this practice. To do so, however, we should select some expression of more comprehensive import than "in an action". We suggest as a substitute "in a judicial proceeding" and advise amending exception (a) accordingly.[28]

Rule 25 - exceptions - subdivision (c). (N.B. we take up (b) and (c) in inverse order)

Rule 25 provides in part as follows: ". . . every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule . . . (c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis . . ." [Italics added]

The language above italicized seems intended to convey the thought that whereas no person has any privilege under Rule 25 to refuse to furnish or permit the taking of the samples, such person may have a privilege of refusal on some other basis. Thus the Commissioners speak as follows in their comment on 25 (c):

> " . . . Resistance to the forcible extraction of body fluids is not justified on the ground of privilege against self-incrimination, but may be warranted on the ground of violation of the right of personal immunity, if proper safeguards, such as supervision by a physician, are not provided. The rule does not attempt to solve that constitutional question, but limits its application strictly to the privilege against self-incrimination. A sample of spittle or a sample of stomach contents may be equally incriminating and they are on the same ground under this rule. But the taking of the sample from the stomach by stomach pump may be viewed very differently from the other when it comes to the question of safeguards to be taken to assure non-violation of the right of security of one's person."

Recent California cases approach the problem of forcible seizure of body substances in the same way, accepting the view that the privilege against self-incrimination is inapplicable. For example, in People v. Haeussler,[29] (a case of blood extraction

from defendant while defendant was unconscious) the court spoke in part as follows:

> "[T]he privilege is guaranteed by the Constitution of this state, which declares that '[n]o person shall . . . be compelled, in any criminal case, to be a witness against himself.' (Cal. Const., art. 1, § 13.) . . . 'Wigmore, in an exhaustive and scholarly discussion of the history and policy behind the provision of the federal Constitution, which is substantially the same as the California mandate, concludes that the object of the protection "is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. . . .
>
> '"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion."' . . .
>
> Evidence is not obtained by testimonial compulsion where it consists of a test of blood taken from an accused. It is not a communication from the accused but real evidence of ultimate fact in issue--the defendant's physical condition. . . .
>
> Similarly, real evidence obtained from a defendant's stomach by use of an emetic is not violative of the privilege against self-incrimination. Despite contrary suggestions, the majority of the court in the Rochin case did not rest its reversal of the conviction upon that ground. (See the concurring opinions of Justices Black and Douglas, 342 U.S. 165, 174, 177.) . . ."

Consider also the following from People v. Duroncelay:[30]

> "We are of the opinion that the only reasonable conclusion permitted by the testimony of Riggs and the nurse who assisted him in taking the blood sample is that, when asked for his permission, defendant made no verbal response to indicate whether he consented or refused. Because of defendant's condition, it would have been extremely difficult for him to give an answer, but, when the nurse approached him with the needle, he reacted

by withdrawing his arm. Under the circumstances, a finding that defendant consented is unwarranted, and we must therefore determine whether the results of the blood test were admissible in the absence of defendant's consent to the taking of the sample.

It is settled by our decision in People v. Haeussler, 41 Cal. 2d 252, 257, 260 P. 2d 8, that the admission of the evidence did not violate defendant's privilege against self-incrimination because the privilege relates only to testimonial compulsion and not to real evidence. We also held in the Haeussler case that the taking of the defendant's blood for an alcohol test in a medically approved manner did not constitute brutality or shock the conscience and that, therefore, the defendant had not been denied due process of law under the rule applied in Rochin v. People of California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183. . . .

The question remains as to whether the taking of defendant's blood constituted an unreasonable search and seizure in violation of his constitutional rights. . . .

It is obvious from the evidence that, before the blood sample was taken at the request of the highway patrolman, there was reasonable cause to believe that defendant had committed the felony of which he was convicted, and he could have been lawfully arrested at that time. Pen. Code, § 836. . . . Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest. . . . Under the circumstances, a search, for example, of defendant's pockets or his automobile to obtain additional evidence of the offense would have been proper, regardless of whether he consented thereto. The question to be determined here is whether the taking of a sample of his blood for an alcohol test was a matter of such a different character that it must be regarded as an unreasonable search and seizure. . . .

We conclude that there was no violation of defendant's rights and that the results of the alcohol test were properly admitted in evidence."

This approach seems to be precisely the approach intended by Rule 25, subdivision (c), namely, the privilege against self-incrimination is inapplicable and in and of itself is therefore not basis for excluding the evidence. However, Rochin doctrines or Cahan doctrines or both may make the evidence inadmissible. Therefore in screening the evidence we lay the privilege aside and proceed to decide the problem on the basis of the other doctrines.

Our conclusion is that subdivision (c) of Rule 25 is in accord with California law.[31]

Rule 25 - exceptions - subdivision (b).

Rule 25, subdivision (b) is as follows:

> ". . . every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule, . . . (b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition . . ."

If (as provided in subdivision (c) and as held in People v. Haeussler and People v. Duroncelay) the privilege vs. self-incrimination does not embrace the privilege to refuse to permit the taking of samples of body fluids or substances for analysis, it would seem to follow a fortiori that (as provided in subdivision (b)) the privilege does not embrace the privilege to refuse to submit to examination for the purpose of discovering or recording corporal features and other identifying characteristics or physical condition (see hereinafter as to mental condition). In

other words, the approval of the principle of (c) in Haeussler and Duroncelay logically suggests California's approval of the principle of (b) (except possibly as to mental condition). Thus we anticipate that California would hold today that insofar as privilege vs. self-incrimination is concerned a person has no privilege to refuse to give an examplar of his handwriting, as in People v. Smith[32] or to give an impression of his fingerprint, as in People v. Jones;[33] or to submit his arm to examination for hypodermic needle scars as in People v. Salas,[34] or to submit his hand for examination under an ultraviolet ray machine as in People v. Irvine;[35] or to submit his private parts for examination for venereal disease as in People v. Guiterez,[36] or to submit his private parts for examination for the presence of fecal matter thereon as in People v. Morgan,[37] We hasten to concede that in all of the cases just cited there was consent by the suspect. None of these cases, therefore, raises the problem of 25 (c); namely, whether there is a privilege vs. self-incrimination to refuse to consent. However, we maintain that under the logic of Haeussler and Durancelay, there is no such privilege. Our position is (we believe) supported by the following from People v. Robarge;[38]

> "Defendant further contends that the action of the police in placing dark glasses on him at the time he was identified . . . at the police station was in violation of his constitutional rights. . . . Defendant relies solely on Rochin v. California (1952), 342 U.S. 165 [72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R.2d 1396], in support of his contention that he was deprived of his constitutional rights. That case was extensively reviewed in People v. Haeussler, . . . where this court

[illegible] examination and that that something more is interrogation.

stated . . . 'In brief, the Rochin case holds that brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence.' In the present case there is no evidence whatsoever of brutality or shocking conduct. In fact, there is nothing to show that force was used when the glasses were placed upon defendant, and, for all that appears, he may have consented to what was done."39

Here, to be sure, the court does suggest as a possible rationale the theory of consent but that is an alternate (and apparently secondary) theory to the principal theory which seems to be: (1) No privilege vs. self-incrimination is applicable, but (of course) (2) Rochin principles are applicable.

In the foregoing discussion of 25 (b) we have purposely omitted the following italicized portion:

"(b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording . . . his . . . mental condition." [Italics added]

What is the meaning here of "mental condition" and what is the meaning of "examination"? The expression "mental condition" is, of course, a very broad term. In one sense of the term it includes consciousness of guilt. Manifestly, however, the Commissioners do not use the term in this sense, for if "mental condition" includes consciousness of guilt subdivision (b) to Rule 25 wholly negates and nullifies the Rule itself. Probably what the Commissioners intend by the term is mental condition in the sense of sanity or insanity. At any rate we shall discuss their proposal on the basis of that assumption. We assume, too, that they mean by "examination" something more than just observational examination and that that something more is interrogation.

Unless "examination" includes interrogation the Commissioners' proposal is simply a declaration that the privilege does not insure privacy and freedom from observation - a proposition so obvious that the Commissioners would scarcely be suggesting it as a legislative enactment. We think, then, the proposal is this: The privilege vs. self-incrimination does not embrace a privilege to refuse to answer questions relevant to the examinee's sanity or insanity, except, of course, that under Rule 23 (1) the accused has the privilege not to be called as a witness and not to testify upon his trial as such accused.

California law seems to be in accord with the proposition just stated. Let us take note first of the exception stated immediately above (that the accused does possess privilege at his trial not to be called and not to testify in re his sanity).

Penal Code § 1026 provides in part as follows:

> "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty . . . then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law . . . ."

Clearly defendant possesses his normal privilege against self-incrimination upon the trial of the sanity issue. As is

said in People v. Lamey:[40]

> "It is declared in the Constitution of California, article I, section 13, that no person shall be compelled, in any criminal case, to be a witness against himself. In this case, under the plea of not guilty, the effect of the verdict in each instance was that the defendant had committed the acts which, if committed by a sane person, would make him guilty of the alleged crimes. For the purposes of that verdict he was presumed to be sane, but under his plea of not guilty by reason of insanity, the question of his status and responsibility as a criminal remained open and undetermined. That he was a criminal, and subject to punishment, was not yet established. Under the second plea, that issue was to be tried separately, but it was all in the same case. The second verdict, equally with the first, was necessary before a judgment of conviction could be rendered. Under the former practice, when the defendant relied upon his right to introduce evidence of insanity as part of his defense, it was well understood that the state had no right to compel the defendant to give testimony as a witness, even upon that issue. We do not perceive that his rights in this respect are in any way different under the new practice. The change is only a change of procedure; it does not affect a substantial right, and it does not take away any constitutional right or immunity. In People v. Troche, 206 Cal. 35 [273 Pac. 767, 772], the defendant was tried on his plea of not guilty, and then under his plea of not guilty by reason of insanity, as provided by the present law. (Pen. Code, secs. 1016, 1020, 1026.) The jury found against him on both pleas. On appeal from the judgment, defendant contended that the provisions of the state Constitution guaranteeing a public and speedy trial to one accused of a crime 'means one speedy and public trial and no more.' To this the Supreme Court responded: 'The trial had by the defendant, under the present law, amounted to one trial, and no more.' The very reasoning which sustains the present procedure, at the same time preserves to the defendant all of his rights of defense. Among these rights, saved to the defendant under the Constitution, is the right of immunity from being compelled, in any criminal case, to be a witness against himself."

The same result, it seems, would follow under Rule 23 (1) to which Rule 25 (b) is, of course, subject.

What, then, is the situation respecting pre-trial or out-of-court sanity examinations? The earliest case seems to be People v. Bundy,[41] The facts and holding are indicated by the following excerpt:

> "The ground mainly urged for reversal is that the trial court improperly allowed two doctors called as witnesses by the district attorney to give their opinions on the question of defendant's sanity . . . . At the time of the second examination by Dr. Reynolds and the examination by Dr. Orbison defendant had counsel, and they were not notified that any examination was to be had and had no knowledge thereof. Defendant was in custody, confined in the county jail, where the examinations were had. He was informed by Dr. Orbison prior to his examination that he, Orbison, was employed by the district attorney to make an examination . . . . Defendant made no objection whatever to being examined at any time, and conversed very freely with each of the doctors. The claim of counsel is that by allowing the doctors to give their opinions based upon their examinations, defendant was compelled to be a witness against himself, in violation of section 13, article I of the constitution, which provides that 'No person shall . . . be compelled in any criminal case to be a witness against himself . . .'. . . . It may freely be admitted that in view of this provision, one accused of crime may not be compelled to divulge to another, to be used by that other as basis for his testimony on the trial, facts which he has a right to hold secret. Whether one accused of crime can properly be compelled to submit to an examination by medical experts for the purpose of determining whether or not he is of sound mind, is a question that it is not necessary to discuss here. There is nothing in the constitutional provision relied on that prohibits such a person from furnishing evidence against himself if he chooses to do so. He shall not be compelled to do so, but whatever fact he may disclose without force or compulsion of any kind, or whatever testimony he

> may voluntarily give is not within the inhibition. . . . No decision brought to our attention holds to the contrary. And with special reference to examinations for the purpose of ascertaining whether an accused is of unsound mind, it is said in 4 Wigmore on Evidence, sec. 2265, that 'the use of the accused's utterances for forming a witness' opinion as to sanity is a dubitable case only when compulsion has been resorted to.' Perhaps utterances induced by fraud might likewise fall within the dubitable cases. In the case at bar an appellate court would certainly not be warranted by the record in holding that any force or compulsion was used, or that the accused did not voluntarily submit to the examinations. There was nothing in the nature of fraud on the part of the medical men, the authorities or anybody else. The fact that defendant's counsel were not notified of the proposed examinations and had no knowledge thereof in no way affects the question of the admissibility of the evidence complained of. There is nothing in the law that makes notice or knowledge to counsel essential to a voluntary disclosure of facts by an accused person . . . ."

Here our question (i.e. compulsory examination) is not reached for decision but the court seemingly accepts Wigmore's suggestion that the question is "dubitable".

In 1929 the Legislature added § 1027 to the Penal Code which section provides in part as follows:

> "When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals, and may select and appoint three alienists, at least one of whom must be selected from such staffs, to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question . . . ."

The next case to be noted - People v. Strong[42] was decided under this section. The facts and holding are indicated by the following excerpt:

> "Defendant was accused of robbery . . . and, standing mute, a plea of 'not guilty' was ordered entered . . . On December 9th he appeared with the public defender as counsel and entered an additional plea of 'not guilty by reason of insanity' . . . The trial of the issues raised by the pleas 'not guilty' resulted in a verdict of guilty . . . whereupon the same jury was sworn to try the issues raised by the last pleas entered, which resulted in verdicts finding the defendant sane at the time of the commission of the offenses charged . . .
>
> It appears that the court, under Section 1027 of the Penal Code, appointed Dr. Benjamin Blank and Dr. Martin Carter to examine defendant and that Dr. Blank was called as a witness by the district attorney and testified that in his opinion the defendant was sane . . . . It is the contention of appellant . . . that said section 1027 . . . in effect compels a defendant to give evidence against himself . . . in violation of . . . section 13, article I, of the California Constitution . . .
>
> We fail to see any merit in the contention that under section 1027 a defendant is compelled to be a witness against himself. Nothing in the section compels him to submit to an examination. If he does so the action is purely voluntary. To assert his constitutional rights all that is required is for him to stand mute, and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion."

Here again (as in People v. Bundy) we fail to reach our question of compulsory examination because P.C. § 1027 is construed as not requiring such compulsory examination. Here, however, we do have a suggestion in terms of constitutional right of the right to stand mute and refuse to permit the examination.

Our next and final case is People v. French.[43] The facts and holding are indicated by the following excerpt:

> "Another of appellant's contentions is that the court committed reversible error by the admission of the proceeding had before the judge which arose out of the refusal of defendant's counsel, participated in by the defendant himself, to permit the alienists appointed by the court to examine the defendant under the authority of section 1027, Penal Code, . . .
>
> The three alienists selected by the court attempted to comply with the provisions of said section before the case came to trial but were met with refusal on the part of the defendant on the advice of counsel to submit to any examination or answer any questions propounded by said alienists or to cooperate with said alienists in any respect whatsoever on the grounds that the statute compelled the defendant to be a witness against himself and was in violation of article I, section 13, of the state Constitution . . . .
>
> All efforts having failed, the matter was brought before the trial judge by the district attorney with the defendant's attorneys, the defendant and the district attorney being present. After discussing the matter at some length with the court, counsel for the defense, with the approval of the defendant, definitely stated that they would ignore any order made by the court requiring the defendant to submit himself to a physical or mental test bearing upon his plea of not guilty by reason of insanity . . . .
>
> The introduction in evidence of the transcript of the proceedings had upon the complaints of the alienists that they had been denied by defendant's counsel the privilege of examining into his mental condition was opposed by his counsel on all pertinent grounds and after its admission a motion to strike all reference to the proceedings was denied.
>
> Appellant cites People v. Strong, 114 Cal. App. 522 [300 Pac. 84], to the point that section 1027, Penal Code, does not compel the defendant to submit himself to an examination and if he does so his action is purely voluntary . . . .

> Whether a statute requiring that a person who enters a plea of confession and avoidance, such as insanity, shall submit to the examination provided by section 1027, Penal Code, under penalty that if he refuses to do so he places himself within the rule of the 1934 amendment of article I, section 13, of the state Constitution (which provides that if the defendant in a criminal case does not testify or fails to deny any evidence or facts in the case against him, that such facts may be commented upon by the court and counsel and considered by the court or jury), would, under the amendment of 1934, be held to be in conflict with another clause of the same section which provides that no person on trial in a criminal case shall be required to be a witness against himself, need not here be decided. This much is true. The defendant did not comply with section 1027, Penal Code, and the only question before us for decision is whether the introduction of said proceedings constituted reversible error. It cannot be questioned that anything done or said in the proceedings if relevant to his mental state would be admissible. The proceedings disclose that he was conscious that his mental responsibility was under investigation and that he was acting in concert with his counsel who were directing his defense and therefore constituted evidence as to his mental condition. . . . 44
>
> The defendant's refusal to give any history or information as to his alleged mental ailment . . . and his refusal and conduct and all that he said was evidence in the case . . . those things that disclosed the defendant's conduct, and indicated that he may have opposed the examination because of his fear of the result, were clearly admissible, as indicating defendant's state of mind."

Here the end result is clear. Court appoints alienist under P.C. 1027. Defendant clams up. Upon trial of issue of sanity the fact that defendant clammed up may be shown as prosecution evidence relative to his mental condition. The result is clear, but what is the rationale? It seems to us that the rationale is that defendant's refusal was <u>not</u> justified as an exercise of his

privilege vs. self-incrimination. It is clear that if a pre-trial privilege does exist defendant's claim of such privilege cannot be proved against defendant at the trial.[45] Hence the holding in People v. French that defendant's pre-trial claim of alleged privilege may be proved is a holding which logically negates the existence of the alleged privilege. The only alternative rationale is, it seems: the privilege exists but (for reasons unknown or unstated) in this instance the pre-trial claim of privilege may be shown. We think the first is the more plausible rationale and we think therefore that the court did (at least indirectly) decide that a statute of the kind posited in the opinion would be valid.

We conclude that in allowing a person's refusal to submit to mental examination to be proved against that person the court in People v. French has in effect affirmed the principle of 25 (b) that "no person has the privilege to refuse to submit to examination for the purpose of discovering or recording . . . his . . . mental condition." On this basis it is our opinion that the portion of 25 (b) just quoted would in this State be valid legislation not in conflict with Art. I, § 13.

The trend of decisions throughout the country seems to lead in the direction of the view of 25 (b).

Summarizing the situation in general the Commissioners state that "[i]n general practice and by the majority of jurisdictions the practice of taking . . . mental examinations is sanctioned."[46] Inbau asserts: "By way of summary it may be stated that the decisions involving insanity pleas have been quite uniform in

admitting in evidence the results of psychiatric examinations allegedly made under compulsion."[47]

We do not deny that what thus seems to be the majority and California view presents some aspects which may disquiet strong advocates of privilege. Let us now note some of the objections that may be advanced and some possible asnwers to these objections.

A man is in jail awaiting trial for murder. His defense is not guilty by reason of insanity. Actually the man committed the murder and actually he is feigning insanity. A court-appointed psychiatrist goes to jail to examine him. Since the man possesses the privilege to refuse to make statements which would tend to show he committed the murder, how can it be that he possesses no privilege to refuse to make statements which would tend to expose his fraudulent claim of insanity?

A possible answer is that a sanity test, though verbal, should be analogized to non-verbal conduct not within the privilege. For example, the subject's participation in exercises to test his memory, reasoning power, etc. may be equated with requiring him to grow a beard and wear dark glasses, put on overalls and, so outfitted, to display himself to an identification witness. This seems to be McCormick's view. He argues that a sanity examination does not infringe the privilege because the "questions are not designed to elicit admissions of guilt as evidence of their truth, but rather to test the coherence and rationality of the subject. They are not used testimonially but as symptoms of abnormality or the reverse."[48] In the following passage Inbau seems to suggest the same rationale:

> "It would . . . [be] desirable for the courts . . . to . . . [hold] that although the privilege protects the accused from supplying any testimonial link in the chain of evidence to establish the conclusion that he committed the crime in question, it has no application to an inquiry as to his mental responsibility at the time the act was committed; for even though an accused's ultimate guilt depends upon his mental condition at the time of the commission of the act, a psychiatric examination has no bearing upon the question of whether he actually committed it. The reasonableness of this analysis is obvious when we realize that a psychiatric examination does not necessitate an inquiry into the issue of the accused person's guilt or innocence of the offense itself. An expert in mental diseases can, if necessary, make a fairly satisfactory psychiatric examination by observing and interviewing an accused without at any time even so much as mentioning the crime in question. . . ."[49]

Another objection which may be leveled against the majority view is along practical lines. Accepting the majority view that there is no privilege, where is the gain in discovering the mental condition of a recalcitrant examinee? The success of a question-and-answer examination must depend in large part upon answers. What if the examinee (even though he has no privilege to do so) simply refuses to answer any and all questions? Is it not true that if the examinee is willing to cooperate he will do so irrespective of whether he has a theoretical privilege and, on the other hand, if he is unwilling to cooperate no denial of privilege will convert his unwillingness into willingness? In other words is not privilege vel non immaterial to the objective of achieving a successful mental examination? In answer to which we say that in many cases (notably cases of sophisticated, professional law breakers) this is probably so. However, if there is no privilege

the examinee may properly be told this and the result in some cases may be to break his silence. Furthermore, if there is no privilege a court order to submit to examination (with appropriate sanctions for contumacy) would seem to be proper and in some cases may be effective.[50]

Our over-all conclusion on 25 (b) is that the subdivision in its entirety is in accord with current California law and we recommend approval of the entire subdivision.

Rule 25 - exceptions - subdivision (d).

This exception is as follows:

> "(d) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; . . ."

Let us suppose that D is on trial charged with larceny of a watch, the property of one A. The prosecution moves for an order requiring D to produce the watch for use as evidence against him. In support of the motion the prosecution has A testify that A owns the watch and that D stole it from A. On the basis of A's testimony the judge finds that (a) A has a right to the possession of the watch superior to D's right, and (b) the watch is now under D's control. The judge therefore makes an order directing D to produce the watch. Under 25 (d) D has no privilege to refuse to obey the order even though the watch constitutes matter incriminating him.[51]

The idea underlying 25 (d) is that, whereas D possesses privilege to refuse to obey an order requiring him to produce his property, he possesses no such privilege respecting property of another in his custody. This idea is fortified by the following reasoning: A could replevy the watch from D and then turn it over to the prosecution. Since this procedure would not violate D's incrimination privilege,[52] short-cutting this procedure and (as it were) enabling the prosecution to act in A's behalf in asserting his property right is no violation of privilege.

We have found no local authority germane to this question. Personally we are persuaded by the logic supporting 25 (d) and we recommend approval of 25 (d).

Rule 25 - exceptions - subdivision (e).

This exception is as follows:

> "(e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; . . ."

Art. I, § 13 does not give certain persons the privilege to refuse to disclose incriminating matter under certain circumstances. The classic illustration is the culpable motorist involved in an accident who, though culpable, must identify himself, give his address and the registration number of his vehicle. It is well-settled that legislation requiring such disclosures (and making refusal to disclose itself a crime) is not an infringement of Art. I, § 13. The leading case in this State is People v. Diller.[53]

Other similar situations are suggested in the opinion in People v. Diller in quoting the following with approval from a Missouri case:

> "We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods."[54]

Such regulations are permissible under Art. I, § 13. We should take care therefore lest in a legislative statement of the scope of incrimination privilege we so broaden the scope that such regulations would be inconsistent with our legislative statement of privilege. That, however, is precisely what we would do if we were to adopt the general rule of 25 omitting any exception to embrace regulations of the kind adverted to. 25 (e) is therefore fashioned (in part) as an exception designed to exclude from the general rule of 25 regulations of the kind in question.

25 (e) is based on A.L.I. Rule 207 (1) as to which the official comment is in part as follows:

> "Paragraph (1) of this Rule states the law as generally applied to matters which . . . dealers in intoxicants or sellers of poisons or habit-forming drugs are required to record, or to matters which persons involved in automobile accidents are directed by statute to

> report. The required disclosure may be written or oral. If written, ownership of the document in which the required disclosure is recorded is immaterial."

The difficulty we find with 25 (e) is this: it is so broadly stated that, taken literally, it includes within its sweep some situations in which there is privilege under Art. I, § 13. For example, a county ordinance requires as follows:

> "'every person who resides in, is employed in, has a regular place of business in, or who regularly enters or travels through any part of the unincorporated territory of Los Angeles County, and who is a member of any communist organization, shall register by acknowledging under oath and filing with the Sheriff's Department of the County a registration statement containing the following (1) Name and any alias or aliases of the registrant . . . (4) the name of all communist organizations of which he is a member.'"

In People v. McCormick[55] it was held that this ordinance contraverses Art. I, § 13; yet 25 (e) is so broadly stated that it could be read as an attempt to deny privilege under the circumstances stated in the ordinance and as so read and applied it (i.e. 25 (e) would itself be unconstitutional. Or consider the hypo suggested by Jackson in Shapiro v. U. S. of a statute requiring that "each citizen . . . keep a diary that would show where he was at all times, with whom he was and what he was up to."[56] Or ponder McCormick's hypo of a statutory "requirement that every person who kills another with firearms should report the fact to the sheriff."[57] Of course, 25 (e) is not intended to go so far as to deny privilege in these situations (i.e. is not intended as a statement that such statutes would be valid).

If the line could be clearly drawn between the valid regulations first noticed and the invalid regulations just mentioned and if definite words of demarcation were available to describe the bounds we could suggest amending 25 (e). However we follow McCormick in believing as follows:

> ". . . It seems . . . that the power to require records and reports and to exempt them from privilege could only be exerted as a means of carrying out some other distinct governmental power, such as the power to tax, the power to regulate prices in an emergency, or the state's police power to regulate activities dangerous to the health, safety, and morals of the community. To make easier the investigation and punishment of crime generally, or of a particular kind of crime, would not suffice as the only footing of the power. Where the independent regulatory power under the constitution and the privilege against self-incrimination come in conflict each must yield to some extent, so that a viable accommodation may be found. Perhaps in the present state of the law, the limits can be no more definitely stated than to say with Vinson, C.J., that the bounds have not been overstepped 'when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection . . .'"58

In this uncertain state of the law we cannot improve upon 25 (e) as a statement of general principle. We recognize, however, that, if enacted and held valid in this State, it would have to be construed as <u>not</u> intended to deny privilege in situations in which privilege is vouchsafed by Art. I, § 13.

Concluding on 25 (e), we may say a word about the provision insofar as public officials are concerned. On this phase of 25 (e) note the following A.L.I. commentary on Rule 201 (1) (which

25 (e) copies):

> "Paragraph (1) of this Rule states the law as generally applied to matters which a public official or employee has recorded or is under a duty to record or report."

McCormick gives the following rationale:

> "A document, entry or writing which is part of the state's official records (whether open to the public or not) is of course subject to be produced upon judicial order without regard to any claim of privilege against self-incrimination of the person who has custody. The state's interest in its records has precedence over the private claims of the person in possession."59

Rule 25 - exceptions - subdivision (f).

This exception is as follows:

> "(f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; . . ."

The general rule of Rule 25 is applicable only to a "natural person". Insofar as this general rule is concerned a natural person has the privilege to refuse to obey a subpoena duces tecum ordering production of documents in his possession which would incriminate him. (This assumes no exception to 25 is applicable.) On the other hand, a corporate or artificial person possesses no such privilege.[60] It follows that an agent of the corporation (who, for this purpose is, of course, the corporation) has no privilege to refuse to obey a subpoena duces tecum to produce the corporation's books and other tangibles. Rule 25 gives no such privilege, nor does any other Rule; therefore under Rule 7 there

is no privilege. As representative of the corporation, the agent must obey the process even though in so doing he incriminates himself in his individual capacity. There is, however, nothing new in all this for as the court states in McLain v. Superior Court:[61]

> "It has long been decided that the constitutional privilege inherent in the declaration that no party accused shall be compelled in a criminal case to be a witness against himself was not available to corporations, which could be required to produce their books and papers by a subpoena duces tecum. Thus in Wilson v. United States, 221 U.S. 361 [31 S.Ct. 538, 55 L. Ed. 771], decided in 1911, the Supreme Court of the United States declared that a corporation could not resist upon such constitutional grounds the compulsory production of its books and papers. (See, also, Heike v. United States, 227 U.S. 131 [33 S.Ct. 226, 57 L.Ed. 450], and Shapiro v. United States, 335 U.S. 1 [68 S.Ct. 1375, 92 L.Ed. 1787].) And this right of a court or properly constituted investigative body to compel the production of such records has long existed, even though they may be temporarily in the custody of someone not authorized to have them by the corporation itself."

Subdivision (f) of Rule 25 is not intended to cover the situation just discussed. In order to see clearly just what is proposed in 25 (f), let us take this official illustration of A.L.I. Rule 207 (2) which 25 (f) copies:

> "A State statute requires all corporations owning stock in other corporations to keep records of such stock ownership, which records shall be open to inspection by specified officials of the State, and makes criminal the falsification of such records or concealment of such ownership. A, an accountant employed by corporation C to keep all its records, by reason of Paragraph (2) of this Rule has no privilege under Rule 203 [U.R.E. Rule 25, general rule] to refuse to testify about the falsity of his record of C's ownership of stock in other corporations."

Note that the intent here is to deny to the corporate employee privilege to refuse to testify to matter incriminating him.

Consider also this exchange between Professor Morgan and Judge Wyzanski in the course of the A.L.I. debate on the A.L.I. Rule 207 (2) (which is identical with U.R.E. 25 (f)):

> "HON. CHARLES E. WYZANSKI, JR. . . .:
> Before you pass 207 (2) . . . Supposing that the wage and hour law requires a corporation to keep records with respect to the employment of individuals and A is the employment manager in charge of these matters for the corporation. He, as a matter of fact, knows what the situation is, but no record was kept at all. The law under the statutes is that a corporation should keep these records. A may be called upon to testify and cannot raise the privilege of self-incrimination. I think it was that situation that it was intended to be covered by 207 (2) . . .
>
> MR. MORGAN: That is right. . . ."[62]

McCormick tells us that:

> ". . . it might well be determined that the agent of a corporation or association could be compelled to disclose by his oral testimony any acts performed for the principal, though incriminating the agent. The courts seem as yet not to have settled this question."[63]

It seems, however, that the question is settled in California and that the decision is adverse to the A.L.I.-U.R.E.-McCormick view.

The case in point is McLain v. Superior Court,[64] The Senate Interim Committee on Social Welfare issued a subpoena addressed to Citizens Committee for Old Age Pensions (a non-profit corporation) and George H. McLain, Chairman of said Citizens Committee for Old Age Pensions, commanding them to appear before the committee

on a given date "as witness in an investigation by the said committee" and commanding them to bring with them all cancelled checks, check stubs, check ledgers and bank statements of all the accounts in the name of Citizens Committee for Old Age Pensions. McLain appeared and was sworn. He testified that he was chairman of the corporation and that he had received the subpoena. He was then told that he had been subpoenaed only in his capacity as chairman and in none other and was asked if he had the documents which the subpoena had required him to produce. After some time was spent in arranging the records, McLain stated that for the convenience of the committee "we have separated to the best of our ability the checks that have been issued to Assemblyman John Evans during 1948 and 1949 as one of our public relations counsel, so we will be very happy to turn these over to you." He thereupon handed the specified checks to counsel for the committee, who said, "What are these?" and McLain replied, "Checks made payable to John W. Evans". The checks were signed "Citizens' Committee for Old Age Pensions, George H. McLain," and bore the apparent endorsement of Mr. Evans, and also the usual stamps and punch marks indicating a clearance through the bank on which they were drawn. Later McLain was indicted by the Grand Jury of Sacramento County. The indictment contained four counts, in each of which McLain was charged with the crime of bribery in that he gave a bribe, consisting of the sum of $75, to John W. Evans, then a member of the state Legislature, with intent to influence the said legislator in giving or withholding his vote on bills introduced for passage.

McLain then sought a writ of prohibition to restrain the Superior Court from taking any steps or proceedings based on the indictment. McLain based his petition upon Section 9410 of the Government Code, which, so far as here applicable, provides as follows:

> "A person sworn and examined before the Senate or Assembly, or any committee, can not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify."

Respondent contended:

> ". . . that immunity was not acquired by petitioner, not because the documents produced under the compulsion of the subpoena did not touch upon the alleged crimes for which he was later indicted, nor that the meager testimony he gave did not serve to identify and authenticate these documents, but that the production of the documents by petitioner and his testimony concerning them fell within permissible limits without the granting of immunity."

The court held that immunity attached and granted prohibition on the following grounds:

> ". . . there is a clear distinction between the admitted power of such a body as the Senate Interim Committee on Social Welfare to compel the production before it of such documents, and the right to compel testimony from the custodian of such documents which would incriminate the witness. . . .
>
> "Here the subpoena was directed to the corporation and to petitioner as chairman of the board of trustees thereof and it required the production of the books and records referred to. However, when petitioner was sworn he became a witness pursuant to the ad testificandum part of the process served upon him. Indeed, there is no way in which a witness can be sworn otherwise, although as has appeared from the statement of facts, there was a prompt declaration by counsel for the committee that petitioner had been subpoenaed merely in his capacity as chairman of the board of trustees of the corporation and

not otherwise. That position was departed from when to him there was administered the usual oath administered to all witnesses. The situation may be illustrated by inquiring how a sentence for contempt would have been served had the petitioner after the administration of the oath proved contumacious. Clearly, he would have served that sentence individually and not as chairman of the board of trustees. If, therefore, after the production of the books and papers in response to the subpoena duces tecum, by which production the demands of that process had been met, the petitioner, in response to appropriate questioning, gave testimony touching the facts and acts for which he now stands under indictment, no reason appears why he should not have the immunity granted him by the statute in exchange for his constitutional privilege against self-incrimination. . .

"Applying, then, the plain language of the act to the facts here, did the petitioner, having been sworn, testify as to any fact or act touching the bribery with which he stands charged? We think he did. . . .

"When the legislative committee swore petitioner as a witness it contracted that he would be immune from prosecution for any crime touching which he might testify. When that testimony touched upon the alleged bribery of Evans, immunity attached. Petitioner cannot be prosecuted therefor."

The Supreme Court denied respondent's petition for a hearing.

This, it seems to us, is a clear recognition that (to paraphrase 25(f)) a person who is an officer, agent or employee of a corporation or other association does have the privilege to refuse to disclose by his testimony matter incriminating him (unless of course some exception other than 25(f) is applicable or immunity is granted).

We conclude that 25(f) would be unconstitutional in this State and on that ground we recommend its disapproval.

Rule 25 - exceptions - subdivision (g).

This exception is as follows:

> "(g) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action."

Suppose an accused in a criminal case voluntarily takes the witness stand and testifies in his defense to certain facts relevant to his defense. Under these circumstances to what extent, if any, is he protected by Art. I, § 13? Could the legislature provide that when such an accused elects to testify the prosecution may cross-examine him with reference to any relevant fact whether or not such fact has been mentioned on direct examination? Could the Legislature provide that when accused elects to testify in his defense the prosecution may call him in rebuttal as a prosecution witness?[65]

Subdivision (g) of Rule 25 suggests these questions, for, if (g) is sound as a statement of the scope of the Art. I, § 13 privilege (i.e. if (g) itself would be a constitutional enactment in this State) it seems that the Legislature could validly enact the two statutes suggested. Subdivision (g) provides that by testifying on the merits the accused waives privilege as to any incriminating matter relevant to the merits. If accused does thus waive his privilege could not the Legislature give the prosecution the advantage of such waiver by permitting full cross-examination of the accused or by permitting the prosecution to call the accused in rebuttal?

As a matter of fact the Legislature has not attempted to provide either for full cross-examination of accused or for calling him in rebuttal. Rather the Legislature has chosen to provide only for restricted cross-examination (i.e. for cross restricted to the scope of direct).[66] Was this legislative decision a free choice or was the decision required by Art. I, § 13? If the former be the case 25(g) would, it seems, be valid legislation in this State; if the latter be the case 25(g) would, it seems, be an unconstitutional enactment. We must now report (regretfully) that the latter seems to be the case.

[67] People v. O'Brien, seems very explicit on the point as the following excerpt shows:

> "The defendant was charged, in an information filed by the district attorney of San Francisco, with the embezzlement of a certain sum of money, to wit, $1000, the same being the property of the state, and on the trial he was called and examined as a witness on his own behalf. On the examination in chief his testimony was directed and confined to the alleged embezzlement of the particular sum of money mentioned in the information, but on the cross-examination he was examined generally as a witness in the case. This course of proceeding was objected to very frequently by his attorney, but the objections were as often overruled by the court, and the examination was allowed to be as general as could have been made of any other witness[68] in the case; the district attorney, in fact, making the defendant his own witness on behalf of the prosecution. The question is, Was this course of proceeding regular and proper under the law?
>
> "Section 13, article 1, of the constitution declares that no person shall 'be compelled in any criminal case to be a witness against himself.' There is, therefore, no power in the court to compel a defendant in a criminal case to take the stand; . . .

"But by section 1323 of the Penal Code, it is provided that 'a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. . . .' It is only under and by virtue of the foregoing provision of the Penal Code that a defendant in a criminal prosecution can be a witness at all; and when he is called on his own behalf and examined respecting a particular fact or matter in the case, the right of cross-examination is confined to the fact or matter testified to on the examination-in-chief. Such is the express language of the statute; and when the court, as it did in the case at bar, allowed the prosecution to make the defendant a general witness in its behalf, it invaded a right secured to the defendant not only by the statute but by the constitution.

"For this error the judgment and order are reversed, and the cause remanded for a new trial."

Here violation of the statutory rule of restricted cross-examination is treated as ipso facto violation of Art. I, § 13.[69] The conclusion seems inescapable that the statute states the outer limits of waiver which the constitution permits. The same point of view seems to be taken in People v. Arrighini[70] as the following excerpt shows:

"The limitation contained in our code (Pen. Code, sec. 1323) was doubtless intended to preserve to defendants the right secured by section 13, article 1, of the constitution. . . . Other states from which cases are cited do not contain such a limitation. In Massachusetts the provision is that he 'shall at his own request, and not otherwise, be deemed a competent witness.' It has been held that when, under this statute, the accused offers himself as a witness, he waives all protection guaranteed by the constitution and becomes a competent witness in the whole case. . . .

"Under our statute there can be no doubt. Here, surely no evidence can be wrung from him. He can only be examined in regard to the matters concerning which he has voluntarily testified. . . ."

In view of the scope of Art. I, § 13 above expounded, we must conclude that in this State 25(g) would be void legislation because in contravention of Art. I, § 13. We must therefore recommend disapproval of 25(g), albeit we do so reluctantly.[71]

RULE 24

Rule 25 refers to "any matter that will incriminate" a person. The language just quoted is defined as follows by Rule 24:

"A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation."

This seems to be generally in accord with the concept of incriminating matter developed in California cases.[72] (See hereinafter, however, as to incrimination under foreign law.) Rule 24 is derived from A.L.I. Rule 202. The two following official illustrations of the latter emphasize the point that the privilege does not embrace incrimination under the laws of another sovereignty:

"T claims exemption from taxation for a Grecian work of art under a statute exempting 'antique foreign works of art.' By Greek law it is criminal to remove antique works of art from Greece. T

cannot by virtue of his privilege against self-incrimination refuse to answer the assessors' questions as to when, where, and how he acquired the work of art in question.

"The income-tax law of a state requires taxpayers to disclose the sources of their incomes. T, a taxpayer of the state, may not by virtue of privilege against self-incrimination refuse to make this disclosure although part of his income is derived from sale of cigarettes in a neighboring state where such sale is criminal."

We have found no local decisions indicative of whether or not Art. I, § 13 extends its protection to incrimination under the laws of any sovereignty other than California. McCormick points out that both the English decisions and American holdings are conflicting on the question of incrimination under "foreign" law.[73] He concludes as follows:

"Certainly there is nothing in the language nor in the history of the Constitutional provisions which dictates an answer either way upon the question whether the protection should extend to prosecution under 'foreign' law. Judges who consider that the policy behind the privilege is so salutary that the range of its application should be extended, will be inclined to accord protection when the danger of 'foreign' prosecution is clear. The argument based on the difficulty in ascertaining the scope of the 'foreign' law has lost much of its force with the widening of the reach of judicial notice.

The paramount argument for confining the privilege to incrimination under the laws of the forum is based upon the undesirability of a wholesale extension of this already burdensome obstruction upon the judicial investigation of facts. Moreover, apart from collusion between the law enforcement agencies of state and Federal governments, there is little incentive for the enforcement officers of one government to seek to require a witness to inculpate himself under the laws of

another jurisdiction. When such collusion does occur then the 'foreign' government is participating in the compulsion, and its own constitutional provision forbidding it to compel the testimony should be applied."

Our personal preference is for the McCormick-U.R.E. view. Furthermore it is our belief that the California courts could be persuaded to construe Art. I, § 13 as embracing the U.R.E. view and hence to uphold Rule 24 as legislation in this State.

RULE 37

This Rule provides in part as follows:

> "A person who would otherwise have a privilege to refuse to disclose . . . a specified matter has no such privilege with respect to that matter if the judge finds that he . . . while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter . . ."

Let us suppose that a fire insurance policy contains the following provision:

> "the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given, and shall produce to such person for examination, all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made. . . . No suit or action on this policy for the recovery of any claim shall be sustained until full compliance by the insured with all of the foregoing requirements."

The insured property is destroyed by fire. Arson is suspected. A grand jury investigates. The insured is called before the grand jury to testify. Asked whether he set the fire, he claims privilege vs. self-incrimination. As we construe Rule 37(a)

the Rule requires that the claim be denied.

37(a) is derived from A.L.I. Rule as to which the A.L.I. Rule 231(a) commentary is in part as follows:

> "This clause goes further than any known case. Under it, when a person contracts with anyone, whether or not a party to the action, to waive a privilege as to a particular matter, the privilege is gone with reference to that matter, completely and forever and it is immaterial that the other contracting party has no interest in, or connection with, the action in which the privilege is claimed. The theory underlying this clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherewise."

We doubt whether 37(a) would be consitutional in this State. In Hickman v. London Assurance Corp.,[75] the policy contained the provision above quoted. After the fire the Company made a written demand upon insured to appear on a certain day before a designated notary and submit to examination as provided in the policy. Insured appeared as demanded but refused to answer pertinent questions, basing his refusal in part upon the circumstance that he had been accused of arson and was about to be tried. Such refusal was held to require denying the insured recovery on the policy in a civil action. The court reasoned as follows:

> "The compulsion secured against by the constitution is a compulsion exercised by the state in its sovereign capacity in some manner known to the law. Constitutional immunity has no application to a private examination arising out of a contractual relationship. The examination to which appellants demanded respondent should submit was an extrajudicial proceeding, notauthorized by any constitutional or statutory provision, but purely by virtue of a contract between the

parties. To bring a case within the constitutional immunity, it must appear that compulsion was sought under public process of some kind. This being so, respondent's refusal to undergo examination and produce his books and papers acquires no sanctity because he urged his constitutional right not to be compelled to be a witness against himself. The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent 'as often as required', and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the conditions of which he has failed to perform. In other words, when he commenced this suit he was without a cause of action."

Here, since the only question for decision is recovery in the civil action, we do not reach the question presented by 37(a) namely whether the prosecuting attorney as (so to speak) a sort of third party beneficiary of the contract between insured and insurer could have the benefit of insured's promise to make disclosures. On the other hand, In re Sales[76] comes directly to the point and, as the following extract shows, seems to rule against the principle of 37(a):

"The district attorney also cites authorities to the effect that a person may enter into a contract to waive said constitutional privilege in which event he may be thereafter estopped from claiming the same; and in this connection it is contended that petitioners' agreement to testify at the trial to the same state of facts

> revealed by them before the grand jury constituted such a contract. We are unable to sustain this view. The action is one instituted and prosecuted by and in the name of the People of the state for the alleged commission of a crime; and consequently there can be no contractual relationship with the witnesses. In other words, any person having knowledge of material facts connected with the commission of a crime may be compelled to testify thereto regardless of his personal inclinations, unless as here his testimony would tend to incriminate him; and any agreement attempted to be made by him as to whether or not he would testify would be wholly void and no rights whatever would be created thereunder."

Apparently the rationale here is that enforcement of the contract would infringe Art. I, § 13. Believing that to be the rationale, we are forced to recommend disapproval of 37(a) insofar as the application thereof to the privilege vs. self-incrimination is concerned.

Turning now to 37(b) let us suppose a witness without compulsion and with knowledge of his privilege testifies before a grand jury to facts incriminating him. The grand jury indicts X. At X's trial the witness is called and claims privilege. Or suppose the testimony was at the preliminary hearing of People v. X and the claim of privilege is at the trial. Under 25(b) the claim would be overruled. Today in California the claim would be sustained.[77] As is said In re Berman:

> "We have . . . to examine first the contention that petitioner, by giving his deposition in the case of Guenther v. Barneson et al., waived his privilege against testifying, assuming for the purpose of this as well as the succeeding question, that to answer the interrogatories would tend to incriminate the petitioner. The problem is not entirely new. In Overend v. Superior Court, 131 Cal. 280 [63 Pac. 372], the prosecuting witness who had testified at the

> preliminary hearing of one against whom a criminal complaint had been filed, refused to testify at the trial in the Superior Court on the ground that his evidence might tend to incriminate him. The trial judge thereupon found that the witness had waived his privilege by testifying at the preliminary hearing and sentenced him for contempt. The Supreme Court says, in reviewing the judgment of contempt: 'It appears that the trial court based its judgment of contempt largely upon the ground that the witness had, without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the trial court in this regard is untenable. This question of waiving the privilege is discussed and decided in Temple v. Commonwealth, 75 Va. 896, and Cullen v. Commonwealth, 24 Gratt. (Va.) 624. It is said in those cases that the witness' statements elsewhere have nothing to do with the question.' We find a like declaration in People v. Cassidy, 213 N.Y. 388 [Ann. Cas. 1916C, 1009, 107 N.E. 713], as follows: 'The weight of authority is against the claim of the people that Walter by giving testimony before Justice Scudder waived his constitutional right to decline to give testimony on the trial of Willett that could be used against him in a criminal case. [citations omitted] These authorities amply establish the rule prevailing in this jurisdiction, and as we think, in accordance with sound reason."

Is the "sound reason" last referred to derived from Art. I, § 13? Presumably so and it seems, therefore, that we are precluded from adopting 25(b) in this State unless it is amended to exclude from its operation the privilege against self-incrimination.

Our conclusion is that in this State both subdivisions (a) and (b) of Rule 37 as applied to privilege vs. self-incrimination would be in contravention of Art. I, § 13.

RULE 38

Let us suppose that under subdivision (a) of Rule 25 the judge finds in re a certain matter "that the matter will not incriminate" a witness and the judge therefore orders the witness to answer. Suppose further that, obedient to the mandate of 25(a) that under such circumstances "the matter shall be disclosed", the witness answers and his answer is in fact incriminating. Later the witness is prosecuted and his answer is offered in evidence against him. Inadmissible under Rule 38 which provides as follows:

> "Rule 38. Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."

The Commissioners state that Rule 38 "safeguards the privileges against destruction by their very violation". The Rule, they say, "states the generally accepted view".[78]

We find no California case directly raising the question but we entertain the opinion that insofar as Rule 38 applies to the privilege vs. self-incrimination the principle of Rule 38 is implicit in the Cahan decision.

RULE 39

This Rule provides in part as follows:

> "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . ., either in the action or with respect to particular matters, or to refuse to disclose . . . any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the

exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. . . ."

Previously we have recommended disapproval of paragraph (4) of Rule 23 on the ground that it is probably in conflict with the comment-inference provisions of Art. I, § 13. Accordingly we now recommend striking the "Subject to" clause of Rule 39. The remainder of Rule 39 would, of course, be subject in this State to Art. I, § 13. Thus in this State Rule 39 would set up a general rule of no comment upon and no inference from exercise of privilege except as provided in Art. I, § 13. As such, Rule 39 would affirm existing California self-incrimination law in some respects; in other respects it would change such law.

Let us note first the respects in which Rule 39 would be in accord with prevailing principle.

Suppose D appears before a grand jury in response to sub poena and refuses to answer several questions on the ground of Art. I, § 13. Later at D's trial the prosecution as part of its case in chief proposes to prove D's claim of privilege before the grand jury. The prosecution contends that the testimony is admissible because (1) it is an admission made by a party in response to an accusatory statement, and (2) defendant's reaction thereto showed a consciousness of guilt.[79] In People v. Calhoun, held inadmissible for the following reasons:

"Neither of these grounds is tenanble, for the reason that no implication of guilt can be drawn from a defendant's relying on the constitutional guarantee of the fifth amendment to the Constitution of the United States, article I, section 13, of the Constitution of the State of California, or Penal Code sections 688, 1323, and 1323.5. (People v. Simmons, 28

Cal. 2d 699, 702 [12], 172 P.2d 18; Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 982 [21] et seq., 1 L.Ed.2d 931; People v. Talle, 111 Cal.App.2d 650, 663 [1] et seq., 245 P.2d 633).

. . . In view of the foregoing rule, the trial court prejudicially erred in holding that the grand jury testimony could be received in evidence as an admission and used to support a verdict. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above.

Such evidence does not fall within the scope of the 1934 amendment to article I, section 13, of the Constitution of the State of California, which provides that 'in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury.' Any inferences to the contrary in People v. Byers, 5 Cal.2d 676, 55 P.2d 1177, are overruled.

. . . Provisions of the federal and state Constitutions and the Penal Code sections referred to above establish that: (1) No person can be compelled in a criminal action to be a witness against himself; (2) if he offers himself, he can be cross-examined by the People's counsel only about matters to which he testified in chief; and (3) in grand jury proceedings, among others, he shall 'at his own request, but not otherwise, be deemed a competent witness.'"

The same result would follow if D's claim of privilege had been in the case of People v. A and the evidence of such claim was offered in People v. D. So held in People v. Bonelli[80] in which the Court spoke as follows:[81]

"The trial court prejudicially erred in admitting the evidence of defendant's refusal to testify in People v. Calhoun. Likewise, the instruction quoted above which the trial judge read to the jury was prejudicially erroneous. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above."[82]

The same results would ensue if these cases were to be decided under Rule 39. In each situation "a privilege [was] exercised . . . to refuse to disclose [a] matter"; therefore the trier of fact (in People v. D) "may not draw any adverse inference therefrom."

Turning now to situations in which the principle of Rule 39 is in disagreement with current law, let us suppose a civil action in which plaintiff calls defendant under C.C.P. § 2055 and defendant refuses to answer pertinent inquiries on the ground of self-incrimination. Today an inference adverse to defendant may be drawn from his privilege claim because, as is said in Fross v. Wotton[83], to hold otherwise "would be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill". On the other hand, the inference would be prohibited by Rule 39. A "privilege is exercised not to testify . . . with respect to particular matters" in the action; therefore "the trier of fact may not draw any adverse inference therefrom."

Let us next suppose a wrongful death action against a railroad. At the coroner's inquest the engineer of the death-dealing train claims privilege. In the death action the engineer testifies

for the railroad in denial of his negligence. Today the engineer's privilege claim before the coroner may be shown to impeach his credibility, "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement of lack of negligence upon his part" (Nelson v. Sou. Pac. Co.)[84]. Again this would be otherwise under Rule 39 for before the coroner "a privilege [was] exercised . . . to refuse to disclose [a] matter" and therefore "the trier of fact may not draw any adverse inference therefrom".

It is apparent from the foregoing discussion that Rule 39 is in some instances more restrictive than current law respecting inference and comment on exercise of incrimination privilege. In these instances our personal preference is the present law. Therefore when we reach a full-scale study of Rule 39 we shall recommend appropriate amendments.

RECOMMENDATION

Today we have a hodge-podge of statutes on incrimination privilege. These are as follows:

> "P.C. § 688. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

> "P.C. § 1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in

chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

"P.C. § 1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.

This section shall not be construed as compelling any such person to testify."

C.C.P. § 2065 [in part]:

"A witness . . . need not give an answer which will have a tendency to subject him to punishment for a felony. . . ."

These statutes plus Art. I, § 13 and our numerous decisions constitute the sources of our present incrimination law.

Rule 23 subdivisions (1) and (3), Rule 24, and Rule 25 subdivisions (a), (b), (c) and (e) would merely be declaratory of existing law. Possibly the same is true of subdivision (d). We recommend all of these for approval.

Rule 23 subdivision (4) and Rule 25 subdivisions (f) and (g) would in our opinion be unconstitutional and are recommended for disapproval.

Rule 37 would be unconstitutional unless amended to exclude the privilege against self-incrimination from its operation. This Rule is applicable to all privileges and we recommend

deferring judgment upon it (even if amended as suggested) until a study is made of its impact upon other privileges. For similar reasons we recommend deferred judgment upon Rules 38 and 39 which are likewise applicable to all privileges.

As stated at the outset of this study the merit, if any, of those Rules and subdivisions above recommended for approval is that they codify and thus summarize and collect in one place a large body of existing rules and principles which today must be extracted from a rather vast amount of case material.

Amending the statutes above mentioned to conform to the enactment of the U.R.E. Rules recommended would be relatively simple. The following changes would be desirable:

1. Eliminate first clause of P.C. § 688 because superfluous.

2. Eliminate first clause of P.C. § 1323 because superfluous (leave second clause intact as substitute for U.R.E. Rule 25 (g)).

3. Repeal § 1323.5 because superfluous.

4. Repeal the portion of C.C.P. § 2065 quoted above because superfluous.

Respectfully submitted,

James H. Chadbourn

FOOTNOTES

1. U.R.E. 23(1) is a copy of A.L.I. Code Rule 201(2). Evidently the sponsors of the U.R.E. agree with the following commentary on A.L.I. Rule 201(2): "It is entirely impracticable at this time, if not unwise, to attempt to abolish this privilege."

   In this memo we accept this point of view and we do not therefore attempt to explore and evaluate arguments pro and con the privilege.

2. 111 C.A.2d 650 (1952).

3. The statute is presently P.C. § 1323.5.

4. The rule that the prosecution should not call the accused is apparently here regarded as based wholly upon the statute. However, in People v. Tyler, 36 C. 522, 529 (1869) the statute is said to be "a re-enactment by statute" of the constitutional incrimination privilege. If this be so, the right not to be called is a constitutional right. The question is presently only of theoretical interest unless it is desired to amend 23(1) to eliminate the privilege not to be called. For reasons stated in Note 1 supra we do not advocate such amendment.

5. Under 23(1) questions would arise as to when one is "an accused" in a "criminal action". For example, in a disbarment proceeding do we have "an accused" in a

"criminal action"? Nothing in the U.R.E. Rules attempts to define the terms quoted. It would seem, therefore, that they would be construed in conformity with prevailing rules on the subject such as the current rule that a disbarment proceeding is "a special proceeding of a civil nature" which means the accused lawyer may properly be called to testify but, of course, may not be required to give incriminating testimony. Fish v. State Bar, 214 C. 215 (1931). In terms of U.R.E. Rules this means the accused lawyer does not possess Rule 23(1) privilege, but does, of course, possess Rule 25 privilege.

For similar problems as to whether certain proceedings are civil or criminal, see Levy v. Superior Court, 105 C. 600 (1895); Thurston v. Clark, 107 C. 285 (1895); In re Tahbel, 46 C.A. 755 (1920); West Coast Home Improvement Co. v. Contractors' State License Board, 72 C.A.2d 287 (1945).

6. People v. Goldenson, 76 Cal. 328, 347 (1880). See also People v. Oliveria, 127 Cal. 376 (1899) and People v. Ferns, 27 C.A. 285 (1915).

7. Wigmore § 2263 quoted with approval in People v. One 1941 Mercury Sedan, 74 C.A.2d 199 (1946); People v. Trujillo, 32 C.2d 105 (1948); People v. Haeussler, 41 C.2d 252 (1953).

8. Wigmore § 2265 quoted with approval in People v. One 1941 Mercury Sedan, 74 C.A.2d 199 (1946); People v. Trujillo, 32 C.2d 105 (1948).

9. 188 C. 237 (1922).

10. 74 C.A.2d 528 (1946).

11. The portion of 25 quoted in the text is taken from A.L.I. Code Rule 203 which likewise uses the expression "in an action". However the Code contains a comprehensive definition of action ("'Action' includes action, suit, special proceeding, criminal prosecution and every proceeding conducted by a court for the purpose of determining legal interests" Rule 1(1)) which the U.R.E. omit. In the absence of such comprehensive definition of "action" that term is not a happy choice of a word to describe judicial proceedings in general. Technically in this State "action" does not comprehend "special proceedings" nor seemingly would it embrace grand jury investigations and coroner's inquests.

Accordingly we suggest amending 25 by striking "in an action" and substituting therefor "in any judicial proceeding".

12. 46 C.A. 755 (1920).

13. Barr, Privileges Against Self-Incrimination in California, 30 Calif. L. Rev. 547, 554-5 (1942) expresses the following opinion:

> "It has been supposed that all the privileges against self-incrimination stem from the constitution. But the provision we find there does not broadly extend its privileges to all persons; it is explicit that the only persons entitled to the exemptions are those who are requested to testify in a 'criminal

case'. The inference seems clear that where the proceeding is not criminal in nature, the privilege of the witness against self-incrimination is not based on article I, section 13. It is an interesting and open question whether the California legislature by repealing the privileges given to civil witnesses under Section 2065 of the Code of Civil Procedure could entirely deprive them of their historic privilege against self-incrimination."

In our opinion the inference which is "clear" to the author is refuted by In re Tahbel and upon the same authority the question which the author regards as "open" is truly a closed question.

14. McCormick § 123.

15. McLain v. Superior Court, 99 C.A.2d 109 (1950) (dictum).

16. West Coast Home Improvement Co. v. Contractors' State License Board, 72 C.A.2d 287 (1945) (dictum).

17. Fink v. State Bar, 214 C. 215 (1931) (dictum).

18. 153 C.A.2d 64, 76 (1957).

19. 28 C.2d 699 (1946). See also People v. McGee, 31 C.2d 299 (1947); People v. Abbott, 47 C.2d 362 (1956); People v. Davis, 43 C.2d 661 (1954).

20. 28 C.2d at 716.

21. 28 C.2d at 721.

22. As suggestive of this possibility consider the following from People v. Clemmons, 153 C.A.2d 64, 76 (1957):

"If the privilege does extend to the police station, as it apparently does, it is difficult to see how Cook, under the circumstances, waived any right to be silent by the simple process of remaining silent. If he did not waive the right, he was certainly clothed with it, and was entitled to all of its protection."

Consider also the following from the Stanford Note "The Privilege Against Self-Incrimination: Does It Exist in The Police Station?", 5 Stanf. L. Rev. 459, 474 (1953):

"People v. Simmons speaks of excluding accusatory statements where the defendant 'has adopted the policy of silence'. What does this mean? The court may have meant that the privilege is lost if not affirmatively claimed. It might be argued that in Simmons it was affirmatively claimed, since defendant continually said he would not talk. But is not the right to be silent claimed by merely refusing to answer? Silence itself would appear to be the most obvious way of claiming the privilege. Would this be a 'policy of silence' under Simmons? Or is it necessary for one to say affirmatively that he will say nothing?"

23. Note, however, that adoption of the U.R.E. would eliminate whatever incompatibility may presently exist between (1) The proposition that the privilege applies in the police station, and (2) The proposition that so-called involuntary admissions (i.e. incriminating statements short of confessions) are admissible. The adoption in this State of U.R.E. Rule 63(6) or its equivalent would make coerced admissions inadmissible thereby eliminating the present inconsistency, if any.

24. McCormick § 125; West Coast Home Improvement Co. v. Contractors' State License Board, 72 C.A.2d 287 (1945); McClain v. Superior Court, 99 C.A.2d 109 (1950).

25. It seems that under some circumstances the person is the sole judge of whether given matter will incriminate simply because no procedure for judicial determination is available. This seems to be so, for example, when a suspect is being interrogated by officers. The privilege applies here (see text at notecall 18) and we are aware of no procedure for procuring a judicial order at this point.

26. See Barr, Privileges Against Self-Incrimination in California, 30 Calif. L. Rev. 547, 553-554 (1942).

27. In re Lemon, 15 C.A.2d 82 (1936); In re Hoertkorn, 15 C.A.2d 93 (1936).

28. See also note 11 supra.

29. 41 C.2d 252, 256 (1953).

30. 312 P.2d 690.

31. Compare, however, People v. McGinnis, 123 C.A.2d Supp. 945 (1954), in which, after holding defendant's refusal to take an intoximeter test admissible as evidence against him, the court states the following dictum (p. 948):

> "A person, arrested because it appears that he is intoxicated, may have the right to refuse to subject himself to any of the usual tests, or to the intoximeter test, as the jury was instructed, but if he takes the tests, no physical or other coercion frowned upon by due process being employed, the result may be brought before a jury. (People v. Haeussler (1953), 41 Cal.2d 252 [260 P.2d 8].)"

In our opinion the following criticism of the dictum in 42 Calif. L. Rev. 697, 700-701 (1954) is well taken:

> "Nevertheless, the conclusion seems quite clear that the court in the McGinnis case was in error either in assuming (or at least suggesting) that McGinnis had a 'right to refuse' to submit to the test or in permitting an inference of guilt based on the exercise of such 'right'. It is submitted that the result was probably correct; that the forcible administration of a breath test ought not to be deemed either an infraction of the Rochin rule or (assuming a lawful arrest) an 'unreasonable search.' And clearly, under the settled local doctrine, it does not violate the privilege against self-incrimination. On this basis, one lawfully arrested has no 'right to refuse' to take a breath test; hence there appears no valid objection to the admissibility of evidence of his refusal as probative of a consciousness of guilt."

Under the Uniform Act on Blood Tests to Determine Paternity (C.C.P. §§ 1980.1 - 1980.7) in civil or criminal actions in which paternity is a relevant fact the court may order the mother, child and alleged father to submit to blood tests. If any party refuses the court may enforce its order or may resolve the question of paternity against such party.

Under the principle of U.R.E. Rule 25(c) the Uniform Act on Blood Tests is not violative of the U.R.E. privilege against self-incrimination. Since California agrees with 25(c) it seems that the Uniform Act is not in violation of Calif. Const. Art. I, § 13.

32. 113 C.A.2d 416 (1952). See also People v. Gormley, 64 C.A.2d 336 (1944) and People v. Harper, 115 C.A.2d 776 (1953).

33. 112 C.A. 68 (1931).

34. 17 C.A.2d 75 (1936).

35. 113 C.A.2d 460 (1952).

36. 126 C.A. 526 (1932).

37. 146 C.A.2d 722 (1956).

38. 41 C.2d 628 (1953).

39. See also People v. Chapman, 311 P.2d 190 (1957), to the effect that taking witnesses to defendant's apartment for identification purposes did not violate his incrimination privilege and People v. Smith, 298 P.2d 540 (1956), admitting photographs of defendant's nude body taken without consent.

40. 103 C.A. 66 (1951).

41. 168 C. 777 (1914).

42. 114 C.A. 522 (1931).

43. 12 C.2d 766 (1939).

44. The excerpt quoted is severely but (we believe) fairly edited.

45. See People v. Simmons, supra, note 19.

See, however, note 82 infra for a possible qualification respecting evidence of pre-trial claim for impeachment purposes.

46. Commentary on Rule 25(b).

47. Inbau, Self-Incrimination, p. 60.

48. McCormick, p. 266.

49. Inbau, Self-Incrimination, pp. 55-56.

50. We do not overlook the fact that in many cases the penalty for the crime would exceed the penalty for disobedience to the order and that therefore the strategy of the suspect might well be to disobey the order and incur the lighter penalty in the effort to win the higher stakes of a favorable verdict.

51. U.R.E. 25(d) copies A.L.I. Code Rule 206. Consider the following colloquy between Mr. Rosenthal and Professor Morgan during the Institute debate on Rule 206:

> "Mr. Rosenthal: Might I ask a question in that connection. Under Rule 206 a man is indicted for larceny and the question is whether he has stolen the watch. Of course, there can be a search warrant, but can that man be ordered in the court which is trying this case against him to produce the watch?
>
> Mr. Morgan: If the trial court finds that the watch belongs to the other party, yes. No question about it under this rule."

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52. Consider the following commentary on A.L.I. Code Rule 206 (which U.R.E. 25(d) copies):

> "There is no question that a person having in his possession a tangible which contains matter incriminating him cannot by claiming the privilege against self-incrimination avoid his duty to deliver it over to the person legally entitled to its possession. And it seems to be immaterial that the latter intends to turn it over to others for use in a criminal proceeding against the present possessor. See Johnson v. United States, 228 U.S. 457, 33 S. Ct. 572, 57 L. Ed. 919, 47 L. R. A., N. S., 263 (1913); Ex parte Fuller, 262 U. S. 91, 43 S. Ct. 496, 67 L. Ed. 881 (1923)."

53. 24 C.A. 799 (1914). See also People v. Fodera, 33 C.A. 8 (1917).

54. People v. Diller, 24 C.A. 799, 802-803 (1914).

55. 102 C.A.2d 954 (1951).

56. 335 U.S. 1, 71 (1948).

57. McCormick, p. 283.

58. McCormick, p. 283.

59. McCormick, p. 281.

60. See § supra.

61. 99 C.A.2d 109 (1950).

62. XIX A.L.I. Proceedings, pp. 129-130.

63. McCormick, pp. 262-263.

64. 99 C.A.2d 109 (1950).

65. We are not thinking here of the situation of prosecution calling defendant in rebuttal for further cross-examination as in People v. La Vers, 130 C.A. 708 (1933) and People v. Searing, 20 C.A.2d 140 (1937).

66. P.C. §1323:

> "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

67. 66 C. 602 (1885).

68. Making the examination "as general as could have been made of any other witness" would not, it seems, in and of itself be objectionable.

69. See also the following from People v. McGungill, 41 C. 429, 430-1 (1871):

> "It appears from the bill of exceptions that 'one Yates was called and sworn as a witness for the prosecution, and among other things, stated that he had a certain conversation with the prisoner.' This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon the fact before the jury; that the defendant refused to be cross-examined to the whole case; that defendant's counsel protested against such comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, and against objections of the defendant's counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of defendant. (People v. Tyler, 36 Cal. 522.)
>
> The fact that defendant offered himself as a witness in his own behalf, did not, as to him, change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant's rights, and then, with the sanction of the Court, in argument to the jury, to comment upon the failure of such attempt as a circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned."

Query: would comment be proper today under the comment provision of Art. I, § 13? If so, does this change the

elder rule that restricted cross-examination is a constitutional right? No, it seems. Comment authorized by the Constitution does not negate the existence of privilege.

70. 122 C. 127 (1898).

71. McCormick's analysis is as follows (pp. 49-50):

> "As a means of implementing the prescribed order of producing evidence by the parties, the restrictive rules limiting cross-examination to the scope of the direct or to the proponent's case are burdensome, but understandable. The cross-examiner who has been halted has at least a theoretical remedy. He may call the witness to answer the same questions when he puts on his own next stage of evidence. But the Federal courts and the states following the restrictive practice have applied these confining rules to the cross-examination of the accused by the prosecution. Thus, the accused may limit his direct examination to some single aspect of the case, such as age, sanity or alibi, and then invoke the court's ruling that the cross-examination be limited to the matter thus opened. Surely the according of a privilege to the accused to select out a favorable fact and testify to that alone, and thus get credit for testifying but escape a searching inquiry on the whole charge, is a travesty on criminal administration. It is supposed to be necessitated by the principle that by taking the stand the accused subjects himself to cross-examination 'as any other witness.' Seemingly at least two escapes are available. First, the rule limiting the cross-examination has always been professedly subject to variation in the judge's discretion, and the fact that the cross-examiner cannot call the witness is a ground for exercising the discretion to permit cross-examination on any relevant fact. Second, the accused might reasonably be held to have waived altogether his right not to be compelled to be a witness against himself, by taking the stand in his own behalf. Consequently, the prosecution could later call the accused as state's witness, and the one-sided effect of limiting the cross-examination would be mitigated. In jurisdictions following the wide-open practice

there is of course no obstacle to cross-examining the accused upon any matters relevant to any issue in the entire case."

For reasons stated in the text, we do not believe McCormick's suggested first escape is available in this State. Nor do we believe his suggested second escape (which is U.R.E. 25(g)) is available.

72. In re Berman, 105 C.A. 37 (1930); In re Crow, 126 C.A. 617 and 621 (1932); People v. Bartges, 126 C.A.2d 763 (1954); Overend v. Superior Court, 131 C. 280 (1900).

73. McCormick, § 124.

74. McCormick, pp. 261-2.

75. 184 C. 524 (1920).

76. 134 C.A. 54 (1933).

77. 105 C.A. 37 (1930).

78. Commentary on Rule 38.

79. 323 P.2d 427 (1958).

80. 324 P.2d 1 (1958).

81. The instruction was as follows:

"'[T]hose accused of crime are competent as witnesses only at their own request and not otherwise. You are therefore not to draw an inference against the Defendant Nathan Harris Snyder because he refused to testify in the case of People versus Calhoun on this ground.

However, you are further instructed that failure to testify on the ground that an answer might tend to incriminate may be considered by you in the light of all other proved facts in deciding the question of the defendant Nathan Harris Snyder's guilt or innocence. Whether or not his failure to testify in the case of People versus Calhoun on the ground of self-incrimination shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination.'"

82. Suppose the evidence of privilege claim had been (1) offered after D testified, and (2) had been offered solely for the purpose of impeaching D's credibility as a witness.

In People v. Kynette, 15 C.2d 731 (1940) the court stated that the use at the trial "solely for impeachment purposes" of an incrimination privilege before a grand jury "no more destroys [the] constitutional privilege than does comment when privilege is exercised at the trial.

Query is this changed by Calhoun and Bonelli?

If today the evidence would be admissible in this situation and upon this theory this is an instance, in addition to those noted in the text, of difference between today's law and Rule 39.

83. 3 C.2d 384 (1935).

84. 8 C.2d 648 (1937). See also Keller v. Key System Transit Lines, 129 C.A.2d 593 (1954).