Date of Meeting: November 27-28, 1959

Date of Memo: November 18, 1959

Memorandum No. 4

Subject: Uniform Rules of Evidence - Report on activities of Bar Committees on medical treatises and medical panels.

The Commission may not want to take action on paragraph (31) of Rule 63 at the November meeting. The Commission originally deferred action on paragraph (31) of Rule 63 (Hearsay exception for Learned Treatises) until the Commission was advised as to what action the Bar was taking on medical treatises and medical panels.

The California State Bar has been studying for some time a statute providing for the admissibility in evidence of a statement of fact or opinion on a subject of science or art, in the discretion of the court, in an action on contract or tort for malpractice. At the same time the Bar has been considering a plan to set up a system of panels and other procedures to be used in connection with malpractice claims. The Board of Governors of the Bar has referred the proposed statute on admission of evidence of medical treatises, etc., to the Committee to Consider Uniform Rules of Evidence. The Southern Section of that Committee is now working on this problem and may have a report available for our December meeting.

Respectfully submitted,

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Executive Secretary

INTRODUCTION

This memo is a study of Rule 63 subdivision (31) providing as follows:

> "Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
> . . .
>
> "(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject."

Learned Treatises - Common-Law

There is a common-law exception to the hearsay rule dealing with "scientific books" or "books of science and art".[1] The scope of the exception is, however, imprecise. Wigmore states that the exception clearly embraces tables of mortality and almanacs but it "is doubtful whether a general rule in favor of standard tables of scientific calculations of all sorts can be regarded as established."[2] He states further that "it is doubtful [whether] there is yet any general exception in favor of works of history,"[3] and that the limits within which the use is allowable of dictionaries and works of general literature are "undefined"[4] (W. §1699). He concludes, therefore, that the exception does not extend broadly to all learned treatises. He finds that the exception exists in this broad form only in the state of Alabama[5] and cites many cases from other jurisdictions rejecting a wide variety of medical and other professional works.[6]

Learned Treatises - California Statutory Exception

In California we have a statute which, on its face, seems to liberalize and clarify the scope of the common-law exception. This enactment is C.C.P. §1936 providing as follows:

> "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."

This seems to be both reasonably precise and liberal. The appearance is, however, deceiving. The leading California case construing §1936 is Gallagher v. Market St. Ry. Co.,[7] a personal injury case. Plaintiff's attorney called a Doctor and had him testify that "Gross on Surgery" is a standard authority on the subject. The Doctor was then excused and the attorney proposed "to read from said book, as though the author were a witness then and there present in court, and testifying in the case before the jury." Defendant's objections being overruled, plaintiff's attorney "read the book, at great length, to the jury as evidence." This was held to be error on the following grounds:

> "Under common-law procedure it was not competent to read books of science to a jury as evidence, because the statements therein contained were not only wanting in the sanctity of an oath, but were made by one who was not present, and was not liable to cross-examination. For that reason they were excluded, notwithstanding the opinion under oath of scientific men, that they were books of authority. . . .

"But it is contended that the common-law rule has been changed by the Code law. Section 1936 of the Code of Civil Procedure makes 'historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, . . . prima facie evidence of facts of general notoriety and interest,' and the question arises, whether such books, which were not regarded before the adoption of the Codes as competent evidence, are not, by force of that provision of the Code, made competent. Doubtless the intention of that legislation was to extend the rule of evidence rather than to restrict it. But the extension is limited by the terms 'facts of general notoriety and interest.'

"What are 'facts of general notoriety and interest?' We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause that, under the provisions of the Code, proof may be made by the production of books of standard authority. . . .

"Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences founded upon conclusions reached from certain and constant data by processes too intricate to be elucidated by witnesses when on examination. . . . Thus mortuary tables for estimating the probable duration of the life of a party at a given age, chronological tables, tables of weights, measures and currency, annuity tables, interest tables, and the like, are admissible to prove facts of general notoriety and interest in connection with such subjects as may be involved in the trial of a cause. . . . .

> "But medicine is not considered as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that, what is considered a sound induction last year may be considered an unsound one this year, and the very book which evidences the induction, if it does not become obsolete may be altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects. . . . 'if such treatises were to be held admissible, the question at issue might be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories.'"

"Science", then, in the §1936 sense means "exact science". Medicine is not such a science. Therefore, medical texts are not within the statutory designation of "books of science". Furthermore, medical facts are not "facts of general notoriety and interest" in the sense of §1936. For these two reasons §1936 is inapplicable to medical literature and to the literature of other "inexact" sciences. Such literature, therefore, remains inadmissible hearsay, as it was at common-law. It is thus improper to read a medical text as substantive evidence;[8] to have a witness quote from the text on direct examination;[9] or to read the text in the course of arguing to the jury.[10] However, to some extent which is more or less uncertain the treatise may be used upon cross-examination.[11]

Learned Treatises - URE Exception (31)

Subdivision (31) excepts from exclusion under Rule 63 a "published treatise, periodical or phamphlet on a subject of

history, science or art" [Italics added.] which treatise etc. is "a reliable authority". Undoubtedly the Commissioners intend to repudiate the notion that "science" means only "exact science" and they intend to include medicine and comparable disciplines under the head of "science or art".[12] Yet their choice of language is ill-adapted to their purpose. "Science or art" is the phrasing of the California statute and of the Iowa statute on which the California enactment is based. Both jurisdictions have held that this phrasing does not embrace medicine.[13] This phrasing is not, therefore, the clear-cut designation of medicine and like disciplines that the new rule should contain. Especially is this so if the new rule is to be adopted in this state. Hence, we suggest that (31) be amended to insert the words "medicine or other" immediately before the word "science".

Is (31), as thus amended, a desirable exception? In support of an affirmative answer the following arguments may be advanced: (1) If proponent's objective is to give the jury Doctor-Author X's views as substantive evidence (so that the jury may reason: X said it; it's true) proponent will in most cases need this exception. The alternative (calling X as witness) will in most cases be either downright impossible or inordinately inconvenient and expensive. There is, therefore, a necessity here in the sense that such necessity is an element of other recognized exceptions to the hearsay rule.[14] (2) There is, moreover, a special trustworthiness of this kind of hearsay arising from scientific nature of the work. Whatever elements of bias or partisanship there may be in a given work are apt to be in relation to scientific theory. This kind of slanting should no

more discredit a book than it discredits a specialist-witness who espouses a particular scientific school of thought.[15] (3) Today (without the exception) we freely allow the expert to testify though (if he is <u>really</u> qualified) his opinion will practically always be compounded in part of his book-learning.[16] If the book-background is thus indirectly brought before the jury, why not allow it directly? Consider, for example, the extent to which the Freudian psychiatrist testifying as expert will, of necessity, rely on Freud's works. If we accept, as we do, the witness' opinion so based, why not the books themselves?

There is (in our opinion) sufficient force in these considerations to justify the new rule dispensing with cross-examination of an author who is found to be a "reliable authority" on "a subject of history, medicine or other science or art."

If it be objected that the jury will be confused by technical terms and concepts, the answer is that proponent's self-interest may be trusted to prompt him to place an expert on the stand for whatever exposition is necessary under the circumstances. If it be objected that text-extracts may be distorted by lifting them out of context, the answer is that opponent's self-interest may be trusted to prompt him to expose the distortion.[17] If it be objected that under the new rule the trial may degenerate into a "battle of books" the answer is that under Rule 45 the trial judge possesses a discretion adequate to guard against this danger.[18]

In sum, (in our opinion) Exception (31), amended as proposed above, is desirable[19] and is recommended for approval.[20]

FOOTNOTES

1. Wigmore §1690.
2. Wigmore §1698.
3. Wigmore §1700.
4. Wigmore §1699.
5. Wigmore §1693.
6. Wigmore §1696 note 1.
7. 67 Cal. 13 (1885).
8. Gallagher, supra note 7.
9. Lilley v. Parkinson, 91 Cal. 655 (1891); Baily v. Kruetzmann, 141 Cal. 519 (1904).
10. People v. Wheeler, 60 Cal. 581 (1882).
11. Gluckstein v. Lipsett, 93 C.A. 2d 391 (1949); Lewis v. Johnson, 12 C. 2d 558 (1939); 23 S.C. L. Rev. 403; 2 U.C.L.A. L. Rev. 252; Wigmore §1700.
12. (31) is based on the A.L.I. Rule of which it is substantially a copy. Morgan says of the A.L.I. Rule that it "has long been advocated by Mr. Wigmore." 18 A.L.I. Proceedings, 195. The rule advocated by Wigmore would, of course, include medical texts. See Wigmore §§1691-1692 and his reference in §1693 note 3 to the "California heresy" of the Gallagher case, supra, note 7.
13. Wigmore §1693, note 3.
14. Wigmore §1691:

> ". . . there are certain matters upon which the conclusions of two or three leaders in the scientific world are always preeminently desirable; and it is highly unsatisfactory that, except in the region where they happen to live, the opinions of world-famous investigators should have no standing of their own. Whether such persons are legally unavailable, or whether it is merely a question of

relative expense, the principle of Necessity is equally satisfied; and we should be permitted to avail ourselves of their testimony in the printed form in which it is most convenient."

15. Wigmore §1692:

"(a) There is no need of assuming a higher degree of sincerity for learned writers as a class than for other persons; but we may at least say that in the usual instance their state of mind fulfils the ordinary requirement for the Hearsay exceptions, namely, that the declarant should have 'no motive to misrepresent'. They may have a bias in favor of a theory, but it is a bias in favor of the truth as they see it; it is not a bias in favor of a lawsuit or of an individual. Their statement is made with no view to a litigation or to the interests of a litigable affair. When an expert employed by an electric company using the alternating or the single current writes an essay to show that the alternating current is or is not more dangerous to human life than a single current, the probability of his bias is plain; but this is the exceptional case, and such an essay could be excluded, just as any Hearsay statement would be if such a powerful counter-motive were shown to exist.

"(b) The writer of a learned treatise publishes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of method and of accuracy of results. The motive, in other words, is precisely the same in character and is more certain in its influence than that which is accepted as sufficient in some of the other Hearsay exceptions, namely, the unwelcome probability of a detection and exposure of errors.

"(c) Finally, the probabilities of accuracy, such as they are, at least are greater than those which accompany the testimony of so many expert witnesses on the stand. The abuses of expert testimony, arising from the fact that such witnesses are too often in effect paid to take a partisan view and are practically untrustworthy, are too well-known to repeat. It must be conceded that those who

write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants.

"It may be concluded, then, that there is in these cases a sufficient circumstantial probability of trustworthiness. The Court in each instance should in its discretion exclude writings which for one reason or another do not seem to be sufficiently worthy of trust."

16. McCormick §296.

17. Wigmore §1690:

"Another objection sometimes raised is the danger of confusing the jury by technical passages without oral comment and simplification. A number of answers to this will suggest themselves; it is enough to point out that, so far as it is an appreciable danger, the counsel may be trusted to protect themselves, where necessary, against this danger by calling also an expert to take the stand.

"Another objection, once made, is that the treatises may be used unfairly, by taking passages which are explained away or contradicted in other books or in other parts of the book. Here, again, so far as the possibility is appreciable, the opposing counsel may be trusted to protect his client's interests, exactly as he does, by bringing to the stand one expert to oppose another, and with much less difficulty and expense."

18. See Morgan's statement in 18 A.L.I. proceedings 195:

"[T]he danger that has been suggested to us is that there will be a battle of the books if you do adopt this Rule. The answer to that is, of course, the answer Judge Hand made - the control of the trial judge."

The battle-of-books objection was long ago made by Alderson, B. though with a different figure of speech. "We must", he said, "have the evidence of individuals, not their written opinions. We should be inundated with books if we were to hold otherwise." Queen v. Crouch, 1 Cox's Cr. Cases 94,

quoted in People v. Wheeler, 60 Cal. 581, 586 (1882).

19. One desirable feature is stated as follows by the Commissioners:

> ". . . The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This exception will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose."

On this point consider the references in note 11 supra.

20. The provisions of Exception (30) could be regarded as broad enough to include Scientific Treatises. If (31) is approved it is, of course, of no importance that there is this possible overlap. If (31) is disapproved, it may be advisable to qualify (30) to exclude its possible application to Scientific Treatises.