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#34 9/17/63

Memorandum 63-44

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

Attached to this memorandum is a preliminary draft of a tentative recommendation relating to this article. We hope to be able to distribute a revised recommendation to the State Bar Committee after the September meeting. We would appreciate comments on the content of the comments in the tentative recommendation.

The following comments relate to the specific rules contained in the tentative recommendation.

Rule 17

This rule was approved at the last meeting in the form contained in the URE, with the suggestion that the rule be revised as set out in the tentative recommendation. The revision has not been approved by the Commission. The revision was considered desirable to make clear that the rule deals strictly with the competency of a witness and to avoid confusion in regard to the credibility of a witness. However, the staff is concerned that the revision may change the existing California law. It is not necessary under existing law to show that a child has a detailed knowledge of the oath. "As long as the child understands that some earthly evil will follow if he does not tell the truth, that is all that is required." People v. Burton, 55 Cal.2d 328, 341-42 (1961). The staff suggests that the original URE language be restored to Rule 17 in order to retain our existing law.

Consideration should be given to revising Rule 17 to state existing California law. Under existing law, "the witness's competency depends

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

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

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

First, "The witness's competency depends upon his ability to perceive, recollect, and communicate. . . . Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact."

Second, the witness must have the ability to perceive the event. "It follows that if the proposed witness was suffering from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event."

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

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

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

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

Rule 18

This rule was approved at the last meeting with the direction that it be revised to refer to the pertinent statutory provisions that set out the form of the oath. Chapter 3 of Part IV of the Code of Civil Procedure contains the pertinent forms. This chapter contains five sections. The first, Section 2093, merely details the persons

authorized to administer oaths and affirmations. Section 2094 sets forth the form of the oath to be given to a witness. Section 2095 grants the court discretion to adopt an alternative mode of an oath. Section 2096 authorizes an alternative swearing according to the peculiar ceremonies of a person's particular religion, if any. Section 2097 provides an alternative form for making an oath or affirmation. It seems desirable to make reference to the entire chapter.

Rule 19

This rule has been revised to make two separate subdivisions as suggested at the last meeting. The substantive language in both follows the language in the uniform rule quite closely. The purpose of this division is to make clear the distinction between the standards or degrees of proof required in the case of an ordinary witness's personal knowledge as opposed to the special qualifications required of expert witnesses. The principle expressed in this rule has been approved by the Commission, though the specific language has not yet been approved.

Rule 19.5

This rule states the substance of the third sentence of Rule 19. It is made the subject of a separate rule in accord with the Commission's decision that the third sentence of Uniform Rule 19 more properly states a substantive rule of law not connected with the requisite foundation required for the testimony of a witness. The specific language for this rule is taken from several cases declaring the doctrine of rejecting testimony incredible as a matter of law. It has not been approved by the Commission.

Rule 20

This rule has not been considered by the Commission. For a complete discussion of this rule and Rules 21 and 22, please refer to Memorandum 63-43, which you should bring to the meeting. Discussion of these rules begins on page 4.

With respect to the language of the rule as included in the tentative recommendation, the introductory clause has been revised in accord with the New Jersey recommended revision of this rule. However, the specific reference to Rules 21 and 22 has been omitted since there are several other rules of equal importance that limit the broad rule stated in Rule 20. Other revisions in the text of this rule as included in the tentative recommendation are as follows: (1) the word "him" has been replaced with "the witness" for purposes of clarity; (2) the word "extrinsic" has been omitted, as it adds nothing to the meaning of the rule; (3) the last phrase, "relevant upon the issues of credibility," has been revised to read "relevant to the credibility of the witness" as being more specific than the original language.

Please refer to the original memorandum (Memorandum 63-43, p.4 et seq.) for further discussion of this rule.

Is the discussion of impeaching one's own witness adequate? Do Commission members have any suggestions for improvement? Does the discussion of supporting the credibility of one's own witness make sense?

Rule 21

The Commission has not considered this rule. It is discussed in connection with Rule 20 in Memorandum 63-43, beginning on page 4.

With respect to the language of the rule as included in the tentative recommendation, the following should be noted: (1) the first sentence has been revised to delete the reference to "dishonestly" and to reorganize the sentence. The terms "fraud, lack of veracity, or false statement" are taken from the New Jersey revision of the uniform rules. The similar language in the present law refers to "truth, honesty, or integrity." The language of the New Jersey rule is presented for your consideration, though it appears to be of no greater merit than the present law. (2) The second sentence has been revised in several respects, primarily for purposes of clarity. The reference to "accused" has been replaced with a reference to "defendant" in keeping with the consistent use of the word "defendant" throughout the revised rules. (3) The terms "action or" have been added to "proceeding" for the same reason. (4) The last phrase has been revised from the statement of a negative to a more positive statement of inadmissibility. The word "sole" has been deleted as being unnecessary, particularly since evidence may be introduced for dual purposes. (5) The words "admissible solely for the purpose of" in the last line have been deleted as being unnecessary.

For other comments with respect to the substance of this rule, please refer to Memorandum 63-43.

Rule 22

This rule is discussed in Memorandum 63-43, beginning on page 8.

With respect to the text of the rule as presented in the tentative recommendation, it should be noted that the principal change is to tabulate the rule.

Subdivision (a) has been revised for purposes of clarity and to eliminate the references to "shall".

Subdivision (b) is the same as the uniform rule except for the deletion of the word "extrinsic," since it appears to add nothing to the rule.

Subdivisions (c) and (d) are in the same form as the uniform rule except for the replacement of the term "shall be" with the word "is".

Subdivision (e) has been added to the rule for the purpose of raising as a policy question whether evidence of religious belief or lack thereof should be inadmissible for the purpose of impairing or supporting the credibility of a witness. Comment in regard to this subdivision is contained on pages 9 and 10 of Memorandum 63-43 and on page 76 of the Commission's tentative recommendation relating to privileges.

Adjustments and Repeals

In addition to the suggested amendments and repeals contained in the preliminary draft of the tentative recommendation, the following material should be considered.

There are numerous sections specifically declaring the competency of certain persons or classes of persons to testify. Many of these appear to be included in the statutes primarily out of an abundance of caution so as to preclude the possible interpretation that other substantive statutes make certain persons incompetent to testify as

witnesses. Others are required to negate in specific instances the present incompetency of spouses in criminal actions. Still others are statutes framed in terms of competency to effectuate a separate purpose unrelated to testimony as such. Though many of these statutes appear to be unnecessary, their retention causes no harm and it is possible that their repeal may have adverse consequences. Accordingly, they are included here for your information and consideration with respect to the tentative recommendation.

Civil Code Section 250 provides that in actions under the Uniform Civil Liability for Support Act, "Husband and wife are competent witnesses to testify to any relevant matter, including marriage and parentage."

Code of Civil Procedure Section 1688 provides that in actions under the Uniform Reciprocal Enforcement of Support Act, "Husband and wife are competent witnesses and may be compelled to testify to any relevant matter, including marriage and parentage."

Penal Code Section 266g provides that in prosecutions for placing a wife in a house of prostitution, the "wife is a competent witness against her husband."

Penal Code Section 266h provides that in a prosecution for pimping, "any female person . . . is a competent witness" whether or not married to the defendant.

Penal Code Section 266i provides that in a prosecution for pandering, "any female person . . . is a competent witness" whether or not married to the defendant.

Penal Code Section 270e provides that in prosecutions for abandonment or neglect "both husband and wife shall be competent to testify."

Penal Code Sections 1322, 1323 and 1323.5, declaring several rules of competency and incompetency in terms of self-incrimination and spousal relationships, have been considered in connection with the Privileges Article. (See Tentative Recommendation Relating to Privileges, p.111.) It is there recommended that Section 1322 and 1323 be repealed and that Section 1323.5 be amended in a form unconnected with the problem of competency. The latter section declares that a defendant "shall, at his own request, but not otherwise, be deemed a competent witness." Though framed in terms of competency, this section actually deals with the defendant's privilege not to testify; hence, there appears to be no reason to alter this present statute.

Health and Safety Code Section 21377 provides that in prosecutions under the venereal disease control law, "any physician, health officer, spouse, or other person shall be competent . . . to testify."

Vehicle Code Section 40804 provides that in prosecutions involving the speed of a vehicle, (a) "any officer or other person shall be incompetent as a witness if the testimony is based upon or obtained from or by the maintenance or use of a speed trap" and (b) "every officer arresting, or participating or assisting in the arrest of, a person [for a traffic violation] is incompetent as a witness

if at the time of such arrest he was not wearing a full distinctive uniform or was using a motor vehicle not painted the distinctive color specified by the commissioner."

Respectfully submitted,

Jon D. Smock
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STATE OF CALIFORNIA

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

TENTATIVE RECOMMENDATION AND A STUDY

Relating to

The Uniform Rules of Evidence

Article IV. Witnesses

March 1964

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

LETTER OF TRANSMITTAL

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

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

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

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

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

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

Respectfully submitted,

HERMAN F. SELVIN
Chairman

March 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article IV. Witnesses

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

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

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

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

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

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

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

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

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

RULE 17. DISQUALIFICATION OF WITNESS; INTERPRETERS.

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

(a) [~~the proposed witness is~~] Incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him[,] ; or

(b) [~~the proposed witness is~~] Incapable of understanding the [~~duty of a witness to tell the truth~~] obligation of the oath, affirmation or declaration required by Rule 18.

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

COMMENT

General scheme of Rules 17-19. Uniform Rule 7 declares that "every person is qualified to be a witness" and that "no person is disqualified to testify in any matter." By way of limitation of Rule 7, Rule 17 states the minimum capabilities a person must possess to be permitted to testify as a witness--ability to communicate and an understanding of the duty to tell the truth, Rule 18 requires that the witness testify under oath, and Rule 19 requires a person to have personal knowledge or expertise before he may be permitted to testify concerning a particular matter. Under the URE scheme, matters of the witness's ability and opportunity to perceive, his memory, mental competence, experience, and the like, go to the weight to be given to his testimony rather than to his right to testify unless they are so lacking that they negate the existence of personal knowledge. Exclusion of testimony on the ground of privilege is covered by the revised

URE article on Privileges, and Rules 42 and 43 limit testimony by judges and jurors.

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

Rule 17 generally. Under existing California law, the competency of a witness depends upon his ability to understand the oath and to perceive, recollect, and communicate. Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact. People v. McCaughan, 49 Cal.2d 409, 420 (1957). On the other hand, Rule 17 requires merely the ability to communicate and to understand the obligation of an oath. The two missing qualifications--the ability to perceive and to recollect--are found only to a very limited extent in Rule 19 and proposed Rule 19.5. These rules require that the testimony of a proposed witness be excluded

if he claims to have observed and to recall an event and the judge determines that the claim is totally incredible (as, for example, where the proposed witness is blind and obviously did not have the ability to see the event).

The practical impact of adopting Rule 17 (together with Rules 19 and 19.5) would be to make a significant change in the nature of the inquiry the judge must make to determine the competency of a child or person suffering from mental impairment to testify concerning an event. As the following discussion indicates, in some cases the adoption of the Uniform Rules would permit testimony by children and persons suffering from mental impairment who would be disqualified from testifying under existing law. But, in such cases, where a person can communicate adequately, can understand the duty to tell the truth, and has personal knowledge, the sensible course of action is to put the person on the stand and to let him tell his story for what it may be worth. The trier of fact can consider his immaturity or mental condition in determining the credibility of his testimony. The alternative--to exclude the testimony--may deprive the trier of fact of the only testimony available.

Children. Rule 17 does not contain any specific provisions dealing with children as witnesses. They are competent witnesses if they meet the requirements of Rule 17 (ability to understand the oath and the ability to communicate) and Rules 19 and 19.5 (personal knowledge). On the other hand, Code of Civil Procedure Section 1880(2) provides that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," are incompetent as witnesses. This section means that a child under 10

must possess sufficient intelligence, understanding and ability to receive and fairly accurately recount his impressions and must have an understanding of the nature of an oath and a moral sensibility to realize that he should tell the truth and that he is likely to be punished for a falsehood. People v. Burton, 55 Cal.2d 328, 341 (1961).

Thus, the adoption of the Uniform Rules would result in a change in the nature of the inquiry the judge makes to determine the competency of a child and, in some cases would permit testimony by children who would be disqualified from testifying under existing law. Under existing law, the judge makes an inquiry into the intelligence and understanding of the child and his ability to fairly accurately recount his impressions in order to determine whether the child has the ability to perceive and to recollect; and, if the judge is not pursuaded that the child has these abilities, the child is disqualified as a witness. Under the URE no similar inquiry is made except to the extent necessary to determine whether the child has personal knowledge, and the judge must permit the child to testify if any trier of fact could conclude that the child has the ability to perceive and to recollect. It is unlikely that the difference in the nature of the judge's inquiry would result in any great change in actual practice. Under existing law, as under the Uniform Rule, the person objecting to the testimony of the child has the burden of showing incompetency. People v. Gasser, 34 Cal. App. 541 (1917); People v. Holloway, 28 Cal. App. 214 (1915). Moreover, the determination of competency is primarily within the judge's discretion, and the California cases indicate that children of very tender years are commonly permitted to testify. Witkin, California Evidence 438-39 (1958). See Bradburn v. Pock, 135 Cal.

App.2d 161, 164 (1955)(held, it was reversible error to refuse to permit a child to testify without conducting examination to determine his competency. "We cannot say that no child of 3 years and 3 months is capable of receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that no child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5.")

Persons "of unsound mind." Rule 17 does not contain any specific provisions dealing with the competency of a person suffering from mental impairment to be a witness. His competency is determined in the same manner as any other witness; he must have personal knowledge, the ability to understand the oath, and the ability to communicate. On the other hand, Code of Civil Procedure Section 1880 provides that "those who are of unsound mind at the time of their production for examination" cannot be witnesses. But the test is the same as for other witnesses under California law--an understanding of the oath, and the ability to perceive, recollect and communicate. People v. McCaughan, 49 Cal.2d 409, 420-21 (1957). In applying this test to persons who suffer from a degree of mental unsoundness, the court stated: "It follows that if the proposed witness was suffering from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event." People v. McCaughan, 49 Cal.2d 409, 421 (1957). And, although the trial judge determines whether the person is competent as a witness, "sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of

inquiry in a case in which the question is not simply whether or not an act was done but, rather, the manner in which it was done and in which testimony as to details may mean the difference between conviction and acquittal." Id. at 421.

Thus, adoption of Rules 17-19 would result in a significant change in the nature of the inquiry the judge makes to determine the competency of a person suffering from a degree of mental impairment. As in the case of a child, under existing law, the judge must be pursuaded that the proposed witness has the ability to perceive and to recollect; whereas, under the URE, the judge must permit the person to testify if any trier of fact could conclude that the person had the ability to perceive and to recollect.

The Dead Man Statute. In its tentative recommendation on the Privileges Article, the Commission recommended repeal of the Dead Man Statute. Hence, this statute would no longer be a ground for disqualification of a proposed witness.

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

RULE 18. OATH.

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

COMMENT

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

RULE 19. PREREQUISITES OF KNOWLEDGE AND EXPERIENCE.

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

(b) As a prerequisite for the testimony of an expert witness, the judge must find from sufficient evidence that the proposed witness has special knowledge, skill, experience or training sufficient to qualify him as an expert on the matter. Such evidence may be provided by the testimony of the witness himself. The judge may receive conditionally the testimony of the witness, subject to the evidence of special knowledge, skill, experience or training being later supplied in the course of the trial.

RULE 19.5. EXCLUSION OF INCREDIBLE TESTIMONY.

The judge may reject the testimony of a witness if he finds that such testimony is so inherently improbable that no trier of fact could reasonably believe it.

COMMENT

This rule restates the substance of the third sentence of Uniform Rule 19 but is not limited, as is the URE language, to the witness's perception of the matter.

The principle of this rule has been recognized at the appellate level in California in cases where the appellate court rejected testimony as a matter of law because it was so inherently improbable that no trier of fact reasonably could believe it. People v. Huston, 21 Cal.2d 690 (1943); People v. Headlee, 18 Cal.2d 266 (1941). Although no California cases have been found so holding, there is no reason why the same rule should not apply at the trial level.

RULE 20. EVIDENCE GENERALLY AFFECTING CREDIBILITY

[~~Subject to Rules 21 and 22~~] Except as otherwise provided by statute, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine [~~him~~] the witness and introduce [~~extrinsic~~] evidence concerning any conduct by him and any other matter relevant [~~upon the issues of~~] to the credibility of the witness.

COMMENT

Rule 20 sweeps away all pre-existing rules limiting the admissibility of evidence relating to the credibility of witnesses. The rule, however, is subject to several qualifications on the admissibility of such evidence. Thus, for example, Rules 21 and 22 limit the admissibility of certain types of evidence relevant to this matter. Other rules more general in scope also limit the admissibility of such evidence. Thus, rules of privilege and rules excluding hearsay evidence also operate to exclude evidence that may otherwise be admissible on this issue.

Impeaching one's own witness. The URE rule eliminates the present restriction on impeaching one's own witness. Under the present law, a party is precluded from impeaching his own witness unless he has been surprised and damaged by the witness' testimony. Code Civ. Proc. § 2049; In re Relph's Estate, 192 Cal. 451 (1923). In large part, the present law rests upon the theory that a party producing a witness is bound by his testimony. See Smellie v. Southern Pac. Co., 212 Cal. 540 (1931). This theory has long been abandoned in progressive jurisdictions where the practical aspects of modern litigation have been recognized. See McCormick,

Evidence, pages 70-71 (1954). Since a party should not be "bound" by the testimony of a witness produced by him, it follows that impeachment of his credibility should be permitted without anachronistic limitations. Moreover, denial of the right to impeach often may work a hardship on the party where by necessity a hostile witness is produced by the party. This is not uncommon in criminal cases, nor, for that matter, is it uncommon where expert testimony is required. In many cases, a party has no control over a person who witnessed an event. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure.

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

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

discretion to be exercised by the trial judge.

Support of witnesses. Under the present law, a witness's credibility may not be supported by the party calling him until an attack has been made upon his credibility, i.e., until his credibility is placed in issue by impeachment. C.C.P. § 2053; People v. Bush, 65 Cal. 129 (1884). Thus, character evidence in support of an unimpeached witness is inadmissible under existing law, probably because of a fear that too many collateral issues would be raised; but such evidence would be admissible under this rule. In many cases the witness' character for truth and honesty would appear to be of material benefit to the trier of fact. There is no sound reason for an arbitrary rule of exclusion which always excludes such facts from the jury's consideration. Here, too, discretionary exclusion under Rule 45 is preferable to a fixed rule of exclusion. Note that revised Rule 63(1) limits admissibility of prior consistent and inconsistent statements of a witness.

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

Evidence of the conviction of a witness for a crime [~~not involving dishonesty~~] is inadmissible for the purpose of impairing his credibility unless the crime involves fraud, lack of veracity or false statement [~~shall be inadmissible for the purpose of impairing his credibility~~]. If the witness be the [~~accused~~] defendant in a criminal action or proceeding, [~~no~~] evidence of his conviction of a crime [~~shall be admissible~~] is inadmissible for the [~~sole~~] purpose of impairing his credibility unless he has first introduced evidence [~~admissible solely for the purpose of~~] supporting his credibility.

COMMENT

This rule deals with the use of a criminal conviction for the purpose of impairing the credibility of a witness. In this regard, the present law is seriously defective. Under the present law, a conviction of any felony may be used to impeach the credibility of a witness unless the person received a pardon. Code Civ. Proc. §§ 2051, 2065. However, conviction of a crime that is punishable either as a felony or misdemeanor is not considered conviction of a felony unless punishment for a felony is imposed; hence, it is insufficient for impeachment purposes. People v. Hamilton, 33 Cal.2d 45 (1948). It makes no difference what crime was committed. But, conviction for a misdemeanor involving the very traits of character involved in determining the credibility of a witness is inadmissible, since this is a specific act which is excluded. Code Civ. Proc. § 2051; People v. White, 142 Cal. 292 (1904). This hodge-podge is totally without reason.

Under Rule 21, the substantive crime, whether a felony or a misdemeanor, must involve the very traits in issue in determining the credibility of the witness. Thus, convictions for crimes involving dishonesty or false statement are admissible, whether classed as felony or misdemeanor. On the other hand, conviction of a crime involving any other trait is inadmissible, regardless of the seriousness of the offense.

The second sentence of this rule relates to the order of proof in regard to impeachment of a criminal defendant. It declares that his credibility cannot be impeached until evidence of his credibility has been introduced first by him. This permits the criminal defendant to take the stand in his own defense without fear that his prior convictions for other crimes will be used to impeach his credibility and prejudice him in the eyes of the jury.

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

As affecting the credibility of a witness:

(a) In examining the witness as to a statement made by him in writing that is inconsistent with any part of his testimony, it [~~shall~~] is not [be] necessary to show or read to him any part of the writing, [~~provided that if~~] but the judge [deems it feasible] may require that the time and place of the writing and the name of the person addressed, if any, [shall] be indicated to the witness[~~;~~] .

(b) [~~extrinsic~~] Evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement[~~;~~].

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

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

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

COMMENT

This rule contains further limitations upon the admissibility of evidence affecting the credibility of a witness. Thus, the rule limits the scope of Rule 20. It is divided into several subdivisions, each of which is discussed below.

Subdivision (a). This subdivision deals with the foundational

requirements prerequisite to examining a witness concerning an inconsistent statement made in writing for the purpose of impairing his credibility. It eliminates the requirement of exhibiting an inconsistent writing to the witness before examining him concerning its contents. The URE rule, however, does not eliminate entirely the necessity for establishing a foundation, for it gives the judge discretion to require that certain information about the writing be disclosed to the witness.

So far as this subdivision eliminates the requirement of exhibiting an inconsistent writing to the witness, it represents a change in the present law. Code of Civil Procedure Section 2052 now requires that such writings be shown to the witness before the witness may be examined concerning them. The present law, based upon the common law since abrogated in England, has been severely criticized for unduly restricting the examiner in his examination of the witness. See, e.g., McCormick, Evidence, page 53 (1954).

Subdivision (b). Present law, embodied in Section 2052 of the Code of Civil Procedure, requires that a proper foundation be laid before the witness may be examined concerning a prior inconsistent statement. As in the case of subdivision (a), subdivision (b) gives the judge discretion to require the same foundation as is presently required.

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

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

Subdivision (d). Under this subdivision, specific instances of conduct are inadmissible to prove a trait of character for the purpose of impairing or supporting the credibility of a witness. This is in accord with the present California law. Cal. Code Civ. Proc. § 2051. This subdivision has been revised to make clear its relationship to Rule 22 relating to conviction of the witness of a crime.

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

AMENDMENTS AND REPEALS OF EXISTING STATUTES

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

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

Code of Civil Procedure

Section 1845 provides:

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

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

Section 1846 should be revised to read:

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

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

Section 1847 should be revised to read:

> 1847. WITNESS PRESUMED TO SPEAK THE TRUTH. A witness is presumed to speak the truth. [~~This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the~~] The jury are the exclusive judges of his credibility.

The first sentence of this section is framed in terms of a presumption and, hence, will be considered in connection with the URE article on presumptions. The deleted portion of the section is superseded by Rules 20, 21 and 22, dealing with impeachment and support of a witness' credibility.

Section 1868 should be revised to read:

> 1868. EVIDENCE CONFINED TO MATERIAL ALLEGATION. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the Court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination [~~, or when it affects the credibility of a witness~~].

Insofar as this section refers to the credibility of a witness, it is superseded by Rule 20.

Subdivision 16 of Section 1870 provides:

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

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

Section 1879 provides:

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

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

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

Section 1880 provides as follows:

1880. PERSONS INCOMPETENT TO BE WITNESSES. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

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

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

Section 1884 provides:

> 1884. WHEN AN INTERPRETER TO BE SWORN. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any Court or Judge to appear before such Court or Judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned who fails to attend at the time and place named in the summons, is guilty of a contempt.

This section should be repealed. It is superseded by the second sentence in Rule 17.

Section 2049 provides:

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

This section should be repealed. It is superseded by Rule 20, which permits a party calling a witness to impeach or support his credibility.

Section 2051 provides:

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

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

Section 2052 provides:

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

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

This section should be repealed. The matters dealt with in this section are covered by Rule 22, which makes foundation evidence a matter of discretion with the judge.

Section 2053 provides:

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

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

Section 2054 should be revised to read:

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

The stricken material is inconsistent with Rule 22, subdivision (a), making proper foundation a metter of discretion for the judge.

Section 2065 should be revised to read:

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

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

The deleted portion is inconsistent with Rule 21.