mtg.

#34(L) 10/14/63

Memorandum 63-48

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

Attached to this memorandum as Exhibit I (pink pages) are Rules 19 and 19.5 as they have been revised to carry out the directions of the Commission.

We have encountered difficulty with these rules; hence, they are presented by this memorandum so that the problems might be decided by the Commission.

1. Is Rule 19.5 necessary or desirable?

Rule 19.5 gives a trial judge the power to exclude testimony if he finds that it is impossible. But the rule does not specifically provide that he may not do so if the testimony is merely so inherently improbable that no reasonable man could believe it.

Rule 19.5 was based originally on the sentence in Rule 19 granting the judge power to disqualify a witness if he finds there is no evidence from which a trier of fact could reasonably find that the witness has personal knowledge. Thus, the original URE sentence dealt only with the admissibility of evidence, i.e., the qualifications of a witness to testify concerning a particular matter.

Rule 19.5, on the other hand, now deals with the credence to be given to a witness' testimony. Thus, Rule 19.5 now deals with matters that are involved in the question of the judge's power to grant nonsuits, directed verdicts, judgments notwithstanding verdicts, and peremptory instructions on the establishment or nonestablishment of certain facts. Because of

the fact that Rule 19.5 deals with these matters, problems of interpretation are created because of the limited scope of Rule 19.5.

Under existing law, a trial judge is required to give a peremptory instruction as to the existence or nonexistence of a fact if the evidence of such "is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved." Blank v. Coffin, 20 Cal.2d 457, 461 (1942); Roberts v. Del Monte Properties Co., 111 Cal. App.2d 69 (1952). The trial court may decide issues of fact "where the jury could draw but one conclusion from the evidence". Smith v. American Surety Co., 148 Cal. App.2d 131, 134 (1957); People v. Geijsbeek, 153 Cal. App.2d 300 (1957).

Where reasonable minds cannot differ as to the ultimate facts upon which the rights of the parties depend, a directed verdict is proper. Perumean v. Wills, 8 Cal.2d 578 (1937). Of course, if there is a substantial conflict in the evidence, the court may not decide the question. But not every conflict in the evidence precludes a decision of the court. California does not follow the "scintilla of evidence" rule The conflict must be substantial. Hence, a court acts properly in directing a verdict or granting a nonsuit if the testimony is so inherently improbable that it cannot be rationally believed. Jensen v. Leonard, 82 Cal. App.2d 340 (1947); Neblett v. Elliott, 46 Cal. App.2d 294 (1941); Nicholas v. Jacobson, 113 Cal App. 382 (1931). "In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict." Estate of Lances, 216 Cal. 397 (1932).

As Rule 19.5 is limited to "physical impossibility" cases, does the Commission intend to restrict the trial court's right to direct a finding or a verdict to physical impossibility cases? Is the rule sppposed to preclude the trial court from making rulings on "inherent improbability" cases?

If so, the language should be clearer. The language of Rule 19.5 is a grant of power to exclude evidence. In the light of the cases, it would seem that a direct restriction on the trial court would be needed if the power to reject evidence as inherently improbable is to be taken from the trial courts.

Such a change in the law appears to be undesirable. In the first place it seems unenforceable. If the judge strikes the evidence, the appellate court can't find the error prejudicial if the appellate court is also of the opinion that the evidence is inherently improbable and a verdict could not have been based upon it. In the second place, it seems undesirable to permit only the appellate courts to rule on certain questions of law to the exclusion of the trial courts. Litigation should be settled at the earliest stage possible; hence, the trial courts should be fully competent to rule on all questions of law that must be decided for the ultimate disposition of the case at the trial level. Appellate courts and appeals exist for review of trial court decisions, not for deciding questions in the first instance that arise at the trial level.

Because Rule 19.5 does not deal with the competence of witnesses to testify about particular matters at all, because Rule 19.5 implies, although it does not state, that the trial judge may not decide all aspects of the cases he hears, and because the implications of Rule 19.5 might

cause an undesirable change in existing law, the staff recommends that Rule 19.5 be deleted from the recommendation. Moreover, Rule 19.5 deals with matters not usually considered by courts on questions of admissibility. As the URE is concerned almost exclusively with admissibility, Rule 19.5 seems inappropriate in the URE.

Insofar as Rule 19.5 deals with the subject of personal knowledge, Rule 19 covers the subject and Rule 19.5 is unnecessary.

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

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

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

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

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

Wigmore explains the matter as follows:

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

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

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

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

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

Respectfully submitted,

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mtg.

Memo 63-48

EXHIBIT I

(Extract from Tentative Recommendation

on Witnesses)

RULES 19 AND 19.5

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

(1) [~~As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required~~] The testimony of a witness concerning a particular matter is inadmissible if no trier of fact could reasonably find that he has personal knowledge of the matter, but an expert witness may testify concerning matters of which he does not have personal knowledge to the extent provided in Rule 56.

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

(3) [~~Such~~] Evidence of personal knowledge, special knowledge, skill, experience, training, and education may be provided by the testimony of the witness himself. [~~The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter.~~]

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

COMMENT

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

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

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

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

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

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

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

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

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

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

The sentence in the origianl URE rule permitting the judge to reject the testimony of a witness that he has personal knowledge has been deleted because it is unnecessary in view of the revision of subdivision (1) and too limited in its scope. The rule developed in the cases is that any testimony that is contrary to the admitted physical facts or, for some other similar reason, is impossible and hence incapable of belief may be excluded by the judge. See annotations, 21 A.L.R. 141, 8 A.L.R. 798; Waizman v. Black, 101 Cal. App. 610 (1929); Keyes v. Hawley, 100 Cal. App. 53 (1929). The Commission has added Rule 19.5 to express the rule in its broader form. See comment to Rule 19.5.

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

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

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

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

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

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

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

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

RULE 19.5. EXCLUSION OF IMPOSSIBLE TESTIMONY

The judge may exclude the testimony of a witness if he finds that under the circumstances disclosed there exists a physical impossibility that such testimony is true.

COMMENT

This rule embodies in part the substance of the third sentence of Uniform Rule 19. But it differs from the URE rule in that it is not limited, as is the URE language, to the witness' perception of the matter.

The rule expresses a principle well established in other juridictions. See annotations, 21 A.L.R. 141, 8 A.L.R. 798. No case has been found in California, however, that applies the rule. It seems likely that the rule would be applied in an appropriate case as a specific example of the general rule that the trial judge may decide questions of fact if but one conclusion can be reasonably reached from the evidence. Jensen v. Leonard, 82 Cal. App.2d 340, 354 (1947). ("We . . . are merely holding . . . the negative testimony of appellant . . . 'is so inherently improbable that it was not entitled to consideration as evidence . . . .'" Hence, directed verdict affirmed.) And expressions may be found in some appellate cases indicating that the rule would be applied. See, for example, Fowden v. Pacific Coast Steamship Co., 149 Cal. 151 (1906).

Under the rule, improbability of the testimony is not enough to warrant its exclusion. The testimony must be impossible before it may be excluded under the rule. And the impossibility must be shown by uncontradicted evidence, for any conflicts in the evidence must be resolved by the trier of fact. See Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 160-162 (1906).

Rule 19.5 will have no effect on the rule applied by the appellate courts of California that a determination by the trier of fact may be reversed where the evidence relied on is so improbable as to be incredible. Under such circumstances the appellate court will assume the decision was the result of passion and prejudice. People v. Headlee, 18 Cal.2d 266 (1941).