#34 7/21/64

Third Supplement to Memorandum 64-48

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code - Division 9 - Extrinsic Policies)

We received a letter dated July 17, 1964, from Mr. Powers, commenting on Section 1153 of the Evidence Code (exclusion of offers to plead guilty to crime). The pertinent text of the letter is quoted herein.

In concurring with the staff's suggestion in regard to language changes in this section (see page 3 of the First Supplement to Memorandum 64-48), Mr. Powers comments as follows:

> There are many cases where a defendant, in talking to police officers, couples an admission or confession with a request for intercession by them for a lesser sentence such as County Jail over State Prison, offers to turn in other criminals for such help, requests immunity for possible co-defendants and, in general, makes statements which could be considered "in negotiation" of his plea of guilty. Therefore, it is respectfully suggested that the section be completely rewritten to correct a possible misinterpretation of the language set for therein.

A second point raised by Mr. Powers deals with the treatment of a plea of guilty, later withdrawn.

> In addition, it is suggested that the new section contain a provision that where a defendant in open court has entered a plea of guilty after the usual foundational requirements have been laid, namely, his statement that he wishes to enter a plea of guilty after full consultation with his attorney, that his rights have been explained to him, that he knows the nature of the charge to which he is pleading guilty, that he is pleading guilty because, in fact, he is guilty, and that no promises of any kind have been extended to him for his plea of guilty, that such plea be allowed to be offered in evidence against a defendant. There are occasions when such a plea has been allowed to be set aside by the court where a defendant in a probation report or through some other fashion has indicated that he was

not guilty of the crime or entered the plea on a belief that he would receive some consideration, and the court, in its discretion, would allow the plea to be set aside. We believe that under such circumstances the plea should be allowed to be offered in evidence against the defendant and the section should be re-drafted to contain this right of the People.

As a basis for Commission consideration of this matter, the following discussion relates to the extisting California law and recent developments in this area. For this purpose, we present a pertinent extract foom the recent decision of the California Supreme Court in People v. Halmilton, 60 Cal.2d ___, ___, 32 Cal. Rptr. 4, 8-9, 383 P .d 412, 415-416 (1963) (which is repeated almost verbatim in a companion case, People v. Wilson, 60 Cal.2d ___, ___, 32 Cal. Rptr. 44, 54 55, 383 P.2d 452, 462-463 (1963):

> It was error to admit this offer to plead guilty into evidence.
>
> It is true that, in the absence of statute, it has been held in California that an offer to plead guilty is admissible (People v. Boyd, 67 Cal.App. 292, 302-303, 227 P. 783; People v. Cooper, 81 Cal.App.2d 110, 117-118, 183 P.2d 67). It has also been held that a plea of guilty, later withdrawn, is admissible (People v. Ivy, 163 Cal.App.2d 436, 329 P.2d 505). In the absence of statute, the underlying theory of these cases is that by his plea or offer to plead guilty the dffendant has made, in fact an admission of guilty. In jurisdictions other that California the cases are in conflict. (See discussion 4 Wigmore, Evidence (3d ed. 1940) § 1067, p.66.)
>
> But all of the cases cited above were either decided before Penal Code sections 1192.1 through 1192.4 were enacted in 1955 and 1957, or failed to mention those sections. Bu these enactments the Legislature has changed the law in California on this subject.
>
> Section 1192.1 provides that if a defendant is charged with a crime divided into degrees, upon a plea of guilty, when consented to by the prosecutor and approved by the court, the plea may specify the degree, and

defendant cannot be thereafter punished for a higher degree. Section 1192.2 makes the same rule applicable to pleas of guilty before a committing magistrate. Section 1192.3 provides that in cases where the jury can select various punishments, the plea of guilty may specify the punishment to be imposed, and, if accepted by the prosecution and approved by the court, no more severe punishment than specified in the plea may be imposed. Section 1192.4 (added to the Penal Code in 1957, Stats. 1957, ch. 1297, p. 2616, § 4) was passed for the obvious purpose of supplementing the other three sections.

[Sections 1192.1 through 1192.4 are set out as Exhibit I. (pink page).]

By this section, the Legislature has decided, just as it did many years ago in civil cases by probibiting the introduction into evidence of offers to compromise (Code Civ. Proc. § 2078), that it is in the public interest that pleas of gullty to a lesser degree of crime shall not be admissible. The obvious purpose of the section is to promote the public interest by encouraging the settlement of criminal cases without the necessity of a trial. (See McCormick, Evidence (1954) § 251, p. 543.) Certainly, it cannot reasonably be argued that while a plea of guilty to a lesser degree is not admissible, that an offer to]lead guilty to such lesser degree is admissible. There is not material difference between actual pleas of guilty to lesser detree of the crime charged and offers to plead guilty to a lesser degree.

We therefore conclude that appellant's offer to plead guilty if assured of a life sentence, as made to a representative of the district attorney was improperly admitted tnto evidence. By virtue of the provisions of section 1192.4 the earlier cases treating such offers to plead and pleas as admissions of guilt are no longer controlling.

Both of these cases (Hamilton and Wilson) hold that an offer to plead guilty is inadmissible. Neither case specifically involved the question of an actual plea of guilty that is later withdrawn. However, in a recent case decided by the District Court of Appeal, First District (BRAY, P.J., MOLINARI, SULLIVAN, JJ.), People v. Quinn, 223 Cal. App.2d ____, 36 Cal. Rptr. 233 (1963), the court held that a withdrawn plea of guilty to a robbery charge could be shown against the defendant; the holdings in Hamilton and Wilson were limited to the specific questions involved in those cases, i.e., offers to plead guilty to a crime divided in degrees (Wilson) and whose punishment is divided in degrees (Hamilton). There is an extensive discussion of the Hamilton and Wilson cases together with pertinent cases preceding them in the Quinn case at 36 Cal. Rptr. at 237-240. In effect, the Quinn case reaffirms the decision in People v. Boyd, 67 Cal. App. 292, 303, 227 Pac. 783 (1924), which disapproved People v. Ryan, 82 Cal. 617, 23 Pac. 121 (1890).

We cannot state precisely what the existing California law is in light of this most recent District Court of Appeal decision because the Supreme Court granted a hearing in the Quinn case on February 14, 1964, and so far as our research has disclosed (advance sheets through July 6, 1964) the case is still pending in the Supreme Court. However, the Boyd case was cited in both Hamilton and Wilson and, as the above extract shows, may have been dealt a fatal blow by the language: "But all of the cases cited above were either decided before Penal Code section 1192.1 through 1192.4 were enacted in 1955 and 1957, or failed to mention those sections. By these enactments the Legislature has changed the law in California on this subject."

The matter suggested by Mr. Powers' comment is precisely the situation involved in the Quinn case (except that it is not clear that the elaborate foundation mentioned in the comment was present in that case). However, it is somewhat beyond the precise language of Section 1153, which deals with offers only and does not purport to state whether a plea, later withdrawn, is within its scope. It seems quite likely, however, that Mr. Powers' suggestion would change existing law (depending upon the Supreme Court's decision in the Quinn case).

In reviewing the pertinent materials for preparing this supplement, we discovered one further point that should be raised in connection with this section. As presently drafted, this section applies to exclude offers to plead guilty in "any action." Existing Penal Code Section 1192.4 applies "in any criminal, civil or special action or proceeding of any nature, including proceedings before agencies, commissions, boards and tribunals." Since we do not have an existing statute (Penal Code Section 1192.4) that has broad scope (though possibly may apply only to a narrowly restricted situation dependent upon the Supreme Court's decision in the Quinn case) the staff suggests Section 1153 be revised by adding at the end thereof, immediately following "in any action," the following:

> or any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

Respectfully submitted,

Jon D. Smock
Associate Counsel

7/21/64

EXHIBIT I

1192.1. Upon a plea of guilty to an information or indictment accusing the defendant of a crime divided into degrees when consented to by the prosecuting attorney in open court and approved by the court, such plea may specify the degree thereof and in such event the defendant cannot be punished for a higher degree of the crime than the degree specified.

1192.2. Upon a plea of guilty before a committing magistrate as provided in Section 859a of this code, to a crime divided into degrees, when consented to by the prosecuting attorney in open court and approved by such magistrate, such plea may specify the degree thereof and in such event, the defendant cannot be punished for a higher degree of the crime than the degree specified.

1192.3. Upon a plea of guilty to an information or indictment for which the jury has, on a plea of not guilty, the power to recommend, the discretion of imposing, or the option to impose a certain punishment, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty. Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant cannot be sentenced to a punishment more severe than that specified in the plea.

1192.4. If the defendant's plea of guilty pursuant to Section 1192.1, 1192.2 or 1192.3 of this code be not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The pleas so withdrawn may not be received in evidence in any criminal, civil or special action or proceeding of any nature, including proceedings before agencies, commissions, boards and tribunals.

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1. EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

1100. Character itself in issue: Manner of proof.

1100. When a person's character or a trait of his character is itself an issue, any otherwise admissible evidence (including testimony in the form of opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible when offered to prove only such person's character or a trait of his character.

1101. Character evidence to prove conduct.

1101. (a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his character (whether in the form of opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

1102. Evidence of character of criminal defendant to prove conduct.

1102. In a criminal action, evidence of the defendant's character or a trait of his character in the form of opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove his innocence.

(b) Offered by the prosecution to prove the defendant's guilt if the defendant has previously introduced evidence of his character to prove his innocence.

1103. Evidence of character of victim of crime to prove conduct.

1103. In a criminal action, evidence of the character or a trait of character (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(b) Offered by the prosecution to meet evidence previously offered by the defendant under subdivision (a).

1104. Character trait for care or skill.

1104. Evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

1105. Habit or custom to prove specific behavior.

1105. Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

CHAPTER 2. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

1150. Evidence to test a verdict.

1150. Upon an inquiry as to the validity of a verdict, evidence otherwise admissible may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have improperly influenced the verdict. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

1151. Subsequent remedial conduct.

1151. When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

1152. Offer to compromise and the like.

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any

other thing, act, or service to another who has sustained or claims to have sustained loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim on demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his pre-existing debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty.

1153. Offer to plead guilty to crime.

1153. Evidence that the defendant in a criminal action has offered to plead guilty to the alleged crime or to a lessor crime, as well as any conduct or statements made in negotiation thereof, is inadmissible in any action.

1154. Offer to discount a claim.

1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

1155. Liability insurance.

1155. Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

§ 1100

Comment. Section 1100 is technically unnecessary. Section 351 declares that all relevant evidence is admissible. Hence, all of the evidence declared to be admissible by Section 1100 would be admissible anyway under the general provisions of Section 351. Section 1100 is included in the Evidence Code, however, to forestall the argument that Section 351 has not removed all judicially created restrictions on the forms of evidence that may be used to prove character or a trait of character when that character or character trait is an ultimate fact to be proved and not merely circumstantial evidence of conduct in conformity therewith.

Section 1100 seems to be generally consistent with existing California law, although the existing law is uncertain in some respects. Cases involving character as an ultimate issue may be found admitting opinion evidence (People v. Wade, 118 Cal 672, 50 Pac. 841 (1897); People v. Samonset, 97 Cal. 448, 450, 32 Pac. 520, 521 (1893)), reputation evidence (Estate of Akers, 184 Cal. 514, 519-520, 194 Pac. 706, 708-709 (1920); People v. Samonset, supra), and evidence of specific acts (Guardianship of Wisdom, 146 Cal. App.2d 635, 304 P.2d 221 (1956); Currin v. Currin, 125 Cal. App.2d 644, 271 P.2d 61 (1954); Guardianship of Casad, 106 Cal. App.2d 134, 234 P.2d 647 (1951)). However, cases may also be found excluding some kinds of evidence where particular traits are involved. For example, in cases involving the unfitness or incompetency of an employee, evidence of specific acts is admissible to prove such unfitness or incompetency, while evidence of reputation is not. E.g., Gier v. Los Angeles Consol. Elec. Ry., 108 Cal. 129, 41 Pac. 22 (1895). Section 1100 eliminates the uncertainties in

existing law and assures the admissibility of any evidence that is relevant to prove what the character in issue actually is.

Section 1100 is based on Rule 46 of the Uniform Rules of Evidence.

§ 1101

Comment. Section 1101 is concerned with evidence of a person's character--i.e., his propensity or disposition to engage in a certain type of conduct--that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion. Section 1101 is not concerned, however, with evidence of character offered on the issue of the credibility of a witness; the admissibility of such evidence is determined under Sections ***-***. Nor is Section 1101 concerned with evidence offered to prove a person's character when that character is itself in issue; the admissibility of evidence offered to prove character as an ultimate fact--and not as circumstantial evidence of some other fact--is determined under Section 1100.

Civil cases. Section 1101 makes character evidence inadmissible to prove conduct in civil cases. Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened. Because of the danger of abuse of this kind of evidence, the confusion of issues, collateral inquiry, prejudice, and the like, Section 1101 excludes evidence of character to prove conduct in civil cases.

Section 1101 states what is the general rule under existing law. CODE CIV. PROC. § 2053 (superseded by Evidence Code Section 1101)("Evidence of the good character of a party is not admissible in a civil action . . . ."); Decoy v. Tassi, 21 Cal.2d 109, 130 P.2d 389 (1942)(assault; evidence of defendant's bad character for peace and quiet held inadmissible); Vance v. Richardson, 110 Cal. 414, 42 Pac. 909 (1895)(assault; evidence of defendant's good character for peace and quiet held inadmissible); Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260 (1907)(divorce for adultery; evidence of defendant's and the nonparty-corespondent's good character held inadmissible). Under existing law, however, there may be an exception to this general rule: Existing law may permit evidence to be introduced of the unchaste character of a plaintiff to show the likelihood of her consent to an alleged rape. Valencia v. Milliken, 31 Cal. App. 533, 160 Pac. 1066 (1916)(civil action for rape; error, but nonprejudicial, to limit evidence of unchaste character of plaintiff to issue of damages). The Evidence Code has no such exception for civil cases. But see Section 1103.

Criminal cases. Section 1101 states the general rule that evidence of character to prove conduct is inadmissible in a criminal case. Sections 1102 and 1103 state exceptions to this general principle. See the Comment to Section 1102.

Evidence of misconduct to show fact other than character. Subdivision (b) of Section 1101 is probably unnecessary, but it is desirable to make clear that Section 1101 does not prohibit the admission of evidence of misconduct when it is offered not as circumstantial evidence of other misconduct (i.e., disposition to commit crime or engage in misconduct) but as evidence of some other fact in issue (i.e., motive, common scheme or plan, preparation, intent, knowledge, identity or absence of mistake or accident).

Subdivision (b) codifies existing California law. People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569 (1939)(prior crime admissible to show general criminal plan and absence of accident); People v. David, 12 Cal.2d 639, 86 P.2d 811 (1939)(prior robbery admissible to show defendant's sanity and ability to devise and execute deliberate plan); People v. Morani, 196 Cal. 154, 236 Pac. 135 (1925)(prior abortion admissible to show that operation was not performed in ignorance of effect and, hence, to show necessary intent). See discussion in CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PRACTICE 491-498 (1964).

Evidence of character offered on issue of credibility. Section 1101 is not concerned with evidence of character offered on the issue of the credibility of a witness. The admissibility of evidence relating to credibility is determined under Sections ***-***. Subdivision (c) of Section 1101 makes this clear.

§ 1102

Comment. Section 1101 states the general rule that character evidence is not admissible to prove a disposition to commit a crime or to engage in misconduct. Sections 1102 and 1103 state exceptions to this general rule. These exceptions apply only in criminal cases.

Sections 1102 and 1103. Under Section 1102, the accused in a criminal case may introduce evidence of his good character to show his innocence of the alleged crime--provided that the trait of character to be shown is involved in the charge made against him. This codifies existing law. People v. Chrisman, 135 Cal. 282, 67 Pac. 136 (1901). Sections 1101 and 1102 make it clear that the prosecution may not, on its own initiative, use character evidence to prove that the defendant had the disposition to commit

the crime charged; but, if the defendant first introduces evidence of his good character to show the likelihood of innocence, the prosecution may meet his evidence by introducing evidence of the defendant's bad character to show the likelihood of guilt. This also codifies existing law. People v. Stewart, 28 Cal. 395 (1865)(murder prosecution; error to exclude evidence of defendant's good character for peace and quiet); People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954)(prosecution for sexual molestation of child; error to exclude expert psychiatric opinion that defendant was not a sexual psychopath); People v. Hughes, 123 Cal. App.2d 767, 267 P.2d 376 (1954)(assault prosecution; evidence of defendant's violent nature held admissible after introduction of evidence showing his good character for peace and quiet). See CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PRACTICE 489-490 (1964).

Likewise, under Section 1103, the defendant may introduce evidence of the character of the victim of the crime where the conduct of the victim in conformity with his character would tend to exculpate the defendant; and, if the defendant introduces evidence of the bad character of the victim, the prosecution may introduce evidence of the victim's good character. This codifies existing law. People v. Lamar, 148 Cal. 564, 83 Pac. 993 (1906)(murder prosecution; error to exclude evidence of victim's bad character for violence offered to prove victim was aggressor and defendant acted in self-defense); People v. Shea, 125 Cal. 151, 57 Pac. 885 (1899) (rape prosecution; error to exclude evidence of the prosecutrix's unchaste character offered to prove the likelihood of consent); People v. Hoffman, 195 Cal. 295, 311-312, 232 Pac. 974, 980 (1925)(murder prosecution; evidence of victim's good reputation for peace and quiet held inadmissible when

defendant had not attacked reputation of victim); People v. Fitch, 28 Cal. App.2d 31, 81 P.2d 1019 (1938)(murder prosecution; evidence of victim's good character for peace and quiet held admissible after defendant introduced evidence of victim's violent nature). See also Comment, 25 CAL. LAW REV. 459 (1937).

Thus, under Sections 1102 and 1103, the defendant in a criminal case is given the right to introduce character evidence that would be inadmissible in a civil case. Since his life or liberty is at stake in the criminal trial, the defendant should not be deprived of the right to introduce evidence even of such slight evidential value as character evidence. As the prosecution has the burden of proving guilt beyond a reasonable doubt, evidence of the character of the defendant or the victim--though weak--may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt; and, as other persons are not directly involved in the litigation, the danger of prejudice is minimal.

Kinds of character evidence admissible to prove conduct under Sections 1102 and 1103. There are three kinds of evidence that might be offered to prove character as circumstantial evidence of conduct: Evidence as to reputation; opinion evidence as to character; and evidence of specific acts indicating character. The admissibility of each of these kinds of evidence when character is sought to be proved as circumstantial evidence of conduct under Sections 1102 and 1103 is discussed below.

Reputation evidence is the ordinary means sanctioned by the cases for proving character as circumstantial evidence of conduct, WITKIN, CALIFORNIA EVIDENCE § 125 (1958). See People v. Fair, 43 Cal. 137 (1872). Both Sections 1102 and 1103 codify the existing law permitting character to be proved by reputation.

There is recent authority for the admission of opinion evidence to prove character as circumstantial evidence of conduct. People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954)(error to exclude expert psychiatric opinion that the defendant was not a sexual psychopath and, hence, unlikely to have violated Penal Code Section 288). Apparently, however, opinion evidence is inadmissible generally. See People v. Spigno, 156 Cal. App.2d 279, 319 P.2d 458 (1957)(full discussion of the Jones case); CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PRACTICE 489-490 (1964). Both Sections 1102 and 1103 permit character to be proved by opinion evidence. The opinions of those whose personal intimacy with a person gives them a firsthand knowledge of that person's character are a far more reliable indication of that character than is reputation, which is little more than accumulated hearsay. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940). The danger of collateral issues seems no greater than that inherent in reputation evidence. The existing rule excludes the most reliable form of character evidence and admits the least reliable; abandonment of this rule in favor of admitting opinion evidence under certain circumstances in criminal cases is, therefore, recommended.

Under existing law, the admissibility of evidence of specific acts to prove character as circumstantial evidence of conduct depends upon the nature of the conduct sought to be proved. Evidence of specific acts of the accused is excluded as a general rule in order to avoid the possibility of prejudice, undue confusion of the issues with collateral matters, unfair surprise, and the like. Thus, it is usually held that evidence of specific acts by the defendant is inadmissible to prove his guilt even though the defendant has opened the question by introducing

evidence of his good character. See discussion in People v. Gin Shue, 58 Cal. App.2d 625, 634, 137 P.2d 742, 747-748 (1943). Evidence of specific acts of violence to prove defendant's character was held admissible after introduction of evidence of defendant's good character in People v. Hughes, 123 Cal. App.2d 767, 267 P.2d 376 (1954); but the holding in that case may be explained on the basis of cases holding that evidence of specific acts of misconduct is admissible to rebut a defendant's direct testimony denying any prior misconduct of the kind alleged. People v. Westek, 31 Cal.2d 469, 190 P.2d 9 (1948). On the other hand, it is well settled that in a rape case, for example, the defendant may show the unchaste character of the prosecutrix with evidence of prior voluntary intercourse in order to indicate the unlikelihood of resistance on the occasion in question. People v. Shea, 125 Cal. 151, 57 Pac. 885 (1899); People v. Benson, 6 Cal. 221 (1856); People v. Battilana, 52 Cal. App.2d 685, 126 P.2d 923 (1942). But, in a homicide or assault case where the defense is self-defense, evidence of specific acts of violence by the victim is inadmissible to prove his violent nature (and, hence, that the victim was the aggressor) unless the prior acts were directed against the defendant himself. People v. Yokum, 145 Cal. App.2d 245, 302 P.2d 406 (1956); People v. Soules, 41 Cal. App.2d 298, 106 P.2d 639 (1940). But see People v. Carmichael, 198 Cal. 534, 548, 246 Pac. 62, 68 (1926)(if defendant had knowledge of victim's statement evidencing violent nature, the "statement was material and might have had an important bearing upon his plea of self-defense"); People v. Swigart, 80 Cal. App. 31, 251 Pac. 343 (1926). See also Comment, 25 CAL. LAW REV. 459, 466-469 (1937).

Section 1102 codifies the general rule under existing California law which precludes evidence of specific acts of the defendant to show character as circumstantial evidence of his innocence or of his disposition to commit the crime with which he is charged. See, however, Section 1101(b)(use of evidence of specific acts of defendant to prove motive, plan, etc.) and the Comment thereto.

Section 1103 permits both the defendant and the prosecution to use evidence of specific acts of the victim of the crime to prove the victim's character as circumstantial evidence of his conduct. In this respect, the section appears to be in accord with existing law, although the existing law is not entirely clear.

§ 1103

Comment. See the Comment to Section 1102.

§ 1104

Comment. Section 1104 places a further limitation on the use of character evidence. Under Section 1104, character evidence with respect to care or skill is inadmissible to prove that conduct on a specific occasion was either careless or careful, skilled or unskilled.

Section 1104 codifies well-settled California law. Towle v. Pacific Improvement Co., 98 Cal. 342, 33 Pac. 207 (1893). The purpose of the rule is to prevent collateral issues from consuming too much time and distracting the attention of the trier of fact from what was actually done on the particular occasion. Here, the slight probative value of the evidence balanced against the danger of confusion of issues, collateral inquiry, prejudice, and the like, warrants a fixed exclusionary rule.

Section 1104 is the same as Rule 48 of the Uniform Rules of Evidence.

§ 1105

Comment. Section 1105, like Section 1100, declares that certain evidence is admissible. Hence, Section 1105 is technically unnecessary because Section 351 declares that all relevant evidence is admissible. Nonetheless, Section 1105 is desirable to assure that evidence of custom or habit--a regular response to a repeated specific situation--is admissible even where evidence of a person's character--his general disposition or propensity to engage in a certain type of conduct--is inadmissible.

The admissibility of habit evidence to prove conduct in conformity with the habit has long been established in California. Wallis v. Southern Pac. Co., 184 Cal. 662, 195 Pac. 408 (1921)(distinguishing cases holding character evidence as to care or skill inadmissible); Craven v. Central Pac. R.R., 72 Cal. 345, 13 Pac. 878 (1887). The admissibility of evidence of the custom of a business or occupation is also well established. Hughes v. Pacific Wharf & Storage Co., 188 Cal. 210, 205 Pac. 105 (1922)(mailing letter). However, under existing law, evidence of habit is admissible only if there are no eyewitnesses. Boone v. Bank of America, 220 Cal. 93, 29 P.2d 409 (1934). In earlier cases, the Supreme Court criticized the "no-eyewitness" limitation:

> This limitation upon the introduction of such testimony seems rather illogical. If the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eye-witnesses; and if the testimony of the eye-witnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit. [Wallis v. Southern Pac. Co., 184 Cal. 662, 665, 195 Pac. 408, 409 (1921).]

The "no-eyewitness" limitation is undesirable. Eyewitnesses frequently are mistaken, and some are dishonest. The trier of fact should be entitled to weigh the habit evidence against the eyewitness testimony as well as all of the other evidence in the case. Hence, Section 1105 rejects the "no-eyewitness" limitation.

§ 1150

Comment. Section 1150 codifies existing California law which permits evidence to be received of misconduct by a trial juror but forbids the reception of evidence as to the effect of such misconduct on the jurors' minds. People v. Stokes, 103 Cal. 193, 196-197, 37 Pac. 207, 208-209 (1894). Section 1150 excludes only evidence of the effect of various occurrences on a juror's mind; it does not exclude evidence of the fact of such occurrences.

Section 1150 is somewhat similar to Rule 41 of the Uniform Rules of Evidence.

§ 1151

Comment. Section 1151 codifies well settled California law. Helling v. Schindler, 145 Cal. 303, 78 Pac. 710 (1904); Sappenfield v. Main Street etc. R.R., 91 Cal. 48, 27 Pac. 590 (1891). The admission of evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs after the occurrence of an accident. Section 1151 does not prevent the use of evidence of subsequent remedial conduct for the purpose of impeachment in appropriate cases. See Pierce v. J. C. Penney Co., 167 Cal. App.2d 3, 334 P.2d 117 (1959), for a good analysis of the California cases on impeachment by use of evidence of subsequent remedial conduct.

Section 1151 is the same as Rule 51 of the Uniform Rules of Evidence.

§ 1152

Comment. Section 1152, like the existing California law, declares that compromise offers are inadmissible to prove liability. CODE CIV. PROC. § 2078 (superseded by Section 1152). Because of the particular wording of the existing statute, an offer of compromise probably may not be considered as an admission even though admitted without objection. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 675-676 (1964). See also Scott v. Wood, 81 Cal. 398, 405-406, 22 Pac. 871, 873 (1889). Under Section 1152, however, nothing prohibits the consideration of an offer of settlement on the issue of liability if the evidence is received without objection. This modest change in the law is desirable. An offer of compromise, like other incompetent evidence, should be considered to the extent that it is relevant when it is presented to the trier of fact without objection.

The words, "as well as any conduct or statements made in negotiation thereof," make it clear that statements made by parties during negotiations for the settlement of a claim may not be used as admissions in later litigation. This language will change the existing California law under which certain statements made during settlement negotiations may be used as admissions. People v. Forster, 58 Cal.2d 257, 23 Cal. Rptr. 582, 373 P.2d 630 (1962). The rule excluding offers is based upon the public policy

in favor of the settlement of disputes without litigation. The same public policy requires that the statements made during the settlement negotiations be inadmissible. The rule of the Forster case that permits such statements to be admitted prevents the complete candor between the parties that is most conducive to settlement.

Section 1152 is somewhat similar to Rule 52 of the Uniform Rules of Evidence.

§ 1153

Comment. Section 1153 is consistent with existing California law. Under existing law, evidence of a rejected offer to plead guilty to the crime charged or to a lesser crime is inadmissible. PENAL CODE § 1192.4; People v. Wilson, 60 Cal.2d ___, ___, 32 Cal. Rptr. 44, 54-55, 383 P.2d 452, 462-463 (1963); People v. Hamilton, 60 Cal.2d ___, ___, 32 Cal. Rptr. 4, 8-9, 383 P.2d 412, 415-416 (1963).

The language of Section 1153 is based on a similar provision recommended by the New Jersey Supreme Court Committee on Evidence, REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 98-99 (March 1963).

§ 1154

Comment. Section 1154 stems from the same policy of encouraging settlement and compromise that is reflected in Section 1152. Except for the language "as well as any conduct or statements made in negotiation thereof," Section 1154 reflects existing California law. Dennis v. Belt, 30 Cal. 247 (1866); Anderson v. Yousem, 177 Cal. App.2d 135, 1 Cal. Rptr. 889 (1960); Cramer v. Lee Wa Corp., 109 Cal. App.2d 691, 241 P.2d 550 (1952). The significance of the quoted language is indicated in the Comment to Section 1152.

Section 1154 is based on Rule 53 of the Uniform Rules of Evidence.

§ 1155

Comment. Section 1155 codifies a rule that is well settled in California. Rocke v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147 (1903). But see Causey v. Cornelius, 164 Cal. App.2d 269, 330 P.2d 468 (1958) (criticizing the present rule). The evidence might be inadmissible in the absence of Section 1155 because it is not relevant; but Section 1155 assures its inadmissibility.

Section 1155 is the same as Rule 54 of the Uniform Rules of Evidence.

§ 1156

Comment. Section 1156 restates without substantive change and supersedes Code of Civil Procedure Section 1936.1 (enacted in 1963).