STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article VI. Extrinsic Policies Affecting Admissibility

March 1964

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

NOTE

This pamphlet begins on page 601. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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EDMUND G. BROWN, Governor

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December 1963

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was directed 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 VI (Extrinsic Policies Affecting Admissibility) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn 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, each report covering a different article of the Uniform Rules of Evidence.

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

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article VI. Extrinsic Policies Affecting Admissibility

INTRODUCTION

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

The tentative recommendation of the Commission on Article VI of the Uniform Rules of Evidence (Extrinsic Policies Affecting Admissibility), consisting of Rules 41 through 55, is set forth herein.

URE Rule 7 abolishes all disqualifications of witnesses and other exclusionary rules of evidence except to the extent that such disqualifications and exclusionary rules are provided in the URE. Some URE rules exclude evidence on the ground that it is unreliable. For example, Rules 62 through 66 exclude unreliable hearsay, and Rules 68 through 72 exclude documentary evidence if it is not properly authenticated or if there is better evidence available. Other rules, however, exclude evidence for reasons of public policy even though the evidence is relevant and reliable. Such rules are those of privilege, which exclude evidence in order to protect certain relationships or rights deemed important in the law. Article VI of the URE contains another group of rules that deals with questions of admissibility or inadmissibility of evidence for reasons of public policy.

Most of the rules in Article VI are exclusionary rules—*i.e.*, Rules 41-45, 47 and 48, and 51-55. These rules provide exceptions to the general propositions stated in Rule 7 that all relevant evidence is admissible and all persons are competent witnesses. A few of the rules in this article—Rules 46, 49, and 50—provide for the admissibility of evidence. As Rule 7 provides that all relevant evidence is admissible, these rules are apparently intended to prevent courts from disregarding Rule 7 and holding the evidence mentioned in these rules inadmissible for reasons of public policy not appearing in the URE.

[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.

The Commission tentatively recommends that URE Rules 41-55, revised as hereinafter indicated, be enacted as the law in California.[2] The rules as revised will codify some of the present California law; they will eliminate some anomalous provisions of existing California law; and they will generally improve the law of evidence in California.

REVISION OF URE ARTICLE VI

In the material that 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 the Commission in recommending important substantive changes in the rule or in the corresponding California law. For a detailed analysis of the URE rules relating to extrinsic policies and the related California law, see the research study beginning on page 625.

Rule 41. Evidence to Test a Verdict

RULE 41. Upon an inquiry as to the validity of a verdict ~~or an indictment~~, *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 ~~shall be received~~ *is admissible* to show the effect of ~~any~~ *such* statement, conduct, ~~event or~~ condition, *or event* upon ~~the mind of~~ a juror ~~as~~ *either in* influencing him to assent to or dissent from the verdict ~~or indictment~~ or concerning the mental processes by which it was determined.

Comment

Revised Rule 41 expresses the 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). The URE rule has been revised to make it clear that it 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.

The URE reference to "an indictment" has been deleted because, under California law, an indictment may not be attacked on the ground that events occurred that were likely to have improperly influenced the grand jury. The only grounds for attack on an indictment are noncompliance with the formal procedural requirements and insufficient evidence. PENAL CODE § 995. See *People v. Kempley*, 205 Cal. 441, 446-448, 271 Pac. 478, 480-481 (1928).

[2] 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 42. Testimony by the Judge

RULE 42. Against the objection of a party, the judge presiding at the trial *of an action* may not testify in that trial as a witness. *If, after such objection, the judge finds that his testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another judge.*

Comment

Under existing California law, a judge may be called as a witness, but the judge may in his discretion order the trial postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883. Rule 42, on the other hand, prohibits a judge from testifying if a party objects.

Rule 42 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to his testimony must be ruled on by the witness himself. The extent of cross-examination may be limited by the fear of appearing to attack the judge personally. A party might be embarrassed to introduce impeaching evidence. For these and similar reasons, the Commission recommends the approval of Rule 42. See generally *People v. Connors*, 77 Cal. App. 438, 450-457, 246 Pac. 1072, 1076-1079 (1926) (abuse of discretion for the presiding judge to testify as to important and necessary facts without proof of which the issue, which his testimony is designed to support, cannot be sustained).

The second sentence, based on Section 1883 of the Code of Civil Procedure, has been added to indicate the procedure to be followed in those cases where the judge's testimony would be important.

Rule 43. Testimony by a Juror

RULE 43. *(1)* A member of a jury, sworn and empanelled in the trial of an action, may not testify in that trial as a witness. *If the judge finds that the juror's testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another jury.*

(2) This rule does not prohibit a juror from testifying as to matters covered by Rule 41 or as provided in Section 1120 of the Penal Code.

Comment

Subdivision (1). Under existing California law, a juror may be called as a witness, but the judge in his discretion may order the trial postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883. Rule 43, however, prohibits a juror from testifying at all.

Unlike Rule 42, which prohibits a judge from testifying only if a party objects, Rule 43 prohibits testimony by a juror even though no objection is made. A juror-witness is in an anomalous position. He

(as juror) is required to weigh his own testimony (as witness) with complete impartiality. Manifestly, this is impossible. The adverse party, too, is placed in an embarrassing position. He cannot cross-examine in such a manner as to antagonize the juror. He cannot impeach for fear of antagonizing the juror. If he objects to the juror appearing as a witness, the juror may regard the objection as a personal reflection upon his character and veracity. For these reasons, the Commission recommends Rule 43, which prohibits a juror from testifying even though no objection is made.

The second sentence of subdivision (1) has been added to preserve the existing California practice of continuing the case for trial before another jury when it is necessary for a juror to testify and it would be improper to permit him to do so. CODE CIV. PROC. § 1883.

Subdivision (2). Subdivision (2) has been added to make it clear that this rule does not prohibit a juror from testifying as to the occurrence of events likely to have improperly influenced a verdict. Therefore, under Rule 7 (which provides that all persons are competent to testify) a juror is competent to testify as to the matters specified in Rule 41.

This subdivision together with Rule 7 will change the existing California law. URE Rule 44, which would have preserved existing California law in this regard, has been disapproved by the Commission. Under existing California law, a juror is incompetent to give evidence as to matters that might impeach his verdict. *People v. Gray*, 61 Cal. 164, 183 (1882). See also *Siemsen v. Oakland, S.L., & H. Elec. Ry.*, 134 Cal. 494, 66 Pac. 672 (1901). He is competent, however, to give evidence that no misconduct was committed by the jury after independent evidence has been given that there was misconduct. *People v. Deegan*, 88 Cal. 602, 26 Pac. 500 (1891). By statute, a juror may give evidence by affidavit that a verdict was determined by chance. CODE CIV. PROC. § 657(2). The courts have further held that affidavits of jurors may be used to prove that a juror concealed bias or other disqualification by false answers on *voir dire (Williams v. Bridges*, 140 Cal. App. 537, 35 P.2d 407 (1934)) or was mentally incompetent to serve as a juror *(Church v. Capital Freight Lines*, 141 Cal. App.2d 246, 296 P.2d 563 (1956)).

The rule that jurors' affidavits may be used to show concealed disqualification has been extended by recent cases so that there may be little left of the underlying rule of incompetency. In *Shipley v. Permanente Hospital*, 127 Cal. App.2d 417, 274 P.2d 53 (1954) (disapproved in *Kollert v. Cundiff*, 50 Cal.2d 768, 329 P.2d 897 (1958), insofar as the court's interpretation of Code of Civil Procedure Section 657(1) is concerned, though the *Kollert* case reaffirms disqualification by juror's affidavit for concealed bias on *voir dire*), the court held that jurors' affidavits could be received to show a concealed bias of some jurors in favor of physicians charged with malpractice even though there was no intentional or conscious concealment on *voir dire*. And, in *Noll v. Lee*, 221 Cal. App.2d ____, 34 Cal. Rptr. 223 (1963) (hearing denied), the court held that the falsity of a juror's answers on *voir dire—i.e.*, that he would follow the law given in the judge's instructions—could be shown by his affidavit that he read and relied on portions of a Vehicle Code summary that he took with him to the

jury room. Despite the evidence in the record that the juror did not believe he was violating the trial court's instructions and did not believe that he was deceiving the court on his *voir dire* examination, the appellate court held as a matter of law that he did in fact deceive the court by false answers on *voir dire* and that jurors' affidavits could be used to prove it. Apparently, then, if the questions asked on *voir dire* are sufficiently comprehensive to cover in general terms the kinds of misconduct that would warrant an attack on the verdict, jurors' affidavits may be used to show that such misconduct occurred and that, consequently, the answers on *voir dire* were false.

Thus, under existing law, a juror is permitted to give evidence of a chance verdict or evidence of misconduct when an intention to engage in misconduct is denied on *voir dire,* but he is prohibited from giving evidence of misconduct under any other circumstances. No reason is apparent for this distinction. The danger to the stability of verdicts appears to be as great in the one case as it is in the other. Jurors are the persons most apt to know whether misconduct has occurred. Not to hear evidence as to misconduct from the jurors themselves (except when it can be linked to an answer on *voir dire*) may at times conceal the only evidence of misconduct that exists. The existing rule is a temptation to eavesdropping and similar undesirable practices, for the only admissible evidence of misconduct in the jury room must come from those not authorized to be there.

The existing rule is based on an ancient common law precedent. *Vaise v. Delaval,* 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). The reason given for the rule in that case—that the jurors should not be permitted to give evidence of their own crime or misconduct—is no longer apposite. The rule is now based on a fear that juries will be tampered with and their verdicts imperiled. *Saltzman v. Sunset Tel. & Tel. Co.,* 125 Cal. 501, 505, 58 Pac. 169, 170 (1899). But the peril to the verdict flows from the substantive rule permitting verdicts to be set aside for misconduct, not from the source of the evidence. If verdicts may be set aside for jury misconduct, it is absurd to deny access to the most reliable evidence of such misconduct. See criticism of existing rule in 8 WIGMORE, EVIDENCE § 2353 (McNaughton rev. 1961). Experience with the exception to the existing rule that permits jurors to impeach verdicts made by chance or by jurors who answer falsely on *voir dire* indicates that fears of jury tampering are unrealistic. Therefore, the Commission recommends that the rule forbidding a juror to give evidence of misconduct of the jury be repudiated.

Penal Code Section 1120 requires a juror who discovers that he has personal knowledge of the case being tried before him to declare that fact. The section requires the juror to be sworn as a witness and examined in the presence of the parties. Rule 43 has been revised to retain this method for determining whether a juror is qualified to continue to sit as a juror in the case.

Rule 44. Testimony of Jurors Not Limited Except by These Rules

~~RULE 44. These rules shall not be construed to (a) exempt a juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a~~

~~material bearing on the validity of the verdict or the indictment, except as expressly limited by Rule 41, (b) exempt a grand juror from testifying to testimony or statements of a person appearing before the grand jury, where such testimony or statements are the subject of lawful inquiry in the action in which the juror is called to testify.~~

Comment

URE Rule 44 is in the Uniform Rules of Evidence to make it clear that Rule 43 does not prohibit a juror from testifying as to misconduct of the jury "if the law of the state permits." Rule 7 ("every person is qualified to be a witness" and "no person is disqualified to testify to any matter") and Rule 43 as revised make it clear that a juror may so testify. Hence, Rule 44 is no longer necessary and is disapproved. See the Comment to Rule 43, *supra.*

Rule 45. Discretion of Judge to Exclude Admissible Evidence

RULE 45. ~~Except as in these rules otherwise provided,~~ The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, ~~or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered~~.

Comment

Revised Rule 45 expresses a rule recognized by statute and in several California decisions. CODE CIV. PROC. §§ 1868, 2044; *Adkins v. Brett,* 184 Cal. 252, 258, 193 Pac. 251, 254 (1920) ("The matter [of admissibility] is largely one of discretion on the part of the trial judge."); *Moody v. Peirano,* 4 Cal. App. 411, 418, 88 Pac. 380, 382 (1906) ("a wide discretion is left to the trial judge in determining whether [evidence] is admissible or not"). The phrase, "except as in these rules otherwise provided," has been deleted as unnecessary. The only exception to the rule is found in URE Rule 47, which has been revised to eliminate that exception.

The last clause has been deleted from the URE rule because surprise should not be a ground of inadmissibility. Surprise frequently is the essential tool for uncovering the truth. The trial judge may protect a party from any unfairness by granting a continuance. See CODE CIV. PROC. § 595. See also *People v. Holden,* 28 Cal. 123, 139 (1865).

Rule 46. Character Itself in Issue: Manner of Proof

RULE 46. When a person's character or a trait of his character is ~~in~~ *itself an* issue, ~~it may be proved by~~ *any otherwise admissible evidence (including* testimony in the form of opinion, evidence of reputation, ~~or~~ *and* evidence of specific instances of ~~the~~ *such* person's conduct ~~,~~ *) is*

admissible when offered to prove only such person's character or trait of his character ~~subject, however, to the limitations of Rules 47 and 48~~.

Comment

Rule 46 is technically unnecessary. URE Rule 7 declares that all relevant evidence is admissible. Hence, all of the evidence declared to be admissible by Rule 46 would be admissible anyway under the general provisions of Rule 7. Rule 46 is included in the revised rules, however, to forestall the argument that Rule 7 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.

The rule has been revised to make it clear that it deals with evidence offered to prove only a person's character or character trait and not to prove character as circumstantial evidence of some other fact. The URE language, "in issue," does not make this limitation sufficiently clear. This revision has eliminated the need for the cross-reference to Rules 47 and 48, for those rules are concerned only with character as circumstantial evidence of conduct. The phrase "may be proved by" has been replaced by the words "is admissible" to avoid any implication that a person's burden of proof is necessarily discharged by the introduction of any of the evidence described in the rule.

The revised rule 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).

The revised rule will eliminate the uncertainties in existing law and assure the admissibility of any evidence that is relevant to prove what the character in issue actually is.

Rule 47. Character Trait as Proof of Conduct

RULE 47. *(1)* ~~Subject to Rule 48, when a trait of a person's character is relevant as tending~~ *Except as provided in this rule, 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.~~, such trait may be proved in the same manner as~~

~~provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b)~~

(2) In a criminal action *or proceeding,* evidence of *the defendant's character or* a trait of ~~an accused's~~ *his* character ~~as tending to prove his guilt or innocence of the offense charged,~~ *in the form of opinion or evidence of his reputation is not inadmissible under this rule:*

(a) ~~(i) may not be excluded by the judge under Rule 45 if~~ *When* offered by the ~~accused~~ *defendant* to prove his innocence. ~~; and (ii) if~~

(b) When offered by the prosecution to prove ~~his~~ *the defendant's* guilt~~, may be admitted only after the accused~~ *if the defendant* has *previously* introduced evidence of his ~~good~~ character *to prove his innocence.*

(3) In a criminal action or proceeding, 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 inadmissible under this rule:

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

(b) When offered by the prosecution to meet evidence previously offered by the defendant under paragraph (a).

(4) Nothing in this rule 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.

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

Comment

Scope of Rule 47. Rule 47 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. Rule 47 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 Rules 20-22. Nor is Rule 47 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 Rule 46.

Civil cases. Revised Rule 47 makes character evidence inadmissible to prove conduct in civil cases. This is the general rule under existing law. CODE CIV. PROC. § 2053 ("Evidence of the good character of a party is not admissible in a civil action . . . ."); *Deevy 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). There may be an exception to this general rule, however, that permits 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. 1086 (1916) (civil action for rape; error, but nonprejudicial, to limit evidence of unchaste character of plaintiff to issue of damages).

URE Rule 47 would make evidence of character admissible to prove conduct in civil cases. Thus, under the URE rule, the plaintiff in a civil assault case would be permitted to introduce evidence of his good character for peace and quiet and to introduce evidence of the defendant's bad character for violence even though the defendant had not introduced any evidence relating to his character. The URE rule would make an undesirable change in existing law. 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, the revised rule restates the existing California law generally applicable in civil cases by excluding evidence of character to prove conduct in such cases.

Criminal cases. Subdivision (1) of the revised rule states that evidence of character to prove conduct is inadmissible in a criminal case. Subdivisions (2) and (3) of the revised rule state the exceptions to this general principle.

Under subdivision (2) of the revised rule, the defendant 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 (*People v. Chrisman,* 135 Cal. 282, 67 Pac. 136 (1901)); and, 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 is 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).

Likewise, under subdivision (3) of the revised rule, 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 also is 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 the revised rule, 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. The revised rule permits opinion evidence as to character and evidence of reputation—but not evidence of specific instances of conduct—to be used to prove conduct under some circumstances in criminal cases. In addition, evidence of specific instances of conduct of the victim of the crime with which the defendant is charged is admissible under the circumstances prescribed in subdivision (3).

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). The revised rule retains the existing law permitting character to be proved by reputation.

There is recent authority for the admission of opinion evidence. *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). URE Rule 47 makes opinion evidence admissible, and the revised rule retains this provision. 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 Revised Rule 47 admitting opinion evidence under certain circumstances in criminal cases is, therefore, recommended.

Under URE Rule 47, evidence of specific acts to show character is inadmissible unless the evidence consists of convictions of crime. Under existing law, the admissibility of specific acts depends upon the nature of the conduct sought to be proved. 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). On the other hand, 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). 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).

Where evidence of specific acts is excluded, it is done to avoid the possibility of prejudice, undue confusion of the issues with collateral matters, unfair surprise, and the like. The URE rule limits the collateral issues by restricting the evidence of specific acts to criminal convictions. The limitation proposed in the URE rule is inadequate to prevent the defendant in a criminal case from being unduly prejudiced by this kind of evidence. Inasmuch as the revised rule does not permit the defendant in a criminal case to offer evidence of specific instances of his conduct (but permits only evidence of specific instances of the victim's conduct), the revised rule does not permit the prosecution to use a defendant's convictions—*i.e.,* a specific instance of his

conduct—to show his character. The rule limits the prosecution to the same kind of character evidence that may be introduced by the defendant—reputation and opinion evidence (and evidence of specific instances of the victim's conduct). The revised rule is consistent with the existing California rule that precludes introduction of specific acts of the defendant to show his bad character, and appears to be in accord with existing law in regard to the admissibility of specific acts of the victim of the crime with which the defendant is charged, though the law in this respect is not entirely clear.

Evidence of misconduct to show fact other than character. Subdivision (4) of the revised rule is based on the last clause of URE Rule 55. It is probably unnecessary, but it is desirable to make it clear that Revised Rule 47 does not prohibit the admission of evidence of misconduct when it is offered not as circumstantial evidence of other misconduct but as evidence of some other fact in issue.

Subdivision (4) declares 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).

Evidence of character offered on issue of credibility. Rule 47 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 Rules 20-22. Subdivision (5) has been added to Rule 47 to make this clear.

Rule 48. Character Trait for Care or Skill

RULE 48. Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

Comment

Rule 48 places a further limitation on the use of character evidence. Under Rule 48, 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.

Rule 48 sets forth the 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.

Rule 49. Habit or Custom to Prove Specific Behavior

RULE 49. *Any otherwise admissible* evidence of habit or custom is ~~relevant to an issue of behavior~~ *admissible to prove conduct* on a specified occasion~~, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to~~ *in conformity with* the habit or custom.

Comment

Rule 49, like Rule 46, declares that certain evidence is admissible. Hence, Rule 49 is technically unnecessary because Rule 7 declares that all relevant evidence is admissible. Nonetheless, this rule 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 language of the rule has been revised in the interest of simplicity and clarity.

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, approval of Rule 49, which rejects the "no-eyewitness" limitation, is recommended.

Rule 50. Opinion and Specific Instances of Behavior to Prove Habit or Custom

~~RULE 50. Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.~~

Comment

Rule 50 is unnecessary because Rule 7 declares that all relevant evidence is admissible. Rule 50 does not appear necessary in the interest of clarity nor in order to avoid undesirable implications of other rules; hence, it is disapproved.

Rule 51. Subsequent Remedial Conduct

RULE 51. 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.

Comment

The rule stated above is well settled in existing 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. As the removal of hazards by repair of conditions causing accidents should be encouraged, not discouraged, public policy requires the approval of Rule 51.

This rule 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.

Rule 52. Offer to Compromise

RULE 52. *(1)* 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.

(2) This rule ~~shall~~ *does* not affect the admissibility of evidence *of:*

(a) ~~of~~ Partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim; *;* or

(b) ~~of~~ A debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

Comment

This rule, like the existing California law, declares that compromise offers are inadmissible to prove liability. CODE CIV. PROC. § 2078. Be-

cause 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 the Study, *infra* at 675-676. See also *Scott v. Wood,* 81 Cal. 398, 405-406, 22 Pac. 871, 873 (1889). Under Rule 52, 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," have been added so that statements made by parties during negotiations for the settlement of a claim may not be used as admissions in later litigation. This provision 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 existing rule that permits such statements to be admitted prevents the complete candor between the parties that is most conducive to settlement.

Rule 52.5. Offer to Plead Guilty to Crime

RULE *52.5. Evidence that the defendant in a criminal action or proceeding has offered to plead guilty to the alleged crime or to a lesser crime, as well as any conduct or statements made in negotiation thereof, is inadmissible in any action or proceeding.*

Comment

This rule expresses the existing California law. Under the present 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 this rule 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).

Rule 53. Offer to Discount Claim

RULE 53. 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.

Comment

Rule 53 stems from the same policy of encouraging settlement and compromise that is reflected in Rule 52. Except for the added language, Rule 53 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 added language is indicated in the Comment to Rule 52, *supra*.

Rule 54. Liability Insurance

RULE 54. 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 as tending to prove negligence or other wrongdoing.

Comment

Rule 54 states a rule that is well settled in California. *Roche 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 Rule 54 because it is not relevant; but Rule 54 assures its inadmissibility.

Rule 55. Other Crimes or Civil Wrongs

~~RULE 55. Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.~~

Comment

Rule 55 is disapproved. The revisions made to Rule 47 obviate the need for Rule 55. See Revised Rule 47 and the Comment thereto, *supra*.

AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of existing statutes that should be revised or repealed in light of the Commission's tentative recommendation concerning Article VI (Extrinsic Policies Affecting Admissibility) of the Uniform Rules of Evidence.

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 than the existing law.

References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

Code of Civil Procedure

Section 657 provides that misconduct of the jury may be proved by the affidavit of a juror if the misconduct involved consists of determining the verdict by chance. Under Rules 41 and 43, a juror is competent to give evidence of any misconduct; hence, the limitation on the kinds of misconduct that can be shown by a juror's affidavit should be removed from Section 657. So far as it is pertinent, the amended section would read:

> 657. The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:
>
> * * * * *
>
> 2. Misconduct of the jury; ~~and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;~~

Section 1883 provides:

> 1883. JUDGE OR A JUROR MAY BE WITNESS. The Judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another Judge or jury.

This section is superseded by Rules 42 and 43 and, therefore, should be repealed.

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 rule pertains to character evidence relating to both parties and witnesses. Insofar as it pertains to character evidence relating to parties, it is superseded by the provisions of Rules 46, 47, and 48. Insofar as it relates to character evidence relating to witnesses, its subject matter is covered by Rules 20-22, which are the subject of a separate recommendation and study by the Law Revision Commission. Therefore, the section should be repealed.

Section 2078 provides:

> 2078. COMPROMISE OFFER OF NO AVAIL. An offer of compromise is not an admission that anything is due.

This section is superseded by Rule 52 and should, therefore, be repealed.

Penal Code

Section 1120 requires a juror who discovers that he has personal knowledge of a fact in controversy in the case to disclose the same in open court. If he reveals such personal knowledge during the jury's retirement, the jury must return into court. The section then requires that the juror be sworn as a witness and examined in the presence of the parties.

The section does not make clear whether this examination in the presence of the parties is for the purpose of determining if "good cause" exists for the juror's discharge in accordance with Penal Code Section 1123 or whether this examination is for the purpose of obtaining the juror's knowledge as evidence in the case. Permitting a juror to testify as a witness in the case would be contrary to Rule 43. Therefore, Section 1120 should be amended to eliminate the ambiguity in its provisions and to provide assurance that the juror's examination is to be used solely to determine whether "good cause" exists for his discharge. The amended section would read as follows:

> 1120. ~~KNOWLEDGE OF JUROR TO BE DECLARED IN COURT, AND HE TO BE SWORN AS A WITNESS.~~ If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties *in order that the court may determine whether good cause exists for his discharge as a juror.*

A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE— EXTRINSIC POLICIES AFFECTING ADMISSIBILITY *

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* This study was made at the request of the California Law Revision Commission by Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

INTRODUCTION

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State 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.[1]

The present study, made at the request of the Law Revision Commission, is directed to the question whether California should adopt the provisions of the Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") relating to extrinsic policies affecting admissibility—*i.e.*, Rules 41 through 55 and other related provisions of the Uniform Rules. The study undertakes both to point up what changes would be made in the California law of evidence if these URE provisions were adopted and also to subject these provisions to an objective analysis designed to test their utility and desirability. In some instances, modifications of the provisions of the Uniform Rules are suggested. The problem of incorporating these provisions of the

[1] Cal. Stats. 1956, Res. Ch. 42, p. 263.

The Uniform Rules are the subject of the following law review symposia: *Institute on Evidence*, 15 ARK. L. REV. 7 (1960-61); *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 (1953-54); *Symposium—Minn. and the Uniform Rules of Evidence*, 40 MINN. L. REV. 297 (1956); Comment, *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U. L. REV. 481 (1954); *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479 (1956); Chadbourn, *The "Uniform Rules" and the California Law of Evidence*, 2 U.C.L.A. L. REV. 1 (1954).

See also Brooks, *Evidence*, 14 RUTGERS L. REV. 390 (1960); Cross, *Some Proposals for Reform in the Law of Evidence*, 24 MODERN L. REV. 32 (1961); Gard, *Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence*, 37 ORE. L. REV. 287 (1958); Levin, *The Impact of the Uniform Rules of Evidence on Pennsylvania Law*, 26 PA. B. ASS'N Q. 216 (1955); McCormick, *Some High Lights of Uniform Evidence Rules*, 33 TEXAS L. REV. 559 (1955); Morton, *Do We Need a Code of Evidence?* 38 CAN. B. REV. 35 (1960); Nokes, *Codification of the Law of Evidence in Common-Law Jurisdictions*, 5 INT. & COMP. L. Q. 347 (1956); Nokes, *American Uniform Rules of Evidence*, 4 INT. & COMP. L. Q. 48 (1955).

The Uniform Rules also have been scrutinized by committees appointed by the Supreme Courts of New Jersey and Utah. See REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955) and FINAL DRAFT OF THE RULES OF EVIDENCE (1959), the report of the Utah Committee on the Uniform Rules of Evidence. A Commission appointed by the New Jersey Legislature also has studied the Uniform Rules. See REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (1956). In 1960, the New Jersey Legislature enacted a revised version of the Privileges Article of the Uniform Rules and granted the New Jersey Supreme Court the power to adopt rules dealing with the admission or rejection of evidence. N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A:84A-1 to 2A:84A-49). Following this enactment, the New Jersey Supreme Court appointed another committee to study the Uniform Rules. The report of this committee in 1963 (REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE (March 1963)) contains a comprehensive analysis of the Uniform Rules and many worthy suggestions for improvements.

The new evidence article in the Kansas Code of Civil Procedure, enacted in 1963 following a report by the Kansas Judicial Council (see *Recommendations as to Rules of Civil Procedure, Process, Rules of Evidence and Limitations of Actions* in KANSAS JUDICIAL COUNCIL BULLETIN (Nov. 1961)), is substantially the same as the Uniform Rules. See Kan. Laws 1963, Ch. 303, Art. 4, §§ 60-401 through 60-470, pp. 670-692.

Uniform Rules into the California codes is also discussed. Similar studies of the other Uniform Rules are contemplated.

The provisions of this article of the Uniform Rules of Evidence deal with several miscellaneous rules gathered together under the single title of "Extrinsic Policies Affecting Admissibility." In the material that follows, these rules are discussed in logical rather than numerical sequence. Thus, for example, the rules relating to permissible evidence for impeachment and support of verdicts and indictments (Rules 41 and 44) are discussed together, as are the rules relating to judges and jurors as witnesses (Rules 42 and 43) and the several rules relating to character and habit evidence.

In considering these rules, it should be kept in mind that Rule 7 [2] proclaims, *inter alia,* that "all relevant evidence is admissible" except "as otherwise provided *in these Rules.*" (Emphasis added.) Thus, it is contemplated that where the Uniform Rules are adopted, all pre-existing exclusionary rules would be superseded. Only the Uniform Rules would be consulted as the exclusive source of law excluding relevant evidence. If nothing in the Uniform Rules permits or requires the exclusion of an item of relevant evidence, it is to be admitted, notwithstanding any pre-existing law which required its exclusion,[3] for Rule 7 wipes from the slate all prior exclusionary rules. The slate remains clean, except to the extent that some other rule or rules write restrictions upon it.

[2] Rule 7 of the Uniform Rules provides: "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

[3] However, evidence inadmissible on constitutional grounds would, of course, remain so under the Uniform Rules. The comment on Rule 7 states: "Illegally acquired evidence may be inadmissible on constitutional grounds—not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

RULES 41 AND 44

Introduction

Rule 41 provides as follows:

> RULE 41. *Evidence to Test a Verdict or Indictment.* Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

This is a rule of exclusion operative only in certain proceedings, namely, proceedings involving an "inquiry as to the validity of a verdict or an indictment," such as a motion for new trial [1] or a motion to set aside an indictment.[2] In such proceedings, the rule operates to exclude "evidence . . . to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or [evidence] concerning the mental processes by which [the verdict or indictment] was determined."

A motion for new trial or a motion to set aside an indictment is, of course, an adversary proceeding involving an effort by one side to *impeach* the verdict (or indictment) and an effort by the other side to *support* the verdict (or indictment). The scope and purpose of Rule 41 can best be seen if the rule is analyzed in terms, first, of impeaching the verdict (or indictment) and, next, of supporting the verdict (or indictment).

Impeaching a Verdict

Rule 41 speaks of "the effect of any statement, conduct, event or condition upon the mind of a juror." Much of the present California law and practice respecting new trials is concerned with "the effect" upon the minds and emotions of the jurors of a wide variety of incidents, conditions, and circumstances. When offered to set aside a verdict, the whole purpose of evidence proving such matters is to show an adverse effect upon the jurors. Moreover, in weighing a given matter to determine whether a new trial should be granted in a particular case, the court's assessment ordinarily is in terms of probable or improbable deleterious effect upon the jury. It cannot be doubted, therefore, that upon "an inquiry as to the validity of a verdict" in California today, there is to a considerable extent an investigation into "the effect of any statement, conduct, event or condition upon the mind of a juror." For example, under Penal Code Section 1181, "When a verdict has been rendered . . . against the defendant, the court may . . . grant a new trial . . . when the jury has received any evidence out of court . . . or been guilty of any misconduct . . . [or] when the district attorney . . . has been guilty of prejudicial misconduct during the trial . . . ." If the evidence received extra-

[1] CAL. CODE CIV. PROC. § 657; CAL. PENAL CODE § 1181.
[2] CAL. PENAL CODE § 995.

judicially is a newspaper article adverse to defendant, or if the district attorney's alleged misconduct is a remark derogatory of defendant, or if the jury's alleged misconduct is becoming intoxicated, is it not clear that the reason for considering such matters at all is the possibility of their effect upon the minds and emotions of jurors? Is it not also manifest that in any case, a determination as to the seriousness of such a matter entails inquiry (at least by way of speculation and conjecture) concerning the impact of the matter upon the jury?

It cannot possibly be the intent of Rule 41 to make evidence of such matters inadmissible. In the first place, the Commissioners state that Rule 41 is "almost universally the law." If the rule excluded evidence of the type just mentioned, the rule emphatically would not be "almost universally the law," for it is clear enough that at common law and generally today such evidence is admissible.[3] In the second place, the Commissioners state in their Comment to Rule 41 that:

> The rule does not impose limitations on testimony as to the *existence* of conditions or the occurrence of events bearing on the verdict . . . . The limitation imposed by this [rule] extends only to that testimony which concerns the mental or emotional *effects* on the jurors of such conditions or occurrences. [Emphasis added.]

These quotations reveal the intent of the Commissioners and demonstrate that it is not their purpose to make radical changes in the traditional law and practice of impeaching verdicts. If it be thought that there is an apparent paradox in the Comment of the Commissioners last quoted, the following illustration may remove the apparent contradiction: Suppose that upon a motion for new trial after verdict of guilty, a bailiff is offered to testify that he saw members of the jury reading during retirement a certain news article respecting the trial. This testimony is, of course, admissible. This is evidence of the *existence* of the occurrence. However, testimony by the jurors themselves as to the impact of the article upon their minds would be inadmissible.[4] In other words, though it is permissible to receive evidence which tends to show a *probable* effect on the minds or emotions of the jurors, it is *not* permissible to take the next step and explore the jurors' minds to determine the *actual* effect. This is a subtle and, at this point, perhaps an impractical distinction. The distinction possesses greater clarity and significance, however, in connection with the following discussion regarding support of verdicts.

Before turning to this subject, the following matters should be noted by way of summary:

(1) Code of Civil Procedure Section 657 provides as grounds for new trial, *inter alia,* the following: irregularity preventing a fair trial; misconduct of the jury; error in law.

(2) Penal Code Section 1181 provides as grounds for new trial, *inter alia,* the following: jury receiving evidence out of court; separation of the jury; misconduct of the jury; decision by lot or by means other

[3] 8 WIGMORE, EVIDENCE § 2352 (3d ed. 1940) [hereinafter cited as WIGMORE]. See People v. Stokes, 103 Cal. 193, 37 Pac. 207 (1894) (reading newspaper in jury room); Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268 (1893) (quotient verdict); People v. Gray, 61 Cal. 164 (1882) (drinking by jury); Donner v. Palmer, 23 Cal. 40 (1863) (verdict by lot). Distinguish the question whether such matters may be testified to by the jurors themselves. See *infra,* pp. 632-635.

[4] See note 7, *infra.*

than fair expression of opinion; misdirection by court; prejudicial conduct by the district attorney.

(3) It is not the intent of Rule 41 to make evidence of the *existence* of any of the above matters inadmissible, when offered to impeach a verdict.

Supporting a Verdict

It has been pointed out that the party moving for new trial may impeach the verdict by evidence of the *existence* of certain statements, conduct, events, and conditions. It follows, of course, that the party resisting the new trial may support the verdict by evidence contradicting the existence of such matters.[5] May the supporting party, however, admit the existence of such matters and then attempt to support the verdict by evidence that these matters actually had no adverse effect on the jury? More specifically, if the verdict is attacked on the ground of misdirection by the court, prejudicial remarks by the district attorney, or an unauthorized view by the jury, may the party defending the verdict give evidence that the jury paid no heed to the court's misdirection, disregarded the district attorney's remarks, or were unaffected by the view? Some decisions (which Wigmore supports as sound) exclude such evidence.[6] This, it seems, is the California view.[7]

[5] People v. Azoff, 105 Cal. 632, 634, 39 Pac. 59, 60 (1895) ("such [jurors'] affidavits may be used to disprove . . . alleged misconduct . . . ."); People v. Deegan, 88 Cal. 602, 26 Pac. 500 (1891) (affidavits of jurors that another juror was not intoxicated).

[6] 8 WIGMORE § 2349 n. 2, pp. 670-677. McCormick's view is somewhat different. See MCCORMICK, EVIDENCE § 68, p. 149 n. 16 (1954) [hereinafter cited as MCCORMICK]. He states as follows:

> [W]hen an allowable attack is made for misconduct, such as an unauthorized view, evidence of the jurors as to whether the misconduct actually influenced their finding (and this evidence would usually support the verdict) should be received. . . . But as to the influence on the jurors of erroneous instructions, improper arguments of counsel, etc., as distinguished from misconduct of the jurors, the considerations may well be different and the test may be, not were the jurors influenced, but was the instruction or the argument calculated to mislead. [*Ibid.*]

[7] Consider, for example, the following extract from the opinion in People v. Stokes, 103 Cal. 193, 196-197, 37 Pac. 207, 208-209 (1894):

> It is insisted that a new trial should have been granted, because of misconduct of the jury after they had retired to deliberate upon their verdict. The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, which included a matter of evidence the court had rejected as inadmissible, and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct. A juror is not allowed to say: "I acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room." The law, in its wisdom, does not allow a juror to purge himself in that way. It was said in *Woodward* v. *Leavitt*, 107 Mass. 466; 9 Am. Rep. 49: "But, where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." There are intimations in the cases of *People* v. *Goldenson*, 76 Cal. 328, and *People* v. *Murray*, 85 Cal. 350, tending to oppose the foregoing views, but they do not express the law.

See also People v. Azoff, 105 Cal. 632, 634-635, 39 Pac. 59, 60 (1895).

Moreover, this is the view, it seems, which Rule 41 is intended to state. In behalf of this view, the Commissioners state in their Comment to Rule 41 as follows:

> Perhaps some verdicts would be saved if jurors were allowed to testify to the effect on them of the supposed misconduct. On the other hand verdicts would be lost in like manner and considerations of public policy make it continue to seem unwise to explore jurors' minds except as revealed by the verdict.

Impeaching and Supporting an Indictment

Wigmore asserts that the foregoing principles respecting impeachment and support of the verdict of a petit jury are applicable *mutatis mutandis* to impeaching and supporting the indictment of a grand jury.[8] Rule 41 proceeds upon the same theory. There appears to be no California case raising the question. However, it seems reasonable to assume that such matters as, for example, bribery of a grand juror could be shown to invalidate an indictment and that, in such event, no testimony would be received to show that such bribery had no effect on the minds of the grand jurors. Assuming this is so, Rule 41 is in accord with present law with respect to impeaching and supporting an indictment.

Amendment of Rule 41

Construing Rule 41 in the light of its purpose as revealed by the Uniform Commissioners' Comment thereon, the rule would operate in the same manner as present California law. Speaking generally, the present California law is that such misconduct and other events as are mentioned in the new trial statutes may be shown for the purpose of impeaching a verdict, whereas evidence that such misconduct or event had no ill-effects is inadmissible in support of the verdict.

Since it is the intent of Rule 41 to perpetuate *both* of these propositions, it would be well to state both such propositions in the rule. Therefore, it is recommended that a second sentence be added to Rule 41 to read as follows:

> This rule shall not be construed to exclude evidence otherwise admissible of the existence of such statement, conduct, event, or condition.

Impeaching and Supporting a Verdict by Juror's Testimony—Rule 44

As noted above,[1] certain matters (such as decision by lot, receiving evidence out of court, and the like) may be shown to impeach a verdict. What are the permissible sources of proof to establish such matters?

In 1785, Lord Mansfield answered the question in these terms:

> Upon a motion by *Law* for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won, in which was cited, *Hale* v. *Cove,* I *Stra.* 642.

[8] 8 WIGMORE § 2364.
[1] See the text, *supra* at 629-631.

> *Per* Lord MANSFIELD, CH. J. The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.
>
> Rule refused.[2]

Thus "tossing up" would be a "very high misdemeanor" tainting the verdict. Nevertheless, the fact that the jury did so toss up could not be established by their testimony. The evidence must come from some other sources—such as a peeping bailiff.

The rule established by Lord Mansfield in the case of *Vaise* v. *Delaval*[3] has become widely accepted.[4] The policy underlying it is expounded as follows by the United States Supreme Court:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.[5]

Beginning with volume one of the California Reports, there are many affirmations of Lord Mansfield's rule as the rule in California.[6] To be

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[2] Vaise v. Delaval, 1 Durn. & East 11 (1785). The brief report of the case is set out in full.

[3] 1 Durn. & East 11 (1785).

[4] 8 WIGMORE § 2354; MCCORMICK § 68.

[5] McDonald v. Pless, 238 U.S. 264, 267-268 (1915).

[6] People v. Baker, 1 Cal. 403 (1851) (affidavit of juror that he had formed and expressed an opinion before trial); Amsby v. Dickhouse, 4 Cal. 102 (1854) (one juror to testify another juror told him plaintiff was a gambler); Castro v. Gill, 5 Cal. 40 (1855) (juror's affidavit that verdict recorded was not as agreed upon); People v. Wyman, 15 Cal. 70 (1860) (affidavit that verdict not a fair expression of jury's opinion); People v. Hughes, 29 Cal. 257 (1865) (juror's affidavit that sheriff told jury to agree in five minutes or judge would lock them up for the night); Siemsen v. Oakland, S.L. & H. Elec. Ry., 134 Cal. 494, 66 Pac. 672 (1901) (affidavit and other statements by juror to prove he made inspection of locus of accident); Kimic v. San Jose etc. Ry., 156 Cal. 379, 104 Pac. 986 (1909) (affidavit of a third person as to juror's statements); People v. Reid, 195 Cal. 249, 261, 232 Pac. 457, 462 (1924) ("Upon well-grounded considerations of public policy jurors are legally disabled to impeach their verdict by any means, whether it be by affidavit or by testimony or by extra-judicial statements.").

In all of the above cases, the evidence of the juror's statements was offered by the losing party and was inadmissible. Compare, however, People v. Chin Non, 146 Cal. 561, 80 Pac. 681 (1905) (holding such testimony admissible because offered by the prevailing party).

Given admissible evidence (such as testimony of a bailiff) tending to show misconduct of the jury, affidavits by the jurors in denial of such misconduct may be received. See notes 5 and 6, *supra* at 631.

sure, the Legislature has made one exception to the rule [7] and another has been judicially developed.[8] But, save for these exceptions, the rule seems to be in full force today.

Although Wigmore is severely critical of the rule [9] and the American Law Institute's Model Code of Evidence proposed to abolish it,[10] the intent expressed in the Uniform Rules of Evidence seems to be to continue the rule in operation (*i.e.*, continue it in operation in those states —the overwhelming majority—which now have it). This intent may be deduced from Rule 44(a), which provides as follows:

> These rules shall not be construed to (a) exempt a juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by Rule 41.[11]

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[7] Code of Civil Procedure Section 657(2) states, in part:

> [W]henever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268 (1893) (quotient verdict); See Donner v. Palmer, 23 Cal. 40 (1863) (coin-tossing).

[8] Williams v. Bridges, 140 Cal. App. 537, 35 P.2d 407 (1934) (Personal injury action. On *voir dire*, juror VL states she knows absolutely nothing about the facts of the case. Verdict for plaintiff. Motion for new trial supported by affidavits of jurors that after retirement of jury VL said she knew about accident, having been at scene thereof. Held, new trial should be granted). Said the court:

> The defendant earnestly claims that his motion should have been granted because, as he asserts, it was fully supported by the facts and came within the provisions of both division 1 and division 2 of Section 657 of the Code of Civil Procedure. The plaintiff replies that it is settled law that the affidavits of jurors will not be received to impeach their verdict except where the verdict is reached by resort to the determination of chance. (20 Cal. Jur. 61.) That reply is quite sufficient as to words or acts inherent in the verdict and which had their origin after the impanelment, and before the discharge of the jury. The authorities cited by the plaintiff all fall within that class. No one of them rested on facts, as presented in the instant case, which had their origin before the impanelment, and continued until the discharge of the jury. The rule seems to be general that, "It is ground for new trial that a juror had personal knowledge of material facts in the case, had formed and expressed an opinion on the case . . . if such ground of objection was denied or concealed by the juror on proper inquiry on his *voir dire* examination. . . ." [Citations omitted.] We do not understand the plaintiff to contend to the contrary. However, she does challenge the proof that was offered by the defendant as being competent and she relies on the cases cited in 20 California Jurisprudence, 61. But no one of those cases involved a false answer made on the juror's *voir dire* examination. That distinction is very material. However, there are California cases in which it was claimed that a juror had intentionally made a false answer on his *voir dire* examination. The last one we have found is *People* v. *Galloway*, 202 Cal. 81 [259 Pac. 332]. That case rested on the provisions of the Penal Code, sections 1179-1182. Those sections are not as broad as the provisions of the Code of Civil Procedure. Nevertheless the court held that the affidavits of jurors which purported to state relevant evidence were competent and should have been received. [*Id.* at 540-541, 35 P.2d at 408-409.]

[9] 8 WIGMORE § 2353.

[10] See AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rule 301 (1942) [hereinafter cited as MODEL CODE], together with Comment and Illustrations.

[11] The full text of Rule 44 is as follows:

> RULE 44. *Testimony of Jurors Not Limited Except by these Rules.* These rules shall not be construed to (a) exempt a juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by Rule 41; (b) exempt a grand juror from testifying to testimony or statements of a person appearing before the grand jury, where such testimony or statements are the subject of lawful inquiry in the action in which the juror is called to testify.

This seems to mean that jurors may testify to impeach their verdict to the extent, but only to the extent, now permitted by the law of the state adopting Rule 44. In California, this would mean that in the two instances above mentioned [12] the jurors could so testify; in others, they could not.

It would seem, therefore, that adoption in California of Rules 41 and 44 would continue in operation the present law as to (1) those matters which may be shown to impeach or support a verdict, and (2) the permissible sources of proof to establish such matters.[13]

Recommendation

It is recommended that Rule 41 be amended as suggested above and that, as so amended, Rule 41 be approved. Approval of Rule 44 is also recommended.

Incorporating Rules 41 and 44 into California Law

As has been shown, Rule 41 declares existing California law. However, such existing law is nonstatutory. Therefore, no statutory adjustments are necessary in connection with the enactment of the rule.

Rule 44 deals with (a) testimony by petit jurors as to events bearing on the validity of their verdict, and (b) testimony by grand jurors as to testimony or statements of persons appearing before the grand jury.

In the Commissioners' Comment to Rule 44, the rule is said to be a cautionary rule designed to make it clear that, whereas the limitations of the present law respecting petit and grand juror's testimony are intended to be continued in force, only such limitations are intended. Hence, no change in statutes presently in effect is called for in connection with the adoption of Rule 44.[14]

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[12] See notes 7 and 8, *supra*.

[13] Is there today any rule which precludes disclosure of jury proceedings when such disclosure is sought for some purpose other than impeaching or supporting a verdict? For example, suppose in the civil action of "P v. D," W testifies for P. Later, and in order to impeach W for bias, D offers X to testify that X and W were on the jury in the case of "People v. JS" and during the jury's deliberations in that case W made derogatory remarks about D. Does W possess a privilege to prevent X from so testifying? Wigmore argues that there is such privilege. 8 WIGMORE §§ 2345(A), 2346. In Clark v. U.S., 289 U.S. 1, 12-14 (1933), Justice Cardozo suggests the existence of such privilege. See also Williams v. Bridges, *supra* note 8, quoting Justice Cardozo's language.

Possibly, this privilege (if it does exist) is not within the saving provisions of Rule 44(a) and is, therefore, abolished by the general provision of Rule 7.

[14] The following provisions are the source of the present California law: CAL. CODE CIV. PROC. § 657(2) ("whenever any one or more of the jurors have been induced to assent to any . . . verdict . . . by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." This operates as a declaration by implication of the general common law rule that jurors may not testify to impeach their verdict. It operates, also, of course, to engraft upon the general rule the exception it states.); CAL. PENAL CODE § 911 (grand juror's oath: "I . . . will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before the grand jury . . . ."); CAL. PENAL CODE § 924.2 (Court may require grand juror to disclose testimony of witness before grand jury for purpose of ascertaining whether consistent with present testimony of witness or when grand jury witness charged with perjury.).

RULES 42 AND 43

Introduction

Rules 42 and 43 provide that the judge presiding at a trial (Rule 42) or a juror impaneled to try the action (Rule 43) may not testify upon the trial of the action. The text of these rules reads as follows:

> RULE 42. *Testimony by the Judge.* Against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness.
>
> RULE 43. *Testimony by a Juror.* A member of a jury sworn and empanelled in the trial of an action, may not testify in that trial as a witness.

Present California law dealing with the same matter consists of the following two statutory provisions.

Code of Civil Procedure Section 1883 provides:

> The Judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another Judge or jury.

Penal Code Section 1120 provides:

> If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open Court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into Court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties.

California cases have held that the judge presiding at a trial did not abuse his discretion in testifying during such trial.[1]

Manifestly, there is a clear-cut difference in policy between the present California law and Uniform Rules 42 and 43.

Judge as Witness

Rule 42, which is supported by McCormick,[2] is predicated upon what the Commissioners on Uniform State Laws regard as "the impropriety and the bad policy of a judge testifying as a witness even as to formal matters, in the trial over which he is presiding."[3] What are the elements of this alleged "bad" policy? Wigmore suggests that there are three such elements:

> The only real . . . objections to the judge's assuming the place of a witness seem to be, in the first place, that he would be put

[1] People v. Madison, 3 Cal.2d 668, 46 P.2d 159 (1935); People v. Connors, 77 Cal. App. 438, 246 Pac. 1072 (1926).

[2] MCCORMICK § 68.

[3] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF EVIDENCE, RULE 42 Comment (1953) [hereinafter cited as UNIFORM RULES].

> thereby into a more or less partisan attitude before the jury and would thus as a judge lose something of the essential traits of authority and impartiality; secondly, that his continuing power as judge would embarrass and limit the opposing counsel in his cross-examination of the judge-witness, and would thus unfairly restrict the opponent's opportunity to expose the truth; and, thirdly (though this is itself inconsistent with the first reason), that the judge's official authority would impress his testimony upon the jury with special and therefore unfair weight.[4]

Having stated these three objections to testimony by judges, Wigmore proceeds to answer them as follows:

> Military commanders do not train cannon on a garden gate; and the law of Evidence need not employ the cumbrous weapon of an invariable rule of exclusion to destroy an entire class of useful and unobjectionable evidence in order to avoid embarrassments which can easily be dealt with when they arise. Since the trial judge has no interest to subject himself or counsel or jury to these supposed embarrassments, it may properly be left to his discretion to avoid them, when the danger in his opinion arises, by retiring from the Bench before trial [has] begun or by interrupting and postponing the trial and securing another judge.[5]

Juror as Witness

Wigmore suggests that there are two alleged objections to testimony by jurors:

> First, that the opposing counsel will be embarrassed by a fear of offending the juror, so that an adequate cross-examination or impeachment would be prevented; and, secondly, that the juror, sitting afterwards as judge of the facts, would be disposed to give excessive weight to his own testimony and in general to treat too favorably the testimony of the side whose partisan he had been made.[6]

Having stated these objections, Wigmore proceeds to answer them in these terms:

> The first objection is in the hands of the opponent himself to obviate, for if the juror is to be a principal witness and his testimony will be of such consequence as to deserve impeachment on thorough cross-examination, the opponent may ascertain this upon the juror's "voir dire," and may then exclude him by challenge. The second objection is of slight consequence, because it may usually be obviated in the same way by challenge, and because the impartiality of the remaining jurymen can be trusted to counteract whatever slight bias may be by possibility created in the testifying juror, and because this bias can ordinarily affect only a minor fact in the whole mass of evidential matter.[7]

[4] 6 WIGMORE § 1909.
[5] *Ibid.*
[6] 6 WIGMORE § 1910.
[7] *Ibid.*

Recommendation

In regard to both judge as witness and juror as witness, the view of Wigmore and of present California law [8] seems more persuasive than the view expressed in Uniform Rules 42 and 43. It is recommended, therefore, that these rules be stricken in California's adoption of the Uniform Rules of Evidence and the present California provisions dealing with this topic, as indicated above, be left intact.

[8] The Wigmore-California view is also the view expressed in Rule 302 of the Model Code.

RULE 45

Introduction

Rule 45 is an exclusionary rule whereby the judge is authorized to exclude evidence which but for the rule would be admissible.[1] The text of the rule is as follows:

> RULE 45. *Discretion of Judge to Exclude Admissible Evidence.* Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

The Problem in General

It is axiomatic, of course, that in order for an item of evidence to be admissible, it must be relevant. It is axiomatic also that relevancy requires that the item possess some probative force. What is not so obvious is that very weak probative force suffices for this purpose. In other words, as the court states in the recent case of *People* v. *Hess*,[2] "Evidence is relevant when no matter how weak it may be it tends to prove the issue before the jury."

Suppose a given item possesses this minimum force (but no more) and suppose, further, that the item complies with all the ordinary rules, such as hearsay, opinion, and privilege; is the court compelled to admit the item or does the court, at least under some circumstances, possess discretion to exclude the item? If the court does possess such discretion, how broad is the discretion and what are the standards, if any, which guide the court in the exercise of its discretion?

Rule 45 supplies answers to these questions. Before considering these answers, however, the present California law on the subject should be examined.

Present California Law

Evidence relevant, but unduly prejudicial. Not infrequently, evidence will be of slight value as proof of the issues and at the same time will be grievously detrimental in terms of generating prejudice against a party. Such situations arise from time to time when the evidence happens to be especially gruesome. This is generally conceded to be a situation in which the court possesses discretion to protect the party by excluding the evidence, even though such evidence is relevant.[3]

[1] In many respects, Rule 45 is similar to Rule 3, which permits the judge under stated circumstances to admit evidence which but for the rule would be inadmissible. Each rule vests in the trial judge a large degree of discretion.

[2] 104 Cal. App.2d 642, 676, 234 P.2d 65, 87 (1951).

[3] MCCORMICK § 179.

In California, such discretion is provided for by statute [4] and is affirmed by judicial decision.[5]

Another situation in which the judge possesses discretion to exclude evidence is that in which an item of evidence that logically tends to prove *two* points in a case is competent as proof of one point but is incompetent as proof of the other. (For example, P sues D for alienating the affections of P's wife. The wife's statement as to D's acts is competent to prove the state of the wife's feelings but incompetent to prove that D did the acts.) In such cases, the trial judge possesses discretion to admit the evidence (giving the jury an appropriate charge as to the limited competency of the evidence) or to exclude the evidence altogether. As Justice Olney states in *Adkins* v. *Brett*,[6] a case in which the facts were as in the example above:

> The matter is largely one of discretion on the part of the trial judge. If the point to prove which the evidence is competent can just as well be proven by other evidence, or if the evidence is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points.[7]

Evidence relevant, but cumulative. Unless the court is to be powerless to bring about the termination of a trial, the court must have, as it presently does have in California,[8] discretion respecting repetitious testimony of a witness and the recall of witnesses. The court must also possess discretion to decide when any further evidence on a point will be regarded as cumulative and will be excluded for this reason. Such discretion is now provided by the second sentence of Code of Civil Procedure Section 2044, which reads as follows:

> The court . . . may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

Evidence relevant, but "collateral" or "remote." Code of Civil Procedure Section 1868 provides that:

> 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

[4] CAL. CODE CIV. PROC. § 1954 provides as follows:
Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the Court.

[5] People v. Guldbrandsen, 35 Cal.2d 514, 218 P.2d 977 (1950); People v. Burns, 109 Cal. App.2d 524, 241 P.2d 308 (1952), noted in Comment, 4 STAN. L. REV. 598 (1952).

[6] 184 Cal. 252, 193 Pac. 251 (1920).

[7] *Id.* at 258-259, 193 Pac. at 254 (1920).

[8] CAL. CODE CIV. PROC. § 2050 provides as follows:
A witness once examined cannot be re-examined as to the same matter without leave of the Court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the Court. Leave is granted or withheld, in the exercise of a sound discretion.

essential to its proper determination, or when it affects the credibility of a witness.

In considering the significance of Section 1868, the first point to note is that, in the sense of this section, "collateral fact" is *not* synonymous with "irrelevant fact." As is said in *Remy* v. *Olds*,[1]

> That the evidence [is] upon a collateral issue is not conclusive against its relevancy. The question [is] whether the fact it [tends] to establish would tend to prove or disprove the fact at issue. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred.[2]

The second point to note is this: Under the second and third sentences of Section 1868, inquiry into collateral facts is discretionary with the court, the standard to guide the court being whether such inquiry is "essential for [the] proper determination" of "the question in dispute." Thus, evidence of a relevant collateral fact (*i.e.*, an offer of an item of relevant circumstantial evidence) may be offered in a case, but the judge *may* exclude such offer on the ground that it is not essential to a *proper* determination of the case.[3]

Comparable to the foregoing doctrine of discretion to exclude "collateral" facts is the doctrine of discretion to exclude "remote" facts. The objection that evidence is "too remote" is a fairly common objection. Yet, as the court states in *People* v. *Boggess*,[4] "[T]here is no hard-and-fast rule relative to the admission of evidence claimed to be too remote" and "as the law does not fix any particular limitation of time which will render evidence too remote, the admissibility of evidence in the face of objection upon the ground of its remoteness ordinarily should be left to the sound discretion of the trial court."

This is a vague rule which vests in the court an equally vague discretion. Possibly, a "remote" fact in the sense of this rule is the same as a "collateral" fact in the sense of Code of Civil Procedure Section 1868.

The discretion of the trial court regarding "collateral" or "remote" facts is, of course, reviewable. Thus, there are holdings approving[5] and disapproving[6] trial courts' discretionary rulings admitting evidence, and approving[7] and disapproving[8] discretionary rulings excluding evidence. It appears, however, that none of these cases lays down any *specific* guides to instruct the courts in the exercise of their discretion.

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[1] 4 Cal. Unrep. 240, 246 (1893).
[2] See also Firlotte v. Jessee, 76 Cal. App.2d 207, 172 P.2d 710 (1946); Moody v. Peirano, 4 Cal. App. 411, 88 Pac. 380 (1906).
[3] See Sun Oil Co. v. Union Drilling & Petroleum Co., 208 Cal. 114, 120, 280 Pac. 535, 537 (1929).
[4] 194 Cal. 212, 235, 228 Pac. 448, 458 (1924).
[5] See cases cited in note 2, *supra*, and see Estate of Akers, 184 Cal. 514, 194 Pac. 706 (1920); Jennings v. Arata, 83 Cal. App.2d 143, 188 P.2d 298 (1948); Lundgren v. Converse, 34 Cal. App.2d 445, 93 P.2d 819 (1939).
[6] People v. Boggess, 194 Cal. 212, 228 Pac. 448 (1924).
[7] Sun Oil Co. v. Union Drilling & Petroleum Co., 208 Cal. 114, 280 Pac. 535 (1929).
[8] Remy v. Olds, 4 Cal. Unrep. 240 (1893).

The Two Schools of Thought About Rule 45

Sharp differences of opinion have developed respecting Uniform Rule 45 and its counterpart in the American Law Institute's Model Code (Rule 303). Opponents of the rule contend that the rule is not now law and that the rule should not become law. Representative of this point of view is the argument advanced by Judge Van Vorhis against Model Code Rule 303:

> It seems to me that to permit a trial judge in his discretion to exclude evidence if he finds that its probative value is outweighed by the risks and its admission will necessitate undue consumption of time is a dangerous provision . . . . I certainly do not think that the judge should have [this] power . . . . I say frankly I have known judges who would close the case and go fishing. . . .[1]

On the other hand, partisans[2] of the rule contend that the rule states the substance of existing law and that the principle of the rule is essential.

The Uniform Commissioners align themselves with the view last stated. They call Rule 45 "a rule of necessity," and they state that the rule merely sanctions "the sort of thing which the trial judge does every day in actual practice."[3]

It seems evident that the extreme differences of opinion between supporters and opponents of the rule must stem from differing constructions of the meaning and purpose of the rule. It is well, therefore, to attempt to arrive at some understanding of the true intent of the rule.

The "True Intent" of Rule 45

The surest index of the intent of the rule is to be found, it seems, in the specific instances which the sponsors of the rule cite as illustrative of its intended scope. In this regard, the following two illustrations are instructive:

> PROFESSOR MORGAN: Very frequently evidence of slight probative value will be admissible because relevant but the trial judge knows that there is no use of taking up time with hearing it. Take evidence of similar accidents, for example, to show that a particular place is dangerous. Now, most of the courts will say that you can put that in if there is not going to be a great dispute about each one of these accidents. Suppose you offer to show that X was hurt at this particular place one year ago and Y was hurt at this particular place two years ago or there were three or four accidents in that place, and suppose the opponent of the evidence says, "If you admit that evidence, sir, we intend to go into the question of the circumstances of each one of these accidents to show that it was due solely to the fault of the injured person." Is the trial court going to have to take all that evidence? It is all relevant. The reason that the courts give frequently for keeping

[1] 19 A.L.I. PROCEEDINGS 220-221 (1941-1942).

[2] Among such partisans are Professor Morgan, Judge Augustus Hand, Judge McElroy (see 19 A.L.I. PROCEEDINGS 222-227 (1941-1942)), Judge Learned Hand (see his opinion quoted at 644, *infra*), and Professor McCormick (see MCCORMICK § 152 at 319).

[3] UNIFORM RULE 45 Comment.

that testimony out is that it will consume too much time. Of course, it is relevant. Its relevancy is slight. Sometimes they say there is the danger of misleading the jury by confusing the issues.[4]

JUDGE MCELROY: Take for example, a prosecution for unlawful homicide, in which evidence is offered about a prior difficulty between the accused and the deceased. Possibly one side or the other may wish to bring in 30 or 40 witnesses to testify to the prior difficulty; with the result that if all are permitted to testify, the dog of vitally important matters will be wagged by the tail of relatively trivial matters. The extent to which the prior difficulty can be gone into ought to be placed in the discretion of the trial judge, whose action if badly out of line will be corrected by the appellate court.[5]

These examples give a clue as to what "undue consumption of time," "confusing the issues," and "misleading the jury" are intended to mean in the sense of Rule 45.

Insofar as the intended meaning of unfair "surprise" is concerned, the Uniform Commissioners have not provided an illustrative case. There is, however, this observation in the Comment on Model Code Rule 303:

> Where the only objection is that the evidence takes the adversary by surprise, it cannot prevail if the probative value is substantial. Usually a party should have foreseen this development of the case. If not, a continuance will give appropriate relief.

Since the concepts of "undue consumption of time," "confusing the issues," and "misleading the jury" in Rule 45 are intended to be limited to such cases as those cited above, and since the unfair "surprise" concept is intended to be construed in accordance with the statement last quoted, it seems that the discretion which Rule 45 is intended to vest in the trial judge cannot be regarded as "arbitrary discretion." Moreover, it is clearly assumed by the sponsors of Rule 45 that the judge's ruling when exercising his Rule 45 discretion is reviewable. Thus, the Uniform Commissioners state that they propose Rule 45 "in the assurance that the results of rare and harmful abuse of discretion will be readily corrected on appeal."[6]

Is the Principle of Rule 45 Law Today in California?

As pointed out above,[7] partisans of Rule 45 adhere to the belief that the rule is, as Judge McElroy states in regard to its counterpart in Model Code Rule 303, "just about what the common law now is, though perhaps the judicial opinions do not use precisely the same language."[8] Wigmore's and McCormick's analyses of the common law seem to support Judge McElroy's statement.[9]

Is the principle of Rule 45 now law in California? It has been previously noted[10] that, under Code of Civil Procedure Section 1868,

[4] 19 A.L.I. PROCEEDINGS 223 (1941-1942).
[5] *Id.* at 226.
[6] UNIFORM RULE 45 Comment.
[7] See the text, *supra* at 642.
[8] 19 A.L.I. PROCEEDINGS 226 (1941-42).
[9] See 1 WIGMORE §§ 29a, 42; 2 WIGMORE §§ 443-444; 6 WIGMORE §§ 1904-1907; MCCORMICK § 152.
[10] See the text, *supra* at 640-641.

"collateral questions must . . . be avoided," unless "inquiry into [such] collateral fact . . . is essential to [the] proper determination" of "the question in dispute." In administering this vague legislative directive, it would seem that the court might well reason that inquiry into a collateral fact (*i.e.*, the admission of an item of circumstantial evidence) is not essential to the proper determination of the question because (a) the probative force of the fact is not worth the time that would be consumed in making the fact a subsidiary issue in the case, or (b) the probative force of the fact is not worth the risk it entails of confusing the issues or misleading the jury, or (c) the probative value to the proponent is not sufficient to offset the unfair and harmful surprise of the opponent.

If it would be proper for the court in the exercise of its duties under Section 1868 to reason as above, it would follow, of course, that the broad, vague principles of Section 1868 embrace the specific principles set forth in Rule 45.

There are no precise precedents indicating whether the principle embodied in Section 1868 embraces the specific criteria mentioned in Rule 45. Were the point to be raised, however, there is reason to believe a court would hold that Section 1868 was intended to state in general terms such guides to discretion as those enumerated in Rule 45. In such a case, the court's decision probably would be favorably influenced by such authorities as Morgan and McCormick [11] (vigorous champions of Rule 45) and by such out-of-state judicial language as the following by Learned Hand in his opinion in *United States* v. *Krulewitch:* [12]

> [T]he competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for truth; and that does not inevitably follow from the fact that it is rationally relevant. . . . [T]he question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and the expense it will involve, and by the chance that it will divert the jury from the facts which should control their verdict.

Recommendation

California today has a vague rule of discretion which may or may not be intended to bear the more specific meaning which Rule 45 states. It is believed, however, that the California rule is intended to bear the meaning of Rule 45.

It would follow that adoption of Rule 45 would not change the substance of California law, but would improve its form by making explicit that which is now implicit in such law. Adoption of Rule 45 is, therefore, recommended.

Incorporating Rule 45 into California Law

The counterpart of Rule 45 in present California law is Code of Civil Procedure Section 1868, discussed above. If Rule 45 were adopted in California, Section 1868 should be repealed as superfluous.

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[11] See references in note 2, *supra* at 642.
[12] 145 F.2d 76, 80 (1944).

RULES 46-50 AND RULE 55

Introduction

Prior to discussion in detail of Rules 46 to 50 and Rule 55, it will be well to consider some distinctions that are essential to an understanding of the scope and purpose of these rules.

"Character" and "Reputation" Distinguished

Rules 46 and 47 deal with the subject of "character" and "traits" of character. These rules also deal with "reputation."

Frequently, the terms "character" and "reputation" are treated as synonyms.[1] Wigmore protests this usage, insisting that when properly defined and used the two terms indicate concepts which are significantly different. Thus, "character" means actual disposition, whereas "reputation" is merely evidence of what such actual disposition is. Emphasizing this difference, Wigmore writes as follows:

> That actual character is distinct from reputation of it, and the latter is merely evidence to prove the former, ought to be a truism. . . . When we argue that a defendant probably did not commit a forgery because his disposition was honest . . . , or that a witness probably is speaking falsely because he is mendacious in disposition . . . , we are arguing from his actual moral constitution, which in its turn becomes a fact to be proved; and when we then resort to reputation . . . , we are resorting to it as evidence from which we may make some inference to the nature of the actual trait.[2]

The American Law Institute's Model Code of Evidence uses the terms "character" and "reputation" in Wigmore's sense. Thus Model Code Rule 304 defines "character" as follows:

> Character as used in these Rules means the aggregate of a person's traits, including those relating to care and skill and their opposites.

The Comment upon this rule states that:

> Character . . . means disposition not reputation. It denotes what a person is, not what he is reputed to be.

Although the Uniform Rules do not include the above Model Code definition of "character," Rules 46-50 and Rule 55 are substantially copies of Model Code Rules.[3] Both from this circumstance and from

[1] See 5 WIGMORE § 1608.

[2] *Ibid.*

[3] The following table shows the derivation of these Uniform Rules:

UNIFORM RULES	MODEL CODE RULES
RULE 46	RULE 305
47	306 (1) (2)
48	306 (3)
49	307 (2)
50	307 (3)
55	311

the context in which "character" and "reputation" are used in the Uniform Rules, it is abundantly clear that the Uniform Rules use the two terms in the Wigmore-Model Code sense.

Thus, throughout the rules under study and throughout the ensuing discussion of such rules, a person's "reputation" means merely evidence of his "character."[4] "Reputation" in this sense is comparable to the other two main sources of proof of "character": namely, testimony in the form of a witness' opinion as to a person's character and testimony in the form of specific instances of conduct which are indicative of character.[5]

"Character" and "Habit" Distinguished

Rules 46-48 and Rule 55 deal with the subject of "character." On the other hand, Rules 49 and 50 deal with the subject of "habit." The relationship of the latter rules to the former depends upon the meaning of these concepts.

Like "character" and "reputation,"[6] "character" and "habit" are often used as synonyms.[7] In the Uniform Rules, however, it is clear that the expressions "character" and "habit" connote different ideas.[8] The difference seems to be that expounded by McCormick in the following passage:

> Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving.[9]

Thus, evidence in a generalized form that X is a careful or careless man (*i.e.*, evidence in the form of the testimony of a witness that "X is a careful man") is evidence of X's "character." This is

[4] See MCCORMICK § 228 at 470: "Reputation is a composite description of what the people in a community have said and are saying about a matter." See also Rule 63(28), making evidence of a person's reputation respecting a trait of his character admissible as an exception to the hearsay rule. And see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 336, 553-554 (1963).

[5] See MCCORMICK § 153.

[6] See note 1, *supra*.

[7] See MCCORMICK § 162 at 342 n.10.

[8] See UNIFORM RULE 50 Comment.

[9] MCCORMICK § 162 at 340-341. See also Hale, *Some Comments on Character Evidence and Related Topics*, 22 SO. CAL. L. REV. 341, 346 (1949). The Model Code definition of "habit" (Rule 307(1)) is as follows:

> Habit means a course of behavior of a person regularly repeated in like circumstances.

illustrated by Rule 48, which so classifies such evidence.[10] On the other hand, evidence that X made a practice of stopping his car before turning his windshield wipers off or on is evidence of "habit."[11] Such evidence would, therefore, be governed by Rules 49 and 50 (the "habit" rules) rather than by Rules 46-48 (the "character" rules).

Character as Ultimate Issue and Character as Circumstantial Evidence of Conduct Distinguished

In a few relatively rare cases, "character" is a substantive, ultimate issue in the case. That is to say, the case simply cannot be decided without adjudicating the issue of "character."[1] Such cases are covered by Rule 46. More commonly, "character" is not an issue in this sense. When this is so, if "character" is introduced into the case, it is usually so introduced merely as an item of circumstantial evidence tending to show that an act was or was not done.[2] Such cases are covered by Rules 47 and 48, governing the use of "character" evidence to prove conduct.

Rules 46-50 and Rule 55 Compared With Rules 20-22

To some extent, Rules 20 and 22 deal with "character" evidence.[3] These rules, however, concern the use of "character" evidence for the purpose of impeaching the credibility of witnesses.[4] On the other hand, Rules 46-50 and Rule 55 deal with the use of "character" evidence as evidence on the merits of the case. Furthermore, the rules regarding the use of "character" evidence for impeachment purposes may be quite different from the rules respecting the use of "character" evidence as evidence on the merits of the case. For example, suppose an accused is charged under Penal Code Section 484 with obtaining prop-

[10] See Hale, *loc. cit. supra* note 9. See also MODEL CODE Rule 304, whereby "character" includes "those [traits] relating to care and skill and their opposites."

[11] Sometimes the distinction will be difficult to draw. As the Comment on Uniform Rule 50 states, "It is sometimes difficult to distinguish between character and habit, especially when the quality in question is skill or care." See also MCCORMICK § 162.

[1] See Hale, *loc. cit. supra* note 9. See also MCCORMICK §§ 153-154, and Comments on Uniform Rules 46 and 47. Sometimes reputation may be an issue in the case (*e.g.*, an action for damages for injury to plaintiff's reputation). See Hale, *supra* note 9, at 344. In such cases evidence of reputation may not be hearsay evidence. See MCCORMICK § 228 at 470.

[2] See references in note 1, *supra*.

[3] These rules provide as follows:

> RULE 20. *Evidence Generally Affecting Credibility.* Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.
>
> 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 inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible 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 inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

[4] The rules dealing with the admissibility of evidence relating to impeachment and support of the credibility of witnesses are the subject of a separate study in this series of studies on the Uniform Rules of Evidence.

erty by false pretenses. Under what circumstances and for what purposes may the prosecution show that the accused's reputation for truth and veracity is bad? If the accused does not take the witness stand and does not call any witnesses to testify to his good character, the prosecution may not introduce such evidence either for impeachment purposes or as evidence on the merits of the case. The evidence is inadmissible as impeaching evidence for the simple reason that the accused has not been a witness. It is inadmissible as evidence on the merits of the case because the accused has not introduced evidence of his good character—a condition required by Rule 47(b)(ii). If, however, the accused does testify but does not introduce evidence of his good character, the prosecution in rebuttal may prove the accused's bad reputation for truth and veracity to impeach his credibility (as is permitted under Rules 20 and 22(c)) but not to prove his guilt (because the conditions of Rule 47(b)(ii) are not satisfied). In such a situation, the difference between "character" evidence for impeachment purposes and "character" evidence on the merits of the case is subtle and, practically speaking, it may be unworkable. Nevertheless, the distinction is maintained in theory and requires an appropriate instruction to the jury.[5]

The above remarks are offered to suggest that the present discussion is concerned primarily with the use of "character" evidence on the merits of the case. Use of "character" evidence for the different purpose of impeaching a witness is referred to only incidentally.

Rule 46

Character as Ultimate Issue

Uniform Rule 46 provides:

> RULE 46. *Character—Manner of Proof.* When a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of Rules 47 and 48.[6]

This rule is concerned with "character" as an ultimate issue in the case, not with "character" as circumstantial evidence of conduct.[7]

Rule 46 is based upon Model Code Rule 305. To indicate the purpose and scope of Rule 46 and to illustrate its application, the following Comment on and Illustration of the Model Code rule should be considered:

> The situations in which character . . . is in issue or is a factor in measuring damages are comparatively few. They concern chiefly character as to chastity and as to competence. Thus a woman's unchaste character may be a defense in an action for breach of promise of marriage, or her chaste character may be an essential of a statutory crime of seduction. An employee's character as to competence or incompetence may be an essential fact of plaintiff's

[5] See People v. Johnson, 57 Cal. 571, 574 (1881).
[6] Rules 47 and 48 are set out in the text, *infra* at 651 and 661, respectively.
[7] See note 1, *supra*.

case or of defendant's defense in an action for breach of contract of employment or an action for damages alleged to have been caused by his careless conduct. In a father's action for seduction of his daughter or a husband's action for criminal conversation, the woman's character as to chastity or unchastity will affect the amount of damages.

In all such cases this Rule not only permits evidence of opinion and reputation to be used; it admits also evidence of specific instances of relevant behavior. . . .

Illustration:

In an action for breach by D of a contract to employ P as engineer to operate a hoist in a mine of great depth, D pleads P's incompetence as a justification for discharging him. D offers (1) testimony of E, an expert engineer, who has observed P's operation of the hoist and other relevant data, that P is incompetent to operate the hoist, (2) evidence that P's reputation among the other employees at the mine is that he is incompetent and is nicknamed the undertaker's assistant, and (3) that on three occasions he caused injury to miners by dropping the cage at excessive speed and stopping it too suddenly. All three are admissible.

Admission of the third item of evidence in the above illustration seems to be clearly in accord with the rule which prevails today. Thus, McCormick states as follows:

A person's possession of a particular character trait may be an operative fact which under the substantive law determines the legal rights and liabilities of the parties. When this is so, . . . the courts have usually held that [character] may be proved by evidence of specific acts. While this is the method most likely to create prejudice and hostility, it is also the most decisive revelation of character, which is here the center of inquiry. We are willing to incur a hazard of prejudice here, and even surprise, which we are not when character is sought to be shown by specific acts on other occasions, only for a remoter and often doubtful inference as to the person's *acts* which are the subject of suit.[8]

[8] McCormick § 154. See also Gier v. Los Angeles Consol. Elec. Ry., 108 Cal. 129, 134, 41 Pac. 22, 24 (1895) (action by employee of defendant for injury inflicted by another employee, alleging defendant's negligence in employing the latter because the other employee was incompetent as defendant knew or should have known. Held, incompetency may be shown by "evidence of individual acts evincing negligence or incompetency."). See also another fellow-servant injury case, Worley v. Spreckels Bros. Com. Co., 163 Cal. 60, 70, 124 Pac. 697, 701 (1912) ("We understand it to be the general rule that evidence of individual acts tending to show negligence or incompetency is admissible for the purpose of showing that the employee was in fact unfit or incompetent."). For a case similar to the *Gier* and *Worley* cases, see Young v. Fresno Flume & Irr. Co., 24 Cal. App. 286, 141 Pac. 29 (1914).

See also People v. Kehoe, 123 Cal. 224, 55 Pac. 911 (1898) (seduction of female of previous chaste character; dictum that evidence of previous acts of intercourse was admissible to show female was not of previous chaste character).

Admission of the first item of evidence in the above illustration is supported by some California cases,[9] and the argument in behalf of this ruling is strong. In the following passage, McCormick summarizes this argument:

> [I]n these cases where character is part of the ultimate issue, . . . the argument is strong for the allowability of opinion-evidence as to character from one who has observed the man and his conduct. It is surely a proper case for opinion, since an impression from facts too detailed to recite may be valuable to the trier of fact. The fact that specific acts may be enquired into upon cross-examination, and thus the trier's attention be unduly distracted, is hardly an objection since the door has already been opened to specific acts as evidence of character in issue.[10]

There is considerable doubt as to the extent, if any, to which admission of the second item of evidence in the above illustration represents the present California law.[11] However, there appears to be no reason why it should not be the future law. Accepting the fact that character may be established by reputation evidence, when it is offered to show conduct (*e.g.*, the accused's good character offered to show noncommission of the crime charged) or to impeach a witness, it would seem to be entirely arbitrary to reject reputation evidence when offered to show character in a case where character is a substantive issue.

Recommendation

It is recommended that Rule 46 be approved for adoption in California.

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[9] People v. Samonset, 97 Cal. 448, 450, 32 Pac. 520, 521 (1893) (Seduction of female of previous chaste character under promise of marriage. Prosecution witness allowed to testify "that he had known the prosecutrix for one or two years, and had roomed in the house where she was employed, and had never known of any improper conduct on her part."). And see People v. Wade, 118 Cal. 672, 674, 50 Pac. 841, 842 (1897) (seduction as in *Samonset, supra.* Question to prosecution witness: "From your acquaintance with Miss Scott and your observation of her general conduct, what would you say as to whether or not she was a chaste and virtuous girl . . .?" Answer: "I never saw anything imprudent in Miss Scott; she seemed to be a nice young girl." Held, proper.)

[10] McCormick § 154. When the purpose is to impeach a witness by character evidence, Rule 20 would permit evidence in the form of opinion (*i.e.*, there appears to be nothing in any other rule that would limit the application of Rule 20).

[11] Note McCormick's comment on fellow-servant injury cases (like Gier v. Los Angeles Consol. Elec. Ry., *supra* note 8):

> [I]n some of these [cases] the courts have reversed the usual preference for reputation as the vehicle of proof of character and have held that reputation is not even admissible as evidence of character, and that specific acts must be adduced if character is to be shown, though reputation may then come in as evidence that such character was known to the defendant. [McCormick § 154.]

The *Gier* case illustrates McCormick's statement. Thus, the court states that, although evidence of individual acts is admissible to establish unfitness, "reputation is not proof of [the] fact [of unfitness]." Gier v. Los Angeles Consol. Elec. Ry., 108 Cal. 129, 134, 41 Pac. 22, 24 (1895).

Rule 47

Character as Proof of Conduct

Uniform Rule 47 provides:

> RULE 47. *Character Trait as Proof of Conduct.* Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged, (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character.

This rule is concerned with the use of evidence of character to prove conduct, not with character as an ultimate issue in the case.[1] To illustrate the difference, suppose a defendant is charged with violation of Penal Code Section 268, which provides:

> Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the State Prison for not more than five years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment.

In such a case, the female's character is an ultimate, substantive issue. Therefore, evidence respecting her character is governed by Rule 46. If, however, defendant denies the acts charged and offers evidence of his good character for morality, then character is offered as the basis for an inference of conduct and the proof is governed by Rule 47.

In discussing the scope and purpose of Rule 47 and in evaluating its merits, it will be convenient to consider, first, the application of the rule to criminal cases and, next, its application to civil cases.

Application of Rule 47 to Criminal Cases

Defendant's evidence of character trait. Under present California law, a defendant may, of course, prove that his reputation for the trait or traits of character related to the crime charged is good.[2] Rule 47 extends the same right to him, together with the assurance contained in Rule 47(b)(i) that the court has no discretion to exclude such evidence under the court's general discretionary powers granted by Rule 45.[3]

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[1] See note 1, *supra* at 647.

[2] People v. Stewart, 28 Cal. 395, 396 (1865) (Murder. "The Court below erred in excluding the testimony offered by the defendant for the purpose of proving his character for peace and quiet to be good."). See also People v. Casey, 53 Cal. 360 (1879). The evidence, however, must be of traits of character related to the crime charged. People v. Cowgill, 93 Cal. 596, 597, 29 Pac. 228, 229 (1892) (Murder. Evidence of defendant's good reputation for truth, honesty, and integrity inadmissible because not "good reputation for the traits of character involved in the crime charged.").

[3] For discussion of Rule 45, see the text, *supra* at 639-644.

Today, in California, a defendant may not ordinarily give testimony in the form of opinion as to his character.[4] Rule 47 would change this by making such opinion evidence admissible.[5]

Prosecution's evidence in chief as to defendant's character traits. Under present California law, the prosecution may not attack the defendant's character until the defendant has given evidence of his good character.[6] This rule is continued in operation by force of Rule 47(b)(ii).

Prosecution's evidence in rebuttal as to defendant's character traits. If defendant gives evidence in defense as to his good reputation, the prosecution may, under present California law, counter this by giving evidence in rebuttal tending to show that the defendant's reputation is bad.[7] This rule is continued in operation by force of Rule 47(b)(ii).

Since Rule 47 permits the defendant to give opinion testimony of his good character, it would follow, of course, that under the same rule the prosecution could counter with opinion testimony in rebuttal. If, however, the defendant has given either reputation or opinion testimony, or both, may the prosecution in rebuttal counter the defendant's evidence by a showing of defendant's conviction or convictions of a crime or crimes indicative of bad character for the trait in question? Clearly such evidence is *in*admissible in the case in chief under Rule 47(b)(ii). It is equally clear that Rule 47(b)(ii) makes such evidence admissible in rebuttal. As the Comment on Rule 47 states:

> Like the Model Code Rules, this rule permits the prosecution after the defendant has produced evidence of his good character, to prove prior convictions as evidence of criminal propensity and likelihood of guilt.

Is this the law today in California? If not, should it become law? On both of these questions, McCormick speaks as follows:

> Should the [prosecution] be allowed to prove . . . , in rebuttal of good reputation, judgments of conviction for crimes involving the

[4] McCORMICK § 158. In People v. Ah Lee Doon, 97 Cal. 171, 179, 31 Pac. 933, 935 (1893), the court states by way of dictum that it is not error to exclude "evidence of the good disposition of the defendant, other than evidence of his good reputation." See, however, People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954), to the effect that defendant may adduce expert psychiatric testimony that he is not a sexual deviate. The case is criticized in Falknor & Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist"*, 102 U. PA. L. REV. 980 (1954). Compare Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. REV. 999 (1955).

[5] Note, however, that under Uniform Rule 47(2), defendant's evidence of specific instances of good conduct is inadmissible. Consider the following illustration given by the Comment on Model Code Rule 306 (on which Uniform Rule 47 is based):

> D is on trial on a charge of larceny. W offers to testify for D . . . (c) that shortly before D's arrest, W had a specific experience with D in which he entrusted D with large sums of money and numerous negotiable securities in circumstances in which a dishonest man might easily have made off with them. The evidence offered in . . . (c) is inadmissible.

[6] People v. McKelvey, 85 Cal. App. 769, 770, 260 Pac. 397 (1927) ("It is elementary that such testimony is admissible upon the part of the prosecution only when the defendant has himself opened the door for such evidence by endeavoring to establish his good reputation for the traits involved in the charge against him." In this case, the prosecution gave such evidence in rebuttal, defendant not having opened the door in his defense; *held*, "clearly prejudicial error.").

[7] *Ibid.*

> same trait in or near the community where the accused lived, and within a reasonable time before the commission of the crime on trial? The cases are few and divided, but such convictions would bear strongly on reputation, are provable with entire certainty, and while they carry a danger of prejudice, it is avoidable by the accused, who need not inject the issue of reputation. The argument here against the use of convictions is far less strong than against the use of convictions to impeach the accused when he takes the stand as a witness.[8]

Evidence of character other than character of the accused. In considering the application of Rule 47 to criminal cases, discussion thus far has centered around the defendant's own character. There are, however, at least two instances where the character of other persons is important. These are discussed below.

Character of prosecutrix in rape cases. It is clear that under present California law, in rape cases in which consent of the prosecutrix is a material circumstance, the defendant may show the bad reputation of the prosecutrix antedating the alleged rape. As the court states in *People* v. *Johnson*:[9]

> This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix. For it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent, than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed.

The same result would be reached under Rule 47.

May the defendant, however, prove specific instances of unchastity on the part of the prosecutrix antedating the alleged rape? In the early case of *People* v. *Benson*,[10] it was held that such testimony is admissible. In *People* v. *Shea*,[11] the *Benson* case is followed, although it is admitted that the weight of authority is opposed to the rule laid down in that case. A dissenting opinion by Justice McFarland urged, however, that the *Benson* case be overruled on the following grounds:

> I see no force in the reasoning that such acts are admissible because they tend to show that the prosecutrix probably consented at the time of the alleged rape. Such acts were no more admissible than would former assaults on others by a man charged with murder be admissible because they would tend to the probability that the defendant committed the murderous assault charged. . . . This reasoning is entirely unsatisfactory to me, and I think that upon principle, and upon the great weight of authority, *People v. Benson, supra*, should be held as improperly decided. The reason that specific acts cannot be proven, while general reputation may, is as old as the law and founded upon the stable ground that a witness is supposed to be able to maintain his or her general reputation, while witnesses cannot be expected to be able to disprove testimony

[8] McCormick § 158 at 337-38.
[9] 106 Cal. 289, 293, 39 Pac. 622, 623 (1895).
[10] 6 Cal. 221 (1856).
[11] 125 Cal. 151, 57 Pac. 885 (1899).

> as to special acts to which their attention had not been called. I think that if counsel for defendant in cases like this are allowed to even ask questions tending to prove that a prosecutrix had sexual intercourse with another man, great injustice and wrong will follow.[12]

Rule 47 is in accord with the views expressed in Justice McFarland's dissenting opinion. Hence, while evidence of the reputation of the prosecutrix would be admissible, evidence of her specific acts of unchastity would be inadmissible under Rule 47(a).

Character of deceased under a plea of "self-defense" to a charge of murder. Under present California law, if a defendant charged with the murder of X pleads self-defense, the defendant may show the reputation of X as the basis for the inference that X was the aggressor in the encounter between defendant and X. As the court states in *People* v. *Lamar*:[13]

> All men, independent of their character or reputation, are under the equal protection of the law, and it in no degree excuses or palliates the taking of human life that the person slain was of bad character or reputation; the offense is as great whether the life maliciously taken be that of a man of bad or of good character. But while the general rule is that evidence of the bad reputation of deceased for peace and quiet cannot be given in evidence, still this rule has its exceptions applicable to cases where the facts and circumstances surrounding them are peculiar. Such an exception applies in cases of homicide where the plea of self-defense is interposed . . . .
>
> [W]here the other evidence introduced raises a doubt whether defendant acted in self-defense, evidence of the reputation of the deceased is admissible, and this rule applies as to every essential issue in the case upon which that plea is founded. It is always a vital issue before the jury, when such a plea is interposed, as to who was the aggressor in the contest. In the case at bar this issue, under the evidence, was involved in doubt, and any fact which would under such circumstances serve to illustrate who was the assailant in the encounter, where the death of one of the parties ensued, would be admissible. In such equivocal condition of the evidence the reputation of the deceased as a violent, turbulent, dangerous man would be a legitimate subject of inquiry, illustrating the animus with which he encountered the defendant. It would be a circumstance immediately connected with the quarrel tending to illustrate the true intent or motive which characterized the conduct of deceased therein, to be taken into consideration by the jury

[12] *Id.* at 153-54, 57 Pac. at 886.

[13] 148 Cal. 564, 573-574, 83 Pac. 993, 996 (1906). See People v. Yokum, 145 Cal. App.2d 245, 260, 302 P.2d 406, 416 (1956) (same); People v. Jefferson, 34 Cal. App.2d 278, 282, 93 P.2d 230, 232 (1939) (same); Comment, 25 CAL. L. REV. 459 (1937). In these self-defense cases, Rule 47 would continue the present rule as to admissibility of reputation evidence. However, it would change the present rule which probably precludes opinion evidence. See 25 CAL. L. REV. 459, 467 n.58 (1937).

in connection with the other facts and circumstances in the case in determining who was the aggressor in the fatal contest.

The same result would be reached under Rule 47.

May the defendant, in order to show that the deceased was the aggressor, make use of specific instances of the deceased's conduct indicative of his bad character for peace and quiet? Under present California law, the answer is, "No," [14] and this answer holds even as to specific instances of criminal conduct evidenced by convictions therefor.[15] Under Rule 47, also, the answer is, "No," with the exception that convictions for criminal conduct are admissible under Rule 47(a).

Application of Rule 47 to Civil Cases

Code of Civil Procedure Section 2053 provides in part: "Evidence of the good character of a party is not admissible in a civil action . . . unless the issue involves his character."

Suppose there is a civil action, "P v. D," for damages for alleged assault and battery. D offers evidence of his good reputation for peace and quiet. Is the evidence admissible? The answer today in California is, "No," because of Code of Civil Procedure Section 2053, which, according to *Vance* v. *Richardson*,[1] "is merely a concise statement of the rule as it is to be found in the text-books and judicial decisions." The court spoke further as follows:

> The general rule is, that in civil actions, evidence of the good character of the defendant is not admissible. Wharton, having stated that good character may be shown in criminal cases where life or liberty is at stake, says: "But whether it be because in a civil case between two private parties both parties stand in this respect on the same footing, or whether it be because most civil suits grow out of, or may be supposed to grow out of, honest misconceptions of rights, English and American courts have agreed in holding that, so far as it concerns the proofs in civil issues, the character of either party is as a rule irrelevant." (1 Wharton on Evidence, sec. 47.) The author then notes the few exceptions to the rule, which consist mostly of cases where the character of some person is the very issue involved—as, for instance, the character of the employe, where the employer is sued for the former's negligence. Character for chastity in certain actions is admissible; some courts have held that in a libel suit the plaintiff may prove his good character, and also in actions for certain kinds of fraud; and there are other exceptions to the rule not necessary to be here mentioned. Greenleaf states the rule in this language: "In civil cases such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it." (1 Greenleaf on Evidence, sec. 54.) But an action for assault and battery is not one of the exceptions; and both Wharton (Wharton on Evidence, sec. 47) and Greenleaf (1 Green-

[14] People v. Soules, 41 Cal. App.2d 298, 106 P.2d 639 (1940); 25 CAL. L. REV. 459, 468 (1937).
[15] People v. Griner, 124 Cal. 19, 56 Pac. 625 (1899).
[1] 110 Cal. 414, 417, 42 Pac. 909, 910 (1895).

> leaf on Evidence, sec. 55) say, affirmatively, that evidence of character is not admissible in such action.[2]

Another striking instance of the exclusionary effect of Code of Civil Procedure Section 2053 is *Van Horn* v. *Van Horn*,[3] an action for divorce on the ground of adultery in which it was held that the defendant's evidence of the good character of herself and the corespondent was inadmissible for the following reasons:

> The general rule is that in civil actions, evidence of character of neither party thereto is admissible. . . . In this state . . . the question is controlled by section 2053. . . . By the allegation of adultery appellant's character was not put in issue, and evidence concerning it, under this section, was properly excluded.[4]

Other like holdings are set forth in the appended footnote.[5]

Rule 47 provides that "when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved" in the manner provided by Rule 46 and subject to the conditions stated in Rule 47. There is, however, nothing in these conditions which excludes civil actions from the application of Rule 47. Hence, Rule 47 in terms applies to civil actions. Moreover, it is clear that one of the purposes of the rule is to abrogate the prevalent doctrine against "character" evidence in civil cases. The Comment on the American Law Institute's Model Code Rule 306 (on which part of Uniform Rule 47 is based) makes this clear by emphasizing that the "Rule . . . authorizes the reception of evidence of relevant traits [of character] in civil actions . . . ."

The foregoing comparison of Code of Civil Procedure Section 2053 and Rule 47 leads inevitably to this question of policy: Should character evidence be admissible to show conduct in civil cases?

No doubt it is a truism that (as Wigmore says) the "character or disposition—*i.e.*, a fixed trait or the sum of traits—of the persons we deal with is in daily life always more or less considered by us in estimating the probability of [their] future conduct."[6] And Wigmore adds that in "point of legal theory . . . the case is no different."[7] McCormick expresses similar ideas in the following passage:

> It will always be relevant, if we have the task of proving that A committed a certain act, and possibly of proving also his guilty or innocent state of mind, to show that A is the kind of man (in his disposition, tendencies, character) who is likely to act in that fashion with the intent charged. A thief will often steal but a man who is looked up to usually will not.[8]

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[2] *Id.* at 416-417, 42 Pac. at 910.
[3] 5 Cal. App. 719, 91 Pac. 260 (1907).
[4] *Id.* at 720-721, 91 Pac. at 261.
[5] Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 Pac. 94 (1908) (Action to enforce trust. Evidence of defendant's character as to truth, honesty, and integrity inadmissible.); Rodetsky v. Nerney, 72 Cal. App. 545, 237 Pac. 791 (1925) (Breach of promise to marry, seduction being alleged in aggravation of damages. Evidence of defendant's good reputation for chastity and morality inadmissible.). Compare cases in note 8, *supra* at 649, in which character was in issue in the sense of Code of Civil Procedure Section 2053.
[6] 1 WIGMORE § 55.
[7] *Ibid.*
[8] MCCORMICK § 155.

There are two conspicuous instances in which legal rules of admissibility are premised upon the considerations of logic and experience above stated. In the first place, there is the rule that an accused may prove or attempt to prove his good character for the trait or traits involved in the crime charged. Thus, if the accused is charged with theft, he may show his good character for honesty, the theory being that, since honest persons do not ordinarily steal, the accused's honesty is some indication that he did not steal on the occasion in question.[9] In the second place, a witness may be impeached by proof of his bad character for truth and veracity,[10] the theory being that, since people possessed of bad character in these respects are more prone to lie than people possessed of good character, the witness' bad character is some indication that he is lying. Although in both cases the evidence is relevant and admissible, it is, of course, far from conclusive; a man theretofore honest may steal, and a person generally addicted to lying may on occasion tell the truth. Thus, although the evidence is not of binding probative force, it is of some force—*i.e.*, of sufficient force to merit consideration by the trier of fact as an item of relevant evidence in the case.

This being the present California approach in criminal actions as to the defendant's character (and in all actions as to the character of witnesses), why should the approach be different as to evidence of the character of the *parties* in *civil* actions?

The different approaches bring about some striking incongruities. Thus, suppose the issue is: Did A murder X? If this issue arises in a criminal action charging A with such murder, A may prove his character. If, however, the issue arises in a civil action against A for the wrongful death of X, A may not prove his character. Likewise, if A charges D with defamation resulting from D's stating that A murdered X, and if D pleads truth as a defense, A may not prove his character. Or, suppose the issue is: Was X or A the aggressor in a fight which occurred between them? If this issue arises in a criminal action in which A is charged with an attempt to murder X and A pleads self-defense, A may show X's bad character for peace and quiet as tending to show X was the aggressor. If, however, the issue arises in X's civil action against A, A may not make a similar showing.

Such are the divergent results in applying rigorously and unqualifiedly the precept that character evidence is admissible in civil actions only when character is a substantive issue in the case or when such evidence is offered to impeach witnesses. Except for these two exceptions, it undoubtedly is thought by some that admission of "character" evidence in civil actions would entail undue consumption of time, would involve distracting the attention of the jury from the main issues by the exploration of collateral issues,[11] and might unfairly surprise the party against whom the evidence is offered.[12] But, if these reasons are *in*sufficient as a basis for excluding evidence of good character in criminal actions, how can it be that they become sufficient reasons when the action happens to be a civil action? Surely it is just as important to determine civil actions rightly and fairly as it is so to determine

[9] See note 2, *supra* at 651.
[10] See CAL. CODE CIV. PROC. § 2051.
[11] "Collateral" in this sense does not mean irrelevant. See note 6, *supra*.
[12] See MCCORMICK § 155; 1 WIGMORE § 64.

criminal actions. If, then, a matter is relevant and conducive to the right determination of an issue (and is, therefore, admissible) when that issue arises in a criminal action, should not the result be the same when the issue arises in a civil action?

Wigmore [13] and McCormick [14] answer, "Yes." A few cases are in accord with this answer. The principle of Rule 47 is in accord.

The Rule 47 principle admitting "character" evidence in civil cases is not limited to civil cases, such as those illustrated above, in which the issue is criminal conduct. The principle of Rule 47 extends to civil actions in which *any* conduct is involved, "character" being relevant on the issue of such conduct.

The relevancy qualification of Rule 47 is, however, an important and significant limitation. In many civil actions, the character of the parties will be simply irrelevant. (Their character as witnesses in the event they testify is, of course, an entirely different matter.) For example, suppose P hands D money. Later, P sues D claiming the transaction was a loan. D defends on the ground that the transaction was a gift. If at the trial P *opens the case* by offering W to testify that P's character is good or that D's character is bad, such evidence at this point seems irrelevant and should, as such, be excluded. (If, however, character evidence is offered later in the case after P or D has testified, such evidence may be admissible to impeach P or D in their capacities as witnesses.[15])

It is important to note, therefore, that Rule 47 does not purport to make character evidence admissible in all civil actions. On the contrary, its purport and purpose is to make such evidence admissible only when relevant. With this obvious limitation, the Rule 47 principle appears to be a desirable change in the present California law and its approval is, therefore, recommended.

Manner of Proving Character Under Rule 47

Rule 47 authorizes three means of proving "character," namely, by (a) evidence of reputation, (b) evidence of conviction of a crime which tends to show the character trait to be bad, and (c) testimony in the form of opinion.

Reputation. This is the means of proof which is most widely accepted today (*e.g.*, an accused's reputation to prove his character trait related to the crime charged [1]). There is, therefore, nothing new in that provision of Rule 47 which makes reputation a permissible source of proof.

Conviction of crime. Two instances have been noted above [2] in which permitting this method of proving "character" probably effects changes in the present law.

Testimony in the form of opinion. Suppose D is charged with embezzlement. At his trial, D offers W to testify as follows: "I know D

[13] 1 WIGMORE § 64.
[14] MCCORMICK § 159.
[15] The admissibility of character evidence for purposes of impeachment is governed by Rules 20-22, which will be the subject of a separate study.
[1] See note 2, *supra* at 651.
[2] See the text at notecalls 8 (*supra* at 653) and 15 (*supra* at 655).

well. I have known him for ten years. In my opinion, D is an honest man."

Under Rule 47, "when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46." Under Rule 46, "a trait of [a person's] character . . . may be proved by testimony in the form of opinion . . . ."

The rule last stated is, however, subject to the requirement of Rule 19 that 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 . . . ." (Hence, one who did not know D could not testify to his opinion of D's character.) Rule 46 is also subject to Rule 56(1) whereby nonexpert "testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue." (In the supposed case above, the proposed testimony would seem to meet these requirements.)

It would seem, therefore, that under the Uniform Rules (Rules 19, 46, 47, and 56(1)) the evidence would be admissible in the case stated above. It seems clear, however, that under existing law the evidence would be inadmissible. Which is the better rule?

Wigmore points out that the early view in both England and America was to admit the witness' testimony in the form of opinion as to "character."[3] He suggests that the abandonment of this early, orthodox view came about because of misinterpretation of certain precedents and texts.[4] He stoutly defends the orthodox view (with which Rules 46 and 47 coincide) in the following eloquent terms:

> So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief. A perusal of the records of State trials will show how natural, straightforward, and useful was this method of asking after belief founded on personal experience for intimacy. Put any one of us on trial for a false charge, and ask him whether he would not rather invoke in his vindication, as Lord Kenyon said, "the warm, affectionate testimony" of those few whose long intimacy and trust has made them ready to demonstrate their faith to the jury, than any amount of colorful assertions about reputation. Take the place of a juryman, and speculate whether he is helped more by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term "reputation" occurs. Look at it from the point of view of the prosecution, and apply the principle in such a case as R. v. Rowton [1865, Leigh & C. 520, 10 Cox Cr. 25], and then decide whether the witness who was there excluded was not, if believed, worth more than forty opposing witnesses testifying to that intangible, untestable creation called "reputation." The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have

[3] 7 WIGMORE §§ 1980-1981, 1983.
[4] *Ibid.*

> never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term "reputation." [5]

There is, however, an opposing argument which has been forcefully set forth as follows by Justice Bartlett in the New York case of *People* v. *Van Gaasbeck:* [6]

> If a witness is to be permitted to testify to the character of an accused person, basing his testimony solely on his own knowledge and observation, he cannot logically be prohibited from stating the particular incidents affecting the defendant, and the particular actions of the defendant which have led him to his favorable conclusion. In most instances it would be utterly impossible for the prosecution to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusion were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness in this respect, its admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation.

On balance the "orthodox-Wigmore-URE" view seems preferable. Therefore, approval of Rules 46 and 47 is recommended insofar as they make "opinion" evidence of "character" admissible.

Summary of Changes Effected by Rule 47

Adoption of Rule 47 in California would appear to establish new law in the following respects:

(1) An accused could attempt to establish his good character by testimony in the form of opinion.[7]

(2) In rebuttal, the prosecution could prove certain of the accused's criminal convictions as indicative of his guilt if, but only if, the accused had offered evidence of good character in defense.[8]

(3) In rape cases, the accused could not attempt to establish the bad character of the prosecutrix by evidence of specific instances of her misconduct.[9]

(4) When an accused pleads self-defense, he could attempt to establish the bad character of his alleged assailant by evidence of certain of the assailant's convictions for crime.[10]

(5) Character evidence would be admissible in civil cases when relevant to show conduct.[11]

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[5] 7 WIGMORE § 1986.
[6] 189 N.Y. 408, 418, 82 N.E. 718, 721 (1907).
[7] See the text, *supra* at 652 (notecalls 4 and 5) and 658-660.
[8] See the text, *supra* at 652.
[9] See the text, *supra* at 653-654.
[10] See the text, *supra* at 654-655.
[11] See the text, *supra* at 655-658.

Recommendation

It is recommended that Rule 47 be approved.

Rule 48

Character for Care or Skill

Uniform Rule 48 provides:

> RULE 48. *Character Trait for Care or Skill—Inadmissible to Prove Quality of Conduct.* Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

Under Rule 47, a person's character trait may be proved in the manner stated in Rules 46 and 47 whenever such trait "is relevant as tending to prove his conduct on a specified occasion." As has been discussed above,[1] a person's traits relating to care and skill and their opposites are character traits and, therefore, such attributes as carefulness (or carelessness) and skillfulness (or unskillfulness) are traits of character.[2] It would seem, furthermore, that the circumstance that a person possessed one of these traits might well be "relevant as tending to prove his conduct on a specified occasion."[3] For example, when a defendant's conduct on the occasion of a traffic accident is in dispute (it being claimed that he was speeding on the wrong side of the highway), evidence that defendant is a careful man is, it seems, evidence having a tendency in reason to prove a material fact. Such evidence, therefore, is by definition "relevant evidence" as this expression is defined in Rule 1(2), which provides that " 'Relevant evidence' means evidence having any tendency in reason to prove any material fact." The relevancy here of "character" evidence as tending to prove conduct is substantially similar to the relevancy of evidence of the good character of an accused when offered by him as tending to establish his innocence.

If the above analysis is sound, it shows that, unless some exception is made to Rule 47, it would operate to make a person's character for care admissible evidence as tending to show that he acted with care on a particular occasion (or make his character for negligence admissible evidence as tending to show negligent conduct on a particular occasion). Since this would be the result unless some exception were made to Rule 47, it seems clear that the purpose of Rule 48 is to provide such an exception. Thus, "Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion."

Rule 48 is in accord with the majority rule[4] prevailing today and is predicated upon the theory that, in the words of the Comment to Rule 48, excluding character evidence with respect to care or skill "probably conduces to saving of time and avoids distraction of attention from the main question of what was actually done on the particular occasion." (It is not altogether clear, however, why "saving of time" and avoidance of "distraction" are determinative factors here

[1] See the text, *supra* at 646.
[2] See the text, *supra* at 646-647.
[3] UNIFORM RULE 47.
[4] See UNIFORM RULE 48 Comment.

but are not so in other cases of character to show conduct, *i.e.*, in Rule 47 cases in general.)

California View

With one possible exception,[5] California law seems to be in accord with the principle of Rule 48. Consider, for example, *Towle* v. *Pacific Improvement Co.*,[6] a wrongful death action, decedent having been killed when run over by a team of horses driven by the defendant's servant. Upon appeal, the question was whether the trial court had properly admitted defendant's evidence that the defendant's servant was "a good, first-class driver, careful in handling horses." The court held the evidence to have been improperly admitted on the following ground:

> The law as to the admissibility of such evidence in cases of similar character is thus stated in Deering on Negligence, section 407: "Whether the act or omission of the defendant is actionable negligence is to be determined by the character of the act, or omission, and not by the defendant's character for care and caution. Evidence that the defendant is a careful, prudent, and cautious man, is inadmissible to negative his want of ordinary care. Upon the question of the negligence of the engineer at the time of the collision of two trains, evidence of the general incapacity of the engineer, or of his being subject to fits, is immaterial. The reputation of the driver of a horse and carriage is inadmissible in an action by the owner of another horse killed by a collision therewith." And in 2 Thompson on Negligence, page 804, it is said: "Evidence that the plaintiff was commonly a careful and skillful driver, is not admissible to show that when the accident occurred he was in the exercise of due care. The principle is that the question whether a person was at a given time in the exercise of due care is to be resolved upon evidence of what took place at the time, and not upon evidence of the general character he may sustain."
>
> The rule as above declared is supported by numerous decisions in other states, and we think it should be followed in this state.[7]

Is there in California an exception to this rule making evidence of "character" admissible where there are no eyewitnesses? McCormick thinks so,[8] and the Comment on Rule 48 is in accord. The case relied upon by McCormick and in the Comment is *Linde* v. *Emmick*.[9] This was a traffic collision case in which plaintiff testified fully as to his operation of his car. Plaintiff then offered witnesses to testify that

[5] See the text, *infra*.

[6] 98 Cal. 342, 33 Pac. 207 (1893).

[7] *Id.* at 343-344, 33 Pac. at 208. See, to the same effect, Langford v. San Diego Elec. Ry., 174 Cal. 729, 164 Pac. 398 (1917); Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35 (1911); Spear v. United Railroads, 16 Cal. App. 637, 117 Pac. 956 (1911); Doggett, *Habit Evidence in California Negligence Cases*, U.C.L.A. INTRA. L. REV. 1 (June 1952).

In Towle v. Pacific Imp. Co., *supra* note 6, it is suggested that on the basis of an earlier case (Boyce v. California Stage Co., 25 Cal. 460 (1864)) the evidence is admissible in cases in which the *utmost* care is required. This distinction is criticized in *Spear*, *supra*, at 645.

[8] MCCORMICK § 156 at 325 n.3.

[9] 16 Cal. App.2d 676, 61 P.2d 338 (1936).

plaintiff "was a careful, cautious driver." [10] The evidence was said to be inadmissible "because [plaintiff] had fully described his actual operation of [his car]." [11] The court cited two cases [12] which held evidence of *habit* inadmissible when there are eyewitnesses. Does this add up to an implication by the court that if there was no eyewitnesses plaintiff's "character" evidence would be admissible? Possibly so, but the inference is not altogether clear. It is clear, however, that if this exception does exist in California, it would be abrogated by adoption of Rule 48.

Recommendation

It is recommended that Rule 48 be approved.

Rule 49

Habit and Custom

Uniform Rule 49 provides:

> RULE 49. *Habit or Custom to Prove Specific Behavior.* Evidence of habit or custom is relevant to an issue of behavior on a specified occasion, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to the habit or custom.

This is the first of the two Uniform Rules (Rules 49 and 50) relating to "habit" evidence.

The distinction between "character" and "habit" has been noted above.[1] Wholly apart from all the foregoing doctrines and principles with reference to "character" evidence, there is contained in Rule 49 the simple proposition that evidence of "habit" is relevant and admissible as tending to show conduct in conformity with "habit." [2] McCormick states as follows with reference to the rationale which underlies this proposition:

> Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence

[10] *Id.* at 685, 61 P.2d at 342.
[11] *Ibid.*
[12] Boone v. Bank of America, 220 Cal. 93, 29 P.2d 409 (1934); White v. Shepardson, 116 Cal. App. 716, 3 P.2d 346 (1931).

[1] See the text, *supra* at 646.

[2] Why, however, does the rule state that the evidence is "admissible . . . *only* as tending to prove . . . behavior"? (Italics added.) If the thought intended to be conveyed is that the evidence is not conclusive, it seems unnecessary to express this thought. Other URE rules of admissibility (*i.e.*, exceptions to the hearsay rule) do not contain any caveat that, though the evidence is admissible, it is not conclusive. Model Code Rule 307(2) (on which Rule 49 is based) states that the evidence "is admissible as tending to prove," not "*only* as tending to prove" as in Rule 49.

Rule 49 could be amended to make it conform to other URE rules of admissibility by substituting "and" for "but" and by striking "only." However, the rule in its present form is an accurate statement of a sound proposition. The suggested amendment is, therefore, a matter of form and not of substance.

as to whether he was in the habit of doing it. We are shocked, then, to read such judicial pronouncements as the following: "For the purpose of proving that one has or has not done a particular act, it is not competent to show that he has or has not been in the habit of doing other similar acts." But surely, if "habit" is used in the sense we have suggested above, expediency and sound reason would lead to the opposite approach, namely that evidence that an act was habitually done by X under like circumstances will be received as evidence that it was done by X on the particular occasion.[3]

Early California cases were clearly in accord with the principle of Rule 49. Thus, in *Craven* v. *Central Pacific R.R. Co.*,[4] where the issue was whether plaintiff had jumped from a train while it was in motion, the Court stated:

> There being a conflict of evidence as to the averment that plaintiff carelessly jumped off the train while it was moving, at the time of the injury, the court, against the objections of plaintiffs, allowed defendant to introduce evidence to show that, within the year preceding the accident, plaintiff had frequently traveled over that route, had frequently jumped off the cars while in motion, and had been warned against the danger of doing so. This ruling is assigned as an error for which a new trial should be granted.
>
> There is no doubt of the general rule applicable to criminal cases, that, on the trial of a defendant for the particular crime charged, evidence of the commission by him of other crimes cannot be introduced. The same rule seems to apply in civil cases, when it is sought to show that some specific act was done maliciously, or that it was done intentionally with some definite purpose, and not carelessly from mere force of habit. But when, in the absence of any question of evil intent, or of any intent at all, the point of fact to be determined is, whether or not a person did a certain thing, or did it in a particular way, and the direct testimony as to the fact is conflicting, then evidence is admissible to show that he was in the habit of doing the thing in question, or accustomed to do it in a particular way. A sensible man, called upon, out of court, to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give *some* weight to the fact that the person was in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned *in* court. The evidence, at least, had some legal tendency to show that plaintiff's conduct at the time of the injury was such as defendant ascribed to her.[5]

The *Craven* case was followed by *Wallis* v. *Southern Pacific Co.*,[6] a railway crossing death action in which one issue was whether decedent had stopped, looked, and listened before entering upon the crossing.

[3] McCormick § 162.
[4] 72 Cal. 345, 13 Pac. 878 (1887).
[5] *Id.* at 347-48, 13 Pac. at 879.
[6] 184 Cal. 662, 195 Pac. 408 (1921), noted in 9 Cal. L. Rev. 242 (1921).

Plaintiff's witnesses were allowed to testify that "decedent on other occasions, not only at this crossing but elsewhere, was in the habit of stopping his team and, when necessary, going ahead to the railroad track to ascertain if any train was approaching." [7] The evidence was held to have been properly admitted. The court, having observed that the "law governing this class of evidence is perplexingly inharmonious," took note of the contention made in some cases that such evidence is admissible only if there are no eyewitnesses. Said the court of this 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.[8]

The court also distinguished its ruling admitting *"habit"* evidence from those cases which exclude *"character"* evidence (like *Towle* v. *Pacific Improvement Co., supra*),[9] stating that:

> These are all cases in which negligence was charged against defendant corporations through acts of their servants or employees. In each instance it was sought to prove or disprove negligence, by the general character of the servant as to his skill or incompetence, prudence, or carelessness in the certain line of employment involved. Such evidence was excluded. This class of evidence is clearly distinguishable from that establishing a custom or habit of doing some particular thing in a particular way. Because one is a skillful workman in a given occupation does not tend to disprove negligence in some specific act, but if the question in controversy is whether he did the thing at all or his manner of doing it, his custom or habit regarding that particular matter would be significant. Most of the text-writers seem to recognize the competency of such testimony. Ruling Case Law (vol. 10, p. 955, sec. 127) thus states the doctrine: "A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and if already shown as a definite course of action is constantly admitted in evidence" . . . .[10]

However, the court also analyzed the evidence in terms of the rule requiring the absence of eyewitnesses and found that upon the record there was such absence in the sense of that rule.

The fact that this analysis was made in *Wallis* led the court to decide in *Starr* v. *Los Angeles Ry. Corp.*[11] that *Wallis* accepts the "eyewitness" rule as the law of this State. *Starr*, in turn, has been interpreted

[7] Wallis v. Southern Pac. Co., 184 Cal. 662, 663, 195 Pac. 408, 408-409 (1921).
[8] *Id.* at 665, 195 Pac. at 409.
[9] See the text, *supra* at 662.
[10] Wallis v. Southern Pac. Co., 184 Cal. 662, 666-667, 195 Pac. 408, 410 (1921).
[11] 187 Cal. 270, 201 Pac. 599 (1921).

as withdrawing the criticisms of the "eyewitness" rule which were advanced in *Wallis*.[12]

Thus, there has evolved in California law which is thus summarized in *Boone* v. *Bank of America*:[13]

> The rule now appears to be crystallized in this state that evidence of habit, i.e., evidence tending to show that an individual had the habit of doing a specific act in a careful or careless manner, is admissible when there are no eye-witnesses to an accident and when the evidence is not too remote as to time and is limited to habit at the approximate place of the accident and under circumstances substantially similar to those in controversy. . . . Examination of the . . . cases discloses that in those instances where evidence of habit was held to have been improperly admitted there were eye-witnesses to the accident who testified upon the very issue sought to be established by the habit evidence or the evidence of habit was too remote to give it any probative value.

There has continued to be some conflict, however, in District Courts of Appeal opinions,[14] and there is on record the following dissent from the "eyewitness" rule as evolved to date:

> SEAWELL, J., Concurring.—I am in accord with the judgment of affirmance. I do not, however, subscribe to the proposition that "habit" has the force of evidence only in cases where there are no eye-witnesses and is inadmissible in cases where there are such witnesses to an accident.
>
> The court or jury should be permitted to weigh it against the testimony of one or any number of witnesses. Surely, if it is to be regarded as having any evidentiary force at all, it should prevail against the testimony of a single discredited witness. I see no reason, if it is to be received in courts of law as evidence, why its application should be limited to cases in which there are no eye-witnesses.[15]

Adoption of Rule 49 would abrogate the "eyewitness" rule, turning the clock back to the earlier and, apparently, sounder decisions on this subject.

McCormick, having observed the tendency to confuse "habit" with "character" and having noted the reluctance of some courts to accept "habit" evidence, continues as follows:

> On the other hand evidence of the "custom" of a business organization or establishment, if reasonably regular and uniform, is usually received much more willingly by the courts, perhaps because there is here no temptation to confuse this with evidence of character. Thus, it is usually held that when a letter has been written and signed in the course of business and placed in the

[12] White v. Shepardson, 116 Cal. App. 716, 3 P.2d 346 (1931), noted in 20 CAL. L. REV. 208 (1932); People v. Crossan, 87 Cal. App. 5, 15, 261 Pac. 531, 535 (1927). See also U.C.L.A. INTRA. L. REV. 1, 3 (June 1952).

[13] 220 Cal. 93, 95-96, 29 P.2d 409, 410 (1934).

[14] See reference to this conflict in Whittemore v. Lockheed Aircraft Corp., 65 Cal. App.2d 737, 752, 151 P.2d 670, 673 (1944).

[15] Boone v. Bank of America, 220 Cal. 93, 96-97, 29 P.2d 409, 410 (1934) (concurring opinion by Seawell, J.).

regular place for mailing, evidence of the custom of the establishment as to the mailing of such letters is receivable as evidence that it was duly mailed.[16]

This doctrine is presently accepted in California [17] and would be continued in force if California were to adopt Rule 49, since Rule 49 makes evidence of custom relevant and admissible as tending to prove behavior in conformity with such custom.

Recommendation

It is recommended that Rule 49 be approved.

Rule 50

Proof of Habit or Custom

Uniform Rule 50 provides:

> RULE 50. *Opinion and Specific Instances of Behavior to Prove Habit or Custom.* Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.

Under Rule 49, evidence of "habit" or "custom" is admissible as there stated. Rule 50 states the permissible means of proving such "habit" or "custom"— namely, testimony in the form of opinion and evidence of specific instances sufficient in number to justify a finding of such "habit" or "custom."

In the following passage, McCormick states the present law as being in accord with the principles of Rule 50:

> Proof of the existence of the person's habit or of the custom of the business may be made by testimony of a witness to his conclusion that there was such a habit or practice. It also may be made by evidence of specific instances, though these latter would be subject to the judge's discretion to require that the instances be not too few or too many, and that the time be near and the circumstances be sufficiently similar.[1]

Recommendation

It is recommended that Rule 50 be approved.

Rule 55

Rule 55 provides:

> RULE 55. *Other Crimes or Civil Wrongs.* Subject to Rule 47 evidence that a person committed a crime or civil wrong on a speci-

[16] McCORMICK § 162.

[17] Hughes v. Pacific Wharf & Storage Co., 188 Cal. 210, 205 Pac. 105 (1922) (mailing letter); Spolter v. Four-Wheel Brake Serv. Co., 99 Cal. App.2d 690, 222 P.2d 307 (1950) (custom of paying by check); Whittemore v. Lockheed Aircraft Corp., 65 Cal. App.2d 737, 151 P.2d 670 (1944) (custom that pilot of plane occupies left-hand seat); American Can Co. v. Agricultural Ins. Co., 27 Cal. App. 647, 150 Pac. 996 (1915) (insurer's custom of sending out expiration notices).

[1] McCORMICK § 162.

fied occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

Is Rule 55 Necessary?

Rule 47(a) makes evidence of specific instances of conduct indicative of a character trait inadmissible to prove conduct on a specified occasion (with, however, one exception [2]). The first part of Rule 55 (down to the word "but") is merely a reaffirmation of the same principle in different words (*e.g.*, substituting "crime or civil wrong" for "specific instances of conduct" and "disposition" for "character").

The second part of Rule 55 (beginning with the word "but" and following through to the end of the rule) is merely a statement to the effect that, though certain evidence is *in*admissible for the purposes stated in Rule 47 and repeated in the first part of Rule 55, nevertheless such evidence may, when relevant to some *other* purpose, be admitted for this other purpose. As such, the latter part of 55 is merely a repetition of that part of Rule 7 which provides: "Except as otherwise provided in these Rules, . . . all relevant evidence is admissible."

From the standpoint of exact analysis, Rule 55 is, therefore, not strictly necessary. This becomes clearer when the American Law Institute's Model Code counterparts of the Uniform Rules are noted and the Comments on these rules are considered. Uniform Rule 47 is based on Model Code Rule 306. Uniform Rule 55 is based on Model Code Rule 311. The Comment on Model Code Rule 311 states that "The Rule is merely an application of Rule 306." Paraphrasing this in terms of the Uniform Rules, Rule 55 is merely an application of Rule 47.

Is Rule 55 Desirable?

Though, in strictness, Rule 55 is not necessary, it nevertheless appears to be desirable from the standpoint of emphasis and clarity.

In the first place, Rule 55 emphasizes and brings into bold relief that portion of Rule 47 which precludes the prosecution from attacking the character of the accused by giving evidence as a part of its case in chief of the criminal record of the accused.

In the second place, Rule 55 makes it clear that there is no intention to abrogate the presently prevailing doctrines pertaining to the admissibility of evidence of other crimes and wrongs when such evidence is relevant for some purpose other than establishing bad character.[3] Rule 55 contributes nothing to the solution of the difficult problems that arise under these doctrines;[4] on the contrary, it merely states that these doctrines are to remain in existence.

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[2] The exception admits "evidence of conviction of a crime which tends to prove the [character] trait to be bad." UNIFORM RULE 47(a). For the full text of Rule 47, see the text, *supra* at 651.

[3] See cases collected in MCBAINE, CALIFORNIA EVIDENCE MANUAL §§ 613-636 (2d ed. 1960).

[4] *Ibid.*

In the final analysis, then, Rule 55 is not a measure of necessity. It is, however, a measure of precaution. As such, it seems to be wisely included as a safeguard against any misunderstanding of what the other rules (*viz.*, Rules 7 and 47) actually provide.

Recommendation

It is recommended that Rule 55 be approved.

Incorporating Rules 46-50 and Rule 55 into California Law

Present California law in the area covered by Rules 46 to 50 and Rule 55 is practically all nonstatutory; therefore, no problems of statutory adjusment arise in connection with adopting these rules. One exception to this statement is Code of Civil Procedure Section 2053, which provides as follows:

> 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 is inconsistent with Rule 47 and should be repealed.

RULE 51

Rule 51 provides:

> RULE 51. *Subsequent Remedial Conduct.* 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.

This states the rule which is well settled in California[1] and elsewhere.[2]

Note, however, that, although evidence of subsequent remedial conduct is inadmissible for the purpose stated in Rule 51, it may be admissible for another purpose (such as impeaching a witness[3]), the jury being given an appropriate charge limiting its consideration of the evidence to the latter purpose.

This rule is recommended for approval. No statutory adjustment is necessary because there is no existing California statute on this subject.

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[1] Helling v. Schindler, 145 Cal. 303, 78 Pac. 710 (1904); Church v. Headrick & Brown, 101 Cal. App.2d 396, 225 P.2d 558 (1950).

[2] UNIFORM RULE 51 Comment.

[3] Hatfield v. Levy Bros., 18 Cal.2d 798, 117 P.2d 841 (1941); Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850 (1936).

RULES 52 AND 53

Rule 52

Rule 52 provides:

> RULE 52. *Offer to Compromise and the Like, Not Evidence of Liability.* 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, is inadmissible to prove his liability for the loss or damage or any part of it. This rule shall not affect the admissibility of evidence (a) of partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim, or (b) of a debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

This rule is an elaboration and supplementation of the principle which Code of Civil Procedure Section 2078 briefly states as follows:

> An offer of compromise is not an admission that anything is due.[4]

The Rule 52 elaboration and supplementation is in accord (with one possible exception [5]) with the doctrines which have been developed in construing and applying Code of Civil Procedure Section 2078, as the following discussion demonstrates.

Necessity for Compromise Negotiations or Humanitarian Motives

By its terms, Code of Civil Procedure Section 2078 applies only to "an offer of compromise." The significance of this limitation is explained as follows in the recent case of *Kelly* v. *Steinberg* [6]:

> The statement of a party against whom a claim is made that he is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest. The rule which excludes offers of compromise does not apply to statements which are in nowise connected with any attempt to compromise.

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[4] See also CAL. CODE CIV. PROC. § 997, which provides as follows:

> The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk, or the judge where there is no clerk, must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

[5] See the text, *infra* at 675-676.

[6] 148 Cal. App.2d 211, 219, 306 P.2d 955, 960 (1957). See also Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692 (1905); Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892); Bank of Italy v. Johnson, 7 Cal. App.2d 463, 46 P.2d 244 (1935); Fink & Schindler Co. v. Gavros, 83 Cal. App. 582, 257 Pac. 156 (1927).

Rule 52 is like Section 2078 in that Rule 52 excludes the matters there stated when these matters are "in compromise." However, unlike Section 2078, Rule 52 provides for exclusion on the basis that a person has acted from "humanitarian motives." As the Comment to Rule 52 indicates, the purpose is "to cover the rather common occurrence of calling an ambulance, paying a doctor bill, repairing or restoring property and the like, with no thought of liability or of compromising a possible liability." Although Section 2078 does not express this doctrine, California does, it seems, have such a doctrine by judicial decision. Thus, in *Connor* v. *Jackson*,[7] an action for injuries to an 18-month-old infant, one question was the admissibility of the following letter written by defendant:

> "Nothing I could say would express the grief I feel and the hope and prayers I have for your son's recovery. I went to the . . . Assurance Co. yesterday to get them on the case immediately. They assured me that they would send a representative out to see you this morning. I hope that he has seen you already and that much is off of your mind anyway . . . He [the agent] assured me that everything necessary would be done for you immediately. If you run into any difficulties at all, please let me know by telegram . . . [at several successive addresses] . . . I offered to stay here until everything was taken care of but [the insurance agent] said there was nothing more that I could do by staying any longer. Please let me know how the baby is. I have to leave now or would wait longer." [8]

The letter was held to be inadmissible on the following grounds:

> The sentiments expressed in the letter contain nothing that could reasonably be construed as an admission of liability. They indicate no more than a gentleman's normal concern for the welfare of the child injured by contact with the author's automobile and a desire to reassure the parents of his interest.[9]

Presumably, there would have been a like ruling had the evidence been that defendant rendered or summoned first aid for the child, paid hospital bills, and the like.

Admissions in the Course of Compromise Negotiations

In *Truman* v. *Sutter-Butte Canal Co.*,[10] the plaintiff, owner of a prune orchard, sued the defendant, a canal company, claiming damage to the orchard from seepage from the defendant's ditches. One of the defendant's defenses was that the damage to the plaintiff's orchard was caused by percolating waters from the plaintiff's rice fields in the vicinity of the orchard. At the trial, the plaintiff offered in evidence the following letter from the defendant's chief engineer:

> "The value of the orchard has been placed at $185.00 per acre, the total valuation therefore would be $4,865 for the 26.3 acres planted to trees. The Canal Company has contributed to some ex-

[7] 94 Cal. App.2d 462, 210 P.2d 897 (1949).
[8] *Id.* at 466-467, 210 Pac. at 900.
[9] *Id.* at 467, 210 Pac. at 900.
[10] 76 Cal. App. 293, 244 Pac. 923 (1926).

> tent to the general seepage condition in the orchard but the major portion of the damage is due to the rice irrigation. There is a total of 2,266 trees in the orchard of which 506 are dead and 571 not thrifty, or 47½ per cent of the orchard has been damaged. This makes the damage done amount to $2,300. The Canal Company is willing to assume $250.00 of this damage, being the amount of damage due to direct seepage from our canals along and adjacent to the trees affected." [11]

The defendant objected on the ground that the letter was an offer of compromise. Plaintiff replied that he offered the letter as an admission by the defendant that the defendant contributed to the damage to the plaintiff's orchard. The trial court admitted the letter for this limited purpose. The appellate court approved the ruling on the following grounds:

> But, conceding, as well we may, that it contained a proposition to compromise, it did so upon an admission by defendant of liability for the damage, the offer to settle, however, being for much less than was and is claimed by plaintiff, and, therefore, the trial court cannot be justly charged with an abuse of discretion in admitting the letter in evidence as in proof of such admission.[12]

The rationale seems to be that the final sentence of the letter (that being the offer of compromise) cannot be considered, but the defendant's admission preceding this offer may be considered.

The result would be the same under Rule 52, which excludes only evidence of furnishing or offering or promising to furnish money, or any other thing, act, or service. Only the last sentence of the letter falls within this description. The first part of the letter, which contains the admission, would thus be admissible insofar as Rule 52 is concerned.

It is clear that Rule 52 is intended to be construed and is intended to operate as just suggested. Rule 52 is based on Model Code Rule 309. The Comment on the latter states as follows:

> Both the Rule and the common law in the United States restrict the exclusion to evidence of the offer, promise or payment. They do not exclude evidence of statements of fact or of opinion, even those conceding liability, though made in negotiations for compromise.

Compromise With Third Persons

Suppose a triple collision occurs as follows: D's trolley strikes X's car; as a result, X's car is thrown against P's car. P sues D, claiming that negligence of the motorman of the trolley was the cause of the collision. D defends on the ground that X's negligence was the cause of the collision. At the trial, P offers evidence that D made a settlement with X. P states that the purpose of his offer is to show that by settling with X, D admitted D's liability to those injured in the collision. As to Code of Civil Procedure Section 2078, P argues that that section

[11] *Id.* at 304, 244 Pac. at 928.
[12] *Id.* at 305, 244 Pac. at 928. See also California Home Extension Ass'n v. Hilborn, 37 Cal.2d 459, 235 P.2d 369 (1951); Rose v. Rose, 112 Cal. 341, 44 Pac. 658 (1896); Scott v. Sciaroni, 66 Cal. App. 577, 226 Pac. 827 (1924).

excludes only an *offer* of compromise (not an executed compromise) and, furthermore, that the section excludes an offer only when such offer is by one of the instant litigants to the other.

In *Brown* v. *Pacific Electric Ry. Co.*,[13] such evidence was offered, and such argument was made in behalf of the offer. It was held, however, that the argument was an unacceptable thesis and that the evidence was, therefore, inadmissible. The court spoke as follows:

> Evidence of a compromise settlement by the defendant of a claim which originated in the very tort alleged by the plaintiff is inherently harmful in the trial of an action for personal injuries. It invades the province of reason in the exercise of its function to ascertain the truth as to whether the alleged tort feasor has committed actionable negligence or has failed to perform an act which in the exercise of reasonable care he should have performed, to the detriment of the claimant. Where the culpability of a defendant in an action based upon his alleged negligence is in issue it should be the aim of the court to endeavor to derive a determination of factual liability by competent proof of the circumstances and occurrences constituting the transaction alleged, and it should not be guided by compromise settlements which the defendant has made of other claims arising out of the same facts. In such a trial there is no proper alternative to the art of presenting only competent evidence and of making sound deductions and drawing reasonable inferences therefrom. When the fact finders enter upon their task poisoned with the recital of some irrelevant event that transpired subsequent to the alleged negligent act they are under a handicap which is not only difficult to disregard but which cannot be eliminated because it has the obvious approval of the judge whose views juries are prone to follow in determining facts if an opportunity is presented for them to ascertain the judicial trend. . . . It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction. To receive such evidence would inevitably tend to discourage settlements out of court if one's purchase of his peace with one person were to be thereafter taken as an admission of his liability for an occurrence which brought injury to another. Reasonable and compelling circumstances might very well influence the defendant to make settlement with the third person while denying all liability to the plaintiff. No party to a justiciable controversy should be discouraged from amicably adjusting his claim by the fear that he might subsequently be confronted with the contention that his concession there was an admission of liability. The rule protecting compromises is too salutary to be whittled away.[14]

[13] 79 Cal. App.2d 613, 180 P.2d 424 (1947).

[14] *Id.* at 615-617, 180 P.2d at 425-426. See also Citti v. Bava, 204 Cal. 136, 266 Pac. 954 (1928); Zelayeta v. Pacific Greyhound Lines, Inc., 104 Cal. App.2d 716, 232 P.2d 572 (1951); Curtis v. McAuliffe, 106 Cal. App. 1, 288 Pac. 675 (1930).

The same result would be reached under the following portion of Rule 52: "Evidence that a person [D] has, in compromise . . . furnished . . . money . . . to another [X] who has sustained . . . loss . . . is inadmissible to prove his [D's] liability for the loss . . . ."

Compromise to Impeach a Witness' Credibility

Continuing with the hypothetical situation stated in the preceding section, suppose that the following events occur at the trial: D calls X. X testifies to the effect that neither he nor the motorman was at fault and that, on the contrary, P was wholly to blame for the collision. P then offers evidence that D had settled with X. P states that the purpose of the offer is to impeach X's credibility by showing his bias.

In *Luis* v. *Cavin*,[1] similar evidence was offered for a similar purpose. The evidence was held to be admissible on the ground that, although the evidence was "improper as an admission [by D] against interest," the evidence was proper "to show bias or prejudice [of X] when confined to such purpose." [2]

The same result would be reached under Rule 52, since that rule precludes evidence of the compromise only when the evidence is offered to prove liability and not when the evidence is offered for some other and independently legitimate purpose.[3]

Admission Without Objection

Suppose plaintiff tenders evidence of an offer of compromise by defendant. Defendant does not object and the evidence is admitted. Should plaintiff be allowed to argue to the jury that by the offer defendant admitted something was due plaintiff? *Scott* v. *Wood* [4] discusses this question and answers it: "Probably not." The court spoke as follows:

> It was probably error for the court to allow the plaintiff's counsel to argue to the jury, against the protest of the defendants, that the offer of one of the then partners to pay a certain sum and counsel fees in settlement of the claim was an admission that something was due. It is true that the testimony as to the offer came in without objection. But the statute expressly says that "an offer to compromise is not an admission that anything is due." (Code Civ. Proc., sec. 2078.) The failure to object to the admission of evidence can hardly make that an admission which the law expressly declares is not so. And our impression is, that the court ought not to have allowed counsel for plaintiff, against the protest of defendant, to argue that the offer was an admission. And it did not improve matters that the court told the jury, in substance, that they must disregard the offer if they thought it was an offer to compromise. For that was a question for the determination of the court itself.

[1] 88 Cal. App.2d 107, 198 P.2d 563 (1948).
[2] *Id.* at 114, 198 P.2d at 568. See also Zelayeta v. Pacific Greyhound Lines, Inc., 104 Cal. App.2d 716, 232 P.2d 572 (1951).
[3] For further illustrations of such other legitimate purposes, see Harris v. Miller, 196 Cal. 8, 235 Pac. 981 (1925); Bryon v. MacDonald, 112 Cal. App.2d 57, 245 P.2d 545 (1952); Farrington v. A. Teichert & Son, Inc., 59 Cal. App.2d 468, 139 P.2d 80 (1943).
[4] 81 Cal. 398, 22 Pac. 871 (1889).

> But as the question will probably not again arise, it is unnecessary to express a positive opinion in regard to it, further than to say that in our opinion the offer was an offer to compromise.[5]

This, of course, is something less than a definitive answer to the question, and there appears to be no further reference to the question in the California cases. Assuming, however, that present California law in the circumstances suggested is that the argument should be prohibited, it is likely that the result would be otherwise if Rule 52 were substituted for Code of Civil Procedure Section 2078. As McCormick[6] forcefully suggests, an offer of compromise may possess some or even considerable probative force (depending, of course, upon how closely the offer approximates the full sum demanded). From this point of view, when evidence is excluded under Rule 52, the basis for such exclusion is not irrelevancy of the evidence, but rather the policy of encouraging settlement. It would follow that, when the evidence is admitted without objection, there is in the record an item of relevant evidence which possesses probative force and which constitutes, therefore, a legitimate basis for argument to the jury. The contrary suggestion in *Scott* seems to be based upon the peculiar wording of Code of Civil Procedure Section 2078.

If the above analysis is sound, adoption of Rule 52 coincident with the repeal of Code of Civil Procedure Section 2078 would change the law in respect to the permissibility of argument based upon "offer of compromise" evidence received without objection.[7]

Subdivisions (a) and (b) of Rule 52

The American Law Institute's Comment on Model Code Rule 309(3) (on which subdivision (a) of Rule 52 is based) states as follows:

> [I]f P claims that D is indebted to him in a fixed amount, evidence of D's unaccepted offer to pay a portion of the amount in full settlement is inadmissible as tending to prove that D was indebted to P in the amount claimed or any other amount. If, however, D makes a partial payment without protest and without otherwise indicating non-recognition of the validity of the claim, evidence of the payment is universally received.

Rule 52(a) covers such cases of partial payment without protest. One wonders, however, why this subdivision is thought to be necessary. By no stretch of the imagination could payment under the circumstances indicated be regarded as furnishing money "in compromise or from humanitarian motives," and, under the first part of Rule 52, only such payments are excluded. There would seem to be no possibility, therefore, that the exclusionary part of Rule 52 could apply to the cases in which subdivision (a) takes pains to state it does not apply.

It is likewise difficult to imagine that a payment or promise to pay, under the circumstances stated in Rule 52(b), could be regarded as

[5] *Id.* at 405-406, 22 Pac. at 873.
[6] McCormick §§ 76, 251.
[7] Upon a defendant's motion for nonsuit, the evidence also would be entitled to weight in determining whether plaintiff had made out a prima facie case.

"in compromise or from humanitarian motives."[8] It appears, therefore, that there is no need for subdivision (b) of Rule 52.

Although subdivisions (a) and (b) of Rule 52 are unnecessary, they are not otherwise objectionable and they are recommended for approval.[9]

Rule 53

Rule 53 provides:

> RULE 53. *Offer to Discount Claim, Not Evidence of Invalidity.* 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, is inadmissible to prove the invalidity of the claim or any part of it.

Rule 52 deals with offers to compromise and with executed compromises when made by the alleged wrongdoer; it provides that such alleged wrongdoer may thus settle or attempt to settle without having his efforts used against him as tending to show the validity of the claim against him.[10] Rule 53 deals with the opposite side of the coin. It provides that the claimant or alleged injured party may attempt settlement without having his efforts used against him as tending to show the invalidity of the claim he is asserting. Code of Civil Procedure Section 2078 does not expressly cover this situation. Since it provides only that an "offer of compromise is not an admission that anything is due," it is directed only to the situation of offers by the alleged wrongdoer. However, the other situation is well covered by judicial doctrine which protects the claimant from adverse use against him of his compromise overtures.[11]

Recommendation

Rules 52 and 53 are recommended for approval.

Incorporating Rules 52 and 53 into California Law

Rules 52 and 53 make an offer of compromise inadmissible to show liability and an offer to discount a claim inadmissible to show invalidity of the claim.

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[8] As to the significance of such payment or promise in tolling the statute of limitations, see CAL. CODE CIV. PROC. § 360.

[9] The Comment to Rule 52 states that "the significance of exceptions (a) and (b) is obvious." It is difficult to believe that this means the subdivisions are obviously necessary. Compare MODEL CODE Rule 309(1) (on which Rule 52 is based), which is phrased in such a way that it *was* necessary to qualify it with subdivisions (3) and (4)—the Model Code counterparts of subdivisions (a) and (b) of Rule 52.

[10] See discussion of this rule in the text, *supra* at 671-677.

[11] See Cramer v. Lee Wa Corp., 109 Cal. App.2d 691, 241 P.2d 550 (1952); Armstrong v. Kline, 64 Cal. App.2d 704, 149 P.2d 445 (1944); Boyes v. Evans, 14 Cal. App.2d 472, 58 P.2d 922 (1936). These are cases in which the plaintiff attempted to settle with the defendant. Suppose, however, the plaintiff settles with a third person. May this be used against plaintiff? For example, suppose D's trolley strikes X's car which then strikes P's car. P settles with X, X paying P $100 in return for P's covenant not to sue X. P now sues D (as is permitted by CAL. CODE CIV. PROC. § 877), and D offers evidence of P's settlement as indicative of P's fault and consequently, as indicative of the invalidity of P's claim. This evidence is inadmissible under Rule 53 and, by analogy to Brown v. Pacific Elec. Ry., 79 Cal. App.2d 613, 180 P.2d 424 (1947), presumably inadmissible in California also.

California's present statutes on this subject are:

Code of Civil Procedure Section 997, which provides:

> The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk, or the judge where there is no clerk, must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendants' costs from the time of the offer.

Code of Civil Procedure Section 2078, which provides:

> An offer of compromise is not an admission that anything is due.

It is recommended that Section 2078 be repealed as superfluous and that Section 997 be left intact as an integral part of the special procedure there provided.

RULE 54

Uniform Rule 54 provides:

> RULE 54. *Liability Insurance.* 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 as tending to prove negligence or other wrongdoing.

This states the rule which is well settled in California [12] and elsewhere.[13]

Note, however, that, although the evidence is inadmissible for the purpose stated in Rule 54, it may be admissible for another purpose, the jury being given an appropriate charge limiting its consideration of the evidence to the latter purpose.[14]

It is recommended that Rule 54 be approved. Since the rule has no statutory counterpart in the present law, no adjustment of existing statutes is necessary.

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[12] Squires v. Riffe, 211 Cal. 370, 295 Pac. 517 (1931); Mahnkey v. Bolger, 98 Cal. App.2d 628, 220 P.2d 824 (1950); Curtis v. McAuliffe, 106 Cal. App. 1, 288 Pac. 675 (1930).

[13] UNIFORM RULE 54 Comment.

[14] Mullanix v. Basich, 67 Cal. App.2d 675, 155 P.2d 130 (1945); Perry v. Paladini, Inc., 89 Cal. App. 275, 264 Pac. 580 (1928).

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