STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article IV. Witnesses

March 1964

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

NOTE

This pamphlet begins on page 701. 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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STATE OF CALIFORNIA EDMUND G. BROWN, *Governor*

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January 1964

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

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

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

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

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

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

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

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relating to

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

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

REVISION OF URE ARTICLE IV

The Commission tentatively recommends that URE Article IV, revised as hereinafter indicated, be enacted as the law in California.[2] In the material which follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strike-out 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 various rules and the California law relating to the competency and credibility of witnesses, see the research study beginning on page 725.

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

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

Rule 17. Disqualification of Witness; Interpreters

RULE 17. *(1)* A person is disqualified to be a witness if ~~the judge finds that~~ *he is:*

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

(b) ~~the proposed witness is~~ Incapable of understanding the duty of a witness to tell the truth.

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

Comment

General Scheme of Rules 17-19

Uniform Rule 7 declares that "every person is qualified to be a witness" and that "no person is disqualified to testify to any matter." As limitations on Rule 7, Rule 17 states the minimum capabilities that a person must possess to be a witness (*i.e.*, the ability to communicate and an understanding of the duty to tell the truth), Rule 18 requires that the witness testify under oath (or its equivalent), and Rule 19 requires that a person have personal knowledge or expertise in order to testify concerning a particular matter. Under the URE scheme, therefore, matters that relate to a witness' ability to perceive, his opportunity to perceive, his memory, mental competence, experience, and the like, go to the weight to be given his testimony rather than to his right to testify unless they are so lacking that they negate the existence of personal knowledge (Rule 19) or the qualifications required by Rule 17.[3]

In many respects, the URE scheme is similar to the present California law, for Code of Civil Procedure Section 1879 declares the general rule that "all persons . . . who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses." This general rule specifically is made subject to the rules of disqualification on the basis of insanity, infancy, and the dead man statute (CODE CIV. PROC. § 1880) and privilege (CODE CIV. PROC. § 1881). In addition, the witness must take an oath to testify truthfully—or make an affirmation or declaration to the same effect—and must have an understanding of the oath. CODE CIV. PROC. §§ 1846 (oath requirement), 2094-2097 (form of oath, affirmation, or declaration). Other code sections limit testimony in particular cases or circumstances. Penal Code Section 1321 makes the rules of competency in criminal cases the same as in civil cases unless otherwise specifically provided.

[3] It should be noted that a witness may be disqualified under other provisions of the URE. Thus, disqualification on the ground of privilege is covered by the revised URE article on Privileges, and Rules 42 and 43 limit testimony by judges and jurors.

Revised Rule 17

Under existing California law, the competency of a witness depends upon his *ability* to understand the oath and to perceive, recollect, and communicate. "Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact." *People v. McCaughan,* 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957). On the other hand, Revised Rule 17 requires merely the ability to communicate and the ability to understand the duty to tell the truth. The two missing qualifications—the ability to perceive and to recollect—are found only to a very limited extent in Revised Rule 19, which permits the trial judge to exclude the testimony of a witness where it is obvious that the witness does not have "personal knowledge" (as, for example, where his knowledge of the event is derived solely from the statements of others).

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

Children. Code of Civil Procedure Section 1880(2) provides that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," are incompetent as witnesses. This section means that a child under 10 must possess sufficient intelligence, understanding, and ability to receive and fairly accurately recount his impressions, and he must have an understanding of the nature of an oath and a moral sensibility to realize that he should tell the truth and that he is likely to be punished for a falsehood. *People v. Burton,* 55 Cal.2d 328, 341, 11 Cal. Rptr. 65, 69-70, 359 P.2d 433, 437-438 (1961). If the judge is not persuaded that the child has these abilities, the child is disqualified as a witness.

Under the Uniform Rules, the judge makes no similar inquiry as to the witness' ability to perceive and to recollect, except to the extent that these matters are necessary to determine whether the child has the requisite personal knowledge under Revised Rule 19 (which requires the judge to permit the child to testify if any trier of fact could reasonably conclude that the child has the ability to perceive and to recollect). It is unlikely, however, that the difference in the nature of the judge's inquiry would result in any great change in actual practice. Under existing law, as under Revised Rules 17 and 19, the person objecting to the testimony of the child has the burden of showing incompetency. *People v. Craig,* 111 Cal. 460, 469, 44 Pac. 186, 188 (1896); *People v.*

Gasser, 34 Cal. App. 541, 543, 168 Pac. 157, 158 (1917); *People v. Holloway*, 28 Cal. App. 214, 218, 151 Pac. 975, 977 (1915). Moreover, the determination of competency is primarily within the judge's discretion, and the California cases indicate that children of very tender years are commonly permitted to testify. WITKIN, CALIFORNIA EVIDENCE § 389 (1958). See *Bradburn v. Peacock*, 135 Cal. App.2d 161, 164-165, 286 P.2d 972, 974 (1955) (*held*, it was reversible error to refuse to permit a child to testify without conducting a *voir dire* examination to determine his competency. "We cannot say that *no* child of 3 years and 3 months is capable of receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that *no* child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5." (Emphasis in original.)).

Persons "of unsound mind." Code of Civil Procedure Section 1880(1) provides that "those who are of unsound mind at the time of their production for examination" cannot be witnesses. But the test is the same as for other witnesses under California law—an understanding of the oath and the ability to perceive, recollect, and communicate; and if, for example, a proposed witness suffers from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event. *People v. McCaughan*, 49 Cal.2d 409, 421, 317 P.2d 974, 981 (1957). Although the trial judge determines whether the person is competent as a witness, "sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not simply whether or not an act was done but, rather, the manner in which it was done and in which testimony as to details may mean the difference between conviction and acquittal." *Id.* at 421, 317 P.2d 981-982.

The revised rules would significantly change the nature of the inquiry the judge makes to determine the competency of a person suffering from mental impairment. Under existing law, the judge must be persuaded that a person of "unsound mind" has the ability to perceive and to recollect; whereas, under the revised rules, the judge must permit such person to testify if any trier of fact could conclude that he has the ability to perceive and to recollect, *i.e.*, "personal knowledge" under Revised Rule 19. See the Comment to Revised Rule 19, *infra*.

The Dead Man Statute. In its tentative recommendation on the Privileges Article, the Commission recommends the repeal of the Dead Man Statute (CODE CIV. PROC. § 1880(3)). *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 268-270 (1964). Hence, this statute would no longer be a ground for disqualification of a proposed witness.

Interpreters. Subdivision (2) of Revised Rule 17 makes the URE rules relating to witnesses applicable to interpreters. This is existing law. *E.g.*, *People v. Lem Deo*, 132 Cal. 199, 201, 64 Pac. 265, 266 (1901).

Rule 18. Oath

RULE 18. Every witness before testifying shall ~~be required to express his purpose to testify by the oath or affirmation required by law~~ *take an oath or make an affirmation or declaration in the form provided in Chapter 3 (commencing with Section 2093) of Title 6 of Part 4 of the Code of Civil Procedure.*

Comment

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

Rule 19. Personal Knowledge

RULE 19. *(1)* ~~As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required~~ *Subject to Rule 56, the testimony of a witness concerning a particular matter is inadmissible if no trier of fact could reasonably find that he has personal knowledge of the matter.*

(2) ~~Such~~ Evidence *of personal knowledge* may be *provided* by the testimony of the witness himself. ~~The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter.~~

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

Comment

Rule 19 relates to qualifications which a person, competent to be a witness under Rule 17, must possess in order to testify concerning a particular matter. URE Rule 19 covers both lay witnesses and expert witnesses, but the provisions relating to the experience and training of expert witnesses have been deleted from the revised rule. The qualifications of an expert witness are considered elsewhere in connection with the Commission's separate recommendation and study relating to expert and other opinion testimony.

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

Under Revised Rule 19(1), as under URE Rule 19, the testimony of a witness must be based on personal knowledge; but, in the absence of timely objection or motion to strike, the evidence is competent. (Revised Rule 4 permits inadmissible evidence to be received and relied on by the court unless there is a timely objection or motion to strike.) This is existing California law. Under existing law, an objection must be made to the testimony of a witness who does not have personal knowledge; and, if there is no reasonable opportunity to object during the direct examination, a motion to strike is appropriate after lack of knowledge has been shown on cross-examination. *Fildew v. Shattuck & Nimmo Warehouse Co.*, 39 Cal. App. 42, 46, 177 Pac. 866, 867 (1918) (objection to question properly sustained when foundational showing of personal knowledge was not made); *Sneed v. Marysville Gas & Elec. Co.*, 149 Cal. 704, 709, 87 Pac. 376, 378 (1906) (error to overrule motion to strike testimony after lack of knowledge shown on cross-examination); *Parker v. Smith*, 4 Cal. 105 (1854) (testimony properly stricken by court when lack of knowledge shown on cross-examination).

Under the revised rule, the requisite showing of personal knowledge must be by evidence from which a trier of fact could reasonably conclude that the witness has personal knowledge, *i.e.*, evidence sufficient to warrant a finding of personal knowledge. The language of the original URE rule is not clear. It requires "evidence" of personal knowledge, but the quantum of evidence is not specified. Apparently, however, the showing contemplated by the rule is a prima facie showing. See the research study, *infra* at 732; REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 58 (March 1963). The judge need not be convinced of the personal knowledge of the witness, and his determination to admit the evidence does not require the jury to find that the witness has personal knowledge. Little discussion of the extent of the foundational showing required can be found in the California cases. Apparently, however, a prima facie showing of personal knowledge is all that is required; the question as to whether the witness actually has personal knowledge is left for the trier of fact to resolve on the issue of credibility. See, *e.g.*, *People v. McCarthy*, 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910). The revised rule will clarify the law in this respect.

The sentence in the original URE rule permitting the judge to reject the testimony of a witness that he has personal knowledge has been deleted as unnecessary in view of the revision of subdivision (1) which gives the judge the same power. In this respect, subdivision (1) probably states existing law. The rule is well settled in California that a trial judge may decide an issue of fact for a jury if but one conclusion can reasonably be reached from the evidence. *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868, 870, (1942) (dictum) ("If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law."). In other jurisdictions, this rule relating to the functions of judge and jury has given rise to the subsidiary rule that the judge may exclude the testimony of a witness if no trier of fact could reasonably conclude that he has personal knowledge of the matter in question. See Annots., 21 A.L.R. 141 (1922); 8 A.L.R.

796 (1920). No appellate case has been found in California applying the subsidiary rule, although it seems likely that it would be applied in an appropriate case as a specific application of the general rule governing the functions of the judge and the jury.

Subdivision (1) has been made subject to Rule 56 because an expert witness in some instances may give opinion testimony not based on personal knowledge. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901 (1964).

Subdivision (2). This subdivision of the revised rule states that evidence of personal knowledge may be provided by the witness' own testimony. This is the means ordinarily used to establish that the witness has personal knowledge.

Subdivision (3). Subdivision (3) of the revised rule provides that the judge may receive testimony conditionally, subject to the necessary foundation being supplied later in the trial. This is merely a specific application of the broad power of the judge under Code of Civil Procedure Section 2042 with respect to the order of proof. Unless the foundation is subsequently supplied, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion.

Rule 20. Evidence Generally Affecting Credibility

RULE 20. *(1)* Subject to ~~Rules 21 and 22, for the purpose of impairing or supporting~~ *subdivisions (2) and (3),* the credibility of a witness ~~,~~ *may be attacked or supported by* 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~~.

(2) Evidence to support the credibility of a witness is inadmissible unless evidence has been admitted for the purpose of proving that he made a prior inconsistent statement or otherwise attacking his credibility.

(3) Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking his credibility.

Comment

Rule 20 sweeps away the pre-existing limitations on the right to support or attack the credibility of witnesses. Together with Rule 7 (providing that all relevant evidence is admissible), Rule 20 makes all evidence relevant to the issue of the credibility of a witness admissible. The revised rule, however, is subject to several qualifications on the admissibility of such evidence. Thus, for example, subdivisions (2) and (3) of the revised rule limit the admissibility of evidence supporting credibility; Rules 21 and 22 limit the admissibility of certain types of evidence relevant to credibility; the rules of privilege and the rules

excluding hearsay evidence also operate to exclude evidence that may otherwise be admissible on this issue; and Rule 45 permits the judge to exclude evidence relating to credibility where it would be unduly prejudicial, consume too much time, cause confusion, and the like.

The URE rule refers to evidence offered for the purpose of "impairing" the credibility of a witness. The word "impairing" is ambiguous. Literally, it refers to the effect of the evidence rather than to the action taken by the party offering the evidence. Thus, evidence offered for the purpose of "impairing" the credibility of a witness might be interpreted to include other testimony that merely contradicts the witness. The revised rule refers to "attacking" the credibility of a witness. This makes it clear that the evidence must constitute an attack on the credibility of a witness, as, for example, by showing his bad character for truthfulness or his prior inconsistent statement. But the credibility of a witness would not be "attacked" merely because other witnesses have testified that the facts are not as the witness states them to be. Since "attack" is a more accurate word, it is uniformly used in the revised rules in place of "impair."

Attacking the credibility of one's own witness. The URE rule and the revised rule eliminate the present restriction on attacking the credibility of one's own witness. Under the present law, a party is precluded from attacking the credibility of his own witness unless he has been surprised and damaged by the witness' testimony. CODE CIV. PROC. §§ 2049, 2052; *People v. LeBeau,* 39 Cal.2d 146, 148, 245 P.2d 302, 303 (1952). In large part, the present law rests upon the theory that a party producing a witness is bound by his testimony. See discussion in *Smellie v. Southern Pac. Co.,* 212 Cal. 540, 555-556, 299 Pac. 529, 535 (1931). This theory has long been abandoned in several jurisdictions where the practical exigencies of litigation have been recognized. See MCCORMICK, EVIDENCE § 38 (1954). A party has no actual control over a person who witnesses an event and is required to testify to aid the trier of fact in its function of determining the truth. Hence, a party should not be "bound" by the testimony of a witness produced by him. It follows that he should be permitted to attack the credibility of the witness without anachronistic limitations. Moreover, denial of the right to attack credibility often may work a hardship on a party where by necessity he must call a hostile witness. This is not uncommon in criminal cases; nor, for that matter, is it uncommon where expert testimony is required. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure. In regard to attacking the credibility of a "necessary" witness, see generally *People v. McFarlane,* 134 Cal. 618, 66 Pac. 865 (1901); *Anthony v. Hobbie,* 85 Cal. App.2d 798, 803-804, 193 P.2d 748, 751 (1948); *First Nat'l Bank v. De Moulin,* 56 Cal. App. 313, 321, 205 Pac. 92, 96 (1922).

"Collateral matter" limitation. The so-called "collateral matter" limitation on attacking the credibility of a witness, where evidence relevant to credibility is excluded unless such evidence is independently relevant to the issue being tried, stems from the sensible approach that trials should be concerned with settling specific disputes between parties. Accordingly, matters that are collateral or too remote to this purpose should be excluded from consideration. Under the present law, this

"collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, *e.g.*, *People v. Wells*, 33 Cal.2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.

The effect of Rule 20 is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Rule 45, the judge has wide discretion in regard to the exclusion of collateral evidence. The effect of Rule 20, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

Support of witnesses. Under the present law, a witness' credibility may not be supported by the party calling him until an attack has been made upon his credibility. *People v. Bush*, 65 Cal. 129, 131, 3 Pac. 590, 591 (1884); CODE CIV. PROC. § 2053. Thus, character evidence in support of a witness is inadmissible under existing law unless his credibility has been attacked, probably because he is presumed to testify truthfully (CODE CIV. PROC. § 1847) and because of a fear that too many collateral issues would be raised. And evidence of a prior consistent statement made by the witness is excluded prior to an attack on the witness' credibility because such statements either are hearsay and cumulative or are irrelevant. See 4 WIGMORE, EVIDENCE § 1124 (3d ed. 1940). Moreover, admission of prior consistent statements would permit a party to prove his case by the introduction of statements carefully prepared in advance even though no issue is raised in regard to his present testimony. For a discussion of the limitations on the admissibility of prior consistent and inconsistent statements, see Revised Rule 63(1) and the Comment thereto in *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 301, 312-314 (1963).

Because the principles underlying the present California law are sound, subdivisions (2) and (3) have been added to the URE rule to prevent the introduction of evidence supporting a witness' credibility until his credibility has been attacked.

Rule 21. Limitations on Evidence of Criminal Conviction as Affecting Credibility

RULE 21. *(1)* Evidence of the conviction of a witness for a crime ~~not involving dishonesty or false statement shall be~~ *is* inadmissible for the purpose of ~~impairing~~ *attacking* his credibility *unless the judge, in proceedings held out of the presence and hearing of the jury, finds that:*

(a) An essential element of the crime is dishonesty or false statement; and

(b) The party attacking his credibility can produce, if required, competent evidence of the record of conviction.

(2) ~~If the witness be the accused~~ In a criminal *action or* proceeding, ~~no~~ evidence of ~~his~~ *the defendant's* conviction ~~of~~ *for* a crime ~~shall be admissible~~ *is inadmissible* for the ~~sole~~ purpose of ~~impairing~~ *attacking* his credibility *as a witness* unless he has first introduced evidence ~~admissible solely~~ *of his character for honesty or veracity* for the purpose of supporting his credibility.

(3) Evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibility if:

(a) A pardon based on his innocence has been granted the witness by the jurisdiction in which he was convicted.

(b) A certificate of rehabilitation and pardon has been granted the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4 or 1203.4a.

(d) The record of the conviction has been sealed under the provisions of Penal Code Section 1203.45.

(e) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in paragraph (b), (c), or (d).

Comment

Rule 21 limits the extent to which evidence of conviction for a crime can be used for the purpose of attacking the credibility of a witness. Evidence of a conviction is inadmissible if it falls within the proscription of any of the three subdivisions.

Rule 22, subdivision (4), provides that evidence of specific acts is inadmissible on the issue of credibility; but the subdivision excepts evidence of the conviction of a crime from its provisions. Hence, evidence of a conviction is admissible under the general provisions of Rules 7 and 20 unless it is made inadmissible by Rule 21.

Subdivision (1). Subdivision (1) of the revised rule follows the recommendation of the Commissioners on Uniform State Laws by limiting the crimes that may be used for impeachment purposes to crimes involving dishonesty or false statement. The reason is that these crimes have a considerable bearing on credibility whereas others do not. Other crimes are excluded because the probative value of such crimes on the issue of credibility is low and the prejudice that may result from their introduction may be great.

The subdivision will substantially change existing California law. Under existing law, a conviction for a felony may be used for impeachment purposes—even though the crime does not involve the trait of honesty—but a conviction for a misdemeanor may not be used to attack credibility—even though the crime involves lying. CODE CIV. PROC. § 2051; *People v. Carolan,* 71 Cal. 195, 12 Pac. 52 (1886) (misdemeanor

conviction inadmissible; gratuitous remark suggesting possible admissibility of misdemeanor conviction for purpose of discrediting a witness if "it should be made to appear that the offense involved moral turpitude or infamy" effectively quashed in *People v. White,* 142 Cal. 292, 294, 75 Pac. 828, 829 (1904), with the statement, "But the language of the code in question [CODE CIV. PROC. § 2051] clearly limits it to cases where there has been a conviction of felony."). Under existing California law, an offense that is punishable either as a felony or a misdemeanor is deemed a misdemeanor for all purposes if the punishment actually imposed is that applicable to misdemeanors. PENAL CODE § 17. Hence, if a person is charged with a felony and is punished with imprisonment in a county jail, the conviction may not be shown to attack his credibility. *People v. Hamilton,* 33 Cal.2d 45, 198 P.2d 873 (1948). But if probation is granted instead of imprisonment, the conviction may be shown to attack the credibility of the defendant in a subsequent criminal case, even after the conviction is expunged under the provisions of Penal Code Section 1203.4 *(People v. Burch,* 196 Cal. App.2d 754, 17 Cal. Rptr. 102 (1961)), unless the court at the time of granting probation declares the offense to be a misdemeanor (PENAL CODE § 17—provision added by Cal. Stats. 1963, Ch. 919, *after* the decision in the *Burch* case, *supra*). Apparently, however, the conviction may not be used to attack the credibility of a person who is not a defendant in a subsequent criminal case once the conviction is expunged under the provisions of Penal Code Section 1203.4. *People v. Mackey,* 58 Cal. App. 123, 128-131, 208 Pac. 135, 137-138 (1922).

Thus, under existing law, evidence of considerable significance on the issue of credibility is frequently excluded while much evidence of little probative value on the issue is admitted. The revised rule will remove these anomalies from the California law.

Subdivision (1) also requires a party, before attacking the credibility of a witness on the basis of prior crimes, to satisfy the judge in proceedings out of the hearing of the jury that the crime in question is admissible under Rule 21 and that the witness actually committed the crime. The purpose of the provision is to avoid unfair imputations of crimes that either do not fit within the rule or are nonexistent. This provision is based in part on a proposal made by the Committee on Administration of Justice of the State Bar of California. See 29 CAL. S. B. J. 224, 238 (1954).

Subdivision (1) makes *any* evidence of crime inadmissible unless the appropriate showing has been made to the judge. This includes evidence in the form of testimony from the witness himself. Hence, a party may not ask a witness if he has been convicted of a crime unless the party has made the requisite showing to the judge.

Subdivision (2). Subdivision (2) prohibits attacking the credibility of a criminal defendant by evidence of his prior conviction unless the defendant-witness first has introduced evidence in support of his credibility. Under Rule 20 as revised, the defendant may introduce evidence in support of his credibility only after his credibility has been attacked. Under the provisions of subdivision (2), the initial attack on the defendant-witness' credibility cannot include evidence of his conviction for a crime.

Subdivision (2) is based on a recognition that evidence of a defendant's prior conviction is highly prejudicial. By limiting the use of such evidence, Rule 21 avoids its excessively prejudicial effect and thus encourages a defendant with a criminal record to take the stand to explain the evidence against him.

Subdivision (3). Subdivision (3) is a logical extension of the policy expressed in Section 2051 of the Code of Civil Procedure that prohibits the use of a conviction to attack credibility if a pardon has been granted upon the basis of a certificate of rehabilitation. Section 2051 is too limited, however, because it excludes a conviction only when a pardon based on a certificate of rehabilitation has been granted. Insofar as other convictions and pardons are concerned, the conviction is admissible to attack credibility, and the pardon—even though it may be based on the innocence of the defendant and his wrongful conviction for the crime—is admissible merely to mitigate the effect of the conviction. *People v. Hardwick,* 204 Cal. 582, 269 Pac. 427 (1928). Moreover, the certificate of rehabilitation referred to in Section 2051 is available only to felons who have been confined in a state prison or penal institution; it is not available to persons given misdemeanor sentences or to persons granted probation. PENAL CODE § 4852.01. Sections 1203.4, 1203.4a, and 1203.45 of the Penal Code provide procedures for setting aside the convictions of rehabilitated probationers and misdemeanants. Yet, under Section 2051 of the Code of Civil Procedure, a conviction that has been set aside under Penal Code Section 1203.4, for example, may be shown to attack the credibility of the defendant in a subsequent criminal prosecution. *People v. James,* 40 Cal. App.2d 740, 105 P.2d 947 (1940). As to the use of such prior convictions generally, see the discussion under subdivision (1), *supra.* Subdivision (3) eliminates these anachronisms by prohibiting the use of any conviction to attack credibility if the person convicted has been determined to be either innocent or rehabilitated and a pardon has been granted or the conviction has been set aside by court order pursuant to the cited provisions of the Penal Code or he has been relieved of the penalties and disabilities of the conviction pursuant to a similar procedure provided by the laws of another jurisdiction.

Rule 22. Further Limitations on Admissibility of Evidence Affecting Credibility

RULE 22. As affecting the credibility of a witness:

~~(a)~~ *(1)* In examining the witness as to a statement made by him ~~in writing~~ *that is* inconsistent with any part of his testimony, it ~~shall~~ *is* not ~~be~~ necessary *to disclose to him any information concerning the statement nor, if the statement is in writing, is it necessary* to show, ~~or~~ read, *or disclose* 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)~~ *(2)* Extrinsic evidence of ~~prior contradictory statements~~ *a statement,* whether oral or written, made by the witness *that is inconsistent with any part of his testimony,* may in the discretion of the judge be excluded unless*:*

(a) The witness was so examined while testifying as to give him an opportunity to identify, explain, or deny the statement*; or*

(b) The witness has not been excused from giving further testimony in the proceeding . ~~;~~

~~(c)~~ *(3)* Evidence of traits of his character other than honesty or veracity or their opposites ~~, shall be~~ *is* inadmissible . ~~;~~

~~(d)~~ *(4)* Evidence of specific instances of his conduct relevant only as tending to prove a trait of his character*, other than evidence of his conviction of a crime,* ~~shall be~~ *is* inadmissible.

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

Comment

This rule contains further limitations upon the admissibility of evidence affecting the credibility of a witness that otherwise would be admissible under the provisions of Rules 7 and 20. It is divided into several subdivisions, each of which is discussed below.

Subdivision (1). Under existing California law, a cross-examiner need not disclose to a witness any information concerning a prior inconsistent oral statement of the witness before asking him questions about the statement. *People v. Kidd,* 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961); *People v. Campos,* 10 Cal. App.2d 310, 317, 52 P.2d 251, 254 (1935). Nor does a party examining his own witness need to make such a disclosure in cases where he is permitted to attack the credibility of his own witness. *People v. Kidd,* 56 Cal.2d 759, 16 Cal. Rptr. 793, 366 P.2d 49 (1961). But, if a witness' prior inconsistent statements are in writing, or, as in the case of former oral testimony, have been reduced to writing, "they must be shown to the witness before any question is put to him concerning them." CODE CIV. PROC. § 2052; *Umemoto v. McDonald,* 6 Cal.2d 587, 592, 58 P.2d 1274, 1276 (1936).

Subdivision (1) eliminates the distinction made in existing law between oral and written statements. Under subdivision (1), a witness may be asked questions concerning prior inconsistent statements even though no disclosure is made to him concerning the prior statement. Whether a foundational showing is required before other evidence of the prior statements may be admitted is not covered in subdivision (1); the prerequisites for the admission of such evidence are set forth in subdivision (2).

The rule requiring that prior inconsistent written statements be shown to the witness has been eliminated for much the same reason that there presently is no such requirement in regard to prior oral statements. The requirement of disclosure limits the effectiveness of cross-examination by removing the element of surprise. The forewarning required gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement and thus avoid being

exposed. The present rule is based on an English common law rule that has been abandoned in England for over 100 years. See MCCORMICK, EVIDENCE § 28, at 53 (1954). The California rule applicable to prior oral statements is the more desirable rule and should be applicable to all prior inconsistent statements.

Subdivision (2). Present law, embodied in Section 2052 of the Code of Civil Procedure, requires that a proper foundation be laid before evidence of a witness' prior inconsistent statement may be admitted. The foundation required includes giving the witness the opportunity to identify, explain, or deny the contradictory statement. The principle of permitting a witness to explain the circumstances surrounding the making of an inconsistent statement is sound; but this does not compel the conclusion that the explanation must be made *before* the inconsistent statement is introduced. Accordingly, this subdivision permits the judge to exclude evidence of a prior inconsistent statement only if the witness (a) was not examined so as to give him an opportunity to explain the statement and (b) has been unconditionally excused and is not subject to being recalled.

The revised rule will permit effective cross-examination and impeachment of several collusive witnesses, for under the revised rule there need be no disclosure of the prior inconsistency before all the witnesses have been examined.

Under subdivision (2), the judge in his discretion may permit the evidence of the prior statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement. An absolute rule forbidding introduction of evidence of the prior statement unless the conditions specified are met may cause hardship in some cases. For example, the party seeking to introduce the prior statement may not have learned of its existence until after the witness has left the court and is no longer available. Hence, the rule grants the trial judge discretion to admit evidence of the prior statement where justice so requires. For a discussion regarding the credibility of a hearsay declarant, see Revised Rule 65 and the Comment thereto in *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 301, 339-340, 569-575 (1963).

Subdivision (3). This subdivision limits evidence relating to the character of a witness to the character traits necessarily involved in a proper determination of credibility. Other character traits of the witness are not of sufficient probative value concerning the reliability of the witness' testimony to offset the prejudicial effect that would be caused by their admissibility.

This subdivision is substantially in accord with the present California law insofar as it admits evidence of the witness' bad reputation for "truth, honesty, or integrity." CODE CIV. PROC. § 2051. See *People v. Yslas*, 27 Cal. 630, 633 (1865). Insofar as the URE rule would permit opinion evidence on this subject, it represents a change in the present law. As to this, the opinion evidence that may be offered by those persons intimately familiar with the witness would appear to be of more probative value than the generally admissible evidence of reputation. See, *e.g.*, 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

Subdivision (4). Under this subdivision, specific instances of conduct are inadmissible to prove a trait of character for the purpose of attacking or supporting the credibility of a witness. This is in accord with the present California law. *Sharon v. Sharon,* 79 Cal. 633, 673-674, 22 Pac. 26, 38 (1889); CODE CIV. PROC. § 2051. This subdivision has been revised to make clear its relationship to Rule 21 (relating to the conviction of the witness for a crime).

Subdivision (5). This subdivision has been added to restate the present California law as expressed in *People v. Copsey,* 71 Cal. 548, 12 Pac. 721 (1887), where the Supreme Court held that evidence relating to a witness' religious belief or lack thereof is incompetent on the issue of credibility.

AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of existing statutes relating to the competency and credibility of witnesses that should be revised or repealed in light of the Commission's tentative recommendation concerning Article IV (Witnesses) of the Uniform Rules of Evidence.

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 1845 provides:

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

This section should be repealed. It is superseded by Rule 19, subdivision (1).

Section 1846 should be revised to read:

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

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

Subdivision 16 of Section 1870 provides:

> 1870. FACTS WHICH MAY BE PROVED ON TRIAL. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> * * *

16. Such facts as serve to show the credibility of a witness, as explained in Section 1847.

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

Section 1879 provides:

1879. ALL PERSONS CAPABLE OF PERCEPTION AND COMMUNICATION MAY BE WITNESSES. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case the credibility of the witness may be drawn in question, as provided in Section 1847.

This section should be repealed. Insofar as it declares all persons to be competent witnesses, it is superseded by Rule 7; insofar as it requires perception and recollection on the part of the witness, it is superseded in part by Rule 19. Insofar as it is not superseded by the revised rules, it treats matters of credibility as matters of competency and is, therefore, disapproved.

Section 1880 provides as follows:

1880. The following persons cannot be witnesses:

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

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

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

This section should be repealed. Subdivisions (1) and (2) are superseded by Rules 17 and 19. Subdivision (3) is the Dead Man Statute in California and its repeal is elsewhere recommended by the Commission. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 268-270 (1964).

Section 2049 provides:

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

This section should be repealed. It is superseded by Rule 20.

Section 2051 provides:

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

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

Section 2052 provides:

> 2052. SAME. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

This section should be repealed. It is inconsistent with subdivisions (1) and (2) of Rule 22.

Section 2053 provides:

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

This section should be repealed. Insofar as it deals with the inability to support a witness' credibility until it has been impeached, it is superseded by Rule 20. Insofar as the section deals with the inadmissibility of character evidence in a civil action, it is superseded by Rules 46 and 47 as revised by the Commission. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612-618 (1964).

Section 2054 should be revised to read:

> 2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and no question ~~must~~ *may* be put to the witness concerning a writing *shown to him* until ~~it has been so shown to him~~ *the opposite party has been given an opportunity to inspect the writing*.

This section has been revised to avoid any inconsistency with Rule 22, subdivision (1), which eliminates the requirement that an inconsistent writing must be shown to the witness before he is examined concerning it for the purpose of attacking his credibility.

Section 2065 should be revised to read:

> 2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the the fact in issue would be presumed. ~~But a witness must answer as to the fact of his previous conviction for felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.~~

The deleted portion is inconsistent with Rule 21. The repeal of the entire section is recommended in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 271-273 (1964).

A STUDY RELATING TO THE WITNESSES ARTICLE OF THE UNIFORM RULES OF EVIDENCE*

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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 witnesses—*i.e.*, Rules 17 through 22 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 Uniform Rules into the California codes

[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 Evdence*, 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 the 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.

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

For convenience of discussion, this article of the URE may be logically divided into two principal sections, the first dealing with rules relating to the competency of a person to be a witness (Rules 17, 18, and 19) and the second dealing with evidence used for the impeachment and support of witnesses (Rules 20, 21, and 22).

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 17, 18, AND 19

Introduction

Rules 17, 18, and 19 provide as follows:

> RULE 17. *Disqualification of Witness. Interpreters.* A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.
>
> RULE 18. *Oath.* Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law.
>
> RULE 19. *Prerequisites of Knowledge and Experience.* As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

Under these rules, a witness must (1) give his testimony under oath or affirmation (Rule 18), and (2) possess certain mental competence (Rule 17), and (3) possess personal knowledge of the matter under investigation (Rule 19).

The California law which deals with these three matters is, to a large extent, in harmony with Rules 17, 18, and 19. Under present California law, (1) testimony must be under oath or affirmation (Code of Civil Procedure Section 1846), and (2) a witness must possess mental competence (Code of Civil Procedure Sections 1879 and 1880, subdivisions (1) and (2)), and (3) a witness must possess personal knowledge (Code of Civil Procedure Section 1845).

However, as these general propositions are broken down into specifics, differences will be discovered between the present mental competence requirement in California and such requirement as stated in Rule 17. Moreover, one aspect of the knowledge requirement as stated in Rule 19 will be found to present difficulties.

In the following discussion, the mental competence and knowledge requirements under present California law is summarized in general terms. This is followed by discussion of the difficulties presented by Rule 19 and the reforms proposed by Rule 17. Finally, Rule 18 and the present California provision analogous to it are compared.

Mental Competence and Knowledge Rules: Present Law in General

Code of Civil Procedure Section 1879 states the following general rule:

> All persons . . . who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses.

This means, of course, if one lacks the capacity to perceive or to communicate, he may not be a witness. Code of Civil Procedure Section 1880 makes this proposition specific with reference to insane persons and infants by providing as follows:

> The following persons cannot be witnesses:
>
> 1. Those who are of unsound mind at the time of their production for examination.
>
> 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

What constitutes the mental soundness which is thus made a requisite of competence to testify? Such competence is composed of the following three elements: (1) the ability to perceive, (2) the ability to recollect, and (3) the ability to communicate.[1]

Thus, in order to qualify as a witness, a person must possess these three qualities. Moreover, he must in addition entertain "some apprehension of the obligation of an oath."[2]

In applying the foregoing standards, the "test should be made with special reference to the field of inquiry and character of the subject on which the witness is to give testimony."[3] Capacity to perceive must be appraised as of the time of the event respecting which it is proposed to have the witness testify.[4] Actual perception, however, is not the test. In his recent opinion in *People* v. *McCaughan*,[5] Justice Traynor points this up in the following language:

> It bears emphasis that the witness's competency depends upon his *ability* to perceive, recollect, and communicate. . . . Whether he

[1] The "witness's competency depends upon his *ability* to perceive, recollect, and communicate." People v. McCaughan, 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957) (Traynor, J.) (Italics in original). See also 2 WIGMORE, EVIDENCE §§ 492-509 (3d ed. 1940) [hereinafter cited as WIGMORE]; MCCORMICK, EVIDENCE § 62 (1954) [hereinafter cited as MCCORMICK].

[2] People v. Tyree, 21 Cal. App. 701, 707, 132 Pac. 784, 787 (1913), quoted with apparent approval in People v. McCaughan, 49 Cal.2d 409, 420, 317, P.2d 974, 981 (1957).

[3] *Ibid.*

[4] People v. McCaughan, 49 Cal.2d 409, 420-21, 317 P.2d 974, 981 (1957) (Traynor, J.):

> The language of section 1880 is addressed to the time at which a witness is produced for examination, and there is language in several cases suggesting that insanity at the time of the event witnessed is not a matter for consideration in the determination whether or not a proposed witness is competent to testify. [Citations omitted.] The rule is to the contrary. . . . [I]f the proposed witness was suffering from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event. Any implication to the contrary in the foregoing cases is disapproved.

[5] 49 Cal.2d 409, 317 P.2d 974 (1957).

> did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact. [Italics in original.][6]

Although actual perception is not the test of competency, actual perception is material in applying the knowledge rule. Code of Civil Procedure Section 1845 states that rule in the following terms:

> A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions . . . .

The relation between this rule and the mental competency rule is clarified by considering the functions of judge and jury respecting the two rules.

Mental Competence and Knowledge Rules: Present Law Regarding Functions of Judge and Jury

The functions of judge and jury respecting the mental competence rule differ materially from their functions respecting the knowledge rule. Moreover, the parties possess different burdens for the purposes of the two rules.

As an illustration, suppose that an issue in a case is whether D forged a certain will. P offers W and proposes to have W testify that W was in D's presence upon the occasion of the alleged forgery and that W then saw D write and sign the document in question. D objects and proposes to show that W was at the time of the alleged forgery a child of five and is, therefore, incompetent under Code of Civil Procedure Section 1880(2) as one "incapable of receiving just impressions of the facts." The court, upon D's request, holds a preliminary hearing at which P undertakes to establish that at the age of five, W was a precocious child, and D undertakes to establish that at such age, W was of average or less than average intelligence. The court is convinced by D's showing and, therefore, sustains D's objection.

This procedure and this ruling are proper, since the competency of W is in issue and that is a question for the court's final determination.[7] Moreover, had the court been uncertain and unconvinced either way, the court should have overruled D's objection, since D possessed the burden to convince the court of W's incompetency.[8]

By way of contrast, suppose W was an adult of average literacy and intelligence at the time of the alleged forgery. P offers W to testify that W was present on the crucial occasion and that W observed all that D then did. Upon this foundation, P proposes to inquire of W what D did. D objects and requests a preliminary hearing for the purpose of producing his witnesses to testify that W was not present on the occasion in question. D argues his right to make this showing at this point because he claims that the question is a preliminary one relating to the competency of W and is, therefore, to be decided by the court.

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[6] *Id.* at 420, 317 P.2d at 981.
[7] McCormick §§ 53, 70; 2 Wigmore §§ 484, 487, 497, 508; 9 Wigmore § 2550.
[8] *Ibid.*

Now it seems clear enough that D's objection should be overruled, his request denied, and his argument rejected, for D is not challenging W's competency (*i.e.*, his *capacity* to observe, remember, and relate) but, rather, D is challenging W's *actual* observation and memory (*i.e.*, his personal knowledge). Although W's capacities to observe, remember and recount are requisites relating to his competency, W's actual observation and recollection is a matter which affects his credibility only.[9]

It would seem, then, that the knowledge requirement differs from the mental competency rule and other rules of disqualification in that under the knowledge rule, the disqualifying fact (want of knowledge) is *not* a question for final determination by the judge, whereas such questions as marriage, infancy, or lunacy are, under the other rules, questions for the court's final determination.[10]

Insofar as the parties' burdens are concerned, the proponent has the burden under the knowledge rule to make the knowledge of the witness apparent, but this burden is merely to make such knowledge prima facie apparent (*i.e.*, the burden is *not* to convince the judge with finality, since the matter is not for the judge's final determination). In other words, and more simply stated, the knowledge of a witness is not assumed and must be established prima facie by the proponent of the witness.[11] On the other hand, the mental competency capacities of the witness are assumed. Hence, the opponent has the burden to establish (and, by convincing the judge, to finally establish) the incompetency of the witness.[12]

The knowledge requirement, then, does not raise questions which the judge must investigate (hearing evidence pro and con) and finally decide. If a witness states that he observed an event and that he remembers the same, that in and of itself supplies the foundation for admissibility of the testimony insofar as the knowledge requirement is concerned. In this respect, the knowledge requirement operates quite differently from the rule requiring capacity to observe, remember, and relate as a condition of competency.

Rule 19

Generally

Lay witnesses. Rule 19 provides in part:

> 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 . . . . Such evidence may be by the testimony of the witness himself.

This seems to be a statement of the same principle which is embodied in Code of Civil Procedure Section 1845.[1]

Note that the rule simply requires that "there must be evidence" of personal knowledge. This probably requires merely evidence sufficient to warrant a finding, or prima facie evidence. Therefore, the knowledge

[9] See McCormick § 10 and Justice Traynor's statement quoted in the text, *supra* at 730-731.
[10] See references in note 7, *supra*.
[11] McCormick §§ 10, 70.
[12] See references in note 7, *supra*.
[1] For the text of Section 1845, see the text, *infra* at 735.

of the witness as required by Rule 19 is not a matter to be decided by the judge under the preliminary inquiry provisions of Rule 8.[2]

Expert witnesses. Rule 19 provides in part as follows:

> As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has . . . experience, training or education if such be required.

This is probably intended to be a statement of the well-established proposition that, if a witness is to give expert testimony, his expertise must be established by the proponent to the satisfaction of the court.[3]

Conditional ruling. Rule 19 also provides, in part, that:

> The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

Code of Civil Procedure Section 2042 provides in part:

> The order of proof must be regulated by the sound discretion of the Court.

In the exercise of such discretion, the court may admit an item of evidence provisionally, subject to its being later stricken unless properly "connected up."[4] Such discretion would seem to be broad enough to embrace the kind of provisional admission authorized by Rule 19.[5]

Rejecting Evidence of Perception Incredible as a Matter of Law—Rule 19, third sentence

As has been discussed above,[6] the knowledge requirement as a condition for admissibility seems to require no more than a mere profession by the witness to have observed and to remember. Is this true, however, in all cases? The answer of Rule 19 is, "No," for the third sentence of that rule provides that:

> The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter.

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[2] Rule 8 provides that:

> RULE 8. *Preliminary Inquiry by Judge.* When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

This rule is discussed at length in the separate study on Article I, General Provisions, one study in this series of studies on the Uniform Rules of Evidence.

[3] 2 WIGMORE § 560.

[4] Parrish v. Thurman, 19 Cal. App.2d 523, 65 P.2d 932 (1937). See also Brea v. McGlashan, 3 Cal. App.2d 454, 466, 39 P.2d 877, 883 (1934); MCCORMICK § 58; 1 WIGMORE § 14; 6 WIGMORE § 1871.

[5] See MCCORMICK § 10 at 19 n.4.

[6] See the text, *supra* at 731-732.

What is the rationale for this rule? Is it law today in California? If not, should it become law?

It is axiomatic, of course, that the credibility of evidence is ordinarily a question for the trier of fact. Much commonplace practice is built upon this axiom. Thus, the plaintiff should *not* be nonsuited because of the judge's disbelief in the credibility of plaintiff's evidence. An appellate court should not substitute its judgment on credibility for that of the trier of fact. The trial judge should not preclude a witness from testifying because *he* thinks the testimony will be untrue. These familiar dogmas all stem from the basic idea that credibility is for the trier of fact.

Nevertheless, there exists a doctrine which in exceptional cases modifies this basic idea, namely, the doctrine that evidence may be *so* incredible that as a matter of law it amounts to no evidence at all. This doctrine is revealed in the following excerpt from the opinion of the court in *People* v. *Headlee*,[7] reversing a judgment of conviction for incredibility of the prosecution's evidence:

> It is not the function of appellate courts to weigh evidence. (*People* v. *Tom Woo*, 181 Cal. 315; *People* v. *Tedesco*, 1 Cal. (2d) 211; *People* v. *Perkins*, 8 Cal. (2d) 502.) Where, however, the evidence relied upon by the prosecution is so improbable as to be incredible, and amounts to no evidence, a question of law is presented which authorizes an appellate court to set aside a conviction. (*People* v. *Dorland*, 2 Cal. (2d) 235.) Under such circumstances an appellate court will assume that the verdict was the result of passion and prejudice. (*People* v. *Niino*, 183 Cal. 126.) To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable. (*People* v. *Braun*, 14 Cal. (2d) 1; *People* v. *Moreno*, 26 Cal. App. (2d) 334.) In this case the inherent improbability of the testimony of the principal witnesses is readily apparent from an examination of the record.[8]

Given the rare case in which the evidence is of this character, should not the *trial* judge have the power and the duty to reject the evidence, either by striking it or forbidding it to be given in the first place? That is the question posed by Uniform Rule 19, third sentence (and the American Law Institute's Model Code Rule 104, upon which the third sentence of Rule 19 is based). The Comment to Model Code Rule 104 explains as follows the exceptional nature of the judge's power:

> It is important to note that the question for the judge is not whether the witness did perceive the matter, but whether a jury or other trier of fact could reasonably believe that the witness perceived it. If the witness proposes to testify that he actually perceived a material matter, he must usually be permitted so to testify unless his story is inherently impossible or so fantastic that no rational person could reasonably believe it. The mere fact that the opponent produces or offers to produce contradictory evidence of

[7] 18 Cal.2d 266, 115 P.2d 427 (1941).
[8] *Id.* at 267-268, 115 P.2d 427.

> greater weight is immaterial, unless that evidence is of such overwhelming weight that no jury could reasonably believe that the witness did not perceive the matter. If the testimony may be believed by a jury, it matters not that the judge disbelieves it. What weight, if any, is to be given to it is for the jury.

Apparently, this power of the trial judge has never been expressly recognized or exercised in California. However, recognition of such power in the trial court appears to be the logical extension of the acknowledged existence of the power on the appellate level. Conceding that the concept of evidence incredible as a matter of law is an extraordinary one, there appears to be no reason to limit its application to review proccedings.

Recommendation

The rule seems to be in accord with California law,[9] saving possibly the third sentence of the rule. If the proposition asserted in that sentence is not present law, the law should be changed to bring it into accord with such proposition.

Incorporation into California Codes

The present California provision analogous to Rule 19 is Code of Civil Procedure Section 1845, which provides:

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

Since Section 1845 covers the same ground as Rule 19, its repeal is recommended concurrently with the adoption of Rule 19.

Rule 17

Changes the Rule Would Make in Present Mental Competency Requirement

As noted above,[1] current fourfold basis of disqualification in California is the inability to (1) perceive, (2) recollect, (3) communicate, and (4) apprehend the obligation of an oath. Rule 17 seems to abandon the first and second of these grounds and to preserve only the third and fourth. Thus, insofar as Rule 17 is concerned, a person is disqualified only if he is wanting in capacity to communicate (Rule 17(a)) or in capacity to understand the duty of a witness to tell the truth (Rule 17(b)).

Rule 17 copies the substance of Model Code Rule 101. The following illustrations contained in the Comment on Model Code Rule 101 may, therefore, be safely relied upon as indicative of the intended scope of Rule 17:

[9] For a discussion of the relationship between Rule 19 and the present California law in regard to nonassertive conduct as hearsay, 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 301, 423-424 (1963).

[1] See the text, *supra* at 730-731.

2. In an action for damages for assault and battery, W, called by P, testifies that he was present at an altercation between P and D and now remembers what occurred. P proposes to question W about what was then said and done.

* * * * *

4. P offers W for the purpose described in Illustration 2. Before W gives any testimony, D makes successively the following objections to W's qualification, requesting an opportunity to sustain each objection by giving in a preliminary hearing evidence which would justify the judge in finding what D contends to be the fact.

(a) That W is not qualified as a witness because, although present at the encounter, he was then subject to insane delusions making him unable to perceive correctly the events which occurred. The issue of W's credibility is for the jury and D's offer raises no question for a preliminary hearing.

(b) That W is not qualified as a witness because, although present at the encounter, he has since suffered from a mental disorder which has erased his memory of what was then said and done. Same decision as in (a).

(c) That W is not qualified as a witness because, although present at the encounter, he suffers at the time of trial from a form of insanity which makes him incapable of giving understandable answers to questions about the events in issue. This contention, if established, disqualifies W to be a witness. Consequently the judge should hold a preliminary hearing.

Changes in present law are here involved. Today, in the situations described in Illustration 4(a) and (b), D's objections would go to the competency of W, and D would be entitled to his requests. Clearly, W's capacity to perceive (which is involved in Illustration 4(a)) and capacity to recollect (which is involved in Illustration 4(b)) are under present law capacities affecting competency.

Eliminating the capacity to observe and to recollect as elements of competency (as Rule 17 does) is, then, a substantial modification of present law. Indeed, judging only by Rule 17, the modification is substantial to the point of becoming ridiculous. This may be demonstrated in the following illustration. Suppose an event happens or a condition exists, personal knowledge of which requires capacity to see (such as the color of a horse). Suppose a man totally blind since birth is obsessed with the honest but naive idea that he can see color. This man claims to have "seen" the color of the horse. Should he be regarded as a competent witness? Rule 17 requires an affirmative answer; but this need not be unduly disturbing, for the man's statement could be rejected under Rule 19, third sentence, even though, insofar as Rule 17 alone is concerned, he is properly classified as a "competent" witness.

Evaluation of Rule 17

The practical impact of adopting Rule 17 (together with Rule 19) in California would be to bring about a shift from competence to credibility. Much which would now disqualify a witness altogether would, under the new rules, affect only the witness' credibility. More specifically, under the system of the Uniform Rules, if a proposed witness

makes a claim—not totally incredible—to have observed and to remember an event (this being required by Rule 19 as a condition for admitting his testimony) and if such witness can communicate intelligently (as required by Rule 17(a)) and if he can understand his duty to tell the truth (as required by Rule 17(b))—if all these conditions are met, the witness may be heard, even though he labors (or has labored) under deficiencies of immaturity, derangement, or other incapacities that might under present California law disqualify him altogether from testifying.

The modern approach is to remove the ancient bases for disqualifying persons from testifying and to let that which formerly incapacitated them have whatever influence it may upon the credibility of such persons.[2] By this approach, the old disqualifications on the score of interest and infamy have been largely abrogated, and the disqualification on the score of coverture has been significantly modified.[3] Rules 17 and 19 carry this approach through to the area of disqualification by reason of infancy and to the area of disqualification by reason of mental deficiency. This extension bears the endorsement of leading authorities, including Wigmore. Thus, Wigmore commends the principle represented in Rules 17 and 19 in the following terms:

> The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible. The subject is not one which deserves to be brought within the realm of legal principle, and it is profitless to pretend to make it so. Here is a person on the stand; perhaps he is a total imbecile, in manner, but perhaps, also, there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it. The step was long ago advocated by the English commission of judges, in their proposals of reform, and has been approved by two such distinguished writers on the law of Evidence as Mr. Best and Mr. Justice Taylor.[4]
>
> * * * * *
>
> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure "a priori" the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable. The desirability of abandoning this attempt and abolishing all grounds of mental or moral

[2] McCormick §§ 61-71.
[3] *Ibid.*
[4] 2 Wigmore § 501.

incapacity has already been noted, in dealing with mental derangement (*ante*, § 501). The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come. To be genuinely strict in applying the existing requirement is either impossible or unjust; for our demands are contrary to the facts of child-nature. . . . [Footnotes omitted.] [5]

Recommendation

As indicated above, the change in present law which would be brought about by California's adoption of Rule 17 appears to be desirable and in harmony with the prevailing modern trend. It is recommended, therefore, that Rule 17 be approved.

Incorporation into California Codes

Rule 7 provides, in part:

> Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and . . . (c) no person is disqualified to testify to any matter.[6]

Rule 17 provides exceptions to the general rule stated in subdivisions (a) and (c) of Rule 7.

Several California code provisions cover the matters treated by Rules 7 and 17. It is manifest, therefore, that problems of adjusting the codes will arise coincident with the enactment of these rules. The provisions of the California codes which will require adjustment if Rule 17 is enacted and the manner in which adjustments should be made are set out below.

Code of Civil Procedure Section 1879 provides:

> All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded;

[5] 2 WIGMORE § 509. See also MCCORMICK § 71, lauding Model Code Rule 101 (on which Uniform Rule 17 is based) as "the goal toward which legislators and rule-makers should press."

[6] The full text of Rule 7 is as follows:

> RULE 7. *General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.* 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.
>
> This rule is discussed at length in the separate study on Article I, General Provisions, one study in this series of studies on the Uniform Rules of Evidence.

nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case the credibility of the witness may be drawn in question, as provided in Section 1847.

Under Rules 7(a) and 17, all of the persons specified in Section 1879 would be qualified. These rules supersede Section 1879, which should, therefore, be repealed.

Code of Civil Procedure Section 1880, subdivisions (1) and (2), provide as follows:

The following persons cannot be witnesses:

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

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

The new standard of competency set forth in Rule 17 makes the older tests of Section 1880, subdivisions (1) and (2), obsolete. These provisions should, therefore, be repealed.

Code of Civil Procedure Section 1880, subdivision (3), states:

The following persons cannot be witnesses:

* * * * *

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

Repeal of Section 1880(3) is recommended coincident with the enactment of Rule 17. Coincident with the repeal of Section 1880(3), it seems desirable to resubmit to the Legislature the California Law Revision Commission's 1957 recommendation relating to the Dead Man Statute.[7]

This could be accomplished by amending Uniform Rule 63 to add thereto a new subdivision to read as follows:

No written or oral statement of a person incapable of being a witness under Rule 17, made upon his personal knowledge and at a time when he would have been a competent witness, shall be excluded as hearsay in any action or proceeding by or against such person or by or against any person in his capacity as the successor in interest of such person.

No written or oral statement of a deceased person made upon his personal knowledge shall be excluded as hearsay in any action or proceeding:

(a) Relating to the will of such deceased person;

[7] See *Recommendation and Study Relating to the Dead Man Statute,* 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at D-1 D-7 (1957).

(b) By or against the beneficiary of a life or accident policy insuring such deceased person, arising out of or relating to such policy;

(c) By or against any person in his capacity as representative, heir, or successor in interest of such deceased person.

Code of Civil Procedure Section 1881, subdivision (1), reads as follows:

> A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other; or in an action for damages against another person for adultery committed by either husband or wife; or in a hearing held to determine the mental competency or condition of either husband or wife.

It is recommended that this subdivision be repealed. The part relating to communications is recommended for repeal because Uniform Rule 28 covers the communications privilege.[8] The remainder is recommended for repeal on the ground that the harm it does in obstructing the search for truth exceeds the good it may do in promoting marital harmony.

Penal Code Section 1322, provides:

> Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of section 270 and 270a of this code or under any provisions of the "Juvenile Court Law."

It is recommended that this section be repealed for the reasons stated above in the comment on Code of Civil Procedure Section 1881(1).[9]

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[8] Rule 28 provides, in part:

> [A] spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.

This rule is discussed at length in the separate study on Article V, Privileges, one study in this series of studies on the Uniform Rules of Evidence.

[9] See the text, *supra.*

Penal Code Sections 2600-2603 relate to prisoners whose civil rights have been suspended or who are deemed civilly dead. Under Section 2603, such prisoners may testify by affidavit or deposition in civil cases or by affidavit or deposition or personally in criminal cases.[10] The net effect of Sections 2600-2603 is that a prisoner is not entitled to be personally present at the proceedings in a civil case.

Although Rule 7 is considered in the study on Article I of the Uniform Rules of Evidence, it is appropriate to repeat here that an amendment of Rule 7 is necessary to avoid any implication that the legislative scheme established by Penal Code Sections 2600-2603 would be affected by the enactment of the Uniform Rules of Evidence. Rule 7 should be amended to revise the pertinent portion thereof to read: "Except as otherwise provided ~~in these Rules~~ *by statute,* (a) every person is qualified to be a witness, and . . . (c) no person is disqualified to testify to any matter . . . ." This amendment would permit Penal Code Sections 2600-2603 to remain in force.

Since the legislative scheme established by those sections is applicable to a particular situation—one not covered by the Uniform Rules—it is recommended that Sections 2600-2603 be left intact.

Probate Code Section 105 provides:

> When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, *excluding the oral declarations of the testator as to his intentions*; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, *excluding such oral declarations.* [Italics added.]

If the above recommendation as to Code of Civil Procedure Section 1880, subdivision (3) (Dead Man Statute), is accepted,[11] Probate Code Section 105 should, it seems, be amended by striking therefrom the language italicized above.

Vehicle Code Sections 40803 and 40804 provide:

> 40803. No evidence as to the speed of a vehicle upon a highway shall be admitted in any court upon the trial of any person for an alleged violation of this code when the evidence is based upon or obtained from or by the maintenance or use of a speed trap.
>
> 40804. (a) In any prosecution under this code upon a charge involving the speed of a vehicle, any officer or other person shall be incompetent as a witness if the testimony is based upon or obtained from or by the maintenance or use of a speed trap.
>
> (b) Every officer arresting, or participating or assisting in the arrest of, a person so charged while on duty for the exclusive or main purpose of enforcing the provisions of Divisions 10 and 11

[10] See also CAL. PENAL CODE §§ 2620-2623 on the method of taking prisoners' testimony.

[11] See the text, *supra* at 739-740.

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

This section does not apply to an officer assigned exclusively to the duty of investigating and securing evidence in reference to any theft of a vehicle or failure of a person to stop in the event of an accident or violation of Section 23109 or in reference to any felony charge or to any officer engaged in serving any warrant when the officer is not engaged in patrolling the highways for the purpose of enforcing the traffic laws.

In enacting Vehicle Code Sections 40803 and 40804, the Legislature made a deliberate choice of policy alternatives: the lawmakers elected to let speeders escape rather than to condone the use of speed-trap evidence. This having been a deliberate legislative choice (and, it is believed, a wise one), Sections 40803 and 40804 of the Vehicle Code should remain intact and operative under the revision of Rule 7 discussed above in the comment to Penal Code Sections 2600-2603.[12]

Rule 18

Rule 18 provides as follows:

> RULE 18. *Oath.* Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law.

The present counterpart of Rule 18 is Code of Civil Procedure Section 1846, providing that:

> A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

It is necessary, of course, to choose between Rule 18 and Section 1846. This choice would not be very important if only the "oath or affirmation" requirement were in question, for both Rule 18 and Section 1846 make the same provision. The decision, however, must be influenced by the second phrase of Section 1846, which provides that a witness "can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine." This provision is significant since it assures that private and *ex parte* examination of witnesses fall under the rules of hearsay evidence. In the separate study on hearsay evidence, it is recommended that Section 1846 be retained for this reason.[13] It is, therefore, recommended that Rule 18 be omitted from California's enactment of the Uniform Rules of Evidence, and that Section 1846 of the Code of Civil Procedure be left intact.

Sections 2093 to 2097 of the California Code of Civil Procedure, which provide for the authority to administer oaths and the manner of their administration, should, of course, remain intact.

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[12] See the text, *supra* at 741.

[13] 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 301, 597 (1963).

RULES 20, 21, AND 22

Introduction

Rules 20, 21, and 22 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 21. *Limitations on Evidence of Conviction of Crimes as Affecting Credibility.* Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his 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.

These rules deal with the broad area of evidence "for the purpose of impairing or supporting the credibility of a witness."

Under present law, much evidence that is "relevant[1] upon the [issue] of [the] credibility" of a witness is nevertheless excluded for one reason or another. In other words, a large body of present exclusionary rules renders inadmissible for various reasons a large mass of evidence, notwithstanding the fact that such evidence possesses a logical tendency to impair or support the credibility of a witness. Rule 20 annuls all of these exclusionary rules except those which are continued in force by some other Uniform Rule or Rules.[2] Rule 20 provides in effect that, except as prohibited by some other rule, *any* party may

[1] RULE 1(2): "'Relevant evidence' means evidence having any tendency in reason to prove any material fact."

[2] Rule 20 is thus a repetition of Uniform Rule 7 insofar as Rule 7 applies to evidence relevant to credibility.

impeach *or* support *any* witness by *any* evidence relevant upon the issue of the credibility of such witness. (However, as explained in the appended note, the qualifying portion of Rule 20, which makes it subject to other URE rules, is not well drafted and should be amended.[3])

Rule 20, then, wipes the slate clean of existing rules excluding evidence relevant to impeach or support a witness; other URE rules are to be consulted to see how much of the existing law is written back on the slate, either in the form of the present law or in modified form. The two principal rules which operate to restore parts of prevailing law and to reshape and to enact, as reshaped, other parts of prevailing law are Rules 21 and 22. All these rules (Uniform Rules 20, 21, and 22) should, however, be considered in connection with Rule 45, which provides 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.

If Rules 20, 21, 22, and 45 were to be adopted, many rules which are currently rules of mandatory exclusion would be transformed into rules giving the court discretion to admit or exclude relevant evidence. In the following discussion, the present California law and the changes proposed by the Uniform Rules are examined.

Abolition of the Rule Against Impeaching One's Own Witness

Code of Civil Procedure Section 2049 provides as follows:

> The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 2052.[4]

[3] As drafted, Rule 20 is stated to be "Subject to Rules 21 and 22." Under the doctrine *expressio unius est exclusio alterious*, the expression "Subject to Rules 21 and 22" might be read to mean "Subject only to Rules 21 and 22." Under this construction, Rule 20 would not be subject to the hearsay rule, the knowledge rule (Rule 19), rules of privilege, and the like. Certainly, the Uniform Commissioners did not intend this result. If Rule 20 as drafted is properly construed, it would, therefore, be read as "subject to these rules." It is advisable, however, to guard against misconstruction and to allay legislative fears of misconstruction by changing "Subject to Rules 21 and 22" to read as follows:

> Except as otherwise provided in Rule 21 or 22 or in any other of these Rules.

One other revision of Rule 20 is recommended. The word "issues" in the expression "issues of credibility" should, it seems, be "issue," since the reference throughout the rule is to a single witness.

[4] Code of Civil Procedure Section 2052 requires the laying of a foundation and is discussed in the text, *infra* at 751-754.

On the other hand, Rule 20 provides, in part, as follows:

> For the purpose of impairing . . . the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence . . . .

Under Code of Civil Procedure Section 2049, the party producing a witness is not allowed to assail his character by reputation evidence,[5] nor by evidence of his criminal record,[6] nor by evidence of bias.[7] Furthermore, such party is allowed to impeach such witness by showing "that he has made at other times statements inconsistent with his present testimony" only if the party can show that he is surprised and damaged by the testimony of the witness.[8] These restrictions do not, of course, operate against a party when he seeks to impeach a witness produced by his adversary.[9]

Rule 20 makes these present restrictions inoperative when the party seeks to impeach his own witness. Under this rule, the party producing a witness could assail the character of the witness, could prove the witness' inconsistencies, and could otherwise impeach him to the same extent and by the same means as such party could impeach a witness called by his adversary. In other words, Rule 20 abrogates all distinctions presently drawn between impeaching one's own witness and impeaching the adversary's witness.

Is this desirable? Consider, first, whether the calling party should be permitted to impeach his witness by attacking the witness' character (by, for example, evidence of bad reputation for veracity or a criminal record) or by showing the witness' bias (by, for example, evidence of bribery). McCormick states as follows the arguments pro and con such impeachment:

> Among the reasons, or rationalizations, [for the present rule forbidding such attacks] . . . are, first, that the party by calling the witness to testify vouches for his trustworthiness, and second, that the power to impeach is the power to coerce the witness to testify as desired, under the implied threat of blasting his character if he does not. The answer to the first is that, except in a few instances such as character witnesses or expert witnesses, the party has little or no choice. He calls only those who happen to have observed the particular facts in controversy. The answers to the second are (a) that it applies only to two kinds of impeachment,

[5] Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310 (1897) (cannot impeach one's own witness by showing his reputation to be bad).

[6] The showing of a witness' criminal record, being an attack on his character, would, as such, be excluded.

[7] McLaughlin v. Los Angeles Ry., 180 Cal. 527, 182 Pac. 44 (1919) (cannot impeach one's own witness by showing his bias)

[8] The question of what constitutes surprise and damage is not explored in full here. The matter is apparently quite unsettled. See California cases collected in McBAINE, CALIFORNIA EVIDENCE MANUAL § 316 (2d ed. 1960); McCORMICK § 38 n.23; 3 WIGMORE § 905 n.4; Note, 42 CAL. L. REV. 178 (1954); Note, 40 CAL. L. REV. 609 (1952); Note, 62 YALE L. J. 650 (1953).

[9] The adverse party called as a witness under Code of Civil Procedure Section 2055 is treated as an adversary witness. Thus P calls D. P may show D's conviction of a felony. Lovinger v. Anglo Cal. Nat'l Bank, 243 P.2d 561 (Dist. Ct. 1952). The court states, however, as follows:

> In holding that conviction of a felony may be shown by the party calling the adverse party under section 2055, we desire to point out that the adverse party must never be called solely for that purpose. [*Id.* at 575.]

> the attack on character and the showing of corruption, and (b) that to forbid the attack by the party calling leaves the party at the mercy of the witness and his adversary. If the truth lies on the side of the calling party, but the witness's character is bad, if he tells the truth he may be attacked by the adversary: if he tells a lie the adversary will not attack him, and the calling party, under the rule, cannot. Certainly it seems that if the witness has been bribed to change his story, the calling party should be allowed to disclose this to the court.[10]

These arguments for permitting impeachment are more persuasive than the rationale which forbids it. Adoption of Rule 20 is recommended, therefore, insofar as the rule permits character attack and bias attack on one's own witness.

Rule 20 also has the advantage of abolishing the surprise-damage condition which presently operates as a limitation upon impeaching one's own witness by showing his contradictory statements. The advantages of abolishing this condition may be demonstrated by the following illustration:

Suppose fact A is an element of plaintiff's cause of action. Plaintiff possesses a document in which one W asserts fact A. However, in pretrial interviews, W insists to plaintiff that W, if called as a witness, will testify to fact not-A. At the trial, plaintiff calls W. W testifies to fact not-A. Plaintiff then lays a foundation and offers the document. Under present law, the offer will be rejected because plaintiff was not surprised. Of course, if W had been called by defendant, plaintiff could have the document admitted. That plaintiff was not surprised by W's testimony would be immaterial. It would likewise be immaterial that, though the document is not (in theory) substantive evidence, almost surely as a practical matter the jury would treat it as substantive evidence. When the witness is defendant's witness, plaintiff is allowed this *practical* advantage stemming from the jury's inability to understand and apply the court's charge that the evidence is nonsubstantive.

The policy underlying the present surprise-damage condition that restricts plaintiff when W is plaintiff's witness seems to be that plaintiff, when aware of W's hostility, should not be allowed to maneuver himself into the position of getting this *practical* advantage.[11] In other words, justice runs the risk under present law that the jury will disregard the court's instruction and treat the pretrial statement as substantive evidence, thereby violating the hearsay rule—it runs this risk when the plaintiff impeaches the defendant's witness. It also runs the risk under present law when the plaintiff's witness surprises the plaintiff. But this is the limit. Ergo, plaintiff cannot *intentionally* produce adverse testimony and then, under the pretense of neutralizing that testimony, get before the jury evidence which, practically speaking, the jury will almost certainly treat as substantive evidence.

If this analysis is sound up to this point, it must now be evident that the surprise-damage condition is rational today only because California presently adheres to the view that the witness' pretrial statement

[10] McCormick § 38 at 70-71.

[11] McCormick seems to suggest this as the reason for the surprise-damage condition. McCormick § 38 at 73.

is hearsay not embraced by any exception to the hearsay rule when considered as substantive evidence of the facts stated. It is evident, also, that the surprise-damage condition would be irrational under the URE system since a witness' prior inconsistent statement is (though hearsay under Rule 63) admissible under Rule 63(1) (either as originally drafted or as tentatively amended by the Commission)[12] as substantive evidence of the facts asserted in it. Adoption of Rule 63(1) brings the present surprise-damage condition under the maxim: *cessante ratione legis cessa et ipsa lex.*

In sum, then, that aspect of Rule 20 which abolishes the present restrictions upon impeaching one's own witness is recommended for adoption.[13]

Impeachment by Specific Contradiction

Suppose in the action of "P v. D" one of the elements of P's cause of action is proposition X. Facts *a, b,* and *c* are items of circumstantial evidence probative of proposition X. At the trial, P calls W_1. W_1 testfies to facts *a, b,* and *c*. After P rests, D calls W_2. W_2 testifies to fact not-*a*. W_2's testimony is, of course, evidence on the merits of the case. Additionally, however, it has the effect of impeaching W_1 by casting a shadow of doubt upon W_1's testimony as to facts *b* and *c*.

This kind of impeachment (which Wigmore calls "specific contradiction"[1]) is, of course, well recognized[2] and is a feature of practically every case in which the evidence is contradictory. Indeed, this kind of impeachment is so commonplace that it is the subject of the maxim: *falsus in uno, falsus in omnibus*—a maxim reflected in Code of Civil Procedure Section 2061 to the effect that the jury is "to be instructed by the Court on all proper occasions . . . that a witness false in one part of his testimony is to be distrusted in others."[3]

The principal limitation upon the process of impeachment by specific contradiction is the rule that such impeachment is *not* allowed upon so-called "collateral matter." This restriction is well established as a general principle both in California and elsewhere.[4] But in California, as elsewhere, there is difficulty in defining and applying the concept, "collateral matter." In *People* v. *Devine,*[5] it is suggested that only matter "relevant to the issue being tried" is noncollateral—all else is collateral. But this formula was found to be an erroneous oversimplifi-

[12] 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 301, 312-314, 425-439 (1963).

[13] There is, however, a possibility of abuse of Rule 20. Suppose that plaintiff knows that defendant plans to call X as defendant's principal witness. X has a record of convictions for embezzlement and perjury. Just before resting his case in chief, plaintiff calls X and asks *only* about X's criminal record. Would this be permitted under Rule 20? Would this be regarded as "matter relevant upon the [issue] of [X's] credibility"? It does not appear so. It cannot be said that there is, as yet, an "issue" of X's credibility. Such "issue" would not arise until X had given some testimony in the case.

[1] 3 WIGMORE, Ch. 35.

[2] Code of Civil Procedure Section 2049 provides, in part: "The party producing a witness . . . may contradict him by other evidence . . . ." Code of Civil Procedure Section 2051 provides, in part: "A witness may be impeached by the party against whom he was called, by contradictory evidence . . . ." Both sections recognize specific contradiction as a form of impeachment.

[3] For California cases interpreting Section 2061, see 3 WIGMORE § 1010 n.2.

[4] MCCORMICK § 47.

[5] 44 Cal. 452, 458 (1872).

cation a few years later in *People* v. *Chin Mook Sow*.[6] Here, the question was whether a witness who denied his conviction of a felony could be contradicted by showing the conviction. The contradiction was held to be proper on the following grounds:

> It is a well settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness on cross-examination, which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked him the question; but it is conclusive against him. But when the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, the rule does not apply. In the latitude permitted by the law in cross-examinations, many questions may be asked which could not be allowed on direct examination, because relating to matter purely collateral. The Code of Civil Procedure (section 2051) allows the cross-examiner to ask a witness if he has been convicted of a felony, and does not confine the evidence of that fact—as was the rule before the Code—to the record of conviction. But by the same section the right to prove the fact, by the record of conviction, is continued. The law authorized the District Attorney to prove by the record the conviction as a distinct fact. It was not one of those matters entirely irrelevant, which may be inquired into only by virtue of the wide latitude permissible on cross-examination, and was, therefore, not simply collateral within the meaning of the rule, which prohibits any other evidence than the statement of the witness on cross-examination.[7]

By this case, the concept of noncollateral matter is broadened to include not only matter "relevant to the issue being tried," but also any other matter which the impeacher "would have a right to prove as an independent fact."[8] The test thus evolved for the admissibility of con-

[6] 51 Cal. 597 (1877). This case shows that some matters are noncollateral and proper subjects of contradiction, notwithstanding the fact that such matters are irrelevant to the issue being tried. Thus, "collateral" is *not* synonymous with "irrelevant" on the merits.

[7] People v. Chin Mook Sow, 51 Cal. 597, 600-601 (1877). Here, of course, the impeachment was twofold: (1) character impeachment (by showing the conviction); and (2) specific contradiction (by showing the lie about the conviction).

Another instance of matter irrelevant on the merits and yet noncollateral for contradiction purposes is the following: Charge: murder; on cross-examination by the prosecution, the defendant's witness denies having attempted to bribe X. In rebuttal, the prosecution is allowed to have X testify to the attempted bribe. People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833 (1897).

[8] Suppose the impeacher would *not* have a right to prove the fact but the opponent would. May the impeacher extract the fact on cross-examination of the witness and then contradict him? For example, in a prosecution under Penal Code Section 288, suppose the prosecution's witness on direct examination testifies only to the act charged. May the defendant on cross-examination ask the witness about *another* lewd act of the defendant with the witness and later contradict the witness as to this *other* act? See People v. Whitholt, 77 Cal. App. 587, 472 Pac. 245 (1926), in which the court's analysis was as follows:

> In a case of the character of that here involved, assuming the admissibility on the part of the prosecution of evidence of acts of a defendant of a nature similar to that charged in the information tending to establish his proneness to commit the particular act of which he is accused, it does not

tradicting evidence (*i.e.*, whether the evidence would be admissible apart from the contradiction) is still probably too narrow. McCormick makes this point as follows:

> A witness has told a story of a transaction crucial to the controversy. To prove him wrong in some trivial detail of time, place or circumstance is "collateral." But to prove untrue some fact recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about, is a convincing kind of impeachment that the courts must make place for, despite the fact that it does not meet the test of admissibility apart from the contradiction. To disprove such a fact is to pull out the linchpin of the story. So we may recognize this . . . type of allowable contradiction, namely, the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true. This test is of necessity a vague one, as it must meet an indefinite variety of situations, and consequently in its application a reasonable latitude of discretionary judgment must be accorded to the trial judge. [Footnotes omitted.] [9]

Today, in consequence of the "collateral matter" doctrine, there has been accumulated a considerable body of precedents designating a wide variety of matters "collateral" and, therefore, precluding contradiction on such matters.[10] How would such cases be handled under the Uniform Rules? Note, first, that the current rule precluding contradiction on collateral matter is *not* predicated upon the premise that the contradiction is irrelevant *on the issue of the credibility* of the witness who is contradicted.[11] Rather, the rule is founded, as McCormick puts it, upon the "dangers of surprise, of confusion of the jury's attention, and of time-wasting." [12] Hence, in cases of contradiction, although the evi-

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necessarily follow that the same evidence would likewise be admissible on the part of the defendant. The purpose of evidence is to present some fact favorable to the cause of the party introducing the evidence, or to contradict a fact apparently established by the opposing party. If the offered evidence tends to do neither the one nor the other, it is immaterial or collateral to the inquiry. In the instant case evidence produced by defendant of the fact that on some occasion other than that specified in the information the defendant had been guilty of an act similar to that of which he was accused would in no sense be favorable to the cause of defendant; neither would it tend in any way to controvert the case made by the prosecution. Therefore, so far as the defense was concerned, evidence of such former acts by defendant was collateral to the question of whether at the time and place set forth in the information he had performed the acts therein specified. The rule, then, forbidding impeachment on collateral facts first brought out on cross-examination would apply to the situation here presented; from which it would result that no error was committed by the trial court. [*Id.* at 590, 247 Pac. at 246-247.]

[9] McCormick § 47 at 102-103. It is not clear whether California makes or would make an exception to the independently-provable-facts test to accommodate the type of case McCormick discusses.

[10] People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949); Redington v. Pacific P.T.C. Co., 107 Cal. 317, 40 Pac. 432 (1895); People v. Tiley, 84 Cal. 651, 24 Pac. 290 (1890); People v. Dye, 75 Cal. 108, 16 Pac. 537 (1888); People v. Bell, 53 Cal. 119 (1878); People v. Merrill, 104 Cal. App.2d 257, 231 P.2d 573 (1951); People v. Burness, 53 Cal. App.2d 214, 127 P.2d 623 (1942).

[11] 3 Wigmore § 1002:

> "collateral" errors, though only remotely probative, are still probative, *i.e.* relevant; and the controlling reason for exclusion is the reason of Auxiliary Policy . . . .

[12] McCormick § 47 at 101.

dence relates to a collateral matter, it is still "evidence concerning . . . matter relevant upon the [issue] of credibility" in the sense of Rule 20. That rule, therefore, provides for admissibility so far as that rule is concerned. Looking to other rules to discover whether any of them provides for unconditional inadmissibility, we find that none of them does. The result is, therefore, that evidence contradicting the witness on a matter regarded today as collateral is to be admitted under Rule 20, unless the court, in the exercise of discretion, decides otherwise under the terms and conditions stated in Rule 45. Thus, the impact of the Uniform Rules on "collateral matter" cases is to convert the present inflexible rule of exclusion into a flexible rule vesting the court with discretion to admit or exclude the evidence.

This appears to be wise. The present test of collateral matter is elusive and, perhaps, too restrictive.[13] The present system is, therefore, unduly complex. Also, it probably excludes evidence that should be admitted. Moreover, in this area where the basic policy considerations are to avoid surprise, confusion, and waste of time, these policies are best implemented by a rule of provisional admissibility like Rule 20, the proviso being the court's discretion under Rule 45.[14]

Impeachment by Self-Contradiction

Suppose in the action of "P v. D" one of the elements of P's cause of action is proposition X. Facts *a*, *b*, and *c* are items of circumstantial evidence probative of proposition X. At the trial, P calls W_1. W_1 testifies to facts *a*, *b*, and *c*. After P rests, D calls W_2 to testify that prior to the trial W_2 heard W_1 make the assertion of fact not-*a*. Wigmore calls this "self-contradiction"[1] (meaning that if W_2 is believed, W_1 has contradicted himself, because W_1 says fact *a* at the trial and he said fact not-*a* prior to the trial). This is to be distinguished from specific contradiction (in which W_1 testifies to fact *a* at the trial and W_2 testifies merely to fact not-*a*, W_2 not here accusing W_1 of any pretrial utterance inconsistent with W_1's testimony). The process of self-contradiction, like that of specific contradiction, is limited by the restriction that a witness' contradictory utterances upon collateral matters may not be shown.[2]

This restriction, like that limiting specific contradiction, becomes a rule of discretion under Rules 20 and 45. The change here is analogous in all significant respects to the specific contradiction situation discussed above.[3] The discussion and evaluation there given are incorporated by reference at this point.

The process of impeachment by self-contradiction is further restricted by the foundation requirement. What is this requirement and what is the rationale which supports it?

If a person testifies as a witness at the hearing and if one of the parties proposes to prove a statement uttered by the witness on another

[13] See the text, *supra* at 747-749.

[14] In an extreme case in which the trial judge let a party develop so many tangential issues that the trial became unreasonably protracted and confused, the appellate court, it seems, could reverse for manifest abuse by the trial judge of his power to invoke and apply the discretion given him by Rule 45.

[1] 3 WIGMORE, Ch. 36.

[2] Western Union Oil Co. v. Newlove, 145 Cal. 772, 79 Pac. 542 (1905); Trabing v. California Nav. & Imp. Co., 121 Cal. 137, 53 Pac. 644 (1898); People v. Webb, 70 Cal. 120, 11 Pac. 509 (1886); People v. McKeller, 53 Cal. 65 (1878).

[3] See the text, *supra* at 747-750.

occasion inconsistent with his testimony, it is, of course, possible to give the witness an "opportunity to identify, explain or deny the statement," in the language of Rule 22(b). Assuming the witness remains available throughout the hearing, he can be afforded such opportunity at some point prior to the conclusion of the hearing. Conceivably, the actual affording of such opportunity could be left up to the party supported by the witness. Conceivably, the party seeking to impeach could be permitted to introduce his evidence regarding an inconsistent statement without making any inquiries of the witness. The other party could then decide whether to *recall* the witness and give him an opportunity to deny the pretrial statement or to admit and explain it. Under this scheme, the party supported by the witness would, of course, run the risk that the witness may become unavailable for recall (because, for example, of death or disappearance).

Actually, however, the present law is otherwise. Code of Civil Procedure Section 2052 provides as follows:

> A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; *but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them.* If the statements be in writing, they must be shown to the witness before any question is put to him concerning them. [Emphasis added.]

Thus, the impeaching party must afford the witness the opportunity to deny or to admit and explain his inconsistencies. This the impeacher must do, either by examining the witness when first produced [4] or upon recall *by him.*[5] It follows, of course, that if the impeaching party delays such examination, counting upon recalling the witness, he bears the risk that the witness will become unavailable for such recall.[6] McCormick summarizes as follows the reasons of policy supporting the rule imposing these requirements upon the impeaching party:

> The purposes of the requirement are (1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness

[4] For California cases interpreting and applying the foundation requirement, see MCBAINE, CALIFORNIA EVIDENCE MANUAL §§ 429-433 (2d. ed. 1960); 3 WIGMORE § 1028 n.1, § 1029 n.1; Fricke, *The Impeachment of Witnesses*, 18 CAL. S. B. J. 331 (1943); Hale, *Impeachment of Witnesses By Prior Inconsistent Statements*, 10 So. CAL. L. REV. 135 (1937).

The foundation specified in Code of Civil Procedure Section 2052 is required only for *extrinsic* evidence of the contradictory statement. Hence, the objection of no foundation is unseasonable on cross-examination of the witness under attack. It is altogether proper to question him about his alleged contradictory statement in more general terms than the Section 2052 formula. The witness' admission of the contradictory statement in response to such nonspecific questions is, of course, *not* subject to a motion to strike for want of the Section 2052 foundation. See People v. Vollmann, 73 Cal App.2d 769, 167 P.2d 545 (1946); Kidd, *Some Recent Cases in Evidence*, 13 CAL. L. REV. 285, 298-302 (1925).

[5] 3 WIGMORE § 1036. Whether such recall shall be permitted lies in the discretion of the court. People v. Keith, 50 Cal. 137, 140 (1875) (no abuse of discretion in refusing recall but "better practice" to permit it unless there is an attempt to "trifle" with the court by uselessly consuming court's time). *Accord*, People v. Shaw, 111 Cal. 171, 43 Pac. 593 (1896) (no abuse in refusal; two justices dissenting).

[6] 3 WIGMORE § 1027. The impeacher, of course, also bears the risk that the trial court will exercise its discretion to refuse recall and that the appellate court will find no abuse of discretion in the ruling. See note 5, *supra.*

Rule 22(a) provides that:

> [I]n 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. [Italics added.]

This converts the "show me" rule into a rule of discretion. Why, however, should the rule be retained even in this mild discretionary form? It must be remembered that not all witnesses who contradict themselves are scheming crooks. Suppose an honest, though forgetful, witness has written a letter at variance with his testimony. Is it fair to let the cross-examiner trap him by beguiling him to deny the letter which he has honestly forgotten? Of course, his forgetfulness and inconsistency should be exposed and explained by him; but should he not be protected from being led into a denial of the letter (an honest denial according to his lights) and being made thereby to appear to be worse than really he is? The problem here would seem to be to fashion some mechanism to protect the honest witness from false appearances and to expose the dishonest witnesses in their true light. In the following passages, McCormick gives the pith of the matter and the argument for the rule of discretion:

> Who is to say whether the witness is of the one kind or the other? Probably the trial judge is most likely to pass on this impartially. In the light of this opinion, he should be vested with the discretion to permit the questioning about the writing without requiring its exhibition to the witness, or on the other hand to require that it be shown to the witness, or that the witness be asked so specifically about the letter as to time, addressee, and contents as to refresh his memory and give him a chance to deny or explain. [Footnote omitted.][17]

Impeachment by Character Evidence

Under the common law tradition, California relies upon character as an index of credibility, and, as Wigmore says, this common law method must "hold its place until science provides a better method."[1] But, what evidence of character is admitted? To what extent, if any, should this present law be changed?

Evidence that a witness has a bad reputation for "truth, honesty, or integrity" is admissible under Code of Civil Procedure Section 2051. Reputation evidence as to *other* character traits is, however, inadmissible for impeachment purposes.[2] Opinion evidence as to character

[17] McCormick § 28 at 54.

[1] 3 Wigmore § 922.

[2] Compare the following from People v. Yslas, 27 Cal. 630, 632-633 (1865):

> The defendant was indicted for an assault with intent to commit murder, tried and convicted as charged.
>
> At the trial the defense proposed to impeach the testimony of the prosecutrix by proving her to be of a notoriously bad character for chastity. The testimony was rejected by the ground that the decision of the Court in that respect was erroneous.
>
> That the ruling of the Court is sustained by the great mass of authority is not disputed by counsel for appellant; but it is insisted, notwithstanding,

(*e.g.*, "I know him well and, in my opinion, he is a liar") is inadmissible even though the opinion relates to the traits of truthfulness, honesty, or integrity.[3] Likewise, evidence of particular wrongful acts is generally inadmissible notwithstanding the fact that such acts indicate bad character traits respecting truthfulness, honesty, or integrity.

In two of the three respects just mentioned, California law is in accord with the URE; in a third respect California law is *contra*. First, both California and the Uniform Rules limit reputation evidence to honesty-veracity (Uniform Rule 22(c); Code of Civil Procedure Section 2051). Second, both California and the Uniform Rules *exclude* evidence of conduct relevant only as tending to prove a trait of the witness' character (Uniform Rule 22(d); Code of Civil Procedure Section 2051).[4] But, the Uniform Rules admit opinion evidence of honesty-veracity;[5] California excludes it. As to this, which is the better view?

For many years, Wigmore has championed the view now advanced by the Uniform Rules with the following classic polemic:

> 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

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that the better reason is opposed to it. We do not deem it necessary to enter into a discussion as to what the law ought to be upon this subject. There is much force in the argument made in support of the theory that the inquiry into the character of a witness, for the purpose of impeaching his testimony, ought not to be restricted to his reputation for truth and veracity; but the rule is too well settled the other way for us to disturb it. If it is thought that the ends of justice would be subserved by changing the rule so as to make the entire moral character of the witness in the estimation of society the subject of inquiry, let the change be made by the Legislature, and not the judiciary.

A concurring opinion advocates broadening the inquiry to encompass "general character or general moral character." *Id.* at 635.

The thrust of the URE is, of course, in the opposite direction. Defendant *qua* witness is impeachable by a showing of his bad reputation for truth, veracity, and integrity. People v. Hickman, 113 Cal. 80, 45 Pac. 175 (1896).

[3] McCORMICK § 44 at 94. So, too, in California. People v. Methvin, 53 Cal. 68, 68-69 (1878):

> The Court below erred in permitting the question, (against the objection of defendant's counsel) "From what you know of his reputation, and *what you know of him*," [the witness sought to be impeached] "would you believe him under oath in a matter in which he is interested?"
>
> Assuming that the question was in other respects proper, it is clear that, in so far as it authorized the witness under examination to base belief on his personal knowledge—as distinguished from general reputation—the question was improper.

However, the reputation witness may state that from the impeached witness' reputation, he would not believe the impeached witness under oath. People v. Tyler, 35 Cal. 553 (1868); Stevens v. Irwin, 12 Cal. 306 (1859).

[4] CAL. CODE CIV. PROC. § 2051, in part: "A witness may be impeached . . . *but not by evidence of particular wrongful acts* . . . ." (Emphasis added.) For California cases interpreting and applying the "wrongful acts" part of this provision, see 3 WIGMORE § 987 n.1, and Hale, *Specific Acts and Related Matters As Affecting Credibility*, 1 HASTINGS L. J. 89 (1950).

Wrongful acts may, however, be shown on cross-examination to "identify the witness with his environment." People v. Lain, 57 Cal. App.2d 123, 134 P.2d 284 (1943).

Code of Civil Procedure Section 2051 does not, of course, operate to exclude wrongful acts (such as bribes) relevant to show bias. See note 9, *infra* at 763.

[5] Such opinion evidence is admissible under Rule 20 unless some other rule makes it inadmissible. The URE Opinion Rule (Rule 56(1)) would not exclude the evidence nor would any other rule seem to do so. Rule 46, with reference to proof of character when character is an issue in the case, specifically provides for proof "in the form of opinion" as well as proof by "evidence of reputation." Presumbably, the Uniform Commissioners intend to provide for both kinds of proof when character is germane only to credibility.

> 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,[6] 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 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."[7]

This argument is persuasive. The Wigmore view reflected in the Uniform Rules seems superior to the stultified approach of the present California law; hence, approval of this principle is recommended.

Impeachment by Criminal Record—In General

If the character traits of truthfulness, honesty, and integrity may be considered as indices of credibility and their opposites as indices of want of credibility (as is done so far as reputation evidence is concerned), it seems only logical to consider a witness' criminal record insofar as such record is indicative of his untruthfulness, dishonesty, or want of integrity. A conviction for perjury suggests a bad character for truthfulness. A conviction for embezzlement suggests a bad character for honesty.

Many convictions, however, do not reflect so directly upon the convicted party's veracity and honesty. To infer untruthfulness from a conviction for manslaughter is a much more tenuous process than to draw the like inference from a conviction for perjury. Reasoning from a manslaughter conviction to the conclusion that the convicted party is untruthful involves deductions based upon the nebulous concept of *general* bad character. It seems fair enough to permit a jury to reason as follows: W was convicted of perjury last year; W is, therefore, a liar; W's testimony is, therefore, untrue. It by no means follows that it is equally fair to permit the jury to reason this way: W was convicted of manslaughter; W is, therefore, a "bad man"; W is, therefore, a liar; W's testimony is, therefore, false.

California rejects the "bad man" (general character) approach so far as reputation evidence is concerned. Should this approach not like-

[6] 1865, Leigh & C. 520, 10 Cox. Cr. 25 (indecent assault upon a boy; the witness for the prosecution was asked, "What is defendant's general character for decency and morality of conduct?", and answered: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion and the opinion of my brothers who were also pupils of his is that his character is that of a man capable of the grossest indecency and the most flagrant immorality). (Footnote in original. 7 WIGMORE § 1986 n.4.)

[7] 7 WIGMORE § 1986.

wise be rejected so far as evidence of criminal record is concerned? Should California accept the view of Rule 21 that his conviction for crime is admissible to impeach the convicted party only when the crime involves "dishonesty or false statement"? It is submitted that the answer should be, "Yes." [8] Adoption of Rule 21 would, however, bring about substantial changes in prevailing law, as the following will demonstrate.

Code of Civil Procedure Section 2051 provides, in part, as follows:

> [I]t may be shown by the examination of the witness, or the record of the judgment, that . . . [the witness has] been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

Code of Civil Procedure Section 2065 provides, in part, that:

> A witness must answer as to the fact of his previous conviction for felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

There can be little doubt that these sections provide an *un*satisfactory criterion for the process of impeachment by criminal record. Mr. Roy A. Gustafson, formerly District Attorney of Ventura County, California, and a former member and chairman of the California Law Revision Commission, has made this clear beyond a reasonable doubt in his recent

[8] The State Bar has considered this question and has sponsored legislation concerning it. The following chronological statement shows this development:

(1) 1952. Pursuant to 1952 Conference Resolution No. 6, the Board of Governors referred to the Committee on Criminal Law and Procedure for study and report to the Board on the "question of whether, and to what extent and in what manner, a witness should be subject to impeachment by reason of a prior conviction of a crime." 27 CAL. S. B. J. 399 (1952).

(2) 1953. Committee on Administration of Justice reported its views and that it will take the matter under study. 28 CAL. S. B. J. 262-263 (1953.) Committee on Criminal Law and Procedure reported matter under study. 28 CAL. S. B. J. 306 (1953).

(3) 1953. Board carried matter on agenda. 28 CAL. S. B. J. 438 (1953).

(4) 1954. Committee on Administration of Justice drafted in tentative form the following amendment of Code of Civil Procedure Section 2051:

"A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that, *as to any witness in a civil case or special proceeding and as to any witness other than the defendant in a criminal case*, it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon based upon a certificate of rehabilitation; *provided, however, that such conviction may not be shown until the party proposing to examine the witness or offer the record of conviction has satisfied the court, in proceedings had outside the presence of the jury (1) that the felony in question was one involving elements which bear directly upon the disposition or character of the witness to speak truthfully as distinguished from a disposition merely to act unlawfully, and (2) that competent evidence of the record of conviction is available for admission in evidence.*" 29 CAL. S. B. J. 238 (1954).

(5) 1955. Assembly Bill 1358, Reg. Sess. (1955), apparently embodying the draft of the Committee on Administration of Justice, made a part of the State Bar's legislative program. 30 CAL. S. B. J. 30 (1955); 30 CAL. S. B. J. 300 (1955).

(6) 1955. Assembly Bill 1358 failed of enactment. 32 CAL. S. B. J. 18 (1957).

(7) 1957. Assembly Bill 2213, Reg. Sess. (1957), (apparently like 1955 Assembly Bill 1358, *supra*) made part of the State Bar's 1957 legislative program. 32 CAL. S. B. J. 18 (1957).

(8) 1957. Assembly Bill 2213 apparently failed of enactment.

study of these sections.[9] Mr. Gustafson points out the many anomalies, paradoxes and absurdities that result from Sections 2051 and 2065. For example:

(1) Misdemeanor convictions for crimes directly related to veracity and honesty may *not* be shown. Felony convictions for crimes only remotely related (if at all) to veracity and honesty may be shown. Thus, the impeacher may not

> show any convictions of crimes which are misdemeanors in the first instance even though the crimes involve the very elements which show the [witness'] . . . unreliability, as in the case of petty theft, deceiving a witness with intent to affect his testimony or destroying evidence.[10]

On the other hand, and by way of contrast, the record of conviction would be admissible to impeach in the following case:

> Suppose that [a witness] . . . previously pleaded guilty to manslaughter as a result of an automobile accident. He was considered to be of excellent character and was granted straight probation with no jail sentence or fine. Since he stands convicted of a felony, his credibility is suspect.[11]

(2) The felony-misdemeanor classification turns upon the sentence imposed. In view of this, the rule that felonies can be shown to impeach and misdemeanors cannot be shown often produces the absurd result that the convicted party who receives straight probation with no jail sentence or fine *is* impeachable (*e.g.*, the manslaughter case stated above) whereas the convicted party who receives a jail sentence is *not* impeachable. Thus,

> suppose [a witness] . . . has been convicted of burglary, grand theft, assault with a deadly weapon and bookmaking. All of these crimes are felonies. After each conviction, [the witness] . . . applied for probation and because of his unsavory character, probation in each instance was denied and he was sentenced, in each case, to one year in jail (the alternative jail sentence being permitted by statute in each instance). Because the sentences imposed transform his crimes from felonies to misdemeanors, the prior convictions cannot be used to impeach his credibility! [Footnotes omitted.] [12]

The contrast is even more strikingly brought out by the following:

> Take the case of two burglars. One gets straight probation [and is therefore guilty of felony and impeachable] and the other goes to jail for one year [and is therefore guilty of a misdemeanor and *not* impeachable]. Is there any basis for believing that the probationer is more likely to be a liar than the convict who was considered unworthy of probation? [13]

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[9] Gustafson, *Have We Created A Paradise for Criminals?*, 30 So. CAL. L. REV. 1, 19-21 (1956).
[10] *Id.* at 20.
[11] *Id.* at 19.
[12] *Id.* at 19-20.
[13] *Id.* at 20.

(3) Finally, the exception in Sections 2051 and 2065 respecting pardon is the source of the following senseless distinctions:

> The felony cannot be used for impeachment if the [witness] . . . "has previously received a full and unconditional pardon, based upon a certificate of rehabilitation." While these certificates are easy to get and are *not* issued on the basis that the defendants were erroneously convicted, they are available only to those who have served prison terms. Only 27% of convicted felons are sent to prison. Hence the man who has served 20 years in prison for murder cannot be impeached while the man who has never served a day in his life (but received probation for a felony) can be impeached because no such certificate is available to him! Furthermore, the mere fact that defendant was pardoned does not preclude his being impeached. The pardon must be of the type specified by the legislature. Hence the man who received a pardon immediately after his conviction on the ground that he was innocent does not have the specified type of pardon and may be impeached! [Footnotes omitted.] [14]

The unsatisfactory conditions above summarized and illustrated would, it is believed, be corrected by enacting Rules 20 and 21.[15] Under these rules, only crimes "involving dishonesty or false statement" are admissible to impeach. The present felony-misdemeanor distinction is abrogated, as well as the condition respecting pardon.[16]

Problems remain, however, respecting the means of proving the witness' conviction. Today, under Code of Civil Procedure Section 2051, a witness' felony conviction "may be shown by the examination of the witness, or the record of the judgment." Thus, in the action of "P v. D," P opens the case by calling W who testifies favorably to P on direct examination. On cross-examination, D asks W: "Have you ever been convicted of a felony?" This is proper cross-examination both as a matter of law and ethics. This is so even though D has no idea whether W is or is not a convicted felon. A felony conviction is legal impeachment. Such conviction may be legally proved by the witness. D is entitled to explore or "fish" on cross-examination, seeking evidence relevant and admissible to impeach W.

Is this, however, fair to W in the event that he answers, "No," and his answer is true? The mere asking of the question carries an imputation which the jury will not miss, and the suggestion thus planted in the minds of the jurors is not entirely wiped out by the witness' denial. In view of these considerations, should the process of proof of conviction by examination of the witness be continued? If so, should this process be redesigned by constructing some protective measures to insure fairness to the witness? When the witness has in fact been con-

[14] *Id.* at 20-21.

[15] For discussion of the defendant himself as a witness in a criminal case, see the text, *infra* at 761-762.

[16] A pardon could, of course, be shown to support the witness. Apparently, however, it would not make the conviction inadmissible in the first instance. This, it seems, used to be the California law. See People v. Hardwick, 204 Cal. 582, 269 Pac. 427 (1928); Holbrook, *Evidence*, 23 So. CAL. L. REV. 34 (1949); Note, 25 So. CAL. L. REV. 231 (1952); Note, 16 CAL. L. REV. 161 (1928).

As to a conviction on which an appeal is pending, see Note, 28 CAL. L. REV. 222 (1940).

victed, proof of this fact by the witness' admission is, of course, a convenient timesaver. The problem is to preserve this method of proof in these cases and, at the same time, protect the *innocent* witness from a question which suggests his guilt.

The 1954 Committee on Administration of Justice of the State Bar fashioned what is an ingenious and commendable solution for this problem. The Committee suggested the possibility of amending Section 2051 to provide, *inter alia*, as follows:

> provided, however, that such conviction may not be shown until the party proposing to examine the witness or offer the record of conviction has satisfied the court, in proceedings had outside the presence of the jury . . . that competent evidence of the record of conviction is available for admission in evidence.[17]

The purpose of this amendment seems to be to preclude the impeacher from suggesting *in any way* that the witness has been convicted unless and until such impeacher convinces the court that there is good reason to believe that the witness has, in fact, been convicted. This, of course, would eliminate exploratory cross-examination so far as impeachment by conviction is concerned. But the possibility of "smearing" an innocent witness by such exploratory tactics makes the restriction desirable in this instance. The amendment would also preserve the convenient method of proof by the witness' own testimony in those cases in which the witness has, in fact, been convicted. It does not appear to be the intent of the suggested amendment that the impeaching party must actually have in his possession "competent evidence of the record of conviction." (If that is the meaning, the amendment would, of course, practically speaking, eliminate the simple process of proof by examining the witness.) Rather, it appears that the impeacher need only convince the court that such evidence can be procured, *if required—i.e.*, if the witness denies the conviction. Presumably, informal representations by counsel to the court could be sufficient to satisfy the court. Assuming this is the intent of the suggested amendment, rephrasing seems desirable to reflect this intent more clearly.

If California is to accept the URE idea that only convictions for crimes "involving dishonesty or false statement" may be shown to impeach, it is necessary, of course, to acknowledge that the question whether a given crime is of this character will often be an arguable question requiring a hearing and decision by the court. Should a procedure be provided whereby this argument must take place in proceedings had outside the presence of the jury? Again, borrowing the idea of the Committee on the Administration of Justice, the answer should be, "Yes."

To implement the ideas expressed above, it is recommended that the first part of Rule 21 be amended by redrafting as follows the first sentence and adding at the end thereof a new sentence (strikeout type indicates deletions; *italics* indicates additions):

> ~~Evidence of the~~ *The* conviction of a witness for a crime not involving dishonesty or false statement shall ~~be inadmissible~~ *not be shown* for the purpose of impairing his credibility. *Except as here-*

[17] 29 CAL. S. B. J. 238 (1954) (original in italics).

inafter provided in this Rule, the conviction of a witness for a crime involving dishonesty or false statement may be shown for the purpose of impairing his credibility by examination of the witness or the record of the judgment, if the party proposing to examine the witness or to offer the record has satisfied the court in proceedings had outside the presence of the jury (1) that the crime in question involves dishonesty or false statement and (2) that competent evidence of the record of conviction is in the possession of such party or can be procured, if required.

Impeachment by Criminal Record—Special Rule as to Defendant in Criminal Case

In California today, if the defendant in a criminal case elects to testify, he is subject to impeachment like any other witness in any other proceeding, civil or criminal. As is said in *People* v. *Beck*:[1]

> "[W]hen the defendant became a witness in his own behalf, he subjected himself to all the rules regulating the examination and cross-examination of witnesses. His privilege was no greater than that of any other witness; he dropped, for the time being, the character of a party and took on that of a witness."

This, of course, means that *qua* witness, defendant's credibility may be impeached by showing his felony conviction or convictions.[2] However, the "question as to previous conviction is only permitted to go to the credibility of the witness" because the "fact that a defendant has been previously convicted of other criminal offenses is, of course, no evidence that he committed the particular offense for which he may be on trial."[3] Thus, if a defendant charged with burglary takes the stand and testifies to an alibi, the prosecution may prove a previous felony conviction for burglary.[4] The jury, however, will be charged to consider the previous conviction only on the question of the defendant's credibility as a witness. As a practical matter, the jury will, of course, experience great difficulty in limiting their consideration of the evidence as directed by the court.

Because of the practical consideration just mentioned, a defendant with a record of "priors" faces a serious dilemma. Shall he claim privilege, thereby invoking against himself the adverse inferences and comment that his silence will produce? Or, shall he waive his privilege and testify, thereby opening himself to proof of his "priors" and subjecting himself to the grievous danger that the jury (as a practical matter) will consider his "priors" on the question of his guilt? There can be little difference of opinion that such defendant does have a difficult choice. There can, however, be much reasonable difference of opinion as to whether anything should be done to relieve such a defendant of this difficulty.[5]

[1] 58 Cal. 212, 213-214 (1881), quoting Clark v. Reese, 35 Cal. 89, 96 (1868).
[2] People v. Reinhart, 39 Cal. 449 (1870).
[3] People v. Johnson, 57 Cal. 571, 574 (1881).
[4] *Ibid.*
[5] The State Bar has considered this question and has sponsored legislation concerning it. See the references in note 8, *supra* at 757, for the legislation proposed and the fate thereof.

It can be safely posited that *some* professional criminals are innocent of particular charges brought against them. Doubtless the number is small, but certainly there must be a few. In order to help these *few,* should a rule be shaped that will afford aid and comfort for the *many* who are guilty? This, of course, is the basic value judgment that always has to be made in the field of criminal law administration in considering how much of a "break" to give defendants charged with crime. It is necessary to make such a judgment in evaluating Rule 21, second sentence.[6] This provision enables an accused to take the stand and testify on the merits and, yet, preclude the prosecution from impeaching him by showing his "priors." No evidence of his "priors" is admissible for the sole purpose of impeaching him unless he has first introduced "evidence admissible solely for the purpose of supporting his credibility." Thus, all the accused needs do to prevent his "record" from being used to impeach him is to *omit* to give evidence of the type just described. In other words, the accused would forfeit his advantage only by volunteering evidence to support his credibility (such as evidence of good reputation for truth and veracity).[7] McCormick's evalution of this principle is as follows:

> Where does the balance of justice lie? Most prosecutors would say with much force that it would be unfair to permit the accused to appear as a witness of blameless life, and this argument has generally prevailed. But in England and in Pennsylvania the accused who takes the stand is shielded, under certain circumstances, from inquiry or proof as to misconduct or conviction of crime when offered to impeach. Similarly the Uniform Rule provides that if the accused does not offer evidence supporting his own credibility the prosecution shall not be allowed, on cross-examination or otherwise, to prove for impeachment purposes his commission or conviction of crime. On balance it seems that to permit, as these provisions do, one accused of crime to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions, is a more just, humane and expedient solution than the prevailing practice. [Footnotes omitted.] [8]

This analysis is convincing. It is therefore recommended that the principle of Rule 21, second sentence, be adopted in California.

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[6] The second sentence of Rule 21 reads as follows:

> If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

[7] Some problems may arise under Rule 21, second sentence. These may be illustrated as follows:

> (1) Charge: murder; defense: alibi. D testifies to alibi. In rebuttal, the prosecution shows D's reputation for truth is bad. D then shows his reputation is good. May the prosecution now show D's conviction for embezzlement? It does not seem so, since D did not "*first*" introduce "evidence admissible solely for the purpose of supporting his credibility."
>
> (2) Charge: embezzlement; defense: D's employer took the money. D so testifies. Under Rule 47(b)(i), D gives evidence of his good reputation for honesty. Under 47(a), the prosecution shows D's prior conviction for burglary. Here, the "prior" is admissible on the merits. Under Rule 21, second sentence, it is not, it seems, admissible on credibility! (D's reputation evidence was not "solely for the purpose of supporting his credibility.")

[8] MCCORMICK § 43 at 94.

Impeachment by Evidence of Bias

A witness may be impeached by showing his bias. This may be done by cross-examination of the witness, by extrinsic evidence, or by a combination of both.[9] There appears to be no statutory basis in this State for bias impeachment. Nevertheless, it cannot be doubted that such impeachment is proper in California, as elsewhere.

As previously pointed out,[10] a foundation is now required for proof of statements or acts indicative of bias. That requirement would be abrogated if the Uniform Rules are adopted, except insofar as the judge in the exercise of his general discretion to exclude admissible evidence under Rule 45 would be persuaded to exclude an item of bias evidence because no foundation had been laid.

There seems to be no other aspect in which current rules and practices respecting bias impeachment would be affected by adoption of the Uniform Rules of Evidence.

Impeachment on Other Grounds

It has been frequently stated that the statutory enumeration of methods of impeachment is exclusive.[1] Though oft-repeated, this statement is erroneous. For example, impeachment by bias is well recognized though no statutory basis supports it. Are there other exceptions?

Suppose a witness testifies for the plaintiff, and the defendant calls a witness to testify that plaintiff's witness is "a person of weak memory." In this identical situation, it was held in *Ah Tong* v. *Earle Fruit Co.*[2] that "the memory of a witness not affected by mental derangement is not to be impeached by other witnesses in order to disparage his testimony; it must be done by cross-examination."[3] In a sodomy case, *People* v. *Dye*,[4] the defendant offered the principal of the school attended by the prosecuting witness to testify that the boy was "mentally deficient and emotionally unstable."[5] This was held inadmissible on the authority of the *Ah Tong* case, *supra*, and *People* v. *Champion*.[6] In *People* v. *Mackey*,[7] the defendant called the divorced wife of a prosecution witness to testify that her former husband was subject to "delusions—to see and tell things he never did see." This was held inadmissible because "not an impeaching question, under the provisions of the Code of Civil Procedure, section 2051, providing how witnesses may be impeached."[8] On the other hand, in *People* v. *La Rue*,[9] it was held that the defendant should have been allowed to show by cross-

[9] People v. Bird, 124 Cal. 32, 56 Pac. 639 (1899) (extrinsic evidence to show bias); People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833 (1897) (attempt to bribe; extrinsic evidence); Luhrs v. Kelly, 67 Cal. 289, 7 Pac. 696 (1885) (attempt to bribe; cross-examination); People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. 859 (1885) (cross-examination of prosecution witness to show bias).

[10] See the text, *supra* at 752 (notecalls 8-10).

[1] *E.g.*, People v. Harlan, 133 Cal. 16, 20, 65 Pac. 9, 10 (1901); People v. Holman, 72 Cal. App.2d 75, 97, 164 P.2d 297, 309 (1945); Kidd, *Some Recent Cases in Evidence*, 13 CAL. L. REV. 285, 299 (1925).

[2] 112 Cal. 679, 45 Pac. 7 (1896).

[3] *Id.* at 682, 45 Pac. at 9.

[4] 81 Cal. App.2d 952, 185 P.2d 624 (1947).

[5] *Id.* at 963, 185 P.2d at 631.

[6] 193 Cal. 441, 225 Pac. 278 (1924).

[7] 58 Cal. App. 123, 208 Pac. 135 (1922).

[8] *Id.* at 128, 208 Pac. at 137.

[9] 62 Cal. App. 276, 284, 216 Pac. 627, 631 (1923).

examination of a prosecution witness that such witness eighteen months before the trial was "suffering from incipient general paresis."

It will be noted that in the foregoing group of cases, the evidence is admitted when offered by way of cross-examination of the impeached witness. It is excluded when extrinsic evidence is offered. These cases make a distinction between cross-examination and extrinsic evidence, and they also make a distinction between "mental derangement" and other lesser mental deficiencies, such as weak memory. Hence, they could be synthesized into these rules: (a) defects other than "mental derangement" are provable only on cross-examination, but (b) "mental derangement" is provable either on cross-examination or by extrinsic evidence. This last proposition would, of course, allow expert testimony to impeach a witness.

However, *People* v. *Bell*[10] holds otherwise. A prosecution witness admitted addiction to heroin. Defendant's expert witness was not allowed to testify whether the addiction of the prosecution witness would have any effect on her ability to tell the truth. The court reasons as follows:

> Section 2051 of the Code of Civil Procedure provides that a witness may be impeached by "contradictory evidence or by evidence that his general reputation for truth, honesty or integrity is bad," or by evidence of conviction of a felony. Section 2052 provides that a witness may be impeached by evidence of prior inconsistent statements. The evidence here involved does not, of course, fall into any of the classes there enumerated. The courts have frequently held that this statutory enumeration is exclusive of other methods of impeachment. [Citations omitted.] However, California has recognized that there is at least one exception, and that is that a witness may be impeached on cross-examination, in addition to the enumerated methods, by evidence that he is affected by mental disease or mental derangement that affects his powers of perception, memory or narration. [Citations omitted.]
>
> In *People* v. *Dye*, 81 Cal. App.2d 952, at page 963 [185 P.2d 624], the limitations on this exception are stated as follows: "As for the mental condition of the witness the court said in *People* v. *Champion,* 193 Cal. 441, 448 . . . : 'A witness not affected by mental disease or mental derangement may be impeached only in the manner and for the reasons provided in sections 2051 and 2052 of the Code of Civil Procedure. . . .' . . . Appellant argues that the jury had a right to consider the mental condition of Hernandez, *which is doubtless true . . . But it does not follow that appellant was entitled to produce a witness to testify as to his opinion that the boy was mentally deficient and emotionally unstable. As said in People* v. *Champion, supra, this must be developed by cross-examination.*" (Italics added.)
>
> Thus, even if addiction does cause a general predilection towards untruthfulness (a fact not supported by substantial medical authority—see 16 So.Cal.L.Rev. 333, 334), the witness could be im-

[10] 138 Cal. App.2d 7, 291 P.2d 150 (1955).

> peached in this respect in this state only on cross-examination, and not by the production of other witnesses, experts or otherwise.[11]

This appears to be a misinterpretation of the precedents cited. Be this as it may, it seems clear that, accepting the *Bell* case as stating correctly the prevailing rule as to expert testimony about "mental disease or mental derangement" affecting credibility, that rule would be changed by adoption of the Uniform Rules. In fact, insofar as all of the cases just discussed above are restrictive of admissibility, they would be changed.

To the extent that these and like cases are to be read as laying down rules of mandatory exclusion, such rules would become rules of discretion under the URE. In each case, the matter is "matter relevant to the [issue] of credibility" in the sense of Rule 20 and is, therefore, admissible unless excluded by some other rule. In none of the cases is the evidence properly classified as character evidence. Weak memory, mental deficiency, emotional instability, obsession with delusion, or drug-addiction are *not* to be thought of as traits of character like dishonesty, inveracity, or pugnacity.[12] The restrictions of Rule 22(c) and (d) are, therefore, inapplicable.[13]

Thus, the URE system, if adopted in California, would enlarge significantly the possibilities of *extrinsic* impeaching evidence covering such nontechnical matters as weak memory or low order of intelligence and such technical matters as neuroses or psychoses. Of course, lay testimony relating to defects of the kind first stated would be screened under the URE rules relating to knowledge[14] and opinion.[15] Expert testimony would likewise be screened under the rules relating to expert testimony.[16] Furthermore, the evidence, whether given by a lay or expert witness, would be subject to exclusion by the court in the exercise of its general discretion under Rule 45.

Supporting the Witness—Evidence of Good Character

Today, a cardinal principle respecting support of a witness by evidence of his good character is that such supporting evidence is inadmissible in the absence of a character attack upon such witness. In the language of Code of Civil Procedure Section 2053, "Evidence of the good character . . . of a witness in any action [is not admissible] until the character of such . . . witness has been impeached." What is the rationale? Is the basis of the rule irrelevancy of the evidence? Or is the rule only a rule of convenience? It seems to be the latter. As Wigmore says:

> Corroboration consists in establishing data which refute possible discrediting circumstances. . . . For example, a witness Smith,

[11] *Id.* at 11-12, 291 P.2d at 152-53.

[12] McCormick suggests that the distinction may be stated in terms of character, on the one hand, and "mental capacity for truth-telling," on the other hand. McCormick § 45 at 99.

[13] These subdivisions provide that:

> As affecting the credibility of a witness . . . (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.

[14] Uniform Rule 19.

[15] Uniform Rule 56(1).

[16] Rules 56-61 deal with expert and opinion testimony and constitute a separate article of the Uniform Rules.

> whose name and face signify nothing to the tribunal and whose moral character may or may not be trustworthy, may receive instantly more credit when it appears that he is the well-known citizen Smith. This class of data may appear on the 'voir dire' of the direct examination, quite as well as on the case in rebuttal after an attempted impeachment, and on the witness's own examination as well as from the testimony of others. Thus the rule of practice which forbids most sorts of so-called corroboration until after an attempted impeachment is a rule of orderly convenience only, and its distinction has no correspondence to any logical feature of Corroboration.[1]

Thus, evidence of good character, though offered before a character attack, is (in the sense of Rule 20) "matter relevant upon the [issue] of credibility." As such, it becomes admissible subject only to the court's discretion under 45. To illustrate: In the action of "P v. D," P calls W as P's first witness. W testifies favorably to P on direct examination. D waives cross-examination. P now offers X to testify to W's good reputation for truth and veracity. This, being evidence "for the purpose of . . . supporting the credibility of a witness" and being a matter "relevant upon the [issue] of credibility," is admissible under Rule 20, unless some other rule makes it unconditionally inadmissible or unless the court exercises its Rule 45 discretion to exclude it. Nothing in Rules 21 or 22 makes the evidence inadmissible. It is not inadmissible under Rule 63 because it falls within an explicit exception contained in subdivision (28) of Rule 63. No other rule operates to exclude it unconditionally. Therefore, admission or exclusion becomes a discretionary matter under Rule 45.

This, of course, constitutes a change in existing law. Is the change desirable? As has been discussed above,[2] the URE approach to the impeachment problem is to transform current inflexible exclusionary rules of thumb into flexible rules of discretion. This approach has been found to be desirable with respect to the impeachment of witnesses, and its application here is equally meritorious.

Supporting the Witness—Evidence of Prior Consistent Statements

Suppose in the action of "P v. D," P opens the trial by calling W_1 who testifies to fact A. D does not cross-examine. P now follows with an offer of W_2 to testify that W_1 stated fact A to W_2 last week. Currently, this is usually inadmissible and the reason is *irrelevancy*. As Wigmore says:

> When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it.

[1] 3 WIGMORE § 874.
[2] See the text, *supra* at 744 and 765.

Such evidence would ordinarily be both irrelevant and cumbersome to the trial; and is rejected in all Courts. [Footnotes omitted.] [3]

Since the rationale for the existing rule excluding evidence of prior consistent statements of a witness not impeached is irrelevancy, such evidence is *not* "evidence concerning . . . matter *relevant* upon the [issue] of credibility" (emphasis added); such evidence is, therefore, not made admissible by Rule 20. Thus, Rule 20 would not change the existing rule. (Subdivision (1) of Rule 63 as originally drafted would change the existing rule. Subdivision (1) as tentatively amended by the Commission would not, it seems, change such rule.[4])

Of course, *after* certain attacks on W_1 implying "recent contrivance or fabrication," W_2's testimony may become "matter relevant upon the

[3] 4 WIGMORE § 1124. In exceptional situations, prior consistent statements of the witness *are* relevant on the issue of his credibility even though no *express* attack has been made upon him. An illustration is the following from People v. Slobodion, 31 Cal.2d 555, 559-60, 191 P.2d 1, 3-4 (1948):

Defendant contends that the admission of evidence pertaining to certain nonjudicial identification of defendant was erroneous. The prosecutrix testified that she identified defendant in a police lineup, and a police officer testified that he was present when the prosecutrix made the identification. Here again, defendant made no objection to the introduction of the testimony of which he now complains, but even if he had this evidence of previous nonjudicial identification would have been admissible.

"Ordinarily, when a witness is asked to *identify* the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out the accused (or other person), then and there in the courtroom, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him.

"The psychology of the situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper . . . to prove that *at a former time*, when the suggestions of others could not have intervened to create a fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person was then so placed among others that all probability of suggestion (by seeing him hand-cuffed, for example) is still further removed, the evidence becomes stronger. The typical illustration is that of the identification of an accused person at the time of arrest . . . ." (4 Wigmore, Evidence (3d ed.), p. 208.)

The foregoing rule stated by Wigmore is not accepted in all jurisdictions, but the weight of recent authority is in accord with his views. (See 1 Wharton's Criminal Evidence (11th ed.), p. 691; anno., 70 A.L.R. 910.) Conflicting lines of authority have arisen in California on this point. One group of cases holds that the admission of evidence of previous identification is erroneous, but in each case the defendant either failed to object or the court held that the error was not prejudicial. (*People* v. *Cotton*, 117 Cal.App. 469, 472; *People* v. *Covington*, 121 Cal.App. 61, 65; *People* v. *Lavender*, 137 Cal.App. 582, 592; *People* v. *Dyer*, 30 Cal.App.2d 590, 593.) Another group of cases holds that testimony of previous identification is admissible, particularly where the eyewitness has first identified the defendant in the courtroom. (*People* v. *Hale*, 64 Cal.App. 523, 527; *People* v. *Garcia*, 83 Cal.App. 463, 468; *People* v. *Savage*, 66 Cal.App.2d 237, 245-246; *People* v. *Richardson*, 74 Cal.App.2d 528, 542.) The only case decided by this court that deals with the question holds without discussion that such identification is admissible. (*People* v. *Sieber*, 201 Cal. 341, 349.) We therefore conclude that the evidence by the prosecutrix that she identified defendant in a lineup after the offense was admissible to corroborate her story and to rebut the suggestion that her identification at the trial was the result of recent contrivance. The same considerations apply to the testimony of the police officer that he saw the witness identify defendant.

A somewhat similar theory may be used to support the receipt of evidence in rape cases that the prosecutrix made pretrial statements complaining of the outrage upon her (see 4 WIGMORE § 1135), though, as Wigmore points out (4 WIGMORE § 1134), the precedents are confused.

[4] 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 301, 312-313 (1963).

[issue] of credibility." In these circumstances, Rule 20 operates as a general canon of admissibility. Furthermore, under Rule 63(1) (even as tentatively amended by the Commission), the evidence would be substantive evidence, whereas today it is only nonsubstantive.[5]

Therefore Rule 20 does *not* change existing law as to the admissibility of prior consistent statements. Rule 63(1) as tentatively amended by the Commission makes no changes as to admissibility, but does change the effect of admissibility by providing that the prior statement (when admissible) is substantive evidence.[6]

Summary of Changes

The changes in existing law that would be made by Uniform Rules 20, 21, and 22 (together with the discretionary power granted the judge by Rule 45) may be summarized as follows:

(1) The rule against impeaching one's own witness is entirely abrogated.[7]

(2) The rules making inadmissible contradictions and self-contradictions on collateral matters are changed to rules of discretion.[8]

(3) Similarly, the requirement of a preliminary "foundation" question as a condition upon extrinsic impeachment by inconsistent statements is made discretionary.[9]

(4) The rule of the *Queen's Case*,[10] embodied in Code of Civil Procedure Sections 2052 and 2054, requiring the cross-examiner to exhibit a writing to a witness before questioning such witness about the writing, is abolished as a mandatory rule, but the judge may require the examiner to give the identifying facts about the writing.[11]

(5) The rule precluding opinion evidence as to a witness' character for truth, honesty, and integrity is abandoned.[12]

(6) The rule that a witness may be impeached by showing his felony convictions is changed to the rule that only his conviction for crimes involving false statement or dishonesty may be shown. But the latter may be shown whether constituting a felony or a misdemeanor.[13]

(7) The defendant in a criminal case who elects to testify in his defense is shielded from impeachment by evidence of his conviction of another crime unless he has offered evidence in support of his credibility.[14]

(8) The rule restricting impeachment of a witness on the ground of mental defects and derangement to cross-examination is abrogated.[15]

(9) Evidence of witness' good character is, in the discretion of the court, admissible even though his character has not been attacked.[16]

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[5] 4 WIGMORE § 1132.
[6] See note 4, *supra*.
[7] See the text, *supra* at 744-747.
[8] See the text, *supra* at 747-750.
[9] See the text, *supra* at 750-753.
[10] 2 Br. & B. 284, 129 Eng. Rep. 976 (1820).
[11] See the text, *supra* at 753-754.
[12] See the text, *supra* at 754-756.
[13] See the text, *supra* at 756-761.
[14] See the text, *supra* at 761-762.
[15] See the text, *supra* at 763-765.
[16] See the text, *supra* at 765-766.

Recommendation

All of these changes are thought to be desirable and are recommended. Acceptance of this recommendation would, however, involve approval of Rule 45 insofar as that rule is applicable to evidence to impeach or support a witness. It is recommended, therefore, that Rules 20 (amended as proposed above), 21 (amended as proposed above), and 22 be approved and, to the extent just stated, Rule 45 also be approved.

Incorporating Rules 20 to 22 into California Law

Assuming that Rules 20 to 22 will be adopted, the following sections of the California Code of Civil Procedure should be repealed, being either inconsistent with the Uniform Rules or superflous:

Section 1847 provides:

> A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

This section is superseded by Rule 20 and should, therefore, be repealed.

Section 1868, third sentence, provides, in part:

> It is . . . within the discretion of the Court to permit inquiry into a collateral fact, when such fact . . . affects the credibility of a witness.

Rules 20 and 45 combine to produce the proposition stated in this portion of Section 1868. It should, therefore, be repealed as superfluous. Repeal of the remainder of Section 1868 is considered elsewhere in the separate study on the URE article dealing with extrinsic policies affecting admissibility.

Section 1870, subdivision 16, provides:

> [E]vidence may be given . . . of . . . :
> 16. Such facts as serve to show the credibility of a witness, as explained in Section 1847.

Since Section 1847 of the Code of Civil Procedure is recommended for repeal above,[17] subdivision 16 of Section 1870 referring thereto should also be repealed.

Section 2049 provides:

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

[17] See the text, *supra.*

This section is inconsistent with Rule 20, which permits the party calling a witness to impeach the witness. Hence, the section should be repealed.

Section 2051 provides:

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

The first clause of Section 2051 is superseded by Rule 20; the second clause is superseded by Rule 22, subdivision (d). The remainder of the section is inconsistent with Rule 21 and should, therefore, be repealed.

Section 2052 provides:

> A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

This section is inconsistent with Rule 22, subdivisions (a) and (b), which make the foundation a matter within the discretion of the court. Repeal of this section is, therefore, recommended.

Section 2053 provides, in part:

> Evidence of the good character of [a witness] . . . is not admissible . . . until the character of such . . . witness has been impeached.

That portion of Section 2053 above excerpted is inconsistent with Rule 20. Repeal of the remainder of Section 2053 is considered elsewhere in the separate study on the URE article dealing with extrinsic policies affecting admissibility.

Section 2054 provides:

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

The italicized portion of the above section is inconsistent with Rule 22, subdivision (a). It should, therefore, be repealed. The remainder of Section 2054 should be left intact.

Section 2065, second sentence, provides:

> But a witness must answer as to the fact of his previous conviction for felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

This sentence is inconsistent with Rule 21. Repeal of the first sentence of Section 2065 is considered elsewhere in the separate study on the URE privileges article.

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