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Supreme Court of California
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S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B296639

MOTION FOR JUDICIAL NOTICE EXHIBITS 1 – 6

VOLUME 1 OF 14, PAGES 1-233 OF 3537

[FILED CONCURRENTLY WITH REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS]

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agenda Item No. 6

Meeting of
January 24-25, 1958

Memorandum No. 2

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

I enclose the following:

(1) A copy of a memorandum sent to the members of the State Bar Committee to Consider the Uniform Rules of Evidence. This memorandum was prepared because Mr. Ball had advised us that he had called a meeting of his section of the committee and that the Northern Section would be meeting soon. The memorandum summarizes the Commission's work to date on the Uniform Rules.

(2) Memoranda received from Professor Chadbourn on Subdivisions 11, 21, 22, 23, 24, 25, 26, 27(c).

Matters for consideration at the January 24-25 meeting include the following:

(1) Revisions of Subdivisions 1, 2, 3, 4, 5 and 9 of Rule 63 prepared by the Staff pursuant to action taken at the December meeting. These revisions are set forth in the memorandum to the State Bar Committee.

(2) Whether the following Subdivisions of Rule 63 will be approved by the Commission: 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27(c).

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRMj:j

January 6, 1958

Memorandum to State Bar Committee to
Consider Uniform Rules of Evidence.

At its meeting in San Francisco on November 29-30 the Law Revision Commission decided that all action which it takes relating to the Uniform Rules of Evidence will be deemed tentative pending final consideration of all of the Rules after they have been individually considered. Subject to this limitation the Commission has thus far taken the following action relating to the Uniform Rules of Evidence:

1. Approved Rule 62(1) as drafted:

> Rule 62. Definitions. As used in Rule 63 and its exceptions and in the following rules,
> (1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

2. Approved the opening paragraph of Rule 63 as drafted:

> Rule 63. Hearsay Evidence Excluded--Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

3. Drafted the following paragraph to be added to Rule 19:

> As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in 62(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

4. Drafted the following as a substitute for subdivision (1) of Rule 63 as drafted:

(1) When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of

MJN 0016

the matter stated, provided the statement would have been admissible if made by him while testifying and provided further

(a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or

(b) The statement is offered following an attempt to impair his testimony as being recently fabricated and the statement is one made prior to the alleged fabrication and is consistent with his testimony at the hearing, or

(c) The statement concerns a matter as to which the witness has no present recollection.

5. Drafted the following as a substitute for subdivision (2) of Rule 63 as drafted:

(2) To the extent admissible by the statutes of this State:

(a) Affidavits.

(b) Depositions taken in the action in which they are offered.

(c) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

6. Drafted the following as a substitute for subdivision (3) of Rule 63 as drafted:

(3) If the judge finds that the declarant is unavailable as a witness at the hearing and subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action is admissible in the present action when

(a) The testimony is offered against a party who offered it

MJN 0017

in his own behalf on the former occasion or against the successor in interest of such party, or

(b) In a civil action, the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or

(c) In a criminal action, the present defendant was a party to the prior action and had the right and opportunity for cross examination with an interest and motive similar to that which he has in the action in which the testimony is offered; provided, however, that testimony given at a preliminary hearing in the prior action is not admissible.

7. Drafted the following as a substitute for subdivision (4) of Rule 63 as drafted (new language underlined):

(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the declarant is unavailable as a witness, a statement written or otherwise recorded at the time the statement was made narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

8. Drafted the following as a substitute for subdivision (5) of Rule 63 as drafted (new language underlined):

MJN 0018

(5) Dying Declarations. A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant and that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

9. Approved subdivision (7) of Rule 63 as drafted:

(7) Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

10. Approved subdivision (8) of Rule 63 as drafted:

(8) Authorized and Adoptive Admissions. As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

11. Drafted the following as a substitute for subdivision (9) of Rule 63 as drafted (new language underlined):

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) in a civil action one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

MJN 0019

1/24/58

Law Offices of

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January 10, 1958

John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: Committee to Consider Uniform Rules of Evidence

Dear John:

Enclosed a proposed agenda for the meeting of the Southern Section of the above committee on Saturday, January 11, 1958.

I have given the members of the committee approximately 6 weeks to assemble their ideas and arguments.

It would be of great assistance to us if you could be present at our meeting in Los Angeles on February 15, 1958.

I will notify you of the date of the meeting of the Northern Section in San Francisco.

Yours very truly,

/s/ Joseph A. Ball/G

Joseph A. Ball

JAB:gb
Enc.
cc: Jack Hayes

AGENDA FOR MEETING OF THE COMMITTEE

TO CONSIDER UNIFORM RULES OF EVIDENCE,

JANUARY 11, 1958

The State Bar Offices
458 South Spring Street - Suite 440
Los Angeles, California

I. **REQUIRED READING.**

Model Code of Evidence.

Uniform Rules of Evidence.

Reports by Professor James H. Chadbourn to the Law Revision Commission.

Minutes of the Law Revision Commission.

II. **SUGGESTED READING.**

Chadbourn's sources in footnotes.

III. **ASSIGNMENTS FOR REVIEW.**

Ball:	Editorial	South-North
Selvin:	Editorial	North
Duniway:	Editorial	South

IV. **ASSIGNMENTS FOR STUDY:**

Selvin:	Rules 19, 20, 21, 22, 64, 65 and 66.
Barker:	Rule 63, Subdivisions 1, 7, 12, 17, 22 and 27.
Kaus:	Rule 63, Subdivisions 2, 8, 13, 18, 23 and 28.
Mack:	Rule 63, Subdivisions 3, 9, 14, 19, 24 and 29.
Patton:	Rule 63, Subdivisions 4, 5, 10, 15, 20 and 25.
Simpson:	Rule 63, Subdivisions 6, 11, 16, 21, 26 and 30.
Kaus and Mack	Rule 63, Subdivision 31.

MJN 0021

V. PROCEDURE.

(a) Each member shall study and review the assigned topic and recommend committee action. Fourteen (14) copies of study, review and recommendation to be forwarded to chairman in accordance with schedule.

(b) Each member will receive reports from other members through chairman not less than two (2) weeks prior to scheduled meeting.

(c) Oral discussion of scheduled topics at meeting of Southern Section.

(d) Proposed recommendation of Southern Section to be forwarded to Northern Section.

(e) Final recommendation of committee to be forwarded to Board of Governors.

VI. SCHEDULE OF REPORTS.

Rule 63, Subdivisions 1-10	by	February 1, 1958
Rule 63, Subdivisions 11-20	by	March 1, 1958
Rule 63, Subdivisions 21-31	by	March 28, 1958
Rule 19	by	February 1, 1958
Rules 20, 21 and 22	by	March 1, 1958
Rules 64, 65 and 66	by	March 28, 1958

VII. SCHEDULE OF MEETINGS AND TOPICS.

February 15, 1958 (Full day meeting)	Rule 63, Subdivisions 1-10; Rule 19
March 15, 1958 (Full day meeting)	Rule 63, Subdivisions 11-20; Rules 20, 21 & 22
April 12, 1958 (Full day meeting)	Rule 63, Subdivisions 21-31; Rules 64,65 & 66

JAB:gb
1-10-58

MJN 0022

MEETING OF THE SOUTHERN COMMITTEE TO CONSIDER

UNIFORM RULES OF EVIDENCE.

The Southern Section of the committee met at the State Bar offices in the Rowan Building, Los Angeles, California at 9:00 o'clock a.m., on Saturday, January 11th, 1958.

Present:

Joseph A. Ball, Chairman
Long Beach

Stanley A. Barker - Los Angeles
Otto M. Kaus - Los Angeles
H. Pitts Mack - San Diego
Robert H. Patton - Los Angeles

Absent:

J. E. Simpson - Los Angeles
Herman F. Selvin - Los Angeles

The agenda was followed as written except "Assignments For Study". After some discussion, it was decided to reassign the topics for study by grouping them as to subject matter.

The reassignments were as follows:

Selvin: Rules 19, 20, 21, 22, 63-Subdivision (1), 64, 65 and 66.

Barker: Rule 63-Subdivisions 1, 13, 14, 22 and 27.

Kaus: Rule 63-Subdivisions 7, 8, 9, 12, 23, 24, 25, 26 and 31.

Patton: Rules 19 and 63-Subdivisions 4, 5, 10, and 20.

Mack: Rule 63-Subdivisions 2, 3, 15, 16, 17, 18, 19, 28, 29 and 31.

Simpson: Rule 63-Subdivisions 4, 6, 11, 21 and 30.

The committee decided that they would adopt the following schedule for the filing of the reports with the chairman:

MJN 0023

SCHEDULE OF REPORTS

Rule 63, Subdivisions 1-10	by	February 1, 1958
Rule 63, Subdivisions 11-20	by	March 1st, 1958
Rule 19	by	February 1, 1958
Rules 20, 21 and 22	by	March 1st, 1958
Rules 64, 65 and 66	by	March 28, 1958
Rule 63, Subdivisions 20-31	by	March 28, 1958

SCHEDULE OF MEETINGS AND TOPICS

Februafy 15, 1958 (Full day meeting)	Rule 63, Subdivisions 1-10, Rule 19
March 15, 1958 (Full day meeting)	Rule 63, Subdivisions 11-20, Rules 20, 21 and 22.
April 12, 1958 (Full day meeting)	Rule 63, Subdivisions 21-31, Rules 64, 65 and 66.

We probably cannot cover the entire assignment for the first meeting in one day. The committee decided that the reports should be filed on time and if the reports filed by February 1st, 1958 meeting were not considered in full at the February 15th meeting, the consideration of the reports first filed can be continued to another date.

By reason of the importance of the study to the bar, it is necessary that the members of this committee report promptly on the scheduled date. We may be required to express an opinion on changes in the Rules of Evidence before the next legislative meeting. We must keep abreast of the studies of the Law Revision Commission.

At our first meeting we discovered that this is a major project and in the south we need all of the manpower that has been assigned. I would suggest that Mr. Duniway consider enlarging the size of his committee so that he can schedule work in the north as we have scheduled work in the south.

MJN 0024

John McDonough, Executive Secretary of the Law Revision Commission has agreed to be present at the next meeting of the southern section of the committee in Los Angeles.

/s/ Joseph A. Ball
Joseph A. Ball, Chairman

cc: Edwin A. Heafey
Stanley A. Barker
Otto M. Kaus
H. Pitts Mack
J. E. Simpson
Robert H. Patton
Herman F. Selvin
Jack A. Hayes
Benjamin C. Duniway
John McDonough

MJN 0025

March 20-21, 1958

Memorandum No. 9

Subject: Uniform Rules of Evidence

To date the Commission has approved, in either their original form or a revised form, the following:

Subdivision (1) of Rule 62.

The opening paragraph of Rule 63.

Subdivisons (1), (2), (3), (4), (5), (7), (8), (9), (12), (13), (14), (17), (18) and (19) of Rule 63.

Rule 68.

We will send you a copy of this material as approved by the Commission prior to the March meeting.

Consideration of Subdivision (6) of Rule 63 has been deferred pending preparation of a memorandum thereon by Mr. Gustafson.

No final action was taken on Subdivision (10).

Subdivision (11) of Rule 63 was disapproved.

Subdivisions (15) and (16) were disapproved and the Staff was directed to prepare a substitute for them embodying the substance of C.C.P. § 1920. It will <u>not</u> be possible to do this in time for the March meeting.

Consideration of Rule 69 was deferred pending submission of a redraft by Professor Chadbourn.

Material on hearsay received from Professor Chadbourn and not yet considered by the Commission includes memoranda on the following:

Subdivisions 20 through 31 of Rule 63.

Rule 65.

MJN 0026

This material has been sent to you. I suggest that it constitute the subject matter on the Uniform Rules of Evidence for discussion at the March meeting. In addition, the Commission should take final action on Subdivision (10).

I will report orally on meetings of the Northern and Southern subcommittees of the State Bar Committee to Consider the Uniform Rules of Evidence which I have attended.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:j

Date of Meeting: May 16-17, 1958

Date of Memo: May 9, 1958

Memorandum No. 8

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

Professor Chadbourn will be with us on Friday, May 17 for a further discussion of the Uniform Rules of Evidence.

I suggest that we plan to discuss the following:

1. New matter - Professor Chadbourn's memoranda on Rules 20, 21 and 22, Rule 65, and Rule 66. (These memoranda have been sent to you.)

2. Old matter - The following subdivisions of Rule 63:

   31 (We have sent you material received from the State Bar relating to this matter);

   6 (If Mr. Gustafson's memorandum has been received);

   15 and 16 (If the Staff memorandum is completed in time - which is doubtful as of this date)

3. Whether we should not, during the next few months, make completion of our work on Rule 63 and related Rules the first (though not only) order of business on the Uniform Rules of Evidence study. This would necessitate our taking the leadership in discussing and resolving differences of opinion with the State Bar Committee and trying to get action by the Board of Governors so that we would have the State Bar position in mind in taking final action. I will state at the meeting my reasons for believing that this should be done. I will send you shortly, as background material for this discussion, a summary of our current situation, vis-a-vis the two Sections of the State Bar Committee, on the work upon which we have been jointly and severally engaged to date.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:imh

May 14, 1958

SUMMARY OF ACTION TAKEN ON VARIOUS
OF THE UNIFORM RULES OF EVIDENCE
BY LAW REVISION COMMISSION AND
NORTHERN AND SOUTHERN SECTIONS
OF STATE BAR COMMITTEE TO STUDY
UNIFORM RULES OF EVIDENCE.

MJN 0029

Rule 19

1. <u>As proposed</u>:

    <u>Prerequisites of Knowledge and Experience</u>. 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.

2. <u>Action of Commission</u>:

    Has not considered Rule itself. In connection with consideration of opening paragraph of Rule 63, proposed to add following paragraph to Rule 19:

    As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in 62(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

3. <u>Action Northern Section</u>:

    Approved first two sentences. Disapproved last two sentences. Did not consider amendment proposed by Commission.

4. <u>Action Southern Section</u>:

    Considered preliminarily and referred to Messrs. Patton and Selvin for redraft.

MJN 0030

Rule 20

1. As proposed:

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.

2. Action of Commission:

Not yet considered.

3. Action Northern Section:

Found rule acceptable in principle except for inclusion of words "or supporting"; would limit supporting evidence to cases where credibility has been attacked. Referred Rule 20 to Mr. Baker to draft an amendment or a separate rule to cover admissibility of evidence to support the credibility of a witness.

4. Action Southern Section:

Not yet considered.

MJN 0031

Rule 21

1. As proposed:

    Limitations on Evidence of Conviction of Crime 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.

2. Action of Commission:

    Not yet considered.

3. Action Northern Section:

    Proposed following as substitute for first sentence:

    > Evidence of the conviction of a witness of a misdemeanor, or of a felony not involving dishonesty or false statement, shall be inadmissible for the purpose of impairing his credibility.

    Made several suggestions for changes in second sentence; referred to Mr. Baker to draft revision.

4. Action Southern Section:

    Not yet considered.

MJN 0032

Rule 22

1. As proposed:

    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.

2. Action of Commission:

    Not yet considered.

3. Action Northern Section:

    Approved (a) by divided vote.

    Concluded subdivision (b) unclear and referred to Mr. Baker to redraft for clarification.

    Approved subdivision (c) with amendment to insert "reputation for" after "than".

    Approved subdivision (d).

4. Action Southern Section:

    Not yet considered.

MJN 0033

Subdivision (1) Rule 62

1. As proposed:

   Rule 62. Definitions. As used in Rule 63 and its exceptions and in the following rules,

   (1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

2. Action of Commission:

   Approved.

3. Action Northern Section:

   Not yet considered.

4. Action Southern Section:

   Suggested that Rules should contain affirmative statements (1) that a statement not offered to prove the truth of the matter asserted therein is not excluded as hearsay; (2) that evidence of nonassertive conduct is admissible. Messrs. Kaus and Selvin will redraft 62(1).

MJN 0034

Rule 63

1. As proposed:

Hearsay Evidence Excluded--Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

2. Action of Commission:

Approved but in connection therewith recommended following addition to Rule 19:

[Same as one set forth on page entitled "Rule 19"]

3. Action Northern Section:

Approved Rule; did not act upon proposed addition to Rule 19.

4. Action Southern Section:

Approved Rule; rejected Commission's proposed addition to Rule 19.

MJN 0035

Subdivision (1), Rule 63

1. As proposed:

(1) Previous Statements of Persons Present and Subject to Cross Examination. A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

2. Action of Commission:

Proposed substitute, to read:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have been admissible if made by him while testifying and provided further:

(a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
(b) The statement is offered following an attempt to impair his testimony as being recently fabricated and the statement is one made prior to the alleged fabrication and is consistent with his testimony at the hearing, or
(c) The statement concerns a matter as to which the witness has no present recollection.

3. Action Northern Section:

Approved Commission substitute with exception of subdivision (c) thereof, which would redraft to read:

(c) The statement concerns a matter as to which the witness has no present recollection, and the statement is evidenced by a written memorandum which (i) was made by the witness, himself or under his direction,

MJN 0036

(ii) was made at a time when the facts recorded in the memorandum actually occurred or at such other time when the facts recorded in the memorandum were fresh in the witness's memory, (iii) is verified by the witness as having been true and correct when made.

4. Action Southern Section:

Approved Commission's (a); but does not necessarily approve Rule 22.

Approved Commission's (b) with addition after "fabricated" of following: "or when his testimony has been impeached by evidence of a prior inconsistent statement".

Recommended following modification of Northern Section's proposed substitute for Commission's (c):

(c) The statement is written or otherwise mechanically recorded and concerns a matter as to which the witness has no present recollection, and ~~the-statement is-evidenced-by-a-written-memorandum which~~ (i) was made or recorded by the witness himself or under his direction, (ii) was made at a time when the facts recorded ~~in-the-memorandum~~ actually occurred or at such other time when the facts recorded ~~in-the-memorandum~~ were fresh in the witness's memory, (iii) is verified by the witness as having been true and correct when made.

MJN 0037

Subdivision (2), Rule 63

1. As proposed:

(2) Affidavits. Affidavits to the extent admissible by the statutes of this state;

2. Action of Commission:

Proposed following substitute:

(2) To the extent otherwise admissible by the statutes of this State:
(a) Affidavits.
(b) Depositions.
(c) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

3. Action Northern Section:

(a) Approved as proposed; disapproved Commission substitute.

(b) Proposed new subdivision 2.1:

To the extent admissible by the statutes of this State:

(a) Depositions taken in the action in which they are offered.

(b) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

4. Action Southern Section:

Concurred in action of Northern Section.

MJN 0038

Subdivision (3), Rule 63

1. As proposed:

(3) Depositions and Prior Testimony. Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

2. Action of Commission:

Proposed following as substitute (part of substance having been incorporated in Commission substitute for Subdivision (2):

(3) If the judge finds that the declarant is unavailable as a witness at the hearing and subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action is admissible in the present action when

(a) The testimony is offered against a party who offered it in his own behalf on the former occasion or against the successor in interest of such party, or

(b) In a civil action, the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or

MJN 0039

(c) In a criminal action, the present defendant was a party to the prior action and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action in which the testimony is offered; provided, however, that testimony given at a preliminary hearing in the prior action is not admissible.

3. Action Northern Section:

Proposed following as substitute (part of substance having been incorporated in Subdivision 2.1 proposed by Section):

(3) Depositions and Prior Testimony in Another Action. Subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action, providing the judge finds that the declarant is unavailable as a witness at the hearing, and when:

(i) such testimony is offered against a party who offered it on his behalf in the other action, or against the successor in interest of such party, or

(ii) in a civil action, the issue is such that the adverse party in the other action had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or

(iii) in a criminal action, the present defendant was a party to the other action and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action in which the testimony is offered. However, testimony given at a preliminary hearing in the other action is not admissible.

4. Action Southern Section:

Approved Northern Section substitute with modifications as shown:

MJN 0040

(3) Depositions and Prior Testimony in Another Action. Subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another ~~action~~ judicial proceeding, or in a deposition taken in compliance with law in another ~~action~~ judicial proceeding, provided the judge finds that the declarant is unavailable as a witness at the hearing, and when:

(i) such testimony is offered against a party who offered it in evidence on his own behalf in the other ~~action~~ proceeding or against the successor in interest of such party but only to the same extent and for the same purpose for which it was offered in the other proceeding, or

(ii) in a civil action, the issue is such that the adverse party in the other ~~action~~ proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the ~~action~~ proceeding in which the testimony is offered, or

(iii) in a criminal ~~action~~ proceeding the present defendant was a party to the other ~~action~~ proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the ~~action~~ proceeding in which the testimony is offered; however, testimony given at a preliminary hearing in the other ~~action~~ proceeding is not admissible.

MJN 0041

Subdivision (4), Rule 63

1. As proposed:

   See "Action of Commission".

2. Action of Commission:

   Approved as proposed with modifications as shown:

   (4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the judge finds that the declarant is unavailable as a witness, a statement written or otherwise recorded at the time the statement was made narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

3. Action Northern Section:

   Approved (a) with two modifications: (1) add "spontaneously" after "made"; (2) admit only if witness is unavailable.

   Approved (b) if limited to cases where witness is unavailable.

   Disapproved (c).

4. Action Southern Section:

   Not yet considered.

MJN 0042

Subdivision (5), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(5) Dying Declarations. A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant and that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

3. Action Northern Section:

Concurred in Commission action.

4. Action Southern Section:

Not yet considered.

MJN 0043

Subdivision (7), Rule 63

1. As proposed:

(7) Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved tentatively but inclines to view that "and if the latter, who was acting in such representative capacity in making the statement" should be stricken. Mr. Erskine to make further report on desirability of including this language.

4. Action Southern Section:

Approved.

MJN 0044

Subdivision (8), Rule 63

1. As proposed:

(8) Authorized and Adoptive Admissions. As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved.

4. Action Southern Section:

Re 8(a): Approved as amended [No record of amendment presently available.]

MJN 0045

Subdivision (9), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) in a civil action one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

3. Action Northern Section:

Approved (a).

Disapproved (b) and proposed, in lieu thereof, the following as subdivision 9.1:

9.1 After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.

Approved (c) as amended by Commission.

4. Action Southern Section:

Approved (a).

Deferred final action on (b).

Approved (c) as amended by Commission.

MJN 0046

Subdivision (10), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(10) Declarations against Interest. Subject to the limitations of exception (6), a statement made by a declarant who is unavailable as a witness which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

3. Action Northern Section:

By divided vote concurred in Commission action except:

(1) would eliminate "or created such risk of making him an object of hatred, ridicule or social disapproval in the community"

(2) would require declarant to have personal knowledge.

4. Action Southern Section:

Not yet considered.

MJN 0047

Subdivision (11), Rule 63

1. As proposed:

    (11) Voter's Statements. A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

2. Action of Commission:

    Disapproved.

3. Action Northern Section:

    Not yet considered.

4. Action Southern Section:

    Not yet considered.

MJN 0048

Subdivision (12), Rule 63

1. As proposed:

(12) Statements of Physical or Mental Condition of Declarant. Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view of treatment, and relevant to an issue of declarant's bodily condition;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved (a).

Approved (b) if limited to unavailable witness; recommends there be separate rule re available witness which would permit such statements to come in only as foundation for opinion testimony of doctor and not as substantive evidence and which would not incorporate a bad faith limitation.

4. Action Southern Section:

Not yet considered.

MJN 0049

Subdivision (13), Rule 63

1. <u>As proposed</u>:

(13) <u>Business Entries and the Like</u>. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

2. <u>Action of Commission</u>:

Approved.

3. <u>Action Northern Section</u>:

Approved.

4. <u>Action Southern Section</u>:

Not yet considered.

MJN 0050

Subdivision (14), Rule 63

1. <u>As proposed</u>:

See "Action of Commission".

2. <u>Action of Commission</u>:

Approved as proposed with modification as shown:

(14) <u>Absence of Entry in Business Records</u>. Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, <u>and that the memoranda and the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness</u>;

3. <u>Action Northern Section</u>:

Concurred in Commission action.

4. <u>Action Southern Section</u>:

Not yet considered.

MJN 0051

Subdivision (15), Rule 63

1. As proposed:

(15) Reports and Findings of Public Officials. Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions 15 and 16 which will embody the substance of C.C.P. §1920.

3. Action Northern Section:

Disapproved; will consider Commission redraft.

4. Action Southern Section:

Not yet considered.

MJN 0052

Subdivision (16), Rule 63

1. As proposed:

(16) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions (15) and (16) which will embody the substance of C.C.P. §1920.

3. Action Northern Section:

Approved tentatively; will consider new subdivision to be prepared by Commission.

4. Action Southern Section:

Not yet considered.

MJN 0053

Subdivision (17), Rule 63

1. <u>As proposed</u>:

(17) <u>Content of Official Record</u>. Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

2. <u>Action of Commission</u>:

Approved.

3. <u>Action Northern Section</u>:

Approved on understanding that Rule 68 will be amended as proposed by Professor Chadbourn (Re latter, believes amendment to Rule 68(d) should read "and is not an office of the United States Government".)

4. <u>Action Southern Section</u>:

Not yet considered.

MJN 0054

Subdivision (18), Rule 63

1. As proposed:

(18) Certificate of Marriage. Subject to Rule 64 certificates that the maker thereof performed a marriage ceremony to prove the truth of the recitals thereof, if the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;

2. Action of Commission:

Approved.

3. Action Northern Section:

Proposes following as substitute:

(18) Certificate of Marriage. Subject to Rules 64 and 67, a certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) the maker of the certificate was, at the time and place certified as the time and place of the marriage, authorized by law to perform marriage ceremonies, and

(b) the certificate was issued at that time or within a reasonable time thereafter.

4. Action Southern Section:

Not yet considered.

MJN 0055

Subdivision (19), Rule 63

1. As proposed:

(19) Records of Documents Affecting an Interest in Property. Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved.

4. Action Southern Section:

Not yet considered.

MJN 0056

Subdivision (20), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(20) Judgment of Previous Conviction. Evidence of a final judgment adjudging a person guilty of a felony to prove, against such person, any fact essential to sustain the judgment;

3. Action Northern Section:

Disapproved.

4. Action Southern Section:

Not yet considered.

MJN 0057

1. As proposed:

(21) Judgment against Persons Entitled to Indemnity. To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

2. Action of Commission:

Approved (as making admissible; not as creating presumption).

3. Action Northern Section:

Not yet considered.

4. Action Southern Section:

Not yet considered.

MJN 0058

Subdivision (22), Rule 63

1. As proposed:

(22) Judgment Determining Public Interest in Land. To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

2. Action of Commission:

Approved (as making admissible; not as creating presumption).

3. Action Northern Section:

Approved.

4. Action Southern Section:

Not yet considered.

MJN 0059

Subdivision (23), Rule 63

1. As proposed:

(23) Statement Concerning One's Own Family History. A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved.

4. Action Southern Section:

Not yet considered.

MJN 0060

Subdivision (24), Rule 63

1. As proposed:

(24) Statement Concerning Family History of Another. A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (b) finds that the declarant is unavailable as a witness;

2. Action of Commission:

Approved with following punctuation changes in clause (a) to make clear that clause beginning "and made the statement as upon" does not apply to a declarant related by blood or marriage: (1) inserted comma after "marriage"; (2) deleted comma after "declared".

3. Action Northern Section:

Approved (without consideration of punctuation changes proposed by Commission).

4. Action Southern Section:

Not yet considered.

MJN 0061

Subdivision (25), Rule 63

1. As proposed:

(25) Statement Concerning Family History Based on Statement of Another Declarant. A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

2. Action of Commission:

Approved.

3. Action Northern Section:

Disapproved.

4. Action Southern Section:

Not yet considered.

MJN 0062

Subdivision (26), Rule 63

1. As proposed:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved on understanding relates to statements of witness on stand, not statements of out-of-court declarant.

4. Action Southern Section:

Not yet considered.

MJN 0063

Subdivision (27), Rule 63

1. As proposed:

(27) Reputation--Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

2. Action of Commission:

Approved.

3. Action Northern Section:

(a) and (b) not yet considered.

Approved (c) with elimination of "or of his personal status or condition".

4. Action Southern Section:

Not yet considered.

MJN 0064

Subdivision (28), Rule 63

1. <u>As proposed</u>:

    (28) <u>Reputation as to Character</u>. If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

2. <u>Action of Commission</u>:

    Approved with addition of "a person's character or" after "If".

3. <u>Action Northern Section</u>:

    Approved as amended by Commission and with further amendment to add "general" before "reputation".

4. <u>Action Southern Section</u>:

    Not yet considered.

MJN 0065

Subdivision (29), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with amendment as shown:

(29) Recitals in Documents Affecting Property. Evidence of a statement relevant to a material matter: (a) Contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement; or (b) Contained in a document or writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter provided the writer could have been properly allowed to make such statement as a witness;

3. Action Northern Section:

Approved objectives; believes should be made subject to Rule 64 and that should be amended to include the ancient document rule as recommended by Commission. Final action postponed pending receipt of Commission redraft [not before Section when action taken].

4. Action Southern Section:

Not yet considered.

MJN 0066

Subdivision (30), Rule 63

1. As proposed:

   (30) Commercial Lists and the Like. Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

2. Action of Commission:

   Approved.

3. Action Northern Section:

   Disapproved.

4. Action Southern Section:

   Not yet considered.

MJN 0067

Subdivision (31), Rule 63

1. <u>As proposed</u>:

(31) <u>Learned Treatises</u>. A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

2. <u>Action of Commission</u>:

Discussed but did not take final action.

3. <u>Action Northern Section</u>:

Disapproved.

4. <u>Action Southern Section</u>:

Not yet considered.

MJN 0068

Rule 68

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

RULE 68. Authentication of Copies of Records. A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state or is an office of the United States government whether within or without this state, and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, or is not an office of the United States government, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular

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agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

3. Action Northern Section:

Concurred in Commission action except would make first word in underlined part of (d) "and" instead of "or".

4. Action Southern Section:

Not yet considered.

MJN 0070

Date of Meeting: June 13-14, 1958

Date of Memo: June 6, 1958

Memorandum No. 7

Subject: Study # 34(L) Uniform Rules of Evidence

Attached is a copy of Mr. Gustafson's Memorandum on subdivision 6 of Rule 63.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Date of Meeting: June 13-14, 1958

Date of Memo: June 6, 1958

Memorandum submitted by Mr. Roy A. Gustafson

Subject: Rule 63(6) of the Uniform Rules of Evidence.

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:...

(6) In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;...

Professor Chadbourn recommends adoption of the Rule, but suggests that the word "reasonably" in the last phrase be stricken.

I propose an entirely different solution. I would omit (6) entirely and incorporate such of its features as are desirable as a proviso to (7). The latter subdivision would then read as follows:

(7) As against himself a statement by a person who is a party to the action in his individual or a representative

MJN 0072

capacity and if the latter, who was acting in such representative capacity in making the statement; provided, however, that if the statement was made by the defendant in a criminal proceeding, it shall not be admitted if the judge finds, pursuant to the procedures set forth in Rule 8, that the statement was made under circumstances likely to cause the defendant to make a false statement;

Rule 63 bars all hearsay except as permitted by the subdivisions of that Rule. It had been my understanding in going through these Rules that evidence admissible under any subdivision could come in notwithstanding that it does not meet the requirements of some other subdivision. If this is true, (6) serves no purpose whatever. Any statement admissible under (6) is necessarily an admission of a party admissible under (7). (7) has no limitations excluding admissions "under compulsion" or "involuntarily" made. That my understanding is correct seems to be borne out by (10) wherein it is provided that declarations against interest are admissible "subject to the limitations of exceptions (6).

Professor Chadbourn points out that (7) is codified in California by C.C.P. § 1870(2). He further points out that C.C.P. § 1870(2) "is a general statutory declaration that admissions are admissible. The special rules developed herein respecting confessions and mere admissions are judicially-created exceptions to or qualifications of Section 1870(2)." We are dealing then in two separate subdivisions with exactly the same subject matter. I think this is wholly unnecessary and that it would be in the interests of simplification and clarity to deal with the subject matter in one subdivision of Rule 63.

MJN 0073

I have several objections to (6), but before stating them I should like to state the matters with which I am in agreement with (6) and Professor Chadbourn.

I agree with Professor Chadbourn that (6) has no effect on the corpus delicti doctrine requiring defendant's admissions and confessions to be corroborated by independent evidence. Neither does my proposal.

I agree with (6) and Professor Chadbourn that there should be no "distinction between involuntary confessions and involuntary admissions short of confessions so far as screening for admissibility is concerned." Elsewhere I have noted one situation in particular where this distinction now causes confusion. (Gustafson, Have We Created a Paradise for Criminals? 30 So. Calif. L. Rev. 1, 29 [1956]) My proposal likewise eliminates the distinction between a confession and an admission.

I agree with Rule 8, taken together with Rule 63(6), which makes admissibility of evidence solely a function of the trial judge and not the jury. Professor Chadbourn's views coincide with mine as elsewhere expressed. (Gustafson, supra at 7.) My proposed addition to (7) is in accord. [It should here be pointed out that Rule 8 should be amended. The word "confession" should be eliminated and the words "statement of a defendant in a criminal case" or some such language should be substituted.]

I object to (6) and to Professor Chadbourn's approval insofar as it attempts to "spell out" the reasons for excluding a defendant's statement.

MJN 0074

(6) requires a showing that the defendant "was conscious and was capable of understanding what he said and did." Professor Chadbourn says that "California is in accord." There is no need to codify this particular Rule and perhaps by so doing exclude some other instance where the statement should be equally inadmissible.

(6) requires that the statement be excluded if the defendant was "induced to make the statement under compulsion". Professor Chadbourn admits that this new phrase is "a flexible concept". He likens it, however, to the present California Rule requiring a "free and voluntary" confession. I think they are different concepts. It seems to me that (6) could be interpreted so as to preclude a statement by the defendant when he was a witness in a civil case or before the grand jury or before a coroner's inquest at a time when no criminal charges were pending against him. He may have been subpoenaed to appear in such a proceeding and in the course of being questioned, he may have made answers which would be relevant to the criminal proceeding later instituted. It is certainly arguable that he made those statements "under compulsion". I see no valid reason for injecting this possible confusion in the field of law.

(6) excludes a defendant's statement if he was "induced to make the statement...by infliction or threats of infliction of suffering upon him or another". Professor Chadbourn says that this "humane restriction is, of course, likewise applicable under California law."

(6) excludes a defendant's statement if the defendant was

MJN 0075

"induced to make the statement...by prolonged interrogation under such circumstances as to render the statement involuntary." I object first of all to the use of the word "voluntary". A statement consists of words and it is impossible to force words from a person in the sense that a person can be physically forced, for example, to lie down. I think that a "coerced" statement is more likely what was intended and this is the word which has been used in more modern cases. More fundamental, I object to singling out "prolonged interrogation" as a ground for excluding statements. As Professor Chadbourn admits, California cases have emphasized the point that protracted questioning, in and of itself, is not alone ground for exclusion. While it is true that (6) bars prolonged interrogation only "under such circumstances as to render the statement involuntary", I am afraid that the emphasis will be on the prolonged interrogation. California courts recognize that "[q]uestioning serves a social purpose in solving crime." (People v. Thompson 133 Cal. App.2d 4 [1955].) The great Mr. Justice Jackson pointed out that decisions excluding statements obtained by prolonged questioning mean that "the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested." (Watts v. Indiana 338 U.S. 49 [1949].) He further states: "The suspect at first perhaps makes an effort to exculpate himself by alibis or other statements. These are verified, found false, and he is then confronted with his falsehood.... The duration of an interrogation may well depend on the temperament, shrewdness and

MJN 0076

cunning of the accused and the competence of the examiner.... [I]f interrogation is permissible at all, there are sound reasons for prolonging it."

(6) excludes a defendant's statement if he was induced to make the statement "by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same." Again, this is present California law.

My principal objection to (6) is that except for the last ground of exclusion, the probable falsity of the statement is not a requisite for exclusion of the statement. This is a startling change from California law and is not noted by Professor Chadbourn in the text, but only in footnote 3. I think this is a wholly indefensible and unnecessary departure from present law.

I cling to the fast disappearing notion that the principal object of a trial is to ascertain the truth. Consequently, I object to the exclusion of truthful evidence unless there are strong policy reasons which demand that the evidence be excluded. With respect to statements of a defendant, the only strong policy reason for excluding them is if they were obtained unfairly. The United States Constitution requires exclusion in that situation. Rochin v. California 342 U.S. 165 (1951), says: "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are

MJN 0077

inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." As Professor Paulsen says (The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411, 429 [1954]): "[A] conviction will be reversed when the confession was obtained by methods which themselves offend due process; here no inquiry into probable falsity is relevant." As I understand the Uniform Rules of Evidence, the drafters did not purport to express in the Rules themselves the various constitutional limitations to which the Rules are subject. The entire body of Rules must be read in the light that they are subject to existing constitutional requirements. Since no statement of the defendant obtained by a method which is constitutionally obnoxious may be admitted in any event, why try to spell out detailed situations in the Rules?

I believe that we should be attempting to state reasons, other than constitutional ones, for the exclusion of evidence. It thus seems to me that untrustworthiness of a statement by the defendant should be the only reason to exclude it. My proposal embodies that concept. The California law to date, I believe, excludes statements by defendants only when made under such circumstances that they are likely to be untrue. In fact, even a statement likely to be untrue will not be held to have been erroneously admitted if the truth of the statement is actually corroborated by other evidence. The supreme court in People v. Castello 194 Cal. 594 (1924), said that "where physical facts and circumstances...corroborate [involuntary]

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confessions of guilt the reason of the rule which would otherwise exclude involuntary confessions to this extent ceases to exist." As late as People v. Burwell 44 Cal.2d 16 (1955), the supreme court of California was unaware that there is any other ground for excluding statements of a defendant: "The test in determining whether statements amounting to a confession may be properly admitted in evidence without a denial of fundamental rights appears, by the latest expression of the [United States] Supreme Court, to be one of trustworthiness."

I repeat that my proposal would exclude all untrustworthy statements without the vice of attempting to specify in detail the circumstances which render a statement untrustworthy and without the vice of excluding trustworthy statements obtained "by prolonged interrogation" or other means which do not "offend the community's sense of fair play and decency." Two Rules of exclusion (statements likely to be false because of the circumstances under which made and statements obtained by methods constitutionally obnoxious) are enough. The added hodgepodge in (6) does nothing but create confusion.

Dated: June 3, 1958

ROY A. GUSTAFSON

MJN 0079

Date of Meeting: September 5-6, 1958

Date of Memo: August 20, 1958

Memorandum No. 5

Subject: Uniform Rules of Evidence

At the September meeting the Law Revision Commission should give consideration to the following Rules, and Subdivisions thereof, of the Uniform Rules of Evidence as to which the Commission has not taken a decision by a vote of five or more members, either as an original proposition (these are indicated by an asterisk) or since receiving the report of the State Bar Committee reporting that the Committee had taken a different view than that originally taken by the Commission:

Rule 62*

Rule 63, Subdivisions 6
7
9
10
15*) See staff report
16*) enclosed herewith
20
27
31*

Rule 64*

You have memoranda from Professor Chadbourn on all of the items listed above except Rules 62 and 64. The Commission has approved Subdivision (1) of Rule 62 which was analyzed in Professor Chadbourn's Memorandum on Rule 63.

MJN 0080

Subdivision (7) is commented on briefly in footnote 11 of his Memorandum on Subdivisions (2) and (3). Professor Chadbourn will be prepared to comment orally on these and other aspects of Rule 62 at the September meeting. No memorandum on Rule 64 appears to be necessary.

Copies of memoranda prepared by members of the State Bar Committee on various of the items listed above will be sent to you prior to the meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

P.S. I enclose also a copy of Memorandum prepared by Professor Chadbourn relating to changes in the Code of Civil Procedure which would be required if a separate Bill on the hearsay portions of the Uniform Rules of Evidence were to be introduced at the 1959 Session.

August 21, 1958

Memorandum submitted by Professor James H. Chadbourn

This Memorandum is a partial, preliminary investigation which seeks to discover some of the present code sections that would require repeal or modification in connection with the enactment of a bill based upon the hearsay provisions of the Uniform Rules of Evidence. The investigation is incomplete because I have found time thus far to consider only the relevant provisions of the Code of Civil Procedure but probably most of the affected provisions will be found there (Of course, the other codes and statutes must be considered before the investigation is complete) The investigation is preliminary not only because many of my conclusions as to particular code sections are extremely tentative but also because at this point there is doubt in some instances as to precisely what the provisions of the bill would be.

Part IV of the Code of Civil Procedure is entitled "Evidence." Hereinafter there is a reference to each of the sections which together constitute Part IV and there is an indication either of "no change" or of suggested repeal or amendment. For the most part the sections are noticed in the order in which they appear in Part IV.Where a section is reasonably short it is usually quoted verbatim; where not, its subject matter is indicated.

MJN 0082

> § 1823. "Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."

COMMENT: URE Rule 1 (1) defines "Evidence" as follows:

> " 'Evidence' is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay."

URE 63 uses the term "evidence" in referring to "evidence of a statement." It seems to me that the expression "evidence of a statement" will carry the same meaning under either the Code of Civil Procedure or the URE definition. My opinion is, therefore, that § 1823 should be left intact in enacting a Hearsay Bill.

> § 1824. "Proof is the effect of evidence, the establishment of a fact by evidence."

COMMENT: URE Rule 1 (3) defines "proof" as follows:

> " 'Proof' is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or nonexistence of such fact."

Rule 63 uses the expression "statement . . . offered to *prove* the truth of the matter stated . . ." [Italics added.] It seems to me that the expression "offered to prove" will carry the same meaning under either the Code of Civil Procedure or the URE definition. My opinion is, therefore, that § 1824 should be left intact in enacting a Hearsay Bill.

MJN 0083

§ 1825. Definition of the law of evidence.

COMMENT: No change.

§ 1826. " The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."

COMMENT: No change.

§ 1827. "There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses."

COMMENT: No change.

§ 1828. "There are several degrees of evidence:

1. Primary and secondary.
2. Direct and indirect.
3. Prima facie, partial, satisfactory, indispensable and conclusive."

COMMENT: No change.

§ 1829. "Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents."

COMMENT: No change.

§ 1830. "Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents."

COMMENT: No change.

§ 1831. "Direct evidence is that which proves the

fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct."

COMMENT: No change.

§ 1832. "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred."

COMMENT: No change.

§ 1833. "Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is prima facie evidence of a record, but it may afterwards be rejected upon proof that there is no such record."

COMMENT: No change.

§ 1834. "Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute."

COMMENT: No change.

§ 1836. "Indispensable evidence is that without which a particular fact cannot be proved."

COMMENT: No change.

MJN 0085

§ 1837. "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it."

COMMENT: Under URE 63 (20) a judgment of conviction of felony, (e.g., felony drunk driving) is admissible as evidence against the convicted party in a civil action for damages. However, the judgment is not conclusive and the record therefore can be contradicted. Thus 63 (20) would be inconsistent with the illustrative second sentence of § 1837. However, since 63(20) would probably not be in our Hearsay Bill, the point is probably moot.

§ 1838. "Cumulative evidence is additional evidence of the same character, to the same point."

COMMENT: No change.

§ 1839. "Corroborative evidence is additional evidence of a different character, to the same point."

COMMENT: No change.

§ 1844. "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

COMMENT: No change.

§ 1845. "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."

MJN 0086

COMMENT: No change.

§ 1846. "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 examinations of all the parties, if they choose to attend and examine."

COMMENT: No change.

§ 1847. "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."

COMMENT: No change.

§ 1848. "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another."

§ 1849. "Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former."

COMMENT: Suppose A deeds Blackacre to B. Later B declares that he had agreed with A that the deed should operate as a mortgage. Still later B deeds the property to C. A now sues C to redeem the property. A wishes to prove B's declaration. B is available. Under § 1849 the evidence is admissible. Under Rule 63 (10) as originally drafted the evidence would be admissible. However,

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under that rule as amended by the Commission to require that declarant be unavailable the evidence would be inadmissible. I think the rule of § 1849 is sound and recommend it be retained. In order to retain it, however, we would either have to include it in our Hearsay Bill as a specific exception or include in our Bill a general exception comparable to our exception for affidavits, i.e., an exception for any statement made admissible by any other law of this State. I like the latter alternative. This would serve to continue in operation any present hearsay exception which otherwise would be repealed by our Hearsay Bill, such as, for example: declarations of an available declarant with whom a party is "in privity" (declarant and party joint owners or joint obligors.) See infra under § 1870 (5).

> § 1850. "Where also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of the fact, such declaration, act, or omission is evidence, as part of the transaction."

COMMENT: This, it seems, is the 19th Century version of the so-called Res Gestae doctrine. It should be regarded as superseded by URE Rule 63 (4) and should be repealed.

> § 1851. "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties."

COMMENT: Superseded by 63 (9) (c). Should be repealed.

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§ 1852. "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible."

COMMENT: Superseded by URE Pedigree Rules - 63 (23) - (27). Should be repealed.

§ 1853. "The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

COMMENT: Superseded by 63 (10). Should be repealed.

§ 1854. "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

COMMENT: This is involved in the Bar Committee's study of the Patton proposal to amend Rule 65 to make all of a declarant's hearsay statements relative to a matter admissible when any of such statements of his have been received. It seems, therefore, we must suspend judgment on the question of the extent, if any, of modification of this section.

§ 1855. "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

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1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.
2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
3. When the original is a record or other document in the custody of a public officer.
4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute.
5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents."

COMMENT: This section should stand as is. See comment under § 1937.

§ 1855a. "When, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; (b) any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of title, to real estate whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstracts and notes, or either,

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> taken from such records in the preparation and upkeeping of its, or his, plant in the ordinary course of its business, the same may, without further proof, be admitted in evidence for the purpose aforesaid. No proof of the loss of the original document or instrument shall be required other than the fact that the same is not known to the party desiring to prove its contents to be in existence; provided, nevertheless, that any party so desiring to use said evidence shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof."

COMMENT: The destruction or loss of a document excuses non-production of the document as proof of its terms and lays a foundation for secondary evidence under both C.C.P. § 1855 and URE Rule 70. If, however, such secondary evidence is hearsay e.g., a certificate or an affidavit (cf. viva voce testimony of a witness who testifies from present memory as to the terms of the document,) we must find some exception to the hearsay rule to make it admissible. When the hearsay is in the form of a purported certificate, i.e., a certified copy by the custodian of the public document, the evidence (tho hearsay) is admissible under Rule 63 (17) and its C.C.P. counterparts. § 1855a, however, deals with a special and different kind of hearsay, viz, the abstracts therein specified. These abstracts would not be made admissible by 63 (17). Possibly they would be admissible under 63 (13). I recommend leaving § 1855a intact in order to

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be sure that the method of proof therein provided for continues in force. The new general exception to Rule 63 which I recommend under §§ 1848 - 1849 would, if added to Rule 63, operate here to make sure that § 1855a is not repealed.

§ 1855b provides for proceedings to record a copy of a lost or defaced map. No hearsay problems. No change.

§ 1856. Parol Evidence Rule. No hearsay problems. No change.

§§ 1857 - 1866. Canons of construction. No hearsay problems. No change.

§§ 1867 - 1869. Immaterial allegations need not be proved. Evidence must be relevant and material. A party must prove his affirmative allegations. No hearsay problems. No change.

> § 1870. "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 1. The precise fact in dispute;
> 2. The act, declaration, or omission of a party, as evidence against such party;
> 3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;
> 4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;

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5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;
6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;
7. The act, declaration, or omission forming part of a transaction, as explained in Section 1850;
8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;
9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;
10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;
11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;
12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;
13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;
14. The contents of a writing, when oral evidence thereof is admissible;
15. Any other facts from which the facts in issue are presumed or are logically inferable;
16. Such facts as serve to show the credibility of a witness, as explained in Section 1847."

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COMMENT:

§ 1870 (1). No change.

§ 1870 (2). Superseded by 63 (7). Repeal. Note: (7) refers only to "statement." On the other hand

§ 1870 (2) refers to "act, declaration or omission." However, under 62 (1) "statement" includes assertive acts or conduct. Under 63 only statements are hearsay. Thus non-assertive acts or omissions are admissible as non-hearsay. Thus 62 (1) plus 63 plus 63 (7) would cover the area of "act, declaration or omission" of a party now embraced by § 1870 (2).

§ 1870 (3). Superseded by 63 (8) (b). Repeal.

§ 1870 (4). Clause one superseded by 63 (23); clause two superseded by 63 (10); clause three superseded by 63 (5). Repeal § 1870 (4) in toto.

§ 1870 (5) first sentence. Superseded by 63 (8) (a) and (9) (a). Repeal.

§ 1870 (5) second sentence. 63 (10) as originally drafted would have made admissible against a party the declaration of a person jointly interested with the party provided such declaration was against the interest of the declarant (as usually it would be.) Such declaration would be admissible even though the declarant is available. *I.e.*, 63 (10) in its original form would have covered most of the ground embraced by § 1870 (5) second sentence.

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63 (10) as amended by the Commission to require the unavailability of the declarant would not, however, cover, as 1870 (5) now does, declarations of an available declarant. I recommend retaining the present rule by the device of including the new general exception to Rule 63 discussed under §§ 1848 - 1849.

§ 1870 (6). Superseded by 63 (9) (b). Repeal.

§ 1870 (7). Superseded by 63 (4) (b). Repeal

§ 1870 (8). Not superseded by 63 (2) as amended by Commission. But should not § 1870 (8) be amended to embody the URE version of unavailability stated in URE 62 (7) ?

§ 1870 (9). No hearsay problem. No change.

§ 1870 (10). No hearsay problem. No change.

§ 1870 (11). Superseded by 63 (27). Repeal.

§ 1870 (12). No hearsay problem. No change.

§ 1870 (13). Superseded by 63 (26). Repeal.

§ 1870 (14). Leave intact. See comment under §§ 1855 and 1937.

§ 1870 (15) (16). No hearsay problems. No change.

§§ 1871 - 1872. Expert witnesses. No hearsay problems. No change.

§ 1875. Judicial Notice. No hearsay problems. Leave intact.

> § 1878. "A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit."

COMMENT: Under this definition if a dying declaration made under oath is admitted the decedent is a "witness." So, too, a deponent whose statement is received is a "witness." Likewise a person who testifies on a former occasion and whose testimony then is admitted now is probably a "witness" (i.e., so to speak, a former witness is a present witness.) This definition and concept of witness seems to include not only a person whose sworn statement at the hearing is received but also any person whose pre-trial sworn statement is now received. Under URE usage persons of the former class are usually referred to as witnesses (e.g., Rule 20); those of the latter class are usually referred to as declarants (e.g., Rule 65) and such persons are called declarants notwithstanding the fact that their declarations were under oath (as in 63 (3).) There is thus the possibility of semantic confusion if we retain § 1878. For example: 63 (3) dealing with testimony in another action and depositions taken in another action (thus covering sworn statements) contains the expression "if the declarant is unavailable as a witness." Under the § 1878 definition of witness "declarant" in this contest would be a "witness" and the quoted expression would mean if the witness is unavailable as a witness.

Recommendation: Repeal § 1878.

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§§ 1879 - 1880. Competency of witnesses. No hearsay problems. No change.

§ 1881. Privileges. No hearsay problems. No change.

§§ 1883 - 1884. Judge as witness. Juror as witness. Interpreter as witness. No hearsay problems. No change

§ 1887. "Writings are of two kinds:
1. Public; and,
2. Private."

§ 1888. "Public writings are:
1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country;
2. Public records, kept in this State, of private writings."

§ 1889. All other writings are private."

COMMENT: URE rule 1 (13) defines "Writing" as follows:

" 'Writing' means handwriting, typewriting, printing, photostating, photographing and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."

Various of the URE hearsay exceptions refer to writings using the term of course in the enlarged sense of Rule 1 (13) (e.g., 63 (13) & (17).) Presumably one of the features of our Hearsay Bill will be the 1 (13) definition of writing. We have, however, not yet faced up to the problem of whether we want to define writing so broadly for all purposes. For example, we have not

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yet considered whether we want to regard writing so broadly for purposes of the Best Evidence Rule (§ 1855; URE Rule 70.) I see no reason, however, why we could not propose the 1 (13) definition as the definition for the purpose and only for the purpose of the Hearsay Bill. I do not think that this would conflict with §§ 1887 - 1889 and believe therefore that these sections could be left intact.

> § 1892. "Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute."

COMMENT: No hearsay problems. No change.

> § 1893. "Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

COMMENT: Last clause superseded by 63 (17). Repeal last clause.

> § 1894. "Public writings are divided into four classes:
> 1. Laws;
> 2. Judicial records;
> 3. Other official documents;
> 4. Public records, kept in this State, of private writings."

COMMENT: No hearsay problems. No change.

§§ 1895 - 1899. Definitions of various kinds of laws.

No hearsay problems. No change.

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§ 1901. See infra Public Records.

§ 1903. Certain recitals in statutes conclusive. No hearsay problems. No change.

§ 1904. Judicial record defined. No hearsay problems. No change.

§ 1905. See infra Public Records.

§ 1906. See infra Public Records.

§ 1907. See infra Public Records.

§§ 1908 - 1917. Various provisions in re res judicata. No hearsay problems. No change.

Public Records (§ 1893, second clause, § 1901 (as amended 1957), § 1905, § 1906, § 1907, § 1918, § 1919, § 1921, § 1922, § 1923, § 1924.)

COMMENT: All of these sections deal with proof of official records by certified copy, In my opinion they are all superseded by 63 (17), 64 and 68. I recommend therefore that all of these sections be repealed.

§§ 1919a - 1919b.

COMMENT: These sections set up an elaborate system for proof by certified copy of the contents of church records. Rule 63 (17) does not seem to apply because church records are not "official" records and 63 (17) applies to proof by certified copy only of

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official records.

I think, therefore, that 1919a and b gives us a means of proof not supplied by the URE and that these sections should be retained by adopting my proposed new exception to 63. See under §§ 1848 - 1849.

> § 1920. "Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein."

> § 1926. "An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry."

COMMENT: Whether these should be repealed or modified and if the latter, how modified, depends upon the as yet unresolved question of what will be our Exceptions (15) and (16) in our Hearsay Bill.

> § 1920a. "Photographic copies of the records of the Department of Motor Vehicles when certified by the department shall be admitted in evidence with the same force and effect as the original records."

COMMENT: A "photographic copy" described in § 1920a would under 63 (17) and 1 (13) be "a writing purporting to be a copy of an official record." Rules 1 (13), 63 (17), 64 and 68 therefore seem to supersede § 1920a and it should be repealed.

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§ 1920b. "A print, whether enlarged or not, from any photographic film, including any photographic plate, microphotographic film, or photostatic negative, of any original record, document, instrument, plan, book or paper may be used in all instances that the original record, document, instrument, plan, book or paper might have been used, and shall have the full force and effect of said original for all purposes; provided, that at the time of the taking of said photographic film, microphotographic, photostatic or similar reproduction, the person or officer under whose direction and control the same was taken, attached thereto, or to the sealed container in which the same was placed and has been kept, or incorporated in said photographic film, microphotographic photostatic or similar reproduction, a certification complying with the provisions of Section 1923 of this code and stating the date on which, and the fact that, the same was so taken under his direction and control.

COMMENT: This is much broader than 63 (17). That does cover certified photographic copies (see above under § 1920a) but only such copies of official records. § 1920b, however, extends to certified photographic copies of any record, document or paper. I find no similar extension in any of the URE provisions. As I read § 1920b it operates to equate the photographic copy therein specified with the original for all purposes, i.e., for purposes of the hearsay rule and also for purposes of the Best Evidence Rule.

CONCLUSION: § 1920b is a highly desirable provision, not incorporated in any of the URE provisions. It should be retained intact and would be so retained under the new exception to Rule 63 proposed under §§ 1848 - 1849.

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§ 1925. Certain certificates prima facie evidence of title. No change.

§ 1927. Certain statements in certain patents prima facie evidence of truth thereof.

A special hearsay exception possibly not covered by URE. Recommendation: retain by adopting new exception to 63. See discussion under §§ 1848 -1849.

§ 1928. Sheriff's deed prima facie evidence property conveyed to grantee.

Doubt whether URE 63 (19) covers this. Recommendation: retain by adopting new exception to 63. See discussion under §§ 1848 - 1849.

§§ 1928.1 - 1928.4. These sections make admissible certain federal records or certified copies thereof respecting the status of certain persons as dead, alive, prisoner of war, interned, etc.

<u>COMMENT</u>: These sections would probably be rendered unnecessary if 63 (15) (c) as originally drafted and 63 (17) were adopted. But we don't know yet what our version of 63 (15) will be and therefore cannot say at this point what, if any, effect it will have on these sections.

> § 1929. "Private writings are either:
>
> 1. Sealed; or,
> 2. Unsealed."

> § 1930. "A seal is a particular sign, made to attest, in the most formal manner, the execution

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of an instrument."

§ 1931. "A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this State."

COMMENT: 63 (17) incorporates the conditions stated in 68. 68 (c) contains references to the "seal" of a court and to the "seal" of an office. The URE contain no definition of "seal." The definitions of §§ 1929 - 1931 seem to define the term in the sense in which the URE use it. These sections should, therefore, be retained.

§ 1932. "There shall be no difference hereafter, in this State, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged by a writing not under seal."

COMMENT: No change.

§ 1933. "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal."

COMMENT: 63 (19) refers to the "execution and delivery" [italics added] of certain instruments. Under the § 1933 definition of "execution" the expression in 63 (19) is redundant. This seems

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harmless to me. If anything is to be done about it, the best solution would seem to be to strike "and delivery" from 63 (19) rather than amending § 1933.

> § 1934. "An agreement, in writing, without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed."

COMMENT: No change.

> § 1935. "A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness."

COMMENT: No change.

> § 1936. "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."

COMMENT: What amendment, if any, is required here depends on what finally becomes of 63 (30) and (31).

> § 1937. "The original writing must be produced and proved, except as provided in Sections 1855 and 1919. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in Section 1855."

COMMENT: ". . . its contents may be proved by a copy . . ." The "copy" referred to in this italicized quote from § 1937

would be hearsay under Rule 63. 63 (17) would make such copy admissible only if the original was an official record. 63 (1) would make such copy admissible only if made by a witness. The underscored provision may admit such copy under other circumstances and may therefore be broader than the URE. To determine whether this is so would require investigation of decisions interpreting the underscored provision. However, it seems most unlikely that such investigation would reveal that the provision is in any way narrower than the URE. Assuming therefore that our Hearsay Bill contains the exception continuing in force any other law making any hearsay admissible, (proposed above under §§ 1848 - 1849) there would be no inconsistency between § 1937 and our Bill and the § 1937 should be left intact.

My analysis and conclusion in re the provision of § 1937 authorizing proof of the terms of a writing "by a recital of its contents in some authentic document" are similar to the analysis and conclusion stated in the preceding paragraph.

> § 1938. "If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party."

COMMENT: What is said above under § 1937 is applicable here insofar as this section provides for proof "as in case of its loss." I recommend, therefore, that § 1938, like § 1937, remain intact.

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§ 1939. "Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case."

COMMENT: No change.

§ 1940. "Any writing may be proved either:

1. By anyone who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness."

§ 1941. "If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence."

§ 1942. "Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution no other evidence of the execution need be given, when the instrument is one mentioned in Section 1945, or one produced from the custody of the adverse party, and has been acted upon by him as genuine."

§ 1943. "The handwriting of a person may be proved by anyone who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting."

§ 1944. "Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge."

§ 1945. "Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact."

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COMMENT: These sections deal with authentication which is the subject of URE 67. I do not think that 67 would be included in our Hearsay Bill. Therefore, I think §§ 1940-1945 should remain intact.

> § 1946. "The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:
>
> 1. When the entry was made against the interest of the person making it.
> 2. When it was made in a professional capacity and in the ordinary course of professional conduct.
> 3. When it was made in the performance of a duty specially enjoined by law."

COMMENT: § 1946 (1) is superseded by 63 (10) and should be repealed. § 1946 (2) is superseded by 63 (13) and should be repealed. Query as to § 1946 (3). What will be the relation between it and our version of 63 (16)?

> § 1947. "When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals."

COMMENT: Superseded by 63 (13). Repeal.

> § 1948. "Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgement or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property."

> § 1950. "The record of a conveyance of real property

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or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office."

§ 1951. "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

<u>COMMENT</u>: For purpose of comment I consider these §§ in inverse order.

First compare § 1951 with 63 (17) (a) and (19) which reads as follows:

(17) "Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein,..."

(19) "Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;"

Comparison reveals that whereas § 1951 deals with the admissibility of (1) the <u>original instrument</u> itself, <u>and</u> (2)

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the <u>original record</u> of the instrument, <u>and</u> (3) a certified <u>copy</u> of the <u>record</u>, 63 (19) deals <u>only</u> with the original record (<u>i.e.</u>, item (2) above) and (17) (a) deals only with a certified copy of the record (<u>i.e.</u>, item (3) above). I find nothing in the URE covering item (1) above.

Comparison reveals further that whereas 63 (19) and 63 (17)(a) are subject to Rule 64, there is no comparable notice requirement in § 1951. A further point by way of comparison is that whereas § 1951 (probably) refers only to in-state records, 63 (19) clearly refers to both in-state and out-of-state records.

Turning now to § 1950 and comparing it with 63 (19) I find that § 1950 imposes restrictions upon the use of the record not found in 63 (19).

Turning finally to § 1948, I find nothing in the URE covering the matters provided for in this section.

I think it would be unwise to repeal §§ 1948 - 1951, for this would do away with the provisions therein contained for admitting the <u>original instrument</u> without supplying any URE substitute and would likewise do away with the provision (§ 1950) safeguarding use of the <u>original record</u> without supplying any URE substitute. On the other hand if we leave §§ 1950 - 1951 as is and also enact 63 (17) (a) and (19) there will be an overlap as respects admission of the record or copy of the record and as to this overlap (17) (a) and (19) will be subject to 64 whereas § 1951 will not be so subject and § 1950 will contain restrictions as to the use of the original record not appearing in 63 (19).

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It seems to me that the best way to correlate §§ 1948 - 1951 with (17) (a) and (19) is as follows: First, amend §§ 1948 and 1951 to make all proof stated therein subject to Rule 64. (It seems to me that the notice requirement of 64 is, in reason, so applicable.) Second, amend 63 (19) to make it applicable only to out-of-state records. Otherwise make no changes in either §§ 1948 - 1951 or in (17) (a) and (19).

These proposals would keep intact our present system in re in-state records, except for the incorporation of the notice feature of Rule 64 and would give us a new provision (63 (19)) in re out-of-state records. At the same time these proposals would make (17) (a) and §§ 1948 and 1951 consistent to the extent that they overlap. ((17) (a) is, of course, much broader than these two sections insofar as certified copies are concerned in that it covers all such copies of all public records; the sections are more narrow in scope.)

§ 1952. Authorizes order for destruction of exhibits and depositions.

COMMENT: No change.

§§ 1953 - 1953.06. Provide for application in any action or proceeding to substitute copy or order reciting contents of any part of record of the action or proceeding destroyed by fire or calamity.

COMMENT: No change.

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§§ 1953e - 1953h. Uniform Business Records as Evidence Act.

COMMENT: Superseded by 63 (13). Repeal.

§§ 1953i - 1953k. The Uniform Photographic Copies of Business and Public Records as Evidence Act.

COMMENT: This Act provides for photographic proof of a writing only when the writing itself would be admissible ("reproduction, when satisfactorily identified, is as admissible in evidence as the original itself.") The Act itself does not, therefore, create any exception to the Hearsay Rule (except that conceivably "satisfactorily identified" may involve hearsay.)

These sections should be left intact. That they are compatible with the URE hearsay provisions is suggested by the fact that URE Rule 72 is the substance of the Uniform Act.

§ 1954. Admissibility of Real Evidence.

COMMENT: No change.

§§ 1957 - 1962. Various provisions in re inferences and presumptions.

COMMENT: No change.

§ 1963. The 40 statutory disputable presumptions.

COMMENT: I find no hearsay problems here. No change.

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§ 1967. Indispensable evidence defined.

COMMENT: No change.

§ 1968. Proof requisite for perjury.

COMMENT: No change.

§§ 1971 - 1974. Statute of Frauds.

COMMENT: No change.

§§ 1980.1 - 1980.7. Uniform Act on Blood Tests to Determine Paternity.

COMMENT: No change.

§§ 1981 - 1983. Various provisions in re Burden of Proof.

COMMENT: No change.

§§ 1985 - 1997. Various provisions in re subpoenas.

COMMENT: No change.

§§ 2002 - 2006. Affidavit, Deposition, Oral Examination defined.

COMMENT: No change.

§§ 2009 - 2015. Use of Affidavits.

COMMENT: No change. Continued in force by our 63 (2).

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§§ 2016 - 2035. The 1957 Discovery Act.

COMMENT: Query: Should § 2016 (d) be amended to make cross reference to our 63 (3?) ?

Query also: Should 63 (7) be amended to make it subject to § 2033 (b)?

§§ 2042 - 2047. Order of proof; excluding witness while another witness is testifying; direct and cross-examination defined; leading questions.

COMMENT: No change.

> § 2047. "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

COMMENT: The second sentence is superseded by our 63 (1). Repeal.

§ 2048. Scope of cross-examination.

COMMENT: No change.

> § 2049. "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by

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> other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 2052."

COMMENT: We want to make sure that the substantive evidence provision of our 63 (1) is given effect. Therefore, it would be well to amend § 2049 by inserting the following after the word "show:" "both as impeaching the witness and as substantive evidence of the facts recited."

§ 2050. Re-examination of witness.

COMMENT: No change.

§ 2051. Various methods of impeaching a witness.

COMMENT: No change.

> § 2052. "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."

COMMENT: For reasons stated under § 2049, suggest adding before first semi-colon: "and such statements shall be received as substance evidence."

§ 2053. Evidence of good character.

COMMENT: No change.

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§ 2054. Inspection of writings.

COMMENT: No change.

§ 2055. Calling adversary as if under cross-examination.

COMMENT: No change.

§ 2056. Non-responsive answers.

COMMENT: No change.

§ 2061. Instructing jury on effect of evidence.

COMMENT: No change.

§§ 2064 - 2070. Rights and Duties of Witnesses.

COMMENT: No change.

§§ 2074 - 2079. Evidence in particular cases.

COMMENT: No change.

§§ 2093 - 2097. Administration of Oaths and Affirmations.

COMMENT: No change.

> § 2101. "All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code."

> § 2102. "All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes

> and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this Code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it."

COMMENT: Whether we change § 2102 depends upon what, if anything, is done with my proposed amendment to URE Rule 8.

§ 2103. Code provisions re evidence in jury trials apply to trial by court or referee.

COMMENT: No change.

Respectfully submitted,

Professor James H. Chadbourn

Date of Meeting: September 5-6, 1958

Date of Memo: August 21, 1958

Memorandum to Law Revision Commission

Subject: Study No. 34 - Uniform Rule of Evidence:
Substitutes for Subdivisions (15) and (16)
of Rule 63

The Commission considered subdivisions (15) and (16) of Rule 63 at its January, 1958, meeting. The minutes thereof disclose that the two subdivisions were not approved and that "The staff was directed o redraft subdivisions (15) and (16) to embody the substance of Section 1920 of the Code of Civil Procedure and to submit the redraft to the Commission for its consideration . . . . "

SUBDIVISION (15), RULE 63

The staff's understanding is that the Commission's intention is to substitute for Subdivision (15) of Rule 63 a provision which will substantially restate the present California law with respect to the admissibility of official entries, records, reports and documents as evidence of facts they state. Would a provision incorporating "the substance of Section 1920" adequately state this law? We conclude that it would

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facts stated or recorded therein

The reasons for these proposed departures from the language of present Section 1920 are as follows:

1. Substitution of "Writings, including maps, charts and the like, made or prepared in the performance of his duty" for "Entries in public or other official books or records"

As is stated above "Entries in public or other official books or records" is a term susceptible of very narrow interpretation. For example, Wigmore defines a "record" as a single volume or file contain-in a series of homogeneous statements recorded by entries made more or less regularly.[1] The present California law relating to the admissibility of official writings is not so restrictive. In the first place, the language of Section 1926 of the Code of Civil Procedure must be taken into account in this connection:

> 1926. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

This section omits reference to "public or other official books or records."[2]

A more important reason for departing from the language "Entries in public or other official books or records" is that the California

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courts have frequently done so, in effect, in determinging the admissibility of official writings. For example, a district court of appeal admitted a United States Coast and Geodetic Survey chart in one case under Sections 1920 and 1926[3] and other maps and plats have been admitted.[4] A notation on a roster card in a civil service commission file[5] and a bank examiner's report[6] have also been admitted. Moreover, there is no case holding that there must be a statutory requirement that a record be kept to make it admissible and some decisions have admitted records which were fairly clearly not required to be kept.[7] These cases suggest that the broader language proposed above should be substituted for the present language of Section 1920 if the law actually applied by California courts at the present time is to be restated.[8] Two safeguards against unlimited admissibility of written material found in public offices are provided our proposed substitute for Subdivision (15) of Rule 63: (1) the writing must be made or prepared in the performance of duty and (2) it is admissible only to prove the facts stated therein, as distinguished from conclusions or opinions. (See further comment below on the second point.)

2. Substitution of "by a public officer or employee" for "by a public officer of this State."

Two comments may be made concerning this proposal:

A. The proposed substitution recognizes that neither "Entries

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in public or other official books or records" nor "Writings, including maps, charts and the like" are apt to be made or prepared personally by a public officer as distinguished from a public employee serving under him. This fact seems to be recognized in part by Code of Civil Procedure Section 1926, quoted above, which makes admissible, inter alia, an entry made under the direction and in the presence of an officer or board of officers. While Section 1926 recognizes that the public officer need not be the scrivener, it literally requires that the "entry" be one made both under his direction and in his presence. Even this restriction has not been uniformly enforced by our courts, however, in determining the admissibility of official writings under Sections 1920 and 1926. There is, for example, no indication in the opinions holding admissible maps and plats that they were prepared either by a "public officer" personally or under the direction and in his presence of such an officer. Nor does either of these limitations seem necessary, given the twin safeguards that the writing be made by a public employee in the performance of his duty and that it be admissible only to prove facts as distinguished from opinions and conclusions.

B. Official writings otherwise admissible are not excluded merely because they were not made by a public officer "of this State."

Section 1926 contains no such limitation and none has been applied by our courts in determining the admissibility of official writings, at least insofar as the United States is concerned.[9] Nor does there appear to be any rational basis for distinguishing between writings prepared

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by California officers and employees and those prepared by their counterparts in other states or countries.

3. Omission of "or by another person in the performance of a duty specially enjoined by law"

The meaning of this language is not entirely clear and it has never been authoritatively interpreted by our courts. One possibility is that these words make admissible entries made by public employees in the performance of official duty; if so, they are made unnecessary by the addition of the words "employee" in proposed Subdivision (15). Another possibility is that this language makes admissible certain types of quasi-official reports or writings prepared by persons who are neither public officers nor public employees; if so, this subject is covered by our proposed substitute for Subdivision (16) of Rule 63, *infra*.

4. Substitution of "to prove the facts stated or recorded therein" for "prima facie evidence of the facts stated therein"

Two comments are in order here:

A. Under the various subdivisions of Rule 63 extrajudicial utterances or writings are made admissible to prove matters which they state or record. Under none of them is the *weight* to be given the evidence thus admitted specified. Consistently with this general

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approach Subdivision (15) should be drafted to make official writings admissible to prove facts rather than as "prima facie evidence" thereof, which would appear to create a presumption that the fact exists.

B. The critical language here is "the facts stated or recorded therein." It seems clear that the principal problem with any exception to the hearsay rule which makes official writings admissible is the danger of thus bringing before the trier of fact a public officer's or employee's conclusions with respect to an ultimate fact -- e.g., a fire marshall's statement as to the cause of a fire, a police officer's report as to whether someone was driving unlawfully, etc.[10] On the other hand, there is much less ground for objection to making admissible a report recording the fact that an act was done or that a physical fact was observed by a public officer in the course of performing his duty, when the report itself is one made in the regular course of official duty.

It must be acknowledged, of course, that the difference between a "fact" and a "conclusion" or an "opinion" is not always readily apparent and that difficult questions and even inconsistent rulings are apt to arise under the language proposed. But if it is made clear from the language used in drafting a substitute for Subdivision (15) and from the Law Revision Commission's official comment thereon that this distinction is intended to be taken it seems reasonably likely that most courts dealing with specific questions will reach essentially sound and fair decisions. Certainly no more discretion is committed to the judge here than in many other of the Rules in general

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or many other Subdivisions of Rule 63 in particular.

Relationship of Code of Civil Procedure Section 1919 and Sections 1953e to 1953h (Uniform Business Records as Evidence Act) to proposed substitute for Subdivision (15)

In considering the present California law with respect to the admissibility of official writings mention should be made of Code of Civil Procedure Section 1918(6) and Sections 1953e to 1953h (the Uniform Business Records as Evidence Act.)

Subsection 6 of Section 1918 provides:

1918. Manner of proving other official documents. Other official documents may be proved, as follows:

*   *   *

(6) Documents of any other class in this State, by the original or by a copy, certified by the legal keeper thereof...

This provision does not appear on its face to determine the admissibility of documents but only to provide for their authentication. Most of the cases which cite this section appear to have so regarded it.[11] While there is loose language in a few opinions which would appear to support the view that Section 1918(6) provides for the admissibility as well as the authentication of government documents,[12] its true relationship to Section 1920 appears to have been accurately states <u>People v. Alves</u>[13] as follows:

> Had [the document] set forth a properly certified copy of the record it would at least have satisfied the method of proving entries in an "official document" ("by a copy, certified by the

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legal keeper thereof") sanctioned by subdivision 6 of section 1918 of the Code of Civil Procedure. The original "entries" thus in evidence would then be "prima facie evidence of the facts stated" therein (Code Civ. Proc., §§ 1920 and 1926); hence, prima facie evidence of the fact of service upon the defendant.

We have assumed, therefore, in drafting a substitute for Subdivision (15) that Section 1918 is not a part of the California law relating to the admissibility of official writings.

Code of Civil Procedure Sections 1963e to 1963h embody the Uniform Business Records as Evidence Act, enacted in 1941. The California courts have held that governmental records meeting the foundational requirements of this "business records" exception to the hearsay rule are admissible under the Act.[14] Since the Commission has decided to recommend that a restatement of Sections 193e to 1963h be adopted as a substitute for Subdivision (13) of Rule 63, we have thought it unnecessary to take these sections into account in drafting Subdivision (15), which provides for the admissibility of official writings. This will mean, of course, that in the future as at present a document from a government file may be admissible under either the business records exception to the hearsay rule (Subdivision (13) of Rule 63) or the official writings exception (Subdivision (15)) or both. However, it would seem to be preferable to draft the exceptions to Rule 63 in this way rather than to undertake to exclude government records from Subdivision (13) and then, in order to restate all of the present law relating to the admissibility of official documents, incorporate in Subdivision (15) the substantial equivalent of the business records rule for application to such documents. If this view is deemed persuasive, it may be desirable to make it clear that this is what is

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being done by revising Subdivision (6) of Rule 62 which defines the application of Subdivision (13) of Rule 63 to read as follows:

> (6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling, governmental activity or operation of institutions, whether carried on for profit or not.

SUBDIVISION (16), RULE 63

The Commission's directive to the staff relating to Subdivision (16) was, in substance, to draft a substitute therefor which restates existing law.

Professor Chadbourn interpreted Subdivision (16) to apply to reports required to be filed in public offices by private citizens, giving as examples birth, marriage and death certificates made and filed by doctors, ministers, and undertakers. (See Memorandum on Subdivision (15) and (16), pp. 8-9) The official comment of the Commissioners on Uniform State Laws suggests that this is a proper interpretation; it states, however, that the exception is not confined to these particular examples but applies to all reports filed by private persons "...whose business or profession requires action in matters usually made the subject of vital statistics and health regulations, and who are under a duty to make and file reports of specified acts, events or conditions."

On its face, however, Subdivision (16) appears to be broader than either the Commissioners' comment or Professor Chadbourn's memorandum

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suggests in at least two respects: (1) it is broad enough to embrace various reports filed by public officers and employees, thus overlapping Subdivision (15) in part, for many reports by such persons would come within the literal language of Subdivision (16): "report or finding of fact...[when] the maker was authorized by statute to perform, to the exclusion of other persons, the functions reflected in the writing, and was required by statute to file in a designated public office a written report relating to the performance of such functions..." (2) there is nothing in the language of Subdivision (16) which confines its application to reports which relate to "vital statistics" as is suggested by the Commissioner's comments.

However this may be, it seems clear that any provision which is substituted for Subdivision (16) should be limited to reports filed by private citizens since the admissibility of writings prepared by public officers and employees is covered by our proposed substitute for Subdivision (15), supra. Professor Chadbourn reports that if Subdivision (16) as it appears in the Uniform Rules of Evidence were adopted in this State it would make admissible only those records which are presently admissible under Health and Safety Code Section 10577 which provides:

> 10577. Any birth, fetal death, death or marriage record which was registered within a period of one year from the date of the event under the provisions of this division, or any copy of such record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, is prima facie evidence in all courts and places of the facts stated therein.

Section 10577 appears to be the only existing provision of California law making reports filed in public offices by private citizens admissible

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in evidence.* It would appear, therefore, that the Commission's instruction to the staff can best be carried out by substituting for Subdivision (16) of the Uniform Rules of Evidence the following provision which incorporates the language of Section 10577 with such modifications as are necessary to conform it to the general format of Rule 63 and its several subdivisions:

> (16) Subject to Rule 64, any birth, fetal death, death or marriage record which was registered, pursuant to the provisions of Division 9 of the Health and Safety Code, within a period of one year from the date of the event ~~under-the provisions-of-this-division~~ or any copy of such record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, ~~is-prima-facie-evidence-in-all courts-and-places-of~~ to prove the facts stated therein.

* In our discussion of Subdivision (15), supra, we noted that the words "or by another person in the performance of a duty specially enjoined by law" in C.C.P. § 1920 may bring some reports made by private citizens within the purview of that Section. So far as we have been able to find this language has not been interpreted or applied by any California court. It seems doubtful, however, that it does apply to private citizen's reports of the type here under consideration, Section 1920 would make admissible reports not included within Health and Safety Code § 10577.

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FOOTNOTES

1. [Need Wigmore citation]

2. It should be noted, however, that Section 1926 seems to have had little independent function. Only one case has been found which cited it without mention of Section 1920: Boyer v Gelhaus, 19 Cal. App. 320, 325, 125 Pac. 916, 918 (1st Dist. 1912). Sections 1920 and 1926 are often cited together; thus, nearly half of the decisions which have cited Section 1920 have also cited Section 1926: People ex rel. Bd. of State Harbor Comm'rs v. Fairfield, 90 Cal. 186, 27 Pac. 199 (1891); Swamp Land Dist. No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462 (1886); People v. Alves, 123 Cal. App. 2d 735, 267 P. 2d 858 (1st Dist. 1954); Reisman v. Los Angeles City School Dist., 123 Cal. App. 2d 493, 267 P. 2d 36 (2d Dist. 1954); Pruett v. Burr, 118 Cal. App. 2d 188, 257 P. 2d 690 (4th Dist. 1953); La Prade v. Deparment of Water and Power, 146 P. 2d 487, 492 (D.C.A. 2d Dist. 1944); Galbreath v. Dingley, 43 Cal. App. 2d 330, 110 P. 2d 697 (4th Dist. 1941); Lusardi v. Prukop, 116 Cal. App. 506, 2 P. 2d 870 (1st Dist. 1931); McFayden v. Town of Calistoga, 74 Cal. App. 378, 240 Pac. 523 (3d Dist. 1925); Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917); Westerman v. Cleland, 12 Cal. App. 63, 106 Pac. 606 (3d Dist 1909); People ex rel. Hardacre v. Davidson, 2 Cal. App. 100, 83 Pac. 161 (3d Dist. 1905). In none of these cases was any attempt made to distinguish between the two sections.

3. Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917).

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4. Southern Pac. Land Co. v. Meserve, 186 Cal. 157, 198 Pac. 1055 (1921) (old survey map from government records: no citation to relevant sections); Burk v. Howe, 171 Cal. 242, 152 Pac. 434 (1915) (government map: no citation to relevant sections); Robinson v. Forrest, 29 Cal. 317 (1865) (plat of survey of township, used to show location of lines only); Gates v. Kieff, 7 Cal. 124 (1857) (map made by county surveyor and deputy). But a map not officially made was excluded. Rose v. Davis, 11 Cal. 133 (1858).

5. Nilsson v. State Personnel Board, 25 Cal. App. 2d 699, 78 P. 2d 467 (3d Dist. 1938) (sec. 1920).

6. Richardson v. Michel, 45 Cal. App. 2d 188, 113 P. 2d 916 (4th Dist. 1941) (report termed sufficiently connected up"; no citation to relevant sections).

7. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156 (1903) (apparently goes off on agency theory of ratification and estoppel; no cite to relevant sections).

8. It must be acknowledged, however, that there are some more restrictive decisions on the books. Thus courts have excluded memoranda from a state agency to private person, Pruett v. Burr, 118 Cal. App. 2d 188, 257 P. 2d 690 (4th Dist. 1953) (held "not public records" under C. C. P. §§ 1918, 1920, 1926, 1953f), letters, Los Angeles v. Watterson, 8 Cal. App. 2d 331, 48 P. 2d 87 (4th Dist. 1935) (insufficient foundation; no citation to relevant sections), and medical reports not deemed to be "of public record", Fritz v. Metropolitan Life Ins. Co., 50 Cal. App. 2d 570,

123 P. 2d 622 (2d Dist. 1942) (report by government doctors to Federal Veterans' Bureau; no citation to relevant sections).

9. Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917) (U. S. Coast and Geodetic Survey Chart admitted)

10. See, excluding such writings, Hoel v. Los Angeles, 136 Cal. App. 2d 295, 288 P. 2d 989 (2d Dist. 1955) (police accident report "essentially hearsay") Harrigan v. Chaperon, 118 Cal. App. 2d 167, 168, 257 P. 2d 716, 717 (1st Dist. 1953) (fire inspector's report which "contains nothing more than a hearsay rumor based on information from an undisclosed source"). See also McGowan v. Los Angeles, 100 Cal. App. 2d 386, 223 P. 2d 862 (2d Dist. 1950) ("blood alcohol determination" excluded for want of adequate foundational evidence linking the report to the person from whom the blood sample was allegedly taken).

But see, admitting official writings not apparently based on personal knowledge, People v. Grundell, 75 Cal. 301, 17 Pac. 214 (1888) (transcript of testimony before a committing magistrate -- sec. 1920); Nilsson v. State Personnel Board, 25 Cal. App. 2d 699, 78 P. 2d 467 (3d Dist. 1938) (notation on civil service roster card); Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917) (Coast and Geodetic Survey Chart -- secs. 1920, 1926).

11. In re Smith, 33 Cal. 2d 797, 205 P. 2d 662 (1949); Hazard, Gould and Co v. Rosenberg, 177 Cal. 295, 170 Pac. 612 (1918); Estate of Baker, 176 Cal. 430, 168 Pac. 881 (1917); Wall v. Mines, 130 Cal. 27, 62 Pac. 386 (1900); Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172 (1896); Merced County v. Fleming, 111 Cal. 46, 43

Pac. 392 (1896); County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644 (1893); Pruett v. Burr, 118 Cal. App. 2d 188, 257 P. 2d 690 (4th Dist. 1953); People v. Santos, 36 Cal. App. 2d 599, 97 P. 2d 1050 (3d Dist. 1940); People v. Wilson, 100 Cal. App. 397, 280 Pac. 137 (2d Dist. 1929); People v. Kuder, 98 Cal. App. 206, 276 Pac. 578 (2d Dist. 1929).

12. Vallejo & Northern R. R. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (1915) (report of state agricultural society, used as basis of an opinion of expert and thus perhaps distinguishable); People v Hagar, 52 Cal. 171 (1877) (letter from register of land office to Yolo County recorder used to prove formation of swamp land district; perhaps distinguishable on the ground that here document itself rather than its content may have borne the evidentiary significance); In re Halamuda, 85 Cal. App. 2d 219, 192 P. 2d 781 (4th Dist. 1948) (report of probation officer used to show parents unfit to have custody of child; perhaps distinguishable in the juvenile hearing context under Welfare and Institutions Code secs. 639, 640).

13. 123 Cal. App. 2d 735, 738, 267 P. 2d 858, 861 (1st Dist. 1954).

14. Nichols v. McCoy, 38 Cal. 2d 447, 240 P. 2d 569 (1952) (results of blood tests entered in coroner's record; court specifically refused to decide whether sec. 1920 would also apply); Jensen v. Traders & General Ins. Co., 141 Cal. App. 2d 162, 296 P. 2d 434 (1st Dist. 1956) (postal receipts as evidence of mailing); Fox v. San Francisco Unified School Dist., 111 Cal. App. 2d 885, 245 P. 2d 603 (1st Dist. 1952) (principal's report on teacher's efficiency); Holder v. Key System,

88 Cal. App. 2d 925, 200 P. 2d 98 (1st Dist. 1948) (letters to and from officers of a public utilities commission): Brown v. County of Los Angeles, 77 Cal. App. 2d 814, 176 P. 2d 753 (2d Dist. 1947) (account of indigents with county).

Date of Meeting: October 8, 1958
Date of Memo: September 23, 1958

Memorandum to Members of California Law Revision Commission and of State Bar Committee to Consider Uniform Rules of Evidence.

Re: Matters for Discussion at Joint Meeting

Attached are : (1) a copy of the portion of the minutes of the Law Revision Commission's meeting of September 6, 1958, which reports action taken on the Uniform Rules of Evidence; (2) an up-to-date Summary of Action taken by the Commission and the State Bar Committee on the Rules and parts thereof relating to heresay. What is shown in the Summary may be stated as follows:

1. The Commission and the State Bar Committee are now in complete agreement on 14 Rules or parts thereof relating to heresay:

Rule 63 (Opening Paragraph)

Rule 63, Subdivisions (5) (8) (11) (17) (18) (19) (22) (23) (25) (26) (27) (28)

Rule 66

2. Both groups are also in agreement in principle on 8 additional Rules or parts thereof but there is as to these not yet complete agreement as to the form which the provision should take:

Rule 63, Subdivisions (2) (3) (7) (9) (13) (14) (24) (29)

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3. There is some disagreement in principle between the two groups as to 5 Rules or parts thereof:

Rule 63, Subdivisions (1) (4) (6) (10) (20)

As to all of these the Commission has made proposals at its meetings of July 19 and September 6 which it is hoped will be acceptable to the State Bar Committee. It is believed that none of these proposals has yet been considered by either Section of the Committee.

Finally, there are 9 Rules or parts thereof which for one reason or another do not fall into any of the foregoing categories. In the case of several of these, as is shown, some person or group has been assigned the responsibility of making a report and recommendation at the time of the October meeting:

Rule 62	(Commission staff and Research Consultant to file reports)
Rule 63 (12)	(Messrs. Barker, Kaus, Kadison and Selvin to file report)
Rule 63 (15)	(Commission staff report enclosed to State Bar Committee members)
Rule 63 (16)	(Commission staff report enclosed to State Bar Committee members)
Rule 63 (21)	(Messrs. Hayes and Patton to file report)
Rule 63 (30)	(Messrs. Hayes, Hoberg, Kaus and Selvin to file report)
Rule 63 (31)	(Messrs. Hayes, Hoberg, Kaus and Selvin to file report)
Rule 64	

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Rule 65 (Messrs. Baker and Patton to file report)

Respectfully submitted,

John R. Mc Donough, Jr.
Executive Secretary

September 29, 1958

MEMORANDUM

Submitted by
Prof. James H. Chadbourne

SUBJECT: WHETHER RULES WHICH DISQUALIFY CERTAIN PERSONS AS WITNESSES ALSO DISQUALIFY HEARSAY DECLARANTS

(Rule 62(7))

MJN 0136

5. The Dead Man Statute (C.C.P. § 1879 (3)).

In this study we do not consider the rule requiring a witness to possess direct knowledge (C.C.P. § 1845) or the Opinion Rule. Hence we do not discuss whether (for example) a party's admission must be based on first hand knowledge, whether a declaration against the interest of a declarant must be so based, whether a dying declaration stating declarant's "conclusion" is inadmissible, etc. The bearing of the Knowledge and Opinion rules upon various hearsay exceptions has been treated in memoranda dealing with those exceptions and will not be considered herein. Our concern at this point is rather with the applicability to hearsay declarants of the five rules stated above.

The Problem in General

There is no overall categorical answer to the question under investigation because, as McCormick tells us (McCormick, p. 505):

> "The application of the standards of competency of witnesses to declarants whose statements are offered in evidence under the various hearsay exceptions has never been worked out comprehensively by the courts . . ."

We can perhaps best summarize what little law there is by considering the problem *seriatim* with reference to each of the several exceptions to the hearsay rule which are indicated by the ensuing titles.

Dying Declarations

Insanity and Infancy. Wigmore (§ 1445) states that "In general, for testimonial qualifications, the rules to be applied [to dying declarants] are no more and no less than the ordinary

ones . . . for the qualifications of other witnesses." Therefore "if the declarant would have been disqualified to take the stand, by reason of infancy [or] insanity . . . his extrajudicial [dying declaration] must also be inadmissible" . Dicta in two California cases are in accord (People v. Sanchez, 24 C. 17 at 26 (1864); People v. Dallen, 21 C.A. 770 at 781 (1913)).

Dead Man Statute. Since dying declarations are admissible only in homicide cases and since the Dead Man Statute applies only in certain civil cases, we do not have any question of the applicability of the Dead Man Statute to declarants of dying declarations.

Spouse Rule. P.C. § 1322 provides in part as follows: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one [is party], except with the consent of both or in case of criminal actions or proceedings for a crime committed by one against the person . . . of the other . . ." Dying declarations are admissible only in homicide cases and, furthermore, only the victim's declarations are covered by the exception. It follows that we have the question of applying the Spouse Rule to the declarant of a dying declaration only when one spouse is charged with homicide of the other and the other's dying declaration is offered. Such case is a "criminal action" for "a crime committed by one against the person of the other" (quotes from P.C. § 1322). Had the crime been attempted murder and had the attacked spouse survived he or she would have been a competent witness under the exception in § 1322. It would seem therefore that where the charge is homicide this should be regarded as a case where the declarant,

if alive, would have been a competent witness and the dying declaration should be received either for or against defendant insofar as the controlling factor is the notion that the rules for witnesses apply to declarants.

Depositions and Former Testimony

The problem of witness-competency rules as applicable to deponents and former witnesses can best be brought out by a series of hypothetical cases.

Case 1. Action of People v. D. At the preliminary W testifies for the prosecution. W is then sane. Prior to the trial W becomes insane and remains so during the trial. At the trial the People offer a transcript of W's testimony at the preliminary. D's objection overruled.

COMMENT: In general competency rules apply to former witnesses and deponents (Wigmore § 479). In general the competency of the former witness or deponent is judged as of the time that the former testimony was given or the deposition was taken (Wigmore § 483 (3)). In our case W, being sane at the time the former testimony was given, the transcript thereof is admissible. 43 C.A. 2d 238. Undoubtedly the same result would follow in case of a deponent who was sane at the time his deposition was taken but who is insane at the time the deposition is

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offered, though, as explained in the appended footnote, C.C.P. § 2016 (e) is confusingly phrased.*

Case 2: Action of P. v. D. P takes W's deposition. W is then insane. Prior to the trial W recovers sanity but leaves the State. At the trial P offers the deposition. D objects on the ground of W's insanity at the time of the deposition. Sustained.

COMMENT: Again competency rules in general apply to deponents (Wigmore § 479) and again competency is usually judged as of the time of the deposition (Wigmore § 483 (3)). Again, however, C.C.P. § 2016 (e) is confusingly phrased, as explained in the appended footnote.**

Case 3: Action of People v. D upon a charge of forgery. The People call D's wife. She testifies without objection. D also testifies. Now D is charged with having committed perjury in the first case. In the perjury trial the People call D's wife. D's objection on the ground of P.C. § 1322 is sustained. The People then offer the transcript of the wife's testimony in the forgery case. No objection by D; transcript admissible. If, however, D had objected to

the transcript on the ground of P.C. § 1322 the transcript would probably have been inadmissible.

COMMENT: Authority for the suggested rulings is the opinion of the Supreme Court denying a hearing in People v. Chadwick, 4 C.A. 63, 75 (1906). In that case D did not object to his wife's testimony at the first trial or to the transcript of such testimony at the second trial (he did, however, object to the proposed testimony of the wife at the second trial). In affirming D's conviction the District Court of Appeal did not use the rationale of waiver of objection to the transcript by failure to object. Rather the Court stated and apparently rested its decision upon the following broad generalization:

> "The provisions of the code (Code Civ. Proc., sec. 1881 [1]; Pen. Code, sec. 1322) prohibiting a husband or a wife from being examined as a witness for or against the other, except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them. The code merely makes either spouse incompetent as a witness in an action or proceeding against the other, but does not render their statements elsewhere given privileged against being shown by competent testimony."

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This generalization is in marked contrast to Wigmore's proposition to the effect that "it would seem that hearsay declarations by the wife or husband, such as would ordinarily be receivable under some exception to the Hearsay Rule, should be excluded when offered against the other spouse (Wigmore § 2233). Furthermore the generalization seems to be disapproved by the following statement of the Supreme Court in the opinion of that Court denying a hearing:

> "If the decision of the district court of appeal was intended to declare, as the defendant insists that it does, that when, upon the trial of a case, the wife of the defendant has testified against him without objection by him, her testimony then given may, in all cases, be read against him, over his objection, upon another trial of that or any other charge against him, we do not approve of that portion of it. No such question was necessarily involved in the case. The affirmance of the judgment, so far as the reading of such testimony is concerned, was justified by the fact that upon the trial of the forgery charge the defendant made no objection to the testimony of Norinee Schneider against him, and that upon the trial of the perjury case, resulting in the judgment appealed from, he did not object to the reading of the testimony given by her upon the other trial."

Nevertheless at least one commentator (Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L.Rev. 390, 394 (1931)) and two subsequent California cases

seemingly overlook the Supreme Court's opinion and suggest that the DCA generalization is the law of this State (First National Bank v. De Moulin, 56 C.A. 313, 323 (1922); People v. Peak, 66 C.A. 2d 894, 906 (1944). If this view is accepted the spouse rule is inapplicable to former testimony, to excited utterances (res gestae) etc. We shall therefore have occasion to make further reference to this view and to the opposing Wigmore view as the study proceeds.

It is perhaps worth noting that under the Wigmore view that the Spouse Rule does apply to hearsay declarations, the time as of which the disqualification is operative or inoperative is the time when the hearsay declaration is offered, not the time when made (Wigmore § 2237 (3) and footnote 6 thereto). It follows that under this view a man could suppress the hearsay declaration of a woman (otherwise admissible against him) by marrying the woman (unless, of course, the case is one of the exceptional cases stated in C.C.P. § 1881 (1) or P.C. § 1322).

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Finally it is perhaps worth noting that in the case of former testimony most objections which could have been made when the testimony was first given may be withheld at that point and be successfully advanced for the first time when evidence of the testimony is offered at the second trial (McCormick § 236). Under the Supreme Court's opinion in Chadwick this, of course, is true of the P.C. § 1322 objection.

Case 4: A sues B for money judgment for goods and services allegedly supplied by A to B. A testifies in support of his claim and is cross-examined by B. Mistrial. Before the action is reached for re-trial A dies and his administrator is substituted as party plaintiff; B also dies and his administrator is substituted as party defendant. Upon the re-trial plaintiff offers a transcript of A's testimony. D objects on the ground of the Dead Man Statute (C.C.P. § 1879 (3)). Query as to the ruling.

COMMENT: This problem has arisen in other jurisdictions and the decisions are in conflict (Wigmore § 1409, footnotes 2 - 4). No

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apposite California case has been found. The better view, it would seem, is that the transcript is admissible. At the time A testified B was alive. Therefore the dangers against which the Dead Man Statute is supposed to be the safeguard (temptation to perjury because of death of B) were simply non-existent. If B had been dead at the time A testified the situation would be entirely different. In other words the disqualification of the Dead Man Statute probably applies to deponents and former witnesses but probably the disqualification is judged as of the time the deposition or former testimony is given. Compare Case 3 in this regard.

SUMMARY: (1) Infancy-insanity disqualification applies to deponent's and former witnesses, qualification being judged as of time deposition is taken or former testimony is given.

(2) Spouse Rule probably applies, qualification being judged as of time deposition or former testimony is offered.

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(3) Dead Man Rule probably applies and, if so, (hopefully) qualification is judged as of time deposition is taken or former testimony is given.

Declarations Against Interest

We find no case or other authority discussing our problem in connection with this exception. The elements of the exception themselves probably embrace at least maturity-sanity competency requisites. That is, a child too young to testify is too young to speak consciously against his interest. So, too, of a loon too daft to testify. Thus the proponent of a declaration against interest probably must show that his declarant possessed minimal maturity-sanity competence to testify in order to show that the declaration was against interest. What is said above under Cases 3 and 4 is germane to the question of Spouse Rule and Dead Man Statute disqualification of declarants of declarations against interest, assuming the problem could conceivably arise - a doubtful assumption, it seems.

Excited Utterances (Res Gestae)

Infancy. Wigmore's position is that the disqualification for infancy does not and should not exclude a child's excited utterance otherwise admissible. His reasoning is that the principle of the excited utterance exception "obviates the usual sources of untrustworthiness in children's testimony" and "furthermore the orthodox rules for children's testimony are not in themselves meritorious" (Wigmore § 175 (11)). McCormick concedes

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that "it is held that evidence of spontaneous declarations of infants is admissible despite the incompetency of the child as a witness" (McCormick p. 582). However, he doubts the wisdom of so holding because, he says, "as to the qualification of mental capacity as applied to young children . . . in its modern form of a mere requirement that the witness must only possess such minimum capacity to observe, remember and narrate the facts as will enable him to give some aid to the trier, it would seem sensible to apply that standard to the out-of-court declarant . . . ." (McCormick p. 505). Neither author cites any California case on the point and none has been found.

Insanity. Wigmore thinks that the "disqualification of insanity should probably be treated for the present purpose like that of infancy" (Wigmore § 1751 (4), citing a Texas case for this view). McCormick cites the same Texas case as indicating the current rule which he, however, questions on the same basis (stated above) on which he questions the infancy rule (McCormick p. 582 and p. 505).

Spouse Rule. Wigmore's position is: "it would seem that hearsay declarations by the wife or husband, such as would ordinarily be receivable under some exception to the Hearsay Rule, should be excluded when offered against the other spouse" (Wigmore § 2233), the qualification of the declarant spouse being judged as of the time the declaration is offered in evidence rather than as of the time the declaration was made (Wigmore § 2237 (3)).

McCormick states the rule to be that an excited declaration is admissible even when "made by the husband or wife of the accused in a criminal case" (p. 582). He cites, however, only one Texas case and makes no reference to Wigmore's view or to the authorities cited by Wigmore supporting that view.

As indicated above under Case 3, a broad generalization in the California Chadwick case is opposed to the Wigmore view but is of doubtful validity.

Dead Man Statute. Suppose P sues X's administrator for damages for alleged injuries allegedly inflicted upon P by X's alleged negligence. P offers evidence of P's excited utterance made right after the accident. D objects on the basis of the Dead Man Statute. Query as to the ruling. In view of the rationale of the Dead Man Statute (fear of perjury motivated by interest) it seems that D's objection should be overruled on the basis that P's excitement and the resulting spontaneity of his statement override the interest-factor. (See by analogy Wigmore § 1751 (3) and Case 4 *supra*.)

Admissions

Infancy and Insanity. Wigmore's position is as follows (§ 1053):

> "A primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistent other utterances . . . . It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party's present claim that gives them logical force. . . .

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> "On the same principle, the admissions of an infant party would be receivable. Theoretically, the admissions of a lunatic party would stand upon the same footing, although the weight to be given them might be 'nil'."

McCormick's position is as follows (§ 240):

> "In so far as outmoded testimonial restrictions still survive, such as disqualification for conviction of crime, marital disqualification, and the test of ability to understand the obligation of an oath as applied to small children, it seems that these requirements should not in general be extended to hearsay declarants nor in particular to admissions. But as to the qualification of mental capacity as applied to young children and insane persons, in its modern form of a mere requirement that the witness must only possess such minimum capacity to observe, remember and narrate the facts as will enable him to give some aid to the trier, it would seem sensible to apply that standard to the out-of-court declarant and the party making admissions. If it does not appear that this minimum capacity was wanting, then the immaturity or insanity of the declarant would only affect the credibility of the admission or other declaration. And so of intoxication, hysteria and similar temporary derangements. If the party making the admission, or other declarant, was not shown to be incapable of making any rational statement, his intoxication or other derangement would be considered only as affecting the credibility of the statement."

In our opinion McCormick's position is preferable to Wigmore's. An admission is substantive evidence, whether made in or out of court. If the admitter when making his out of court statement is so young or so insane that he could not have been heard in court at that time, we think that his out of court statement should be excluded. This seems to be the rule when the admission is in the form of a confession by defendant in a criminal case (People v. Isby, 30 C.2d 879). It should, we submit, be the rule with reference to all admissions.

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Spouse Rule. Usually a third person's out-of-court statement is hearsay as to a party and is not, of course, admissible against the party as his admission. If the party is a husband and the out-of-court declarant is his wife what has just been said is equally applicable. It follows that the situations are very few in which the wife's out-of-court statement could be regarded as the husband's admission and there is little occasion therefore to consider whether the wife-against-husband disqualification applies to out-of-court declarations constituting admissions (Wigmore § 2232). A few such situations, however, do arise under C.C.P. § 1870, subdivisions (5) and (6) which provide as follows:

> "5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence [is admissible]. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;
>
> 6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy [is admissible];"

What if the declarant in such cases is wife of the party? It would seem that the § 1870 rules should override the Spouse Rule (Wigmore § 2232 (1)). Under our decisions it seems clear that this is so insofar as the joint interest principle of § 1870 (5) is concerned. (Wilcox v. Berry, 32 C.2d 189). Possibly it is not so insofar as the agency principle of that section is concerned (Ayres v. Wright, 103 C.A. 610).

A superficially similar problem is presented by C.C.P. § 1870 (3) which is as follows:

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"3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto; [is admissible]"

What if the "another" referred to is the wife of the party? Here, it is clear enough that the evidence is admissible (People v. Leary, 28 C.2d 740) because, as Wigmore says:

". . . the statements are receivable, as would be those of any other person; for they are not offered as hers, but as his by assent and adoption;"

Dead Man Statute. An admission is a party's statement offered against the party. If plaintiff sues an administrator plaintiff could not use his own out-of-court statement because of the Hearsay Rule. If defendant offers the statement there is, of course, no objection under the Dead Man Statute. It seems, therefore, that the problem of disqualification of a party-declarant under the Dead Man Statute does not arise.

Declarations of Physical and Mental Condition

Presumably maturity-sanity requisites are applicable here. Query as to Spouse and Dead Man Rule. See discussion supra under Cases 3 and 4.

Pedigree Declarations

Presumably maturity-sanity requisites apply. Query as to others. See discussion supra under Cases 3 and 4.

U.R.E.

The U.R.E. preserve maturity-sanity requirements in the following terms:

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"Rule 17. 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."

Both the Dead Man Statute and the Spouse Rule are abolished by Rule 7 (the privilege for spousal confidential communications is, however, retained by Rule 28).

Recommendation

It would seem that the minimal requisites to qualify a witness under Rule 17 should be imposed also to qualify hearsay declarants. This could be accomplished by amending 63 (4), (5), (6), (7), (8), (10), (12), (23), (24) and (25) so that each would contain the substance of the following restriction:

"if the judge finds that at the time of making the statement the declarant possessed the capacities requisite to qualify a witness under Rule 17."

Respectfully submitted,

James H. Chadbourn

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FOOTNOTES

*Under C.C.P. § 2016 (d)(3)(iii) the inability of deponent to testify at the trial because of "sickness" or "infirmity" is one of the occasions wherein use of his deposition at the trial is authorized.

However, under § 2016 (e) "objection may be made at the trial . . . to receiving in evidence any deposition . . . for any reason which would require the exclusion of the evidence if the witness were then present and testifying." This cannot mean what it literally states, for taken literally it would mean that the deposition could not be used in the case suggested in the text. Literally our deponent's present [i.e. at the trial] insanity would be a "reason which would require the exclusion of the evidence if the witness were then [i.e. at the trial] present and testifying." Surely, this is not the intent of § 2016 (e) and it is most unlikely that it would be literally construed to bring about this absurd result.

**If C.C.P. § 2016 (e), quoted above in footnote *, be taken literally, D's objection must be overruled. Since W is now sane, no reason "would require the exclusion of the evidence if the witness were then [i.e. at the trial] present and testifying."

Again literal construction producing this absurd result is most unlikely.

I N T R O D U C T I O N

This memo is a study of Rule 23, subdivisions (1), (3) and (4) and of Rules 24 and 25 - all dealing with the privilege against self-incrimination. Rules 37, 38 and 39 are also considered insofar as these rules relate to the incrimination privilege.

The text of the Rules just mentioned is as follows:

> "Rule 23. (1) Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify. . . .
>
> (3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.
>
> (4) If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom."
>
> "Rule 24. A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation."
>
> "Rule 25. Subject to Rules 23 and 37, every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule,

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(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; and

(b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; and

(c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and

(d) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; and

(e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; and

(f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; and

(g) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action."

"Rule 37. A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that

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matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

> "Rule 38. Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."

> "Rule 39. Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege."

GENERAL CONSIDERATIONS

U.R.E. Rule 7 provides in part as follows:

> "Except as otherwise provided in these Rules . . . No person has a privilege to refuse to be a witness, and . . . no person has a privilege to refuse to disclose any matter or to produce any object or writing. . ."

The Commissioners explain as follows the purpose of Rule 7 and its place in the U.R.E. scheme:

> "This rule is essential to the general policy and plan of this work. It wipes the slate clean of all disqualifications of witnesses, *privileges* and limitations on the admissibility of relevant evidence. [Italics added.] Then harmony and uniformity are achieved by writing back on to the slate the limitations and exceptions desired."

If Rule 7 were adopted in any state as legislation (or as a rule of court under the rule-making power), the Rule would not, of course, affect any constitutional rule of privilege in force in the State or any constitutional rule of limitation on the admissibility of evidence. As the Commissioners say:

> "Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

In California the privilege against self-incrimination is a constitutional privilege (Calif. Const. Art. I, § 13). It would therefore be possible to accept and to enact Rule 7 as legislation in this State and at the same time to reject and refuse to enact any or all of the U.R.E. provisions or any comparable provisions concerning the privilege against self-incrimination. The effect of this course would be to leave intact all of the current rules and principles respecting the privilege insofar as such rules and principles are (as most of them are) deduced from Art. I, § 13.

This course, we say, would be possible. This is not, however, the necessary course. There is open to us the alternative of a statutory affirmation of the privilege consistent with Art. I, § 13 and in the form of an exception to the general statutory abrogation of privileges (Rule 7).

It follows from the foregoing observations that in evaluating the U.R.E. Rules respecting privilege vs. self-incrimination, we should bear in mind that in a State like California having the constitutional privilege the U.R.E. incrimination Rules are not a necessary part of the U.R.E. scheme. Conceivably, even

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if we adopt the U.R.E. Rules in general it might be the part of wisdom to omit the incrimination Rules. It follows, too, that if it is deemed the part of wisdom to propose any or all of the incrimination Rules, we must be prepared to support the constitutionality of the same to the extent that what is proposed would be other than a mere legislative declaration of existing constitutional doctrine.

As we proceed with this study we shall discover that most of the U.R.E. incrimination Rules would, if enacted in this State, constitute mere legislative declarations of what our courts have held to be the meaning and intent of Art. I, § 13. In a few instances, however, we shall encounter areas in which the U.R.E. provisions would contravene Art. I, § 13 as construed by our courts. We shall also encounter a few areas in which our courts have not had occasion to rule.

We shall develop the study by considering the Rules in question in their numerical order (with minor variations). We shall note as to each Rule or subdivision thereof whether it clearly declares or departs from existing law or whether it covers an area in which existing law is unclear or undecided. In the end and after reviewing the Rules we shall attempt to formulate a recommendation respecting them.

RULE 23

Rule 23, subdivision (1) - Accused's Privilege.

Rule 23 (1) provides: "Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify."[1]

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Cal. Const. Art. I, § 13 provides in part as follows: " . . . No person shall be . . . compelled, in any criminal case, to be a witness against himself."

Note that 23 (1) explicitly embraces both a privilege "not to testify" and a privilege "not to be called as a witness." The latter privilege is not directly and explicitly stated either in Art. I, § 13 or in any of our statutes. However, certain of our statutes have been construed as forbidding the prosecution to call defendant. These statutes and this construction are revealed in the following excerpt from People v. Talle:[2]

> "It is . . . perfectly clear that, unless a defendant requests the privilege of testifying, he is incompetent as a witness, and that the prosecution has no legal right to ask him to testify. In this state there is an express statute that provides that those accused of crime are competent as witnesses only at their own request and not otherwise. This statute was first passed in 1865. . . . section [one] provides: 'In the trial of or examination upon all indictments, complaints, and other proceedings before any Court, Magistrate, Grand Jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so accused or charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the Magistrate, Grand Jury, or other tribunal before which such testimony may be given.'
>
> Section two as originally enacted, and as it now reads, provides: 'Nothing herein contained shall be construed as compelling any such person to testify.'
>
> This statute . . . has never been repealed. . . .[3] This type of statute is common to the federal government and to many states. The purpose of such statutes was to abrogate, in criminal cases, the original common law rule that made the accused incompetent as a witness even on his own behalf.

> Professor Wigmore interprets statutes such as the . . . one here involved as forbidding the calling of the accused by the prosecution. He states (vol. 8, 3d ed., p. 393): 'By the express tenor, in most jurisdictions, of the statute qualifying the accused, he is declared to be a competent witness "at his own request, but not otherwise" . . . Whether this form of words was chosen with a view to its present bearing can only be surmised; but its evident effect is to forbid the calling of the accused by the prosecution.'"[4]

We conclude that present California law is in accord with Rule 23, subdivision (1).[5]

<u>Rule 23, subdivision (3) - Requiring accused to exhibit body or engage in demonstration at the hearing</u>.

This subdivision is as follows:

> "(3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify."

California law seems to be in accord with the principle stated in this subdivision. Thus it has long been settled that upon the trial of the accused ordering him to stand for identification is not "compelling the defendant to become a witness against himself in any respect within the meaning of the constitutional provision."[6]

By analogy, it would seem no violation of defendant's privilege to order him to "submit his body to examination" in the sense of 23 (3) (e.g., to roll up his sleeve so that judge and jury could see tatoo marks or scars) or "to do [an] act" in the sense of 23 (3) (e.g., walk across the courtroom so that judge and jury could see that he limps). Although no direct local holdings have been found other than the standing-for-identification cases, it seems reasonable to assume that considering the view California has

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taken of the scope of the privilege in out-of-court proceedings (see pp. 22 - 38 infra) California would agree with the limitations upon in-court privilege stated in subdivision (3). Some cases - though not directly involving the scope of the in-court privilege - quote the following from Wigmore with apparent approval:

> "Looking back at the history of the privilege . . . and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. . . .
>
> In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The one idea is as essential as the other."7. . .
>
> "If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.
>
> "The limit of the privilege is a plain one. From the general principle . . . it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, *i.e.*, upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action--as when he is required to take off his shoes or roll up his sleeve--is immaterial,--unless all bodily action were synonymous with testimonial utterance; for, as already observed . . ., not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself . . . . Unless some attempt is made to secure

a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. . . .

Both principle and practical good sense forbid any larger interpretation of the privilege in this application."8

Rule 23, subdivision (4) - Comment on Accused's Exercise of Privilege.

Rule 39 provides in part as follows: "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . ., either in the action or with respect to particular matters, . . . the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom . . . ." Generally, then, under Rule 39 there is to be no comment and there is to be no inference at the trial based upon the exercise of a privilege during such trial. However, paragraph (4) of Rule 23 gives us the following exception to the general rule of Rule 39:

> "If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom."

Calif. Const. Art. I, § 13 provides in part as follows:

> ". . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Now there may be several important, substantive differences between the comment-inference scheme set up by Rules 39 and 23 (4)

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and that provided by Art. I, § 13 and our decisions thereunder. Let us explore these possible differences by considering the hypothetical cases, which follow:

> Case One: Criminal action. Defendant does not testify. In charging jury judge comments on defendant's failure to testify and instructs jury they may consider same.

Clearly Art. I, § 13 permits comment by the court. On the other hand it may be that the U.R.E. - either designedly or fortuitously - prohibit such comment. As we noted above Rule 39 provides in part that: "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . . the *judge* . . . may *not* comment thereon . . ." [italics added] Rule 39 thus sets up a rule of no-comment by judge save as such comment may be permitted by 23 (4) and turning to 23 (4) we find that it refers only to comment by counsel. Whether it was the intention of the U.R.E. draftsmen thus to prohibit court-comment may be doubtful. Their commentary on 23 (4) - which follows - seems to us to be somewhat equivocal:

> "The right of comment upon the accused's failure to testify is here limited to comment in argument of counsel . . . while these rules do not cover comment by the judge, the right of comment by counsel seems to be so closely related to the considerations of admissibility as to require notice here."

The doubt whether the U.R.E. provisions prohibit court-comment creates in turn doubt as to the constitutionality of such provisions if adopted as legislation in this State, for, as pointed out above, Art. I, § 13 clearly permits such comment. Note that our

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constitutional provision is not one simply and solely empowering the legislature to provide for comment (If it were the legislature could provide for lesser comment than the constitution authorizes but, of course, not for more). The Constitution itself sets forth the rule as a self-executing provision not requiring implementing legislation. Since the constitutional provision is of this character, legislation more restrictive of comment than that specifically stated to be valid in the constitution would be void to the extent that it is more restrictive.

> Case Two: Bunco charge against defendant. Alleged victim Evans testifies in detail to transactions with defendant. Defendant testifies he did not know Evans and never saw Evans until after the present charge against defendant. Defendant does not otherwise deny the various transactions to which Evans testified. In summing up to jury D.A. comments upon defendant's failure to deny Evans' testimony point by point.

The case stated is People v. Mayen,[9] in which the D.A.'s comment was approved on the following grounds:

> "All [defendant] testified to was that he did not know Evans and that he never saw him until long after the time of the alleged offense. This was equivalent to denying that he had any of the transactions with Evans testified to by witnesses for the prosecution. To test his denial of acquaintance with Evans it would be proper cross-examination to question him as to every alleged transaction claimed to have occurred between him and Evans. . . . We see no reason why on such testimony, within the scope that may be covered by cross-examination, comment should not be made as to the unsatisfactory nature of the defendant's testimony and the degree to which it fails to satisfactorily meet the testimony for the prosecution for which it was offered as a denial.

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'If the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses.' . . ."

How would this case be decided under the U.R.E.? Note that the D.A.'s comment could not be justified under 23 (4) for that in terms is applicable only "if an accused in a criminal action does not testify." Nevertheless the propriety of the comment could be deduced by holding that Rule 39 (the general no-comment Rule) is inapplicable. This Rule in terms forbids comment only "if a privilege is exercised". Here it could be plausibly held that defendant's election to testify by way of general rather than specific denial was not the "exercise" of a "privilege" (self-incrimination or any other) in the sense of Rule 39 and hence the general rule of no-comment is inapplicable.

What, however, is the situation if defendant's refusal to testify to a matter is expressly put on incrimination grounds and the court sustains the claim and the D.A. comments? This is our Case Three which follows:

Case Three: Robbery. Defendant testifies that on a date following the alleged robbery officers visited defendant's San Francisco hotel; that defendant then left San Francisco and returned at a much later date. On cross-examination defendant is asked as to places he visited while absent from San Francisco. Defendant claims incrimination privilege. It

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appearing that defendant was on parole and that departure from the State would make him a parole violator, defendant's claim is sustained.

Query: would comment on this exercise of privilege be proper today? The answer to the query is, we believe, "Yes". Our authority is People v. Richardson.[10] There the precise question was whether the court, though not requested, erred in failing to instruct the jury not to draw any unfavorable inference against defendant from his claim of privilege. In holding as follows that the charge should not have been given the court, by dictum, indicates that inference (and presumably comment) would have been proper under the circumstances:

> "[T]here was no error here in failing to give an instruction that no unfavorable inference to defendant could be drawn from his claim of the privilege against self-incrimination when testifying as a witness in his own behalf. In People v. Adamson, 27 Cal. 2d 478 [165 P.2d 3], an accused failed to take the stand and explain evidence introduced against him. . . . With respect to the weight which the jury could give to the fact that the defendant failed to take the stand, . . . the court said: 'The failure of the accused to testify becomes significant because of the presence of evidence that he might "explain or to deny by his testimony" . . . , for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it.' . . .
>
> [I]f it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.' These inferences which the jury may draw with respect to evidence when the accused fails to

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take the stand are equally probative and no more subject to any constitutional prohibition when the question involves the defendant's claim of privilege as a witness.

It should be noted, however, that the court is not deciding whether or not the trial court properly allowed the claim of privilege in view of the defendant's testimony on direct examination which in some instances might be considered a waiver of his claim of privilege."

How would our query in this case be answered under the U.R.E. system? Again (as in Case Two) comment could not be supported by Rule 23 (4). Could it be supported (as in Case Two) on the ground that Rule 39 is inapplicable? Possibly so by construing Rule 39 as follows: (a) Rule 39 in terms applies only "if a privilege is exercised". (b) This means validly exercised. (c) Here there was no valid exercise since under Rule 25 (g) defendant had waived his privilege.

Even under this interpretation of Rule 39, deducing the conclusion that comment in Case Three is permissible under the U.R.E. is a roundabout and doubtful process, whereas under Art. I, § 13 the approach is direct and clearly points to the conclusion that comment is proper.

It appears from the foregoing discussion that to the extent that Rule 23 (4) may differ from Art. I, § 13 the difference may be that the former is more restrictive than the latter in the sense that 23 (4) (taken in connection with Rule 39) prohibits what Art. I, § 13 permits. If 23 (4) is thus more restrictive it would be unconstitutional if adopted in this State in the form of legislation.

Art. I, § 13 seems to be a satisfactory solution of the problem in question. Rule 23 (4) would therefore seem to be of

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no utility in this State and of doubtful constitutionality. We recommend its disapproval.

RULE 25

Rule 25 consists of a general rule and seven exceptions to that Rule. In the discussion which follows we first break down the general rule into several of its parts, discussing each part. Thereafter we consider the seven exceptions to the general rule.

Rule 25 - General rule - witnesses in judicial proceedings.

Rule 25 provides, in part, as follows: " . . . every natural person has a privilege, which he may claim, to refuse to disclose in an action . . . any matter that will incriminate him . . ." In the appended footnote we recommend striking "in an action" and substituting therefor "in any judicial proceeding".[11] In the discussion which follows we shall assume the amendment to have been made.

This differs from Rule 23 (1) in two respects as follows: Firstly, 23 (1) deals only with the privilege of "an accused" in the "criminal action" in which he is such accused. That part of 25 immediately under consideration deals with the privilege of "every natural person" in any judicial proceeding." [Italics added] Secondly, 23 (1) gives the accused the privilege (a) "not to be called as a witness," and (b) "not to testify". On the other hand, 25 omits altogether the privilege not to be called and extends the privilege not to testify only to the privilege "to refuse to disclose matter that will incriminate". Thus under 23 (1) the accused should not be called by the prosecution and if

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(in violation of this privilege) he is so called, he still has the privilege to refuse to testify in any respect whatsoever. On the other hand, the natural persons (i.e. witnesses in general) referred to in Rule 25 may under that Rule properly be called in any proceeding and under that Rule they may be required to testify to all matters save only those matters that will incriminate them. These basic distinctions between the privilege of the accused and the privilege of other natural persons are, of course, recognized in California practice. (See, for example, In re Lemon, 15 C.A.2d 82 (1936) recognizing the distinction between "the status of a witness in any proceeding, civil or criminal" and "the status of a party defendant in a criminal proceeding brought against such defendant" and expounding the differences in the privileges accompanying each status.)

Furthermore in California both the privilege of the accused and that of the ordinary witness are derived from Art. I, § 13. Literally and strictly construed this section would extend the privilege only to the defendant in a criminal case. The construction, however, has been otherwise as is revealed in the following excerpt from the leading case of In re Tahbel:[12]

> ". . . The constitution of this state has limited the extent to which the legislature may exercise its power, and has given the individual protection against its exercise by providing, in article I, section 13, that 'no person shall be compelled in a criminal case to be a witness against himself.' . . .
>
> The words 'criminal case,' as used in section 13 of article 1 of the constitution, are broader than 'criminal prosecution.' To bring a person within the immunity of this provision, it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him,

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or that a criminal proceeding should have been commenced and be actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law, and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured him against any use in a criminal prosecution of the evidence he may give, . . ."[13]

We conclude that that portion of the general rule of Rule 25 examined in this section is in accord with current California law.

Rule 25 - General rule - incrimination before governmental agencies.

Rule 25 provides in part: ". . . every natural person has a privilege, which he may claim, to refuse to disclose . . . to . . . any governmental agency or division thereof any matter that will incriminate him . . ."

This states the view prevailing generally[14] and in California. Thus, for example, a person possesses the privilege to refuse to incriminate himself in a hearing held by the Senate Interim Committee on Social Welfare[15] or in a hearing before the Contractors' State License Board[16] or in a disbarment proceeding.[17]

Rule 25 - General rule - incrimination before public officials.

Rule 25 provides in part as follows: " . . . every natural person has a privilege, which he may claim, to refuse to disclose . . . to a public official of this state . . . any matter that will incriminate him . . ." Rule 25 is based on A.L.I. Code Rule 203, one of the official illustrations of the latter being as follows:

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"While investigating a homicide of A who was found dead in a small room, the police ask W whether he was present in the room at the time of the killing. W is entitled to refuse to answer *on the ground of self-incrimination*." [Italics added.]

It seems clear that California agrees with this view of the privilege. As is said in the recent case of *People* v. *Clemmans*:[18] "In California it is recognized that the privilege against self-incrimination goes to and is with the citizen in the police station."

What, however, are some of the consequences of this U.R.E.-California view of the privilege? For instance what is the relation between the proposition of Rule 25 that "every natural person has a privilege . . . to refuse to disclose . . . to a public official of this state . . . any matter that will incriminate him" and the proposition of Rule 63 (8) (b) making admissible as "against a party, a statement . . . of which the party . . . has by words or other conduct manifested . . . his belief in its truth"? Let us suppose police confront a suspect with an alleged confederate; the confederate makes a full statement acknowledging his guilt and implicating the suspect. Asked by the police what he has to say, the suspect replies "I stand on my privilege against self-incrimination". Logically (it seems to us) this is conduct indicative of belief in the truth of the accusation and considering only 63 (8) (b) the evidence would be admissible. However, under Rule 25 our suspect possessed and claimed privilege and under Rule 39 the claim may not be made the basis of an

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"adverse inference". It seems, therefore, that Rules 25 and 39 would here override 63 (8) (b) and the evidence would be inadmissible.

Today we have a comparable situation in California. Our present counterpart of Rule 25 is our police station view of the privilege. Our present counterpart of 63 (8) (b) is that portion of C.C.P. § 1870 (subdivision three) which makes admissible against a party an "act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." Upon the authority of People v. Simmons[19] it seems clear (to us) that the case stated would be resolved in the same way as under the U.R.E. In People v. Simmons defendant's response to police accusations was: "I have told you all I am going to tell you. I have nothing more to say." Held: That in such cases the trial judge should consider inter alia "whether [defendant's] conduct . . . indicated a desire to avail himself of the rule against self-incrimination"[20] and in the instant case "it is obvious that defendant was attempting to exercise his constitutional privilege against self-incrimination" and, therefore, "it was an abuse of discretion on the part of the trial court to admit the evidence."[21]

What, however, would be the result if our suspect had said nothing whatsoever? Should this be regarded as a claim of privilege within the rule of People v. Simmons? Possibly this is an open question today.[22] If so, it would it seems likewise be an open question under U.R.E. Rules 63 (8) (b), 25 and 39. In other words since these U.R.E. rules do no more than state the general principles presently prevailing (police station privilege,

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no comment on exercise thereof, adoptive admissions) enactment of these Rules would not solve questions presently open under presently prevailing principles.[23]

Returning to the main point of this section, we conclude that the principle stated in that part of the general rule of Rule 25 examined in this section is in accord with prevalent California principle.

Rule 25 - General rule - corporations.

Rule 7, subdivision (d) provides as follows:

> "Except as otherwise provided in these Rules . . . (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing . . ."

The expression "person" is here used, it seems, in the broad sense including both natural and artificial persons. Hence the meaning of 7 (d) is that no natural person and no artificial person has any privilege of the character stated unless some other rule gives such person such privilege. Now the introductory part of Rule 25 prescribes a privilege as to incriminating matter but vests such privilege only in a "natural person". Since therefore 25 does not extend the privilege thus stated to corporations and since no other rule gives corporations any privilege against self-incrimination, it follows that under Rule 7 (d) corporations have no privilege to refuse to disclose "any matter" even though the matter be incriminating and have no privilege to refuse to produce "any object or writing" even though the same be incriminating.

This, however, merely carries forward the traditional (and California) view that corporations possess no privilege against self-incrimination.[24]

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Having completed discussion of that portion of Rule 25 which we have called the general rule, we now take up the seven exceptions to that Rule.

Rule 25 - exceptions - subdivision (a).

This exception is as follows:

> "(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; . . ."

Rule 25, general rule, is that "every natural person" is possessed of the privilege there stated "which he may claim". Unless we had exception (a) above to this general rule it might be thought that every such person could decide for himself in every instance whether or not the privilege applied. This exception is desirable therefore to make clear the perpetuation of the present practice of judicial determination of the applicability of the privilege. Where procedures are available for such determination[25] the judge decides the claim and is not, of course, bound by the claimant's protestations.[26]

Observe that exception (a) in terms applies only when the privilege is claimed "in an action". This, it seems, is too narrow. Today it is possible to have a witness claiming privilege and the judge denying such claim before any action is commenced - e.g., in a grand jury investigation.[27] We, of course, should wish to continue this practice. To do so, however, we should select some expression of more comprehensive import than "in an action". We suggest as a substitute "in a judicial proceeding" and advise amending exception (a) accordingly.[28]

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Rule 25 - exceptions - subdivision (c). (N.B. we take up (b) and (c) in inverse order)

Rule 25 provides in part as follows: ". . . every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule . . . (c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis . . ." [Italics added]

The language above italicized seems intended to convey the thought that whereas no person has any privilege under Rule 25 to refuse to furnish or permit the taking of the samples, such person may have a privilege of refusal on some other basis. Thus the Commissioners speak as follows in their comment on 25 (c):

> ". . . Resistance to the forcible extraction of body fluids is not justified on the ground of privilege against self-incrimination, but may be warranted on the ground of violation of the right of personal immunity, if proper safeguards, such as supervision by a physician, are not provided. The rule does not attempt to solve that constitutional question, but limits its application strictly to the privilege against self-incrimination. A sample of spittle or a sample of stomach contents may be equally incriminating and they are on the same ground under this rule. But the taking of the sample from the stomach by stomach pump may be viewed very differently from the other when it comes to the question of safeguards to be taken to assure non-violation of the right of security of one's person."

Recent California cases approach the problem of forcible seizure of body substances in the same way, accepting the view that the privilege against self-incrimination is inapplicable. For example, in People v. Haeussler,[29] (a case of blood extraction

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from defendant while defendant was unconscious) the court spoke in part as follows:

> "[T]he privilege is guaranteed by the Constitution of this state, which declares that '[n]o person shall . . . be compelled, in any criminal case, to be a witness against himself.' (Cal. Const., art. 1, § 13.) . . . 'Wigmore, in an exhaustive and scholarly discussion of the history and policy behind the provision of the federal Constitution, which is substantially the same as the California mandate, concludes that the object of the protection "is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. . . .
>
> '"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion."' . . .
>
> Evidence is not obtained by testimonial compulsion where it consists of a test of blood taken from an accused. It is not a communication from the accused but real evidence of ultimate fact in issue--the defendant's physical condition. . . .
>
> Similarly, real evidence obtained from a defendant's stomach by use of an emetic is not violative of the privilege against self-incrimination. Despite contrary suggestions, the majority of the court in the Rochin case did not rest its reversal of the conviction upon that ground. (See the concurring opinions of Justices Black and Douglas, 342 U.S. 165, 174, 177.) . . ."

Consider also the following from People v. Duroncelay:[30]

> "We are of the opinion that the only reasonable conclusion permitted by the testimony of Riggs and the nurse who assisted him in taking the blood sample is that, when asked for his permission, defendant made no verbal response to indicate whether he consented or refused. Because of defendant's condition, it would have been extremely difficult for him to give an answer, but, when the nurse approached him with the needle, he reacted

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by withdrawing his arm. Under the circumstances, a finding that defendant consented is unwarranted, and we must therefore determine whether the results of the blood test were admissible in the absence of defendant's consent to the taking of the sample.

It is settled by our decision in People v. Haeussler, 41 Cal. 2d 252, 257, 260 P. 2d 8, that the admission of the evidence did not violate defendant's privilege against self-incrimination because the privilege relates only to testimonial compulsion and not to real evidence. We also held in the Haeussler case that the taking of the defendant's blood for an alcohol test in a medically approved manner did not constitute brutality or shock the conscience and that, therefore, the defendant had not been denied due process of law under the rule applied in Rochin v. People of California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183. . . .

The question remains as to whether the taking of defendant's blood constituted an unreasonable search and seizure in violation of his constitutional rights. . . .

It is obvious from the evidence that, before the blood sample was taken at the request of the highway patrolman, there was reasonable cause to believe that defendant had committed the felony of which he was convicted, and he could have been lawfully arrested at that time. Pen. Code, § 836. . . . Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest. . . . Under the circumstances, a search, for example, of defendant's pockets or his automobile to obtain additional evidence of the offense would have been proper, regardless of whether he consented thereto. The question to be determined here is whether the taking of a sample of his blood for an alcohol test was a matter of such a different character that it must be regarded as an unreasonable search and seizure. . . .

We conclude that there was no violation of defendant's rights and that the results of the alcohol test were properly admitted in evidence."

This approach seems to be precisely the approach intended by Rule 25, subdivision (c), namely, the privilege against self-incrimination is inapplicable and in and of itself is therefore not basis for excluding the evidence. However, Rochin doctrines or Cahan doctrines or both may make the evidence inadmissible. Therefore in screening the evidence we lay the privilege aside and proceed to decide the problem on the basis of the other doctrines.

Our conclusion is that subdivision (c) of Rule 25 is in accord with California law.[31]

Rule 25 - exceptions - subdivision (b).

Rule 25, subdivision (b) is as follows:

> ". . . every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule, . . . (b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition . . ."

If (as provided in subdivision (c) and as held in People v. Haeussler and People v. Duroncelay) the privilege vs. self-incrimination does not embrace the privilege to refuse to permit the taking of samples of body fluids or substances for analysis, it would seem to follow a fortiori that (as provided in subdivision (b)) the privilege does not embrace the privilege to refuse to submit to examination for the purpose of discovering or recording corporal features and other identifying characteristics or physical condition (see hereinafter as to mental condition). In

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other words, the approval of the principle of (c) in Haeussler and Duroncelay logically suggests California's approval of the principle of (b) (except possibly as to mental condition). Thus we anticipate that California would hold today that insofar as privilege vs. self-incrimination is concerned a person has no privilege to refuse to give an examplar of his handwriting, as in People v. Smith[32] or to give an impression of his fingerprint, as in People v. Jones,[33] or to submit his arm to examination for hypodermic needle scars as in People v. Salas,[34] or to submit his hand for examination under an ultraviolet ray machine as in People v. Irvine,[35] or to submit his private parts for examination for venereal disease as in People v. Guiterez,[36] or to submit his private parts for examination for the presence of fecal matter thereon as in People v. Morgan.[37] We hasten to concede that in all of the cases just cited there was consent by the suspect. None of these cases, therefore, raises the problem of 25 (c); namely, whether there is a privilege vs. self-incrimination to refuse to consent. However, we maintain that under the logic of Haeussler and Durancelay, there is no such privilege. Our position is (we believe) supported by the following from People v. Robarge;[38]

> "Defendant further contends that the action of the police in placing dark glasses on him at the time he was identified . . . at the police station was in violation of his constitutional rights. . . . Defendant relies solely on Rochin v. California (1952), 342 U.S. 165 [72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R.2d 1396], in support of his contention that he was deprived of his constitutional rights. That case was extensively reviewed in People v. Haeussler, . . . where this court

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tional examination and that that something more is interrogation.

> stated . . . 'In brief, the Rochin case holds that brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence.' In the present case there is no evidence whatsoever of brutality or shocking conduct. In fact, there is nothing to show that force was used when the glasses were placed upon defendant, and, for all that appears, he may have consented to what was done."39

Here, to be sure, the court does suggest as a possible rationale the theory of consent but that is an alternate (and apparently secondary) theory to the principal theory which seems to be: (1) No privilege vs. self-incrimination is applicable, but (of course) (2) Rochin principles are applicable.

In the foregoing discussion of 25 (b) we have purposely omitted the following italicized portion:

> "(b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording . . . his . . . *mental condition*." [Italics added]

What is the meaning here of "mental condition" and what is the meaning of "examination"? The expression "mental condition" is, of course, a very broad term. In one sense of the term it includes consciousness of guilt. Manifestly, however, the Commissioners do not use the term in this sense, for if "mental condition" includes consciousness of guilt subdivision (b) to Rule 25 wholly negates and nullifies the Rule itself. Probably what the Commissioners intend by the term is mental condition in the sense of sanity or insanity. At any rate we shall discuss their proposal on the basis of that assumption. We assume, too, that they mean by "examination" something more than just observational examination and that that something more is interrogation.

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Unless "examination" includes interrogation the Commissioners' proposal is simply a declaration that the privilege does not insure privacy and freedom from observation - a proposition so obvious that the Commissioners would scarcely be suggesting it as a legislative enactment. We think, then, the proposal is this: The privilege vs. self-incrimination does not embrace a privilege to refuse to answer questions relevant to the examinee's sanity or insanity, except, of course, that under Rule 23 (1) the accused has the privilege not to be called as a witness and not to testify upon his trial as such accused.

California law seems to be in accord with the proposition just stated. Let us take note first of the exception stated immediately above (that the accused does possess privilege at his trial not to be called and not to testify in re his sanity).

Penal Code § 1026 provides in part as follows:

> "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty . . . then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law . . . ."

Clearly defendant possesses his normal privilege against self-incrimination upon the trial of the sanity issue. As is

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said in People v. Lamey:[40]

"It is declared in the Constitution of California, article I, section 13, that no person shall be compelled, in any criminal case, to be a witness against himself. In this case, under the plea of not guilty, the effect of the verdict in each instance was that the defendant had committed the acts which, if committed by a sane person, would make him guilty of the alleged crimes. For the purposes of that verdict he was presumed to be sane, but under his plea of not guilty by reason of insanity, the question of his status and responsibility as a criminal remained open and undetermined. That he was a criminal, and subject to punishment, was not yet established. Under the second plea, that issue was to be tried separately, but it was all in the same case. The second verdict, equally with the first, was necessary before a judgment of conviction could be rendered. Under the former practice, when the defendant relied upon his right to introduce evidence of insanity as part of his defense, it was well understood that the state had no right to compel the defendant to give testimony as a witness, even upon that issue. We do not perceive that his rights in this respect are in any way different under the new practice. The change is only a change of procedure; it does not affect a substantial right, and it does not take away any constitutional right or immunity. In People v. Troche, 206 Cal. 35 [273 Pac. 767, 772], the defendant was tried on his plea of not guilty, and then under his plea of not guilty by reason of insanity, as provided by the present law. (Pen. Code, secs. 1016, 1020, 1026.) The jury found against him on both pleas. On appeal from the judgment, defendant contended that the provisions of the state Constitution guaranteeing a public and speedy trial to one accused of a crime 'means one speedy and public trial and no more.' To this the Supreme Court responded: 'The trial had by the defendant, under the present law, amounted to one trial, and no more.' The very reasoning which sustains the present procedure, at the same time preserves to the defendant all of his rights of defense. Among these rights, saved to the defendant under the Constitution, is the right of immunity from being compelled, in any criminal case, to be a witness against himself."

The same result, it seems, would follow under Rule 23 (1) to which Rule 25 (b) is, of course, subject.

What, then, is the situation respecting pre-trial or out-of-court sanity examinations? The earliest case seems to be People v. Bundy,[41] The facts and holding are indicated by the following excerpt:

> "The ground mainly urged for reversal is that the trial court improperly allowed two doctors called as witnesses by the district attorney to give their opinions on the question of defendant's sanity . . . . . At the time of the second examination by Dr. Reynolds and the examination by Dr. Orbison defendant had counsel, and they were not notified that any examination was to be had and had no knowledge thereof. Defendant was in custody, confined in the county jail, where the examinations were had. He was informed by Dr. Orbison prior to his examination that he, Orbison, was employed by the district attorney to make an examination . . . . Defendant made no objection whatever to being examined at any time, and conversed very freely with each of the doctors. The claim of counsel is that by allowing the doctors to give their opinions based upon their examinations, defendant was compelled to be a witness against himself, in violation of section 13, article I of the constitution, which provides that 'No person shall . . . be compelled in any criminal case to be a witness against himself . . .'. . . It may freely be admitted that in view of this provision, one accused of crime may not be compelled to divulge to another, to be used by that other as basis for his testimony on the trial, facts which he has a right to hold secret. Whether one accused of crime can properly be compelled to submit to an examination by medical experts for the purpose of determining whether or not he is of sound mind, is a question that it is not necessary to discuss here. There is nothing in the constitutional provision relied on that prohibits such a person from furnishing evidence against himself if he chooses to do so. He shall not be compelled to do so, but whatever fact he may disclose without force or compulsion of any kind, or whatever testimony he

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may voluntarily give is not within the inhibition. . . . No decision brought to our attention holds to the contrary. And with special reference to examinations for the purpose of ascertaining whether an accused is of unsound mind, it is said in 4 Wigmore on Evidence, sec. 2265, that 'the use of the accused's utterances for forming a witness' opinion as to sanity is a dubitable case only when compulsion has been resorted to.' Perhaps utterances induced by fraud might likewise fall within the dubitable cases. In the case at bar an appellate court would certainly not be warranted by the record in holding that any force or compulsion was used, or that the accused did not voluntarily submit to the examinations. There was nothing in the nature of fraud on the part of the medical men, the authorities or anybody else. The fact that defendant's counsel were not notified of the proposed examinations and had no knowledge thereof in no way affects the question of the admissibility of the evidence complained of. There is nothing in the law that makes notice or knowledge to counsel essential to a voluntary disclosure of facts by an accused person . . . ."

Here our question (i.e. compulsory examination) is not reached for decision but the court seemingly accepts Wigmore's suggestion that the question is "dubitable".

In 1929 the Legislature added § 1027 to the Penal Code which section provides in part as follows:

> "When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals, and may select and appoint three alienists, at least one of whom must be selected from such staffs, to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question . . . ."

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The next case to be noted - People v. Strong[42] was decided under this section. The facts and holding are indicated by the following excerpt:

> "Defendant was accused of robbery . . . and, standing mute, a plea of 'not guilty' was ordered entered . . . On December 9th he appeared with the public defender as counsel and entered an additional plea of 'not guilty by reason of insanity' . . . The trial of the issues raised by the pleas 'not guilty' resulted in a verdict of guilty . . . whereupon the same jury was sworn to try the issues raised by the last pleas entered, which resulted in verdicts finding the defendant sane at the time of the commission of the offenses charged . . .
>
> It appears that the court, under Section 1027 of the Penal Code, appointed Dr. Benjamin Blank and Dr. Martin Carter to examine defendant and that Dr. Blank was called as a witness by the district attorney and testified that in his opinion the defendant was sane . . . . It is the contention of appellant . . . that said section 1027 . . . in effect compels a defendant to give evidence against himself . . . in violation of . . . section 13, article I, of the California Constitution . . .
>
> We fail to see any merit in the contention that under section 1027 a defendant is compelled to be a witness against himself. Nothing in the section compels him to submit to an examination. If he does so the action is purely voluntary. To assert his constitutional rights all that is required is for him to stand mute, and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion."

Here again (as in People v. Bundy) we fail to reach our question of compulsory examination because P.C. § 1027 is construed as not requiring such compulsory examination. Here, however, we do have a suggestion in terms of constitutional right of the right to stand mute and refuse to permit the examination.

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Our next and final case is People v. French.[43] The facts and holding are indicated by the following excerpt:

> "Another of appellant's contentions is that the court committed reversible error by the admission of the proceeding had before the judge which arose out of the refusal of defendant's counsel, participated in by the defendant himself, to permit the alienists appointed by the court to examine the defendant under the authority of section 1027, Penal Code, . . .
>
> The three alienists selected by the court attempted to comply with the provisions of said section before the case came to trial but were met with refusal on the part of the defendant on the advice of counsel to submit to any examination or answer any questions propounded by said alienists or to cooperate with said alienists in any respect whatsoever on the grounds that the statute compelled the defendant to be a witness against himself and was in violation of article I, section 13, of the state Constitution . . . .
>
> All efforts having failed, the matter was brought before the trial judge by the district attorney with the defendant's attorneys, the defendant and the district attorney being present. After discussing the matter at some length with the court, counsel for the defense, with the approval of the defendant, definitely stated that they would ignore any order made by the court requiring the defendant to submit himself to a physical or mental test bearing upon his plea of not guilty by reason of insanity . . . .
>
> The introduction in evidence of the transcript of the proceedings had upon the complaints of the alienists that they had been denied by defendant's counsel the privilege of examining into his mental condition was opposed by his counsel on all pertinent grounds and after its admission a motion to strike all reference to the proceedings was denied.
>
> Appellant cites People v. Strong, 114 Cal. App. 522 [300 Pac. 84], to the point that section 1027, Penal Code, does not compel the defendant to submit himself to an examination and if he does so his action is purely voluntary . . . .

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Whether a statute requiring that a person who enters a plea of confession and avoidance, such as insanity, shall submit to the examination provided by section 1027, Penal Code, under penalty that if he refuses to do so he places himself within the rule of the 1934 amendment of article I, section 13, of the state Constitution (which provides that if the defendant in a criminal case does not testify or fails to deny any evidence or facts in the case against him, that such facts may be commented upon by the court and counsel and considered by the court or jury), would, under the amendment of 1934, be held to be in conflict with another clause of the same section which provides that no person on trial in a criminal case shall be required to be a witness against himself, need not here be decided. This much is true. The defendant did not comply with section 1027, Penal Code, and the only question before us for decision is whether the introduction of said proceedings constituted reversible error. It cannot be questioned that anything done or said in the proceedings if relevant to his mental state would be admissible. The proceedings disclose that he was conscious that his mental responsibility was under investigation and that he was acting in concert with his counsel who were directing his defense and therefore constituted evidence as to his mental condition. . . . 44

The defendant's refusal to give any history or information as to his alleged mental ailment . . . and his refusal and conduct and all that he said was evidence in the case . . . those things that disclosed the defendant's conduct, and indicated that he may have opposed the examination because of his fear of the result, were clearly admissible, as indicating defendant's state of mind."

Here the end result is clear. Court appoints alienist under P.C. 1027. Defendant clams up. Upon trial of issue of sanity the fact that defendant clammed up may be shown as prosecution evidence relative to his mental condition. The result is clear, but what is the rationale? It seems to us that the rationale is that defendant's refusal was not justified as an exercise of his

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privilege vs. self-incrimination. It is clear that if a pre-trial privilege does exist defendant's claim of such privilege cannot be proved against defendant at the trial.[45] Hence the holding in People v. French that defendant's pre-trial claim of alleged privilege may be proved is a holding which logically negates the existence of the alleged privilege. The only alternative rationale is, it seems: the privilege exists but (for reasons unknown or unstated) in this instance the pre-trial claim of privilege may be shown. We think the first is the more plausible rationale and we think therefore that the court did (at least indirectly) decide that a statute of the kind posited in the opinion would be valid.

We conclude that in allowing a person's refusal to submit to mental examination to be proved against that person the court in People v. French has in effect affirmed the principle of 25 (b) that "no person has the privilege to refuse to submit to examination for the purpose of discovering or recording . . . his . . . mental condition." On this basis it is our opinion that the portion of 25 (b) just quoted would in this State be valid legislation not in conflict with Art. I, § 13.

The trend of decisions throughout the country seems to lead in the direction of the view of 25 (b).

Summarizing the situation in general the Commissioners state that "[i]n general practice and by the majority of jurisdictions the practice of taking . . . mental examinations is sanctioned."[46] Inbau asserts: "By way of summary it may be stated that the decisions involving insanity pleas have been quite uniform in

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admitting in evidence the results of psychiatric examinations allegedly made under compulsion."[47]

We do not deny that what thus seems to be the majority and California view presents some aspects which may disquiet strong advocates of privilege. Let us now note some of the objections that may be advanced and some possible asnwers to these objections.

A man is in jail awaiting trial for murder. His defense is not guilty by reason of insanity. Actually the man committed the murder and actually he is feigning insanity. A court-appointed psychiatrist goes to jail to examine him. Since the man possesses the privilege to refuse to make statements which would tend to show he committed the murder, how can it be that he possesses no privilege to refuse to make statements which would tend to expose his fraudulent claim of insanity?

A possible answer is that a sanity test, though verbal, should be analogized to non-verbal conduct not within the privilege. For example, the subject's participation in exercises to test his memory, reasoning power, etc. may be equated with requiring him to grow a beard and wear dark glasses, put on overalls and, so outfitted, to display himself to an identification witness. This seems to be McCormick's view. He argues that a sanity examination does not infringe the privilege because the "questions are not designed to elicit admissions of guilt as evidence of their truth, but rather to test the coherence and rationality of the subject. They are not used testimonially but as symptoms of abnormality or the reverse."[48] In the following passage Inbau seems to suggest the same rationale:

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"It would . . . [be] desirable for the courts . . . to . . . [hold] that although the privilege protects the accused from supplying any testimonial link in the chain of evidence to establish the conclusion that he committed the crime in question, it has no application to an inquiry as to his mental responsibility at the time the act was committed; for even though an accused's ultimate guilt depends upon his mental condition at the time of the commission of the act, a psychiatric examination has no bearing upon the question of whether he actually committed it. The reasonableness of this analysis is obvious when we realize that a psychiatric examination does not necessitate an inquiry into the issue of the accused person's guilt or innocence of the offense itself. An expert in mental diseases can, if necessary, make a fairly satisfactory psychiatric examination by observing and interviewing an accused without at any time even so much as mentioning the crime in question. . . ."[49]

Another objection which may be leveled against the majority view is along practical lines. Accepting the majority view that there is no privilege, where is the gain in discovering the mental condition of a recalcitrant examinee? The success of a question-and-answer examination must depend in large part upon answers. What if the examinee (even though he has no privilege to do so) simply refuses to answer any and all questions? Is it not true that if the examinee is willing to cooperate he will do so irrespective of whether he has a theoretical privilege and, on the other hand, if he is unwilling to cooperate no denial of privilege will convert his unwillingness into willingness? In other words is not privilege vel non immaterial to the objective of achieving a successful mental examination? In answer to which we say that in many cases (notably cases of sophisticated, professional law breakers) this is probably so. However, if there is no privilege

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the examinee may properly be told this and the result in some cases may be to break his silence. Furthermore, if there is no privilege a court order to submit to examination (with appropriate sanctions for contumacy) would seem to be proper and in some cases may be effective.[50]

Our over-all conclusion on 25 (b) is that the subdivision in its entirety is in accord with current California law and we recommend approval of the entire subdivision.

Rule 25 - exceptions - subdivision (d).

This exception is as follows:

> "(d) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; . . ."

Let us suppose that D is on trial charged with larceny of a watch, the property of one A. The prosecution moves for an order requiring D to produce the watch for use as evidence against him. In support of the motion the prosecution has A testify that A owns the watch and that D stole it from A. On the basis of A's testimony the judge finds that (a) A has a right to the possession of the watch superior to D's right, and (b) the watch is now under D's control. The judge therefore makes an order directing D to produce the watch. Under 25 (d) D has no privilege to refuse to obey the order even though the watch constitutes matter incriminating him.[51]

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The idea underlying 25 (d) is that, whereas D possesses privilege to refuse to obey an order requiring him to produce his property, he possesses no such privilege respecting property of another in his custody. This idea is fortified by the following reasoning: A could replevy the watch from D and then turn it over to the prosecution. Since this procedure would not violate D's incrimination privilege,[52] short-cutting this procedure and (as it were) enabling the prosecution to act in A's behalf in asserting his property right is no violation of privilege.

We have found no local authority germane to this question. Personally we are persuaded by the logic supporting 25 (d) and we recommend approval of 25 (d).

Rule 25 - exceptions - subdivision (e).

This exception is as follows:

> "(e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; . . ."

Art. I, § 13 does not give certain persons the privilege to refuse to disclose incriminating matter under certain circumstances. The classic illustration is the culpable motorist involved in an accident who, though culpable, must identify himself, give his address and the registration number of his vehicle. It is well-settled that legislation requiring such disclosures (and making refusal to disclose itself a crime) is not an infringement of Art. I, § 13. The leading case in this State is People v. Diller.[53]

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Other similar situations are suggested in the opinion in People v. Diller in quoting the following with approval from a Missouri case:

> "We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods."[54]

Such regulations are permissible under Art. I, § 13. We should take care therefore lest in a legislative statement of the scope of incrimination privilege we so broaden the scope that such regulations would be inconsistent with our legislative statement of privilege. That, however, is precisely what we would do if we were to adopt the general rule of 25 omitting any exception to embrace regulations of the kind adverted to. 25 (e) is therefore fashioned (in part) as an exception designed to exclude from the general rule of 25 regulations of the kind in question.

25 (e) is based on A.L.I. Rule 207 (1) as to which the official comment is in part as follows:

> "Paragraph (1) of this Rule states the law as generally applied to matters which . . . dealers in intoxicants or sellers of poisons or habit-forming drugs are required to record, or to matters which persons involved in automobile accidents are directed by statute to

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> report. The required disclosure may be written or oral. If written, ownership of the document in which the required disclosure is recorded is immaterial."

The difficulty we find with 25 (e) is this: it is so broadly stated that, taken literally, it includes within its sweep some situations in which there is privilege under Art. I, § 13. For example, a county ordinance requires as follows:

> "'every person who resides in, is employed in, has a regular place of business in, or who regularly enters or travels through any part of the unincorporated territory of Los Angeles County, and who is a member of any communist organization, shall register by acknowledging under oath and filing with the Sheriff's Department of the County a registration statement containing the following (1) Name and any alias or aliases of the registrant . . . (4) the name of all communist organizations of which he is a member.'"

In People v. McCormick[55] it was held that this ordinance contraverses Art. I, § 13; yet 25 (e) is so broadly stated that it could be read as an attempt to deny privilege under the circumstances stated in the ordinance and as so read and applied it (i.e. 25 (e) would itself be unconstitutional. Or consider the hypo suggested by Jackson in Shapiro v. U. S. of a statute requiring that "each citizen . . . keep a diary that would show where he was at all times, with whom he was and what he was up to."[56] Or ponder McCormick's hypo of a statutory "requirement that every person who kills another with firearms should report the fact to the sheriff."[57] Of course, 25 (e) is not intended to go so far as to deny privilege in these situations (i.e. is not intended as a statement that such statutes would be valid).

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If the line could be clearly drawn between the valid regulations first noticed and the invalid regulations just mentioned and if definite words of demarcation were available to describe the bounds we could suggest amending 25 (e). However we follow McCormick in believing as follows:

> ". . . It seems . . . that the power to require records and reports and to exempt them from privilege could only be exerted as a means of carrying out some other distinct governmental power, such as the power to tax, the power to regulate prices in an emergency, or the state's police power to regulate activities dangerous to the health, safety, and morals of the community. To make easier the investigation and punishment of crime generally, or of a particular kind of crime, would not suffice as the only footing of the power. Where the independent regulatory power under the constitution and the privilege against self-incrimination come in conflict each must yield to some extent, so that a viable accommodation may be found. Perhaps in the present state of the law, the limits can be no more definitely stated than to say with Vinson, C.J., that the bounds have not been overstepped 'when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection . . .'"58

In this uncertain state of the law we cannot improve upon 25 (e) as a statement of general principle. We recognize, however, that, if enacted and held valid in this State, it would have to be construed as not intended to deny privilege in situations in which privilege is vouchsafed by Art. I, § 13.

Concluding on 25 (e), we may say a word about the provision insofar as public officials are concerned. On this phase of 25 (e) note the following A.L.I. commentary on Rule 201 (1) (which

25 (e) copies):

> "Paragraph (1) of this Rule states the law as generally applied to matters which a public official or employee has recorded or is under a duty to record or report."

McCormick gives the following rationale:

> "A document, entry or writing which is part of the state's official records (whether open to the public or not) is of course subject to be produced upon judicial order without regard to any claim of privilege against self-incrimination of the person who has custody. The state's interest in its records has precedence over the private claims of the person in possession."59

Rule 25 - exceptions - subdivision (f).

This exception is as follows:

> "(f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; . . ."

The general rule of Rule 25 is applicable only to a "natural person". Insofar as this general rule is concerned a natural person has the privilege to refuse to obey a subpoena duces tecum ordering production of documents in his possession which would incriminate him. (This assumes no exception to 25 is applicable.) On the other hand, a corporate or artificial person possesses no such privilege.[60] It follows that an agent of the corporation (who, for this purpose is, of course, the corporation) has no privilege to refuse to obey a subpoena duces tecum to produce the corporation's books and other tangibles. Rule 25 gives no such privilege, nor does any other Rule; therefore under Rule 7 there

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is no privilege. As representative of the corporation, the agent must obey the process even though in so doing he incriminates himself in his individual capacity. There is, however, nothing new in all this for as the court states in McLain v. Superior Court:[61]

> "It has long been decided that the constitutional privilege inherent in the declaration that no party accused shall be compelled in a criminal case to be a witness against himself was not available to corporations, which could be required to produce their books and papers by a subpoena duces tecum. Thus in Wilson v. United States, 221 U.S. 361 [31 S.Ct. 538, 55 L. Ed. 771], decided in 1911, the Supreme Court of the United States declared that a corporation could not resist upon such constitutional grounds the compulsory production of its books and papers. (See, also, Heike v. United States, 227 U.S. 131 [33 S.Ct. 226, 57 L.Ed. 450], and Shapiro v. United States, 335 U.S. 1 [68 S.Ct. 1375, 92 L.Ed. 1787].) And this right of a court or properly constituted investigative body to compel the production of such records has long existed, even though they may be temporarily in the custody of someone not authorized to have them by the corporation itself."

Subdivision (f) of Rule 25 is not intended to cover the situation just discussed. In order to see clearly just what is proposed in 25 (f), let us take this official illustration of A.L.I. Rule 207 (2) which 25 (f) copies:

> "A State statute requires all corporations owning stock in other corporations to keep records of such stock ownership, which records shall be open to inspection by specified officials of the State, and makes criminal the falsification of such records or concealment of such ownership. A, an accountant employed by corporation C to keep all its records, by reason of Paragraph (2) of this Rule has no privilege under Rule 203 [U.R.E. Rule 25, general rule] to refuse to testify about the falsity of his record of C's ownership of stock in other corporations."

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Note that the intent here is to deny to the corporate employee privilege to refuse to testify to matter incriminating him.

Consider also this exchange between Professor Morgan and Judge Wyzanski in the course of the A.L.I. debate on the A.L.I. Rule 207 (2) (which is identical with U.R.E. 25 (f)):

> "HON. CHARLES E. WYZANSKI, JR. . . .: Before you pass 207 (2) . . . Supposing that the wage and hour law requires a corporation to keep records with respect to the employment of individuals and A is the employment manager in charge of these matters for the corporation. He, as a matter of fact, knows what the situation is, but no record was kept at all. The law under the statutes is that a corporation should keep these records. A may be called upon to testify and cannot raise the privilege of self-incrimination. I think it was that situation that it was intended to be covered by 207 (2) . . .
>
> MR. MORGAN: That is right. . . ."[62]

McCormick tells us that:

> ". . . it might well be determined that the agent of a corporation or association could be compelled to disclose by his oral testimony any acts performed for the principal, though incriminating the agent. The courts seem as yet not to have settled this question."[63]

It seems, however, that the question is settled in California and that the decision is adverse to the A.L.I.-U.R.E.-McCormick view.

The case in point is McLain v. Superior Court,[64] The Senate Interim Committee on Social Welfare issued a subpoena addressed to Citizens Committee for Old Age Pensions (a non-profit corporation) and George H. McLain, Chairman of said Citizens Committee for Old Age Pensions, commanding them to appear before the committee

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on a given date "as witness in an investigation by the said committee" and commanding them to bring with them all cancelled checks, check stubs, check ledgers and bank statements of all the accounts in the name of Citizens Committee for Old Age Pensions. McLain appeared and was sworn. He testified that he was chairman of the corporation and that he had received the subpoena. He was then told that he had been subpoenaed only in his capacity as chairman and in none other and was asked if he had the documents which the subpoena had required him to produce. After some time was spent in arranging the records, McLain stated that for the convenience of the committee "we have separated to the best of our ability the checks that have been issued to Assemblyman John Evans during 1948 and 1949 as one of our public relations counsel, so we will be very happy to turn these over to you." He thereupon handed the specified checks to counsel for the committee, who said, "What are these?" and McLain replied, "Checks made payable to John W. Evans". The checks were signed "Citizens' Committee for Old Age Pensions, George H. McLain," and bore the apparent endorsement of Mr. Evans, and also the usual stamps and punch marks indicating a clearance through the bank on which they were drawn. Later McLain was indicted by the Grand Jury of Sacramento County. The indictment contained four counts, in each of which McLain was charged with the crime of bribery in that he gave a bribe, consisting of the sum of $75, to John W. Evans, then a member of the state Legislature, with intent to influence the said legislator in giving or withholding his vote on bills introduced for passage.

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McLain then sought a writ of prohibition to restrain the Superior Court from taking any steps or proceedings based on the indictment. McLain based his petition upon Section 9410 of the Government Code, which, so far as here applicable, provides as follows:

> "A person sworn and examined before the Senate or Assembly, or any committee, can not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify."

Respondent contended:

> ". . . that immunity was not acquired by petitioner, not because the documents produced under the compulsion of the subpoena did not touch upon the alleged crimes for which he was later indicted, nor that the meager testimony he gave did not serve to identify and authenticate these documents, but that the production of the documents by petitioner and his testimony concerning them fell within permissible limits without the granting of immunity."

The court held that immunity attached and granted prohibition on the following grounds:

> ". . . there is a clear distinction between the admitted power of such a body as the Senate Interim Committee on Social Welfare to compel the production before it of such documents, and the right to compel testimony from the custodian of such documents which would incriminate the witness. . . .
>
> "Here the subpoena was directed to the corporation and to petitioner as chairman of the board of trustees thereof and it required the production of the books and records referred to. However, when petitioner was sworn he became a witness pursuant to the <u>ad testificandum</u> part of the process served upon him. Indeed, there is no way in which a witness can be sworn otherwise, although as has appeared from the statement of facts, there was a prompt declaration by counsel for the committee that petitioner had been subpoenaed merely in his capacity as chairman of the board of trustees of the corporation and

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not otherwise. That position was departed from when to him there was administered the usual oath administered to all witnesses. The situation may be illustrated by inquiring how a sentence for contempt would have been served had the petitioner after the administration of the oath proved contumacious. Clearly, he would have served that sentence individually and not as chairman of the board of trustees. If, therefore, after the production of the books and papers in response to the subpoena duces tecum, by which production the demands of that process had been met, the petitioner, in response to appropriate questioning, gave testimony touching the facts and acts for which he now stands under indictment, no reason appears why he should not have the immunity granted him by the statute in exchange for his constitutional privilege against self-incrimination. . .

"Applying, then, the plain language of the act to the facts here, did the petitioner, having been sworn, testify as to any fact or act touching the bribery with which he stands charged? We think he did. . . .

"When the legislative committee swore petitioner as a witness it contracted that he would be immune from prosecution for any crime touching which he might testify. When that testimony touched upon the alleged bribery of Evans, immunity attached. Petitioner cannot be prosecuted therefor."

The Supreme Court denied respondent's petition for a hearing.

This, it seems to us, is a clear recognition that (to paraphrase 25(f)) a person who is an officer, agent or employee of a corporation or other association does have the privilege to refuse to disclose by his testimony matter incriminating him (unless of course some exception other than 25(f) is applicable or immunity is granted).

We conclude that 25(f) would be unconstitutional in this State and on that ground we recommend its disapproval.

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Rule 25 - exceptions - subdivision (g).

This exception is as follows:

> "(g) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action."

Suppose an accused in a criminal case voluntarily takes the witness stand and testifies in his defense to certain facts relevant to his defense. Under these circumstances to what extent, if any, is he protected by Art. I, § 13? Could the legislature provide that when such an accused elects to testify the prosecution may cross-examine him with reference to any relevant fact whether or not such fact has been mentioned on direct examination? Could the Legislature provide that when accused elects to testify in his defense the prosecution may call him in rebuttal as a prosecution witness?[65]

Subdivision (g) of Rule 25 suggests these questions, for, if (g) is sound as a statement of the scope of the Art. I, § 13 privilege (i.e. if (g) itself would be a constitutional enactment in this State) it seems that the Legislature could validly enact the two statutes suggested. Subdivision (g) provides that by testifying on the merits the accused waives privilege as to any incriminating matter relevant to the merits. If accused does thus waive his privilege could not the Legislature give the prosecution the advantage of such waiver by permitting full cross-examination of the accused or by permitting the prosecution to call the accused in rebuttal?

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As a matter of fact the Legislature has not attempted to provide either for full cross-examination of accused or for calling him in rebuttal. Rather the Legislature has chosen to provide only for restricted cross-examination (i.e. for cross restricted to the scope of direct).[66] Was this legislative decision a free choice or was the decision required by Art. I, § 13? If the former be the case 25(g) would, it seems, be valid legislation in this State; if the latter be the case 25(g) would, it seems, be an unconstitutional enactment. We must now report (regretfully) that the latter seems to be the case.

People v. O'Brien,[67] seems very explicit on the point as the following excerpt shows:

> "The defendant was charged, in an information filed by the district attorney of San Francisco, with the embezzlement of a certain sum of money, to wit, $1000, the same being the property of the state, and on the trial he was called and examined as a witness on his own behalf. On the examination in chief his testimony was directed and confined to the alleged embezzlement of the particular sum of money mentioned in the information, but on the cross-examination he was examined generally as a witness in the case. This course of proceeding was objected to very frequently by his attorney, but the objections were as often overruled by the court, and the examination was allowed to be as general as could have been made of any other witness[68] in the case; the district attorney, in fact, making the defendant his own witness on behalf of the prosecution. The question is, Was this course of proceeding regular and proper under the law?
>
> "Section 13, article 1, of the constitution declares that no person shall 'be compelled in any criminal case to be a witness against himself.' There is, therefore, no power in the court to compel a defendant in a criminal case to take the stand; . . .

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"But by section 1323 of the Penal Code, it is provided that 'a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. . . .' It is only under and by virtue of the foregoing provision of the Penal Code that a defendant in a criminal prosecution can be a witness at all; and when he is called on his own behalf and examined respecting a particular fact or matter in the case, the right of cross-examination is confined to the fact or matter testified to on the examination-in-chief. Such is the express language of the statute; and when the court, as it did in the case at bar, allowed the prosecution to make the defendant a general witness in its behalf, it invaded a right secured to the defendant not only by the statute but by the constitution.

"For this error the judgment and order are reversed, and the cause remanded for a new trial."

Here violation of the statutory rule of restricted cross-examination is treated as ipso facto violation of Art. I, § 13.[69] The conclusion seems inescapable that the statute states the outer limits of waiver which the constitution permits. The same point of view seems to be taken in People v. Arrighini[70] as the following excerpt shows:

"The limitation contained in our code (Pen. Code, sec. 1323) was doubtless intended to preserve to defendants the right secured by section 13, article 1, of the constitution. . . . Other states from which cases are cited do not contain such a limitation. In Massachusetts the provision is that he 'shall at his own request, and not otherwise, be deemed a competent witness.' It has been held that when, under this statute, the accused offers himself as a witness, he waives all protection guaranteed by the constitution and becomes a competent witness in the whole case. . . .

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"Under our statute there can be no doubt. Here, surely no evidence can be wrung from him. He can only be examined in regard to the matters concerning which he has voluntarily testified. . . ."

In view of the scope of Art. I, § 13 above expounded, we must conclude that in this State 25(g) would be void legislation because in contravention of Art. I, § 13. We must therefore recommend disapproval of 25(g), albeit we do so reluctantly.[71]

RULE 24

Rule 25 refers to "any matter that will incriminate" a person. The language just quoted is defined as follows by Rule 24:

"A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation."

This seems to be generally in accord with the concept of incriminating matter developed in California cases.[72] (See hereinafter, however, as to incrimination under foreign law.) Rule 24 is derived from A.L.I. Rule 202. The two following official illustrations of the latter emphasize the point that the privilege does not embrace incrimination under the laws of another sovereignty:

"T claims exemption from taxation for a Grecian work of art under a statute exempting 'antique foreign works of art.' By Greek law it is criminal to remove antique works of art from Greece. T

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cannot by virtue of his privilege against self-incrimination refuse to answer the assessors' questions as to when, where, and how he acquired the work of art in question.

"The income-tax law of a state requires taxpayers to disclose the sources of their incomes. T, a taxpayer of the state, may not by virtue of privilege against self-incrimination refuse to make this disclosure although part of his income is derived from sale of cigarettes in a neighboring state where such sale is criminal."

We have found no local decisions indicative of whether or not Art. I, § 13 extends its protection to incrimination under the laws of any sovereignty other than California. McCormick points out that both the English decisions and American holdings are conflicting on the question of incrimination under "foreign" law.[73] He concludes as follows:

"Certainly there is nothing in the language nor in the history of the Constitutional provisions which dictates an answer either way upon the question whether the protection should extend to prosecution under 'foreign' law. Judges who consider that the policy behind the privilege is so salutary that the range of its application should be extended, will be inclined to accord protection when the danger of 'foreign' prosecution is clear. The argument based on the difficulty in ascertaining the scope of the 'foreign' law has lost much of its force with the widening of the reach of judicial notice.

The paramount argument for confining the privilege to incrimination under the laws of the forum is based upon the undesirability of a wholesale extension of this already burdensome obstruction upon the judicial investigation of facts. Moreover, apart from collusion between the law enforcement agencies of state and Federal governments, there is little incentive for the enforcement officers of one government to seek to require a witness to inculpate himself under the laws of

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another jurisdiction. When such collusion does occur then the 'foreign' government is participating in the compulsion, and its own constitutional provision forbidding it to compel the testimony should be applied."

Our personal preference is for the McCormick-U.R.E. view. Furthermore it is our belief that the California courts could be persuaded to construe Art. I, § 13 as embracing the U.R.E. view and hence to uphold Rule 24 as legislation in this State.

RULE 37

This Rule provides in part as follows:

> "A person who would otherwise have a privilege to refuse to disclose . . . a specified matter has no such privilege with respect to that matter if the judge finds that he . . . while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter . . ."

Let us suppose that a fire insurance policy contains the following provision:

> "the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given, and shall produce to such person for examination, all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made. . . . No suit or action on this policy for the recovery of any claim shall be sustained until full compliance by the insured with all of the foregoing requirements."

The insured property is destroyed by fire. Arson is suspected. A grand jury investigates. The insured is called before the grand jury to testify. Asked whether he set the fire, he claims privilege vs. self-incrimination. As we construe Rule 37(a)

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the Rule requires that the claim be denied.

37(a) is derived from A.L.I. Rule as to which the A.L.I. Rule 231(a) commentary is in part as follows:

> "This clause goes further than any known case. Under it, when a person contracts with anyone, whether or not a party to the action, to waive a privilege as to a particular matter, the privilege is gone with reference to that matter, completely and forever and it is immaterial that the other contracting party has no interest in, or connection with, the action in which the privilege is claimed. The theory underlying this clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherewise."

We doubt whether 37(a) would be consitutional in this State. In Hickman v. London Assurance Corp.,[75] the policy contained the provision above quoted. After the fire the Company made a written demand upon insured to appear on a certain day before a designated notary and submit to examination as provided in the policy. Insured appeared as demanded but refused to answer pertinent questions, basing his refusal in part upon the circumstance that he had been accused of arson and was about to be tried. Such refusal was held to require denying the insured recovery on the policy in a civil action. The court reasoned as follows:

> "The compulsion secured against by the constitution is a compulsion exercised by the state in its sovereign capacity in some manner known to the law. Constitutional immunity has no application to a private examination arising out of a contractual relationship. The examination to which appellants demanded respondent should submit was an extrajudicial proceeding, notauthorized by any constitutional or statutory provision, but purely by virtue of a contract between the

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> parties. To bring a case within the constitutional immunity, it must appear that compulsion was sought under public process of some kind. This being so, respondent's refusal to undergo examination and produce his books and papers acquires no sanctity because he urged his constitutional right not to be compelled to be a witness against himself. The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent 'as often as required', and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the conditions of which he has failed to perform. In other words, when he commenced this suit he was without a cause of action."

Here, since the only question for decision is recovery in the civil action, we do not reach the question presented by 37(a) namely whether the prosecuting attorney as (so to speak) a sort of third party beneficiary of the contract between insured and insurer could have the benefit of insured's promise to make disclosures.[76] On the other hand, In re Sales comes directly to the point and, as the following extract shows, seems to rule *against* the principle of 37(a):

> "The district attorney also cites authorities to the effect that a person may enter into a contract to waive said constitutional privilege in which event he may be thereafter estopped from claiming the same; and in this connection it is contended that petitioners' agreement to testify at the trial to the same state of facts

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revealed by them before the grand jury constituted such a contract. We are unable to sustain this view. The action is one instituted and prosecuted by and in the name of the People of the state for the alleged commission of a crime; and consequently there can be no contractual relationship with the witnesses. In other words, any person having knowledge of material facts connected with the commission of a crime may be compelled to testify thereto regardless of his personal inclinations, unless as here his testimony would tend to incriminate him; and any agreement attempted to be made by him as to whether or not he would testify would be wholly void and no rights whatever would be created thereunder."

Apparently the rationale here is that enforcement of the contract would infringe Art. I, § 13. Believing that to be the rationale, we are forced to recommend disapproval of 37(a) insofar as the application thereof to the privilege vs. self-incrimination is concerned.

Turning now to 37(b) let us suppose a witness without compulsion and with knowledge of his privilege testifies before a grand jury to facts incriminating him. The grand jury indicts X. At X's trial the witness is called and claims privilege. Or suppose the testimony was at the preliminary hearing of People v. X and the claim of privilege is at the trial. Under 25(b) the claim would be overruled. Today in California the claim would be sustained. As is said In re Berman:[77]

> "We have . . . to examine first the contention that petitioner, by giving his deposition in the case of Guenther v. Barneson et al., waived his privilege against testifying, assuming for the purpose of this as well as the succeeding question, that to answer the interrogatories would tend to incriminate the petitioner. The problem is not entirely new. In Overend v. Superior Court, 131 Cal. 280 [63 Pac. 372], the prosecuting witness who had testified at the

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preliminary hearing of one against whom a criminal complaint had been filed, refused to testify at the trial in the Superior Court on the ground that his evidence might tend to incriminate him. The trial judge thereupon found that the witness had waived his privilege by testifying at the preliminary hearing and sentenced him for contempt. The Supreme Court says, in reviewing the judgment of contempt: 'It appears that the trial court based its judgment of contempt largely upon the ground that the witness had, without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the trial court in this regard is untenable. This question of waiving the privilege is discussed and decided in Temple v. Commonwealth, 75 Va. 896, and Cullen v. Commonwealth, 24 Gratt. (Va.) 624. It is said in those cases that the witness' statements elsewhere have nothing to do with the question.' We find a like declaration in People v. Cassidy, 213 N.Y. 388 [Ann. Cas. 1916C, 1009, 107 N.E. 713], as follows: 'The weight of authority is against the claim of the people that Walter by giving testimony before Justice Scudder waived his constitutional right to decline to give testimony on the trial of Willett that could be used against him in a criminal case. [citations omitted] These authorities amply establish the rule prevailing in this jurisdiction, and as we think, in accordance with sound reason."

Is the "sound reason" last referred to derived from Art. I, § 13? Presumably so and it seems, therefore, that we are precluded from adopting 25(b) in this State unless it is amended to exclude from its operation the privilege against self-incrimination.

Our conclusion is that in this State both subdivisions (a) and (b) of Rule 37 as applied to privilege vs. self-incrimination would be in contravention of Art. I, § 13.

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R U L E 3 8

Let us suppose that under subdivision (a) of Rule 25 the judge finds in re a certain matter "that the matter will not incriminate" a witness and the judge therefore orders the witness to answer. Suppose further that, obedient to the mandate of 25(a) that under such circumstances "the matter shall be disclosed", the witness answers and his answer is in fact incriminating. Later the witness is prosecuted and his answer is offered in evidence against him. Inadmissible under Rule 38 which provides as follows:

> "Rule 38. Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."

The Commissioners state that Rule 38 "safeguards the privileges against destruction by their very violation". The Rule, they say, "states the generally accepted view".[78]

We find no California case directly raising the question but we entertain the opinion that insofar as Rule 38 applies to the privilege vs. self-incrimination the principle of Rule 38 is implicit in the Cahan decision.

R U L E 3 9

This Rule provides in part as follows:

> "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . ., either in the action or with respect to particular matters, or to refuse to disclose . . . any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the

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exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. . . ."

Previously we have recommended disapproval of paragraph (4) of Rule 23 on the ground that it is probably in conflict with the comment-inference provisions of Art. I, § 13. Accordingly we now recommend striking the "Subject to" clause of Rule 39. The remainder of Rule 39 would, of course, be subject in this State to Art. I, § 13. Thus in this State Rule 39 would set up a general rule of no comment upon and no inference from exercise of privilege except as provided in Art. I, § 13. As such, Rule 39 would affirm existing California self-incrimination law in some respects; in other respects it would change such law.

Let us note first the respects in which Rule 39 would be in accord with prevailing principle.

Suppose D appears before a grand jury in response to sub poena and refuses to answer several questions on the ground of Art. I, § 13. Later at D's trial the prosecution as part of its case in chief proposes to prove D's claim of privilege before the grand jury. The prosecution contends that the testimony is admissible because (1) it is an admission made by a party in response to an accusatory statement, and (2) defendant's reaction thereto showed a consciousness of guilt. In People v. Calhoun,[79] held inadmissible for the following reasons:

> "Neither of these grounds is tenanble, for the reason that no implication of guilt can be drawn from a defendant's relying on the constitutional guarantee of the fifth amendment to the Constitution of the United States, article I, section 13, of the Constitution of the State of California, or Penal Code sections 688, 1323, and 1323.5. (People v. Simmons, 28

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Cal. 2d 699, 702 [12], 172 P.2d 18; Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 982 [21] et seq., 1 L.Ed.2d 931; People v. Talle, 111 Cal.App.2d 650, 663 [1] et seq., 245 P.2d 633).

. . . In view of the foregoing rule, the trial court prejudicially erred in holding that the grand jury testimony could be received in evidence as an admission and used to support a verdict. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above.

Such evidence does not fall within the scope of the 1934 amendment to article I, section 13, of the Constitution of the State of California, which provides that 'in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury.' Any inferences to the contrary in People v. Byers, 5 Cal.2d 676, 55 P.2d 1177, are overruled.

. . . Provisions of the federal and state Constitutions and the Penal Code sections referred to above establish that: (1) No person can be compelled in a criminal action to be a witness against himself; (2) if he offers himself, he can be cross-examined by the People's counsel only about matters to which he testified in chief; and (3) in grand jury proceedings, among others, he shall 'at his own request, but not otherwise, be deemed a competent witness.'"

The same result would follow if D's claim of privilege had been in the case of People v. A and the evidence of such claim was offered in People v. D. So held in _People_ v. _Bonelli_[80] in which the Court spoke as follows:[81]

> "The trial court prejudicially erred in admitting the evidence of defendant's refusal to testify in People v. Calhoun. Likewise, the instruction quoted above which the trial judge read to the jury was prejudicially erroneous. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above."[82]

The same results would ensue if these cases were to be decided under Rule 39. In each situation "a privilege [was] exercised . . . to refuse to disclose [a] matter"; therefore the trier of fact (in People v. D) "may not draw any adverse inference therefrom."

Turning now to situations in which the principle of Rule 39 is in disagreement with current law, let us suppose a civil action in which plaintiff calls defendant under C.C.P. § 2055 and defendant refuses to answer pertinent inquiries on the ground of self-incrimination. Today an inference adverse to defendant may be drawn from his privilege claim because, as is said in <u>Fross</u> v. <u>Wotton</u>,[83] to hold otherwise "would be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill". On the other hand, the inference would be prohibited by Rule 39. A "privilege is exercised not to testify . . . with respect to particular matters" in the action; therefore "the trier of fact may not draw any adverse inference therefrom."

Let us next suppose a wrongful death action against a railroad. At the coroner's inquest the engineer of the death-dealing train claims privilege. In the death action the engineer testifies

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for the railroad in denial of his negligence. Today the engineer's privilege claim before the coroner may be shown to impeach his credibility, "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement of lack of negligence upon his part" (Nelson v. Sou. Pac. Co.)[84]. Again this would be otherwise under Rule 39 for before the coroner "a privilege [was] exercised . . . to refuse to disclose [a] matter" and therefore "the trier of fact may not draw any adverse inference therefrom".

It is apparent from the foregoing discussion that Rule 39 is in some instances more restrictive than current law respecting inference and comment on exercise of incrimination privilege. In these instances our personal preference is the present law. Therefore when we reach a full-scale study of Rule 39 we shall recommend appropriate amendments.

R E C O M M E N D A T I O N

Today we have a hodge-podge of statutes on incrimination privilege. These are as follows:

> "P.C. § 688. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

> "P.C. § 1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in

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chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

"P.C. § 1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.

This section shall not be construed as compelling any such person to testify."

C.C.P. § 2065 [in part]:

"A witness . . . need not give an answer which will have a tendency to subject him to punishment for a felony. . . ."

These statutes plus Art. I, § 13 and our numerous decisions constitute the sources of our present incrimination law.

Rule 23 subdivisions (1) and (3), Rule 24, and Rule 25 subdivisions (a), (b), (c) and (e) would merely be declaratory of existing law. Possibly the same is true of subdivision (d). We recommend all of these for approval.

Rule 23 subdivision (4) and Rule 25 subdivisions (f) and (g) would in our opinion be unconstitutional and are recommended for disapproval.

Rule 37 would be unconstitutional unless amended to exclude the privilege against self-incrimination from its operation. This Rule is applicable to all privileges and we recommend

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deferring judgment upon it (even if amended as suggested) until a study is made of its impact upon other privileges. For similar reasons we recommend deferred judgment upon Rules 38 and 39 which are likewise applicable to all privileges.

As stated at the outset of this study the merit, if any, of those Rules and subdivisions above recommended for approval is that they codify and thus summarize and collect in one place a large body of existing rules and principles which today must be extracted from a rather vast amount of case material.

Amending the statutes above mentioned to conform to the enactment of the URE. Rules recommended would be relatively simple. The following changes would be desirable:

1. Eliminate first clause of P.C. § 688 because superfluous.

2. Eliminate first clause of P.C. § 1323 because superfluous (leave second clause intact as substitute for U.R.E. Rule 25 (g)).

3. Repeal § 1323.5 because superfluous.

4. Repeal the portion of C.C.P. § 2065 quoted above because superfluous.

Respectfully submitted,

James H. Chadbourn

F O O T N O T E S

1. U.R.E. 23(1) is a copy of A.L.I. Code Rule 201(2). Evidently the sponsors of the U.R.E. agree with the following commentary on A.L.I. Rule 201(2): "It is entirely impracticable at this time, if not unwise, to attempt to abolish this privilege."

   In this memo we accept this point of view and we do not therefore attempt to explore and evaluate arguments pro and con the privilege.

2. 111 C.A.2d 650 (1952).

3. The statute is presently P.C. § 1323.5.

4. The rule that the prosecution should not call the accused is apparently here regarded as based wholly upon the statute. However, in <u>People</u> v. <u>Tyler</u>, 36 C. 522, 529 (1869) the statute is said to be "a re-enactment by statute" of the constitutional incrimination privilege. If this be so, the right not to be called is a constitutional right. The question is presently only of theoretical interest unless it is desired to amend 23(1) to eliminate the privilege not to be called. For reasons stated in Note 1 supra we do <u>not</u> advocate such amendment.

5. Under 23(1) questions would arise as to when one is "an accused" in a "criminal action". For example, in a disbarment proceeding do we have "an accused" in a

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"criminal action"? Nothing in the U.R.E. Rules attempts to define the terms quoted. It would seem, therefore, that they would be construed in conformity with prevailing rules on the subject such as the current rule that a disbarment proceeding is "a special proceeding of a civil nature" which means the accused lawyer may properly be called to testify but, of course, may not be required to give incriminating testimony. Fish v. State Bar, 214 C. 215 (1931). In terms of U.R.E. Rules this means the accused lawyer does not possess Rule 23(1) privilege, but does, of course, possess Rule 25 privilege.

For similar problems as to whether certain proceedings are civil or criminal, see Levy v. Superior Court, 105 C. 600 (1895); Thurston v. Clark, 107 C. 285 (1895); In re Tahbel, 46 C.A. 755 (1920); West Coast Home Improvement Co. v. Contractors' State License Board, 72 C.A.2d 287 (1945).

6. People v. Goldenson, 76 Cal. 328, 347 (1880). See also People v. Oliveria, 127 Cal. 376 (1899) and People v. Ferns, 27 C.A. 285 (1915).

7. Wigmore § 2263 quoted with approval in People v. One 1941 Mercury Sedan, 74 C.A.2d 199 (1946); People v. Trujillo, 32 C.2d 105 (1948); People v. Haeussler, 41 C.2d 252 (1953).

8. Wigmore § 2265 quoted with approval in People v. One 1941 Mercury Sedan, 74 C.A.2d 199 (1946); People v. Trujillo, 32 C.2d 105 (1948).

9. 188 C. 237 (1922).

10. 74 C.A.2d 528 (1946).

11. The portion of 25 quoted in the text is taken from A.L.I. Code Rule 203 which likewise uses the expression "in an action". However the Code contains a comprehensive definition of action ("'Action' includes action, suit, special proceeding, criminal prosecution and every proceeding conducted by a court for the purpose of determining legal interests" Rule 1(1)) which the U.R.E. omit. In the absence of such comprehensive definition of "action" that term is not a happy choice of a word to describe judicial proceedings in general. Technically in this State "action" does not comprehend "special proceedings" nor seemingly would it embrace grand jury investigations and coroner's inquests.

    Accordingly we suggest amending 25 by striking "in an action" and substituting therefor "in any judicial proceeding".

12. 46 C.A. 755 (1920).

13. Barr, Privileges Against Self-Incrimination in California, 30 Calif. L. Rev. 547, 554-5 (1942) expresses the following opinion:

> "It has been supposed that all the privileges against self-incrimination stem from the constitution. But the provision we find there does not broadly extend its privileges to all persons; it is explicit that the only persons entitled to the exemptions are those who are requested to testify in a 'criminal

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case'. The inference seems clear that where the proceeding is not criminal in nature, the privilege of the witness against self-incrimination is not based on article I, section 13. It is an interesting and open question whether the California legislature by repealing the privileges given to civil witnesses under Section 2065 of the Code of Civil Procedure could entirely deprive them of their historic privilege against self-incrimination."

In our opinion the inference which is "clear" to the author is refuted by In re Tahbel and upon the same authority the question which the author regards as "open" is truly a closed question.

14. McCormick § 123.

15. McLain v. Superior Court, 99 C.A.2d 109 (1950) (dictum).

16. West Coast Home Improvement Co. v. Contractors' State License Board, 72 C.A.2d 287 (1945) (dictum).

17. Fink v. State Bar, 214 C. 215 (1931) (dictum).

18. 153 C.A.2d 64, 76 (1957).

19. 28 C.2d 699 (1946). See also People v. McGee, 31 C.2d 299 (1947); People v. Abbott, 47 C.2d 362 (1956); People v. Davis, 43 C.2d 661 (1954).

20. 28 C.2d at 716.

21. 28 C.2d at 721.

22. As suggestive of this possibility consider the following from People v. Clemmons, 153 C.A.2d 64, 76 (1957):

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"If the privilege does extend to the police station, as it apparently does, it is difficult to see how Cook, under the circumstances, waived any right to be silent by the simple process of remaining silent. If he did not waive the right, he was certainly clothed with it, and was entitled to all of its protection."

Consider also the following from the Stanford Note "The Privilege Against Self-Incrimination: Does It Exist in The Police Station?", 5 Stanf. L. Rev. 459, 474 (1953):

"People v. Simmons speaks of excluding accusatory statements where the defendant 'has adopted the policy of silence'. What does this mean? The court may have meant that the privilege is lost if not affirmatively claimed. It might be argued that in Simmons it was affirmatively claimed, since defendant continually said he would not talk. But is not the right to be silent claimed by merely refusing to answer? Silence itself would appear to be the most obvious way of claiming the privilege. Would this be a 'policy of silence' under Simmons? Or is it necessary for one to say affirmatively that he will say nothing?"

23. Note, however, that adoption of the U.R.E. would eliminate whatever incompatibility may presently exist between (1) The proposition that the privilege applies in the police station, and (2) The proposition that so-called involuntary admissions (i.e. incriminating statements short of confessions) are admissible. The adoption in this State of U.R.E. Rule 63(6) or its equivalent would make coerced admissions inadmissible thereby eliminating the present inconsistency, if any.

24. McCormick § 125; West Coast Home Improvement Co. v. Contractors' State License Board, 72 C.A.2d 287 (1945); McLain v. Superior Court, 99 C.A.2d 109 (1950).

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25. It seems that under some circumstances the person is the sole judge of whether given matter will incriminate simply because no procedure for judicial determination is available. This seems to be so, for example, when a suspect is being interrogated by officers. The privilege applies here (see text at notecall 18) and we are aware of no procedure for procuring a judicial order at this point.

26. See Barr, Privileges Against Self-Incrimination in California, 30 Calif. L. Rev. 547, 553-554 (1942).

27. In re Lemon, 15 C.A.2d 82 (1936); In re Hoertkorn, 15 C.A.2d 93 (1936).

28. See also note 11 supra.

29. 41 C.2d 252, 256 (1953).

30. 312 P.2d 690.

31. Compare, however, People v. McGinnis, 123 C.A.2d Supp. 945 (1954), in which, after holding defendant's refusal to take an intoximeter test admissible as evidence against him, the court states the following dictum (p. 948):

> "A person, arrested because it appears that he is intoxicated, may have the right to refuse to subject himself to any of the usual tests, or to the intoximeter test, as the jury was instructed, but if he takes the tests, no physical or other coercion frowned upon by due process being employed, the result may be brought before a jury. (People v. Haeussler (1953), 41 Cal.2d 252 [260 P.2d 8].)"

MJN 0224

In our opinion the following criticism of the dictum in 42 Calif. L. Rev. 697, 700-701 (1954) is well taken:

> "Nevertheless, the conclusion seems quite clear that the court in the McGinnis case was in error either in assuming (or at least suggesting) that McGinnis had a 'right to refuse' to submit to the test or in permitting an inference of guilt based on the exercise of such 'right'. It is submitted that the result was probably correct; that the forcible administration of a breath test ought not to be deemed either an infraction of the Rochin rule or (assuming a lawful arrest) an 'unreasonable search.' And clearly, under the settled local doctrine, it does not violate the privilege against self-incrimination. On this basis, one lawfully arrested has no 'right to refuse' to take a breath test; hence there appears no valid objection to the admissibility of evidence of his refusal as probative of a consciousness of guilt."

Under the Uniform Act on Blood Tests to Determine Paternity (C.C.P. §§ 1980.1 - 1980.7) in civil or criminal actions in which paternity is a relevant fact the court may order the mother, child and alleged father to submit to blood tests. If any party refuses the court may enforce its order or may resolve the question of paternity against such party.

Under the principle of U.R.E. Rule 25(c) the Uniform Act on Blood Tests is not violative of the U.R.E. privilege against self-incrimination. Since California agrees with 25(c) it seems that the Uniform Act is not in violation of Calif. Const. Art. I, § 13.

32. 113 C.A.2d 416 (1952). See also People v. Gormley, 64 C.A.2d 336 (1944) and People v. Harper, 115 C.A.2d 776 (1953).

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33. 112 C.A. 68 (1931).

34. 17 C.A.2d 75 (1936).

35. 113 C.A.2d 460 (1952).

36. 126 C.A. 526 (1932).

37. 146 C.A.2d 722 (1956).

38. 41 C.2d 628 (1953).

39. See also People v. Chapman, 311 P.2d 190 (1957), to the effect that taking witnesses to defendant's apartment for identification purposes did not violate his incrimination privilege and People v. Smith, 298 P.2d 540 (1956), admitting photographs of defendant's nude body taken without consent.

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40. 103 C.A. 66 (1951).

41. 168 C. 777 (1914).

42. 114 C.A. 522 (1931).

43. 12 C.2d 766 (1939).

44. The excerpt quoted is severely but (we believe) fairly edited.

45. See People v. Simmons, supra, note 19.

See, however, note 82 infra for a possible qualification respecting evidence of pre-trial claim for impeachment purposes.

46. Commentary on Rule 25(b).

47. Inbau, Self-Incrimination, p. 60.

48. McCormick, p. 266.

49. Inbau, Self-Incrimination, pp. 55-56.

50. We do not overlook the fact that in many cases the penalty for the crime would exceed the penalty for disobedience to the order and that therefore the strategy of the suspect might well be to disobey the order and incur the lighter penalty in the effort to win the higher stakes of a favorable verdict.

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51. U.R.E. 25(d) copies A.L.I. Code Rule 206. Consider the following colloquy between Mr. Rosenthal and Professor Morgan during the Institute debate on Rule 206:

> "Mr. Rosenthal: Might I ask a question in that connection. Under Rule 206 a man is indicted for larceny and the question is whether he has stolen the watch. Of course, there can be a search warrant, but can that man be ordered in the court which is trying this case against him to produce the watch?
>
> Mr. Morgan: If the trial court finds that the watch belongs to the other party, yes. No question about it under this rule."

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52. Consider the following commentary on A.L.I. Code Rule 206 (which U.R.E. 25(d) copies):

> "There is no question that a person having in his possession a tangible which contains matter incriminating him cannot by claiming the privilege against self-incrimination avoid his duty to deliver it over to the person legally entitled to its possession. And it seems to be immaterial that the latter intends to turn it over to others for use in a criminal proceeding against the present possessor. See Johnson v. United States, 228 U.S. 457, 33 S. Ct. 572, 57 L. Ed. 919, 47 L. R. A., N. S., 263 (1913); Ex parte Fuller, 262 U. S. 91, 43 S. Ct. 496, 67 L. Ed. 881 (1923)."

53. 24 C.A. 799 (1914). See also People v. Fodera, 33 C.A. 8 (1917).

54. People v. Diller, 24 C.A. 799, 802-803 (1914).

55. 102 C.A.2d 954 (1951).

56. 335 U.S. 1, 71 (1948).

57. McCormick, p. 283.

58. McCormick, p. 283.

59. McCormick, p. 281.

60. See §   supra.

61. 99 C.A.2d 109 (1950).

62. XIX A.L.I. Proceedings, pp. 129-130.

63. McCormick, pp. 262-263.

64. 99 C.A.2d 109 (1950).

65. We are not thinking here of the situation of prosecution calling defendant in rebuttal for further cross-examination as in People v. La Vers, 130 C.A. 708 (1933) and People v. Searing, 20 C.A.2d 140 (1937).

66. P.C. §1323:

> "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

67. 66 C. 602 (1885).

MJN 0229

68. Making the examination "as general as could have been made of any other witness" would not, it seems, in and of itself be objectionable.

69. See also the following from People v. McGungill, 41 C. 429, 430-1 (1871):

> "It appears from the bill of exceptions that 'one Yates was called and sworn as a witness for the prosecution, and among other things, stated that he had a certain conversation with the prisoner.' This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon the fact before the jury; that the defendant refused to be cross-examined to the whole case; that defendant's counsel protested against such comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, and against objections of the defendant's counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of defendant. (People v. Tyler, 36 Cal. 522.)
>
> The fact that defendant offered himself as a witness in his own behalf, did not, as to him, change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant's rights, and then, with the sanction of the Court, in argument to the jury, to comment upon the failure of such attempt as a circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned."

Query: would comment be proper today under the comment provision of Art. I, § 13? If so, does this change the

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older rule that restricted cross-examination is a constitutional right? No, it seems. Comment authorized by the Constitution does not negate the existence of privilege.

70. 122 C. 127 (1898).

71. McCormick's analysis is as follows (pp. 49-50):

> "As a means of implementing the prescribed order of producing evidence by the parties, the restrictive rules limiting cross-examination to the scope of the direct or to the proponent's case are burdensome, but understandable. The cross-examiner who has been halted has at least a theoretical remedy. He may call the witness to answer the same questions when he puts on his own next stage of evidence. But the Federal courts and the states following the restrictive practice have applied these confining rules to the cross-examination of the accused by the prosecution. Thus, the accused may limit his direct examination to some single aspect of the case, such as age, sanity or alibi, and then invoke the court's ruling that the cross-examination be limited to the matter thus opened. Surely the according of a privilege to the accused to select out a favorable fact and testify to that alone, and thus get credit for testifying but escape a searching inquiry on the whole charge, is a travesty on criminal administration. It is supposed to be necessitated by the principle that by taking the stand the accused subjects himself to cross-examination 'as any other witness.' Seemingly at least two escapes are available. First, the rule limiting the cross-examination has always been professedly subject to variation in the judge's discretion, and the fact that the cross-examiner cannot call the witness is a ground for exercising the discretion to permit cross-examination on any relevant fact. Second, the accused might reasonably be held to have waived altogether his right not to be compelled to be a witness against himself, by taking the stand in his own behalf, Consequently, the prosecution could later call the accused as state's witness, and the one-sided effect of limiting the cross-examination would be mitigated. In jurisdictions following the wide-open practice

MJN 0231

there is of course no obstacle to cross-examining the accused upon any matters relevant to any issue in the entire case."

For reasons stated in the text, we do not believe McCormick's suggested first escape is available in this State. Nor do we believe his suggested second escape (which is U.R.E. 25(g)) is available.

72. In re Berman, 105 C.A. 37 (1930); In re Crow, 126 C.A. 617 and 621 (1932); People v. Bartges, 126 C.A.2d 763 (1954); Overend v. Superior Court, 131 C. 280 (1900).

73. McCormick, § 124.

74. McCormick, pp. 261-2.

75. 184 C. 524 (1920).

76. 134 C.A. 54 (1933).

77. 105 C.A. 37 (1930).

78. Commentary on Rule 38.

79. 323 P.2d 427 (1958).

80. 324 P.2d 1 (1958).

81. The instruction was as follows:

> "'[T]hose accused of crime are competent as witnesses only at their own request and not otherwise. You are therefore not to draw an inference against the Defendant Nathan Harris Snyder because he refused to testify in the case of People versus Calhoun on this ground.

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However, you are further instructed that failure to testify on the ground that an answer might tend to incriminate may be considered by you in the light of all other proved facts in deciding the question of the defendant Nathan Harris Snyder's guilt or innocence. Whether or not his failure to testify in the case of People versus Calhoun on the ground of self-incrimination shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination.'"

82. Suppose the evidence of privilege claim had been (1) offered after D testified, and (2) had been offered solely for the purpose of impeaching D's credibility as a witness.

In People v. Kynette, 15 C.2d 731 (1940) the court stated that the use at the trial "solely for impeachment purposes" of an incrimination privilege before a grand jury "no more destroys [the] constitutional privilege than does comment when privilege is exercised at the trial.

Query is this changed by Calhoun and Bonelli?

If today the evidence would be admissible in this situation and upon this theory this is an instance, in addition to those noted in the text, of difference between today's law and Rule 39.

83. 3 C.2d 384 (1935).

84. 8 C.2d 648 (1937). See also Keller v. Key System Transit Lines, 129 C.A.2d 593 (1954).

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/13/2020 by Tao Zhang, Deputy Clerk

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Supreme Court of California

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Date

/s/Frederic Cohen

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Last Name, First Name (PNum)

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