

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article I. General Provisions

April 1964

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

NOTE

This pamphlet begins on page 1. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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April 1964

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

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

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article I (General Provisions) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultants, Professor James H. Chadbourn of the Harvard Law School and Professor Ronan E. Degnan of the School of Law, University of California at Berkeley. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

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

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

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

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article I. General Provisions

INTRODUCTION

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.¹ In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Commission on Article I (General Provisions) of the Uniform Rules of Evidence is set forth herein. This article consists of Rules 1 through 8. Rule 1 contains definitions of words and phrases used in the Uniform Rules. Rules 2 through 8 are rules of general application governing the operation of the Uniform Rules.

Rules 1 through 8 are difficult to consider in isolation, since they necessarily influence and are influenced by later specific portions of the Uniform Rules. Nevertheless, a tentative recommendation dealing with these rules has been prepared so that it may be considered in connection with the separately published tentative recommendations covering other articles of the Uniform Rules. For a list of these separate publications, see the Study, *infra* at 40.

Part IV of the Code of Civil Procedure (consisting of Sections 1823-2103) regulates evidence. The introductory portion (Sections 1823-1839) of Part IV consists of definitions and preliminary statements that are somewhat comparable to the definitions contained in Rule 1. In addition, the preliminary provisions (Sections 1-32) of the Code of Civil Procedure contain definitions and general provisions that apply to Part IV of the Code of Civil Procedure. However, only those existing statute sections contained in Part IV are considered in this tentative recommendation. The final recommendation of the Commission will deal with whether the other definitions and general provisions found in the existing evidence statutes should be retained, revised, or repealed.

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

REVISION OF URE ARTICLE I

The Commission tentatively recommends that URE Article I, revised as hereinafter indicated, be enacted as the law in California.² In the material that follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in ~~strikeout~~ and *italics*. Each rule is followed by a Comment setting forth the major considerations that influenced the recommendation of the Commission and explaining those revisions that are not purely formal or otherwise self-explanatory. (For Revised Rule 8, a separate Comment follows each proposed subdivision.) For a detailed analysis of the various rules and the California law relating to URE Article I, see the research study beginning on page 37.

Rule 1. Definitions

RULE 1. *As used in these rules, unless the context otherwise requires:*

(1) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact in judicial or factfinding tribunals; and includes testimony in the form of opinion, and hearsay.

(2) "Relevant evidence" means evidence having any tendency in reason to prove or disprove any material disputed fact that is of consequence to the determination of the action, including the credibility of a witness or hearsay declarant.

(3) "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 the establishment of a fact by evidence.

(4) "Burden of proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion." *Unless a statute or rule of law specifically requires otherwise, the burden of proof requires proof by a preponderance of the evidence.*

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary sufficient to avoid the risk of a directed verdict or peremptory finding against him on a material issue of as to the existence or nonexistence of a fact.

(6) "Conduct" includes all active and passive behavior, both verbal and nonverbal.

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

(7) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact," "*finding*," or "*finds*" means the determination from ~~proof evidence~~ or judicial notice of the existence or non-existence of a fact. A ruling on the admissibility of evidence implies ~~a supporting whatever~~ finding of fact is prerequisite thereto; ~~no~~ a separate or formal finding is ~~required unnecessary~~ unless required by a statute of this state.

(9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a *sui juris* person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(9) "Court" means the Supreme Court, a district court of appeal, superior court, municipal court, or justice court, but does not include a grand jury.

(10) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced includes a commissioner, referee, or similar officer authorized to conduct and conducting a court proceeding or court hearing.

(11) "Trier of fact" includes a jury and means a judge when he is trying an issue of fact other than one relating to the admissibility of evidence and a jury.

(12) "Verbal" includes both oral and written words.

(13) "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.

(14) "Action" includes a civil action or proceeding and a criminal action or proceeding.

(15) "Civil action" means a civil action or proceeding.

(16) "Criminal action" means a criminal action or proceeding.

(17) "Public entity" includes a state, county, city, district, public authority, public agency, and any other political subdivision or public corporation.

(18) "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes the District of Columbia and the territories.

Comment

This rule contains definitions of words and phrases used in the Revised Rules.

Subdivision (1)—“Evidence.” This subdivision defines “evidence” broadly to include the testimony of witnesses, tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof. The definition includes anything offered, whether or not it is technically inadmissible and whether or not it is received. For example, Rule 63 uses “evidence” to refer to hearsay which may be excluded as inadmissible, but which may be admitted if no proper objection is made. *Cf.* Rule 4, *infra*. Thus, when inadmissible hearsay or opinion testimony is admitted without objection, there will be no doubt under this definition that it constitutes evidence.

Subdivision (1) is a better statement of existing California law than Code of Civil Procedure Section 1823, which defines “judicial evidence.” Although Section 1823 by its terms restricts “judicial evidence” to that “sanctioned by law,” the general principle is well established that matter which is technically inadmissible under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if offered and received without proper objection or motion to strike. *E.g., People v. Alexander*, 212 Cal. App.2d 84, 98, 27 Cal. Rptr. 720, 727 (1963) (“illustrations of this principle are numerous and cover a wide range of evidentiary topics such as incompetent hearsay, secondary evidence violating the best evidence rule, inadmissible opinions, lack of foundation, incompetent, privileged or unqualified witnesses, and violations of the parole evidence rule”). See WITKIN, CALIFORNIA EVIDENCE §§ 723-724 (1958). As to whether presumptions are evidence, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM’N, REP., REC. & STUDIES 1001 (1964).

Subdivision (2)—“Relevant evidence.” The revised definition of “relevant evidence” is consistent with existing California law. *E.g., Larson v. Solbakken*, 221 Cal. App.2d ---, ---, 34 Cal. Rptr. 450, 455 (1963); *People v. Lint*, 182 Cal. App.2d 402, 415, 6 Cal. Rptr. 95, 102-103 (1960). Thus, under revised subdivision (2), “relevant evidence” includes not only evidence of the ultimate facts actually in dispute, but also evidence of other facts from which such ultimate facts may be presumed or inferred. This retains existing law as found in subdivisions 1 and 15 of Code of Civil Procedure Section 1870. In addition, revised subdivision (2) makes it clear that evidence relating to the credibility of witnesses and hearsay declarants is “relevant evidence.” This retains existing law. CODE CIV. PROC. §§ 1868, 1870(16) (credibility of witnesses); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM’N, REP., REC. & STUDIES 301, 339-340, 569-575 (1963) (credibility of hearsay declarants).

The revised definition avoids using the word “material” because it is ambiguous. The term has acquired an artificial meaning in the legalistic sense that makes it of little value in precise statutory drafting. For example, it is sometimes used to refer only to an ultimate fact in dispute between the litigating parties. See, *e.g.*, Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574-575 (1956). In ordinary usage, however, the word means “of solid or weighty character; of consequence; important.” MERRIAM-WEBSTER, NEW COLLEGIATE DICTIONARY (2d ed. 1953). See BLACK, LAW DICTIONARY (4th ed. 1951). The California courts frequently refer to the word “material” in its ordinary sense, *i.e.*, meaning any matter that is of consequence or importance. See, *e.g.*, *People v. Boggess*, 194 Cal. 212, 235, 228 Pac. 448, 458 (1924); *People v. Arrangoiz*, 24 Cal. App.2d 116, 118, 74 P.2d 789, 790 (1937); *People v. Dunstan*, 59 Cal. App. 574, 584, 211 Pac. 813, 817 (1922). The revised subdivision incorporates this usual meaning of the word “material,” thereby eliminating any ambiguity that might otherwise result from using the word itself in the definition of “relevant evidence.”

Subdivision (3)—“Proof.” This subdivision states existing law as found in Code of Civil Procedure Section 1824: “Proof is the effect of evidence, the establishment of a fact by evidence.”

Subdivisions (4) and (5)—“Burden of proof” and “burden of producing evidence.” These definitions are useful because they provide a convenient means for distinguishing between the burden of *proving a fact* in the case and the burden of *going forward* with the evidence. They recognize a distinction that is well established in California. WITKIN, CALIFORNIA EVIDENCE §§ 53-60 (1958). The practical effect of the distinction is considered in the Commission’s tentative recommendation relating to the burden of producing evidence, the burden of proof, and presumptions (replacing URE Article III on Presumptions). See 6 CAL. LAW REVISION COMM’N, REP., REC. & STUDIES 1001 (1964).

When “burden of proof” is used in these rules, it refers to the burden of proving the fact in question by a preponderance of the evidence unless a heavier burden of proof is specifically required. The new sentence added to subdivision (4) makes this clear.

The reference to “directed verdict” has been deleted from subdivision (5) as unnecessary. The term “peremptory finding” includes a directed verdict where that is the appropriate relief to be granted under the circumstances. In other situations, the appropriate relief might include a nonsuit, a judgment under Code of Civil Procedure Section 631.8, or merely the admission or exclusion of evidence. The reference to “directed verdict” is deleted, therefore, to avoid any implication that any other judgments or orders that might follow the peremptory finding and resultant ruling on the admissibility of evidence were intentionally excluded from the definition.

Subdivision (6)—“Conduct.” The broad definition of “conduct” is self-explanatory.

Subdivision (7)—“The hearing.” “The hearing” is defined to mean the hearing at which the particular question arises and, unless the context otherwise indicates, not some earlier or later hearing.

Subdivision (8)—“Finding of fact.” The URE definition has been revised to include “finding of fact,” “finding,” or “finds.” The terms are used interchangeably in the defined sense in the URE and in the revised rules.

The second sentence of subdivision (8), which states that a ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto, is consistent with existing law. See *Wilcox v. Berry*, 32 Cal.2d 189, 195 P.2d 414 (1948) (where evidence is properly received, the ground of the court’s ruling is immaterial); *City & County of San Francisco v. Western Air Lines, Inc.*, 204 Cal. App.2d 105, 22 Cal. Rptr. 216 (1962) (where evidence is excluded, the ruling will be upheld if any ground exists for the exclusion).

URE Subdivision (9)—“Guardian.” This definition has been deleted as unnecessary. The term “guardian” is well understood and, apparently, was defined in the URE in order to include such persons as conservators appointed by a court to act in a similar capacity. The revised rules refer specifically to a conservator where such a reference is appropriate. See, e.g., *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM’N, REP., REC. & STUDIES 201, 219, 229, 237, 244 (1964).

Revised Subdivision (9)—“Court.” This subdivision has been added to the URE rule for clarity. Grand juries are specifically excluded from the definition of “court” because of language in some California cases that could be construed too broadly. See, e.g., *Irwin v. Murphy*, 129 Cal. App. 713, 716, 19 P.2d 292, 293 (1933).

Subdivision (10)—“Judge.” The word “judge” is broadly defined to include every authorized person conducting a court proceeding, including those persons specifically mentioned in Code of Civil Procedure Section 2103.

Subdivision (11)—“Trier of fact.” “Trier of fact” is defined to distinguish between jury trials and trials conducted by the court sitting without a jury.

Subdivision (12)—“Verbal.” The word “verbal” is defined to avoid the necessity of repeating “oral or written” in the revised rules.

Subdivision (13)—“Writing.” This definition is considerably broader than the comparable definition found in Section 17 of the Code of Civil Procedure. The definition in subdivision (13) will apply to the revised rules, and the definition in Code of Civil Procedure Section 17 will continue to apply to those provisions that are not included within the new evidence statute.

Subdivision (14)—“Action.” The term “action” is defined to include both civil and criminal actions and proceedings. Defining this term eliminates the necessity of lengthy references in the revised rules.

Subdivisions (15) and (16)—“Civil action” and “criminal action.” The terms “civil action” and “criminal action” are defined to eliminate the necessity of repeating “action or proceeding” in every instance in which the terms are used in the revised rules. The terms are otherwise self-explanatory.

Subdivision (17)—“Public entity.” The broad definition of “public entity” includes every form of public authority and is not limited to public entities in California unless otherwise indicated by context or specific language.

Subdivision (18)—“State.” The definition of “state” is one that appears in several of the California codes. See, *e.g.*, FISH & GAME CODE § 83; INS. CODE § 28. When used to refer to other states, the word includes Puerto Rico, even though Puerto Rico is now considered a “commonwealth.” *Detres v. Lions Building Corp.*, 234 F.2d 596 (7th Cir. 1956).

Rule 2. Scope of Rules

RULE 2. Except to the extent to which they may be relaxed by other procedural rule or as otherwise provided by statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced introduced, including proceedings conducted by a court commissioner, referee, or similar officer.

Comment

Revised Rule 2 expressly makes these rules of evidence applicable only to proceedings conducted by California courts. The rules do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute or specific rule so provides.

Because of the provisions of several existing statutes, these rules will be applicable to a certain extent in proceedings other than court proceedings. For example, Government Code Section 11513 provides that a finding in a proceeding conducted under the Administrative Procedure Act may not be based on hearsay evidence unless it would be admissible over objection in a civil action. Penal Code Section 939.6 provides that a grand jury, in investigating a charge, “shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.” Proposed Rule 22.5 of these rules, as recommended by the Commission, makes the rules relating to privileges applicable in all proceedings of every kind in which testimony can be compelled to be given. See Proposed Rule 22.5 and the Comment thereto in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM’N, REP., REC. & STUDIES 201, 211-212 (1964). An administrative agency may, for reasons of convenience, adopt these rules or some portion of them for use in its proceedings. But, in the absence of any such statute or rule, Revised Rule 2 provides that these rules have force only in court proceedings.

The preliminary phrase has been revised in recognition of the fact that some statutes will make these rules applicable in proceedings other than court proceedings, as well as relax their provisions.

Rule 3. Exclusionary Rules Not to Apply to Undisputed Matter

~~RULE 3. If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.~~

Comment

The Commission disapproves URE Rule 3. This rule would permit proof, by evidence that is otherwise inadmissible, of facts concerning which "there is no bona fide dispute between the parties."

In criminal cases, the application of Rule 3 would violate our historic tradition that a criminal defendant may always require the prosecution to prove by competent evidence *all* matters relating to his guilt.

In civil cases, a variety of pretrial devices already in use in California makes Rule 3 largely unnecessary. For example, Code of Civil Procedure Sections 2033 and 2034 provide for pretrial requests for admissions and impose sanctions for improper failure to make the requested admissions. Discovery, the pretrial conference, the summary judgment procedure, and judicial notice are other means that may be available in a particular case to provide protection against the harassment, expense, and delay occasioned by a strict insistence on the requirements of formal proof. Moreover, as a matter of policy, a party should be limited to the pretrial procedures presently available; he should not be permitted to wait for the trial before claiming that the dispute over the issue is not a "bona fide dispute between the parties." Not only would it be extremely difficult for a trial judge to make this determination, but the rule also might generate additional appeals from trial court determinations.

Rule 4. Effect of Erroneous Admission of Evidence

RULE 4. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless :

(a) There appears of record *an* objection to *or a motion to strike* the evidence *that is* timely ~~interposed~~ *made* and so stated as to make clear the specific ground of *the* objection *or motion*; and

(b) The court which passes upon the effect of the error or errors is of *the* opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

Comment

Subdivision (a) of Rule 4 will codify the well-settled California rule that a failure to make a timely objection to, or motion to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See WITKIN, CALIFORNIA EVIDENCE §§ 700-702 (1958). Rule 4 will also codify the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. WITKIN, CALIFORNIA EVIDENCE §§ 700-709 (1958).

Subdivision (b) of Rule 4 reiterates the requirement of Section 41½ of Article VI of the California Constitution that a judgment may not be reversed nor may a new trial be granted because of an error unless the error is prejudicial.

Rule 5. Effect of Erroneous Exclusion of Evidence

RULE 5. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless ~~(a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding and it appears of record that:~~

(1) The substance, purpose, and relevance of the expected evidence was made known to the judge by the questions asked, an offer of proof, or by any other means; or

(2) The rulings of the judge made compliance with subdivision (1) futile; or

(3) The evidence was sought by questions asked during cross-examination.

Comment

Rule 5, like Rule 4, reiterates the requirement of the California Constitution that judgments may not be reversed, nor may new trials be granted, because of an error unless the error is prejudicial. CAL. CONST., Art. VI, § 41½.

The provisions of Revised Rule 5 that require an offer of proof or other disclosure of the evidence improperly excluded have been revised to reflect exceptions to the rule that have been recognized in the California cases. Thus, an offer of proof is unnecessary where the judge has limited the issues so that an offer to prove matters related to excluded issues would be futile. *Lawless v. Calaway*, 24 Cal.2d 81, 91, 147 P.2d 604, 609 (1944). An offer of proof is also unnecessary when an objection is improperly sustained to a question on cross-examination.

Tossman v. Newman, 37 Cal.2d 522, 525-526, 233 P.2d 1, 3 (1951) ("no offer of proof is necessary to obtain a review of rulings on cross-examination"); *People v. Jones*, 160 Cal. 358, 117 Pac. 176 (1911).

Rule 6. Limited Admissibility

RULE 6. When ~~relevant~~ evidence is admissible as to one party or for one purpose and is inadmissible as to ~~other parties~~ *another party* or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

Comment

Rule 6 expresses the existing (but uncodified) California law which requires the judge to instruct the jury as to the limited purpose for which evidence may be considered when such evidence is admissible for one purpose and inadmissible for another. *Adkins v. Brett*, 184 Cal. 252, 193 Pac. 251 (1920).

Under Revised Rule 45, as under existing law, the judge would be permitted to exclude such evidence if he deemed it so prejudicial that a limiting instruction would not protect a party adequately and the matter in question can be proved sufficiently by other evidence. See discussion in *Adkins v. Brett*, 184 Cal. 252, 258, 193 Pac. 251, 254 (1920); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612, 639-640 (1964).

The word "relevant" has been deleted as unnecessary, for evidence is admissible only if it is relevant. CODE CIV. PROC. § 1868. See Revised Rule 7(3) and the Comment thereto, *infra*.

Rule 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules

RULE 7. (1) Except as otherwise provided in these Rules by statute, ~~(a)~~ every person is qualified to be a witness, and ~~(b)~~ no person has a privilege to refuse to be a witness, and ~~(c)~~ no person is disqualified to testify to any matter . ; and ~~(d)~~

(2) *Except as otherwise provided by statute or by the Constitutions of this State or the United States:*

(a) *No person has a privilege to refuse to be a witness.*

(b) *No person has a privilege to refuse to disclose any matter or to produce any object or writing . ; and (c)*

(c) *No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing . ; and (f)*

(3) *No evidence is admissible except relevant evidence. All relevant evidence is admissible except as otherwise provided by statute.*

Comment

Rule 7 is the keystone of the Uniform Rules of Evidence. It abolishes all pre-existing rules relating to the competency of evidence and witnesses. Under the URE scheme, all rules disqualifying persons to be witnesses or limiting the admissibility of evidence must be found, if at all, among the Uniform Rules of Evidence.

The approval of Rule 7, modified as indicated, is recommended in order that the purpose of the URE—to codify the law relating to the admissibility of evidence—may be fully realized. Revised Rule 7 precludes the possibility that valid restrictions on the admissibility of evidence in addition to those declared by statute will remain. The revised rule does not, however, make evidence admissible that is declared by statute to be inadmissible. Nor does the revised rule affect the power of the judge to exclude otherwise admissible evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury. See Revised Rule 45 in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612 (1964).

The phrase "by statute" is used in the revised rule in place of the URE phrase "in these rules" in order to avoid any implication that the validity of statutory restrictions on the admissibility of evidence (such as the restrictions on "speed trap" evidence provided in Vehicle Code Sections 40803-40804) will be impaired. The URE rule has also been revised to include the substance of Code of Civil Procedure Section 1868, thereby making explicit that which is assumed by the URE—*viz.*, that evidence is not admissible unless it is relevant evidence.

URE Rule 7 has been reorganized to facilitate the integration of its provisions into a comprehensive evidence statute. Thus, subdivision (1) of the revised rule may be easily included in that portion of the statute relating to witnesses, subdivision (2) in that portion relating to privileges, and subdivision (3) in the general provisions portion of the statute.

URE Rule 8. Preliminary Inquiry by Judge

RULE 8. Preliminary Inquiry by Judge. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence

and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Comment

URE Rule 8 sets forth the well-settled rule that preliminary questions of fact upon which the admissibility of evidence depends must be decided by the judge. CODE CIV. PROC. § 2102. However, under the existing California law, the judge determines some preliminary fact questions on the basis of all of the evidence presented to him by both parties, resolving any conflicts in that evidence. See, e.g., *People v. Glab*, 13 Cal. App.2d 528, 57 P.2d 588 (1936), in which the judge considered conflicting evidence and decided that a proposed witness was not married to the defendant and, therefore, was competent to testify. See also *Fairbank v. Hughson*, 58 Cal. 314 (1881). On the other hand, the judge does not always resolve conflicts in the evidence submitted on preliminary fact questions; in some cases, the proffered evidence must be admitted upon a prima facie showing of the preliminary fact. *Reed v. Clark*, 47 Cal. 194, 200 (1873). For example, acts of an agent or co-conspirator are admissible against a defendant upon a prima facie showing of the agency or conspiracy. *Union Constr. Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242 (1912) (agent); *People v. Steccone*, 36 Cal.2d 234, 223 P.2d 17 (1950) (co-conspirator).

The Commission disapproves the language of URE Rule 8 because it fails to distinguish between those situations where the judge must be persuaded as to the existence of the preliminary fact upon which admissibility depends and those situations where the judge must admit the evidence upon a prima facie showing of the preliminary fact. The rule has been substantially revised to make this distinction clear.

Revised Rule 8. Preliminary Inquiry by Judge

(Note: Because of the length of the revised rule, each subdivision is separately set forth below, followed immediately by a Comment relating to that particular subdivision.)

Subdivision (1)—Definitions

(1) *As used in this rule:*

(a) “*Preliminary fact*” means a fact upon the existence of which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or nonexistence of a privilege.

(b) “*Proffered evidence*” means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.

Comment: The terms “preliminary fact” and “proffered evidence” have been defined in the interest of clarity.

“Preliminary fact” is defined to distinguish facts upon which the admissibility of evidence depends from facts sought to be proved by that evidence. The URE rule uses the word “condition” for this pur-

pose. The word "condition" is confusing, however, for it implies that a rule must be worded conditionally (*i.e.*, with "if" or "unless") for Rule 8 to apply. The use of the term "preliminary fact" makes it clear that Revised Rule 8 applies to all determinations of preliminary fact questions.

"Proffered evidence" is defined to avoid confusion between evidence whose admissibility is in question and evidence offered on the preliminary fact issue. "Proffered evidence" includes such matters as the testimony to be elicited from a witness who is claimed to be disqualified, testimony or tangible evidence claimed to be privileged, and any other evidence to which objection is made.

Subdivision (2)—Procedure for Determining Existence of Preliminary Fact

(2)(a) *When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided by this rule.*

(b) *On the admissibility of a confession or admission of a defendant in a criminal action, the judge shall hear and determine the question out of the presence and hearing of the jury unless otherwise requested by the defendant. On the admissibility of other evidence, the judge may hear and determine the question out of the presence or hearing of the jury.*

(c) *In determining the existence of a preliminary fact under subdivisions (4) and (5), exclusionary rules of evidence do not apply except for Rule 45 and the rules of privilege.*

Comment: Subdivision (2) provides that preliminary questions of fact upon which the admissibility of evidence depends are to be determined in accordance with Revised Rule 8. The subdivision then prescribes certain procedures that must be observed in the determination of preliminary fact questions.

The procedures specified in subdivision (2) will change existing California law in certain significant respects.

Confessions and admissions in criminal cases. Subdivision (2)(b) requires the judge to determine the admissibility of a confession out of the presence and hearing of the jury unless the defendant requests otherwise. Under existing law, whether the preliminary hearing is held out of the presence of the jury is left to the judge's discretion. *People v. Gonzales*, 24 Cal.2d 870, 151 P.2d 251 (1944); *People v. Nelson*, 90 Cal. App. 27, 31, 265 Pac. 366, 367 (1928).

The existing procedure permits the jury to hear evidence that may be extremely prejudicial. For example, in *People v. Black*, 73 Cal. App. 13, 238 Pac. 374 (1925), the alleged coercion consisted of threats to send the defendants to New Mexico to be prosecuted for murder. To avoid this kind of prejudice, subdivision (2)(b) requires the preliminary hearing on admissibility to be conducted out of the presence and hearing of the jury unless the defendant requests otherwise.

Admissibility of evidence regarding existence of preliminary fact. Subdivision (2)(c) provides that most exclusionary rules of evidence

do not apply during a preliminary hearing held by the judge to determine whether evidence is admissible under subdivisions (4) and (5). However, the privilege rules are applicable, and the judge also may exclude evidence under Rule 45 if it is cumulative or of slight probative value. Subdivisions (4) and (5) provide the procedure for determining the admissibility of evidence under rules designed to prevent the introduction of evidence either for reasons of public policy or because the proffered evidence is too unreliable to be presented to the trier of fact. (Subdivision (3) provides the procedure for determining whether there is sufficient competent evidence on a particular question to permit that question to be submitted to the trier of fact; hence, all rules of evidence must apply to a hearing held under subdivision (3).)

Under existing California law, which would be changed by the revised rule, the rules governing the competency of evidence *do* apply during the preliminary hearing. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904 (1899) (affidavit cannot be used to show death of witness at preliminary hearing to establish foundation for introduction of former testimony at trial). This change in California law is desirable. Many reliable (and, in fact, admissible) hearsay statements must be held inadmissible if the formal rules of evidence are made to apply to the preliminary hearing. For example, if witness *W* hears *X* shout, "Help! I'm falling down the stairs!", the statement is admissible only if the judge finds that *X* actually was falling down the stairs while the statement was being made. If the only evidence that he was falling down the stairs is the statement itself, or the statements of bystanders who no longer can be identified, the statement must be excluded. Although the statement is admissible as a substantive matter under the hearsay rule, it must be held inadmissible if the formal rules of evidence are rigidly applied during the judge's preliminary inquiry.

The formal rules of evidence have been developed largely to prevent the presentation of weak and unreliable evidence to a jury of laymen, untrained in sifting evidence. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 509 (1898). The hearsay rule is designed to assure the right of a party to cross-examine the authors of statements being used against him. MORGAN, *SOME PROBLEMS OF PROOF* 106-117 (1956). Where factual determinations are to be made solely by the judge, the right of cross-examination is not uniformly required; frequently, he is permitted to determine the facts entirely from hearsay in the form of affidavits and to base his ruling thereon. CODE CIV. PROC. § 2009 (general rule); CODE CIV. PROC. § 657 (2) (affidavits used to show jury misconduct); *Buhl v. Wood Truck Lines*, 62 Cal. App.2d 542, 144 P.2d 847 (1944) (jury misconduct); *Church v. Capital Freight Lines*, 141 Cal. App.2d 246, 296 P.2d 563 (1956) (competency of juror). See CALIFORNIA CONDEMNATION PRACTICE 208 (Cal. Cont. Ed. Bar 1960) (affidavits used to determine amount of immediate possession deposit in eminent domain case). See also 2 WITKIN, *CALIFORNIA PROCEDURE, Proceedings Without Trial*, § 10 at 1648 (1954).

There is no apparent reason for insisting on a more strict observation of the rules of evidence on questions to be decided by the judge alone when such questions are raised during trial instead of before

or after trial. In ruling on the admissibility of evidence, the judge should be permitted to rely on affidavits and other hearsay that he deems reliable. Accordingly, Revised Rule 8(2) is recommended in order to provide assurance that all relevant and competent evidence will be presented to the trier of fact.

Subdivision (3)—Determination of Preliminary Fact When Relevancy, Personal Knowledge, or Authenticity Is Disputed

(3)(a) *The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the judge finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when:*

(i) *The relevance of the proffered evidence depends on the existence of the preliminary fact; or*

(ii) *The preliminary fact is the personal knowledge of the witness concerning the subject matter of his testimony; or*

(iii) *The preliminary fact is the authenticity of a writing; or*

(iv) *The proffered evidence is of a statement or other conduct by a particular person and the disputed preliminary fact is whether that person made the statement or so conducted himself.*

(b) *The judge may admit conditionally the proffered evidence under paragraph (a), subject to the evidence of the preliminary fact being later supplied in the course of the trial.*

(c) *If the judge admits the proffered evidence under paragraph (a):*

(i) *He may and on request shall instruct the jury to determine the existence of the preliminary fact and to disregard the evidence unless the jury finds that the preliminary fact exists.*

(ii) *He shall instruct the jury to disregard the proffered evidence if he subsequently determines that a jury could not reasonably find that the preliminary fact exists.*

Comment: As indicated in the Comment to URE Rule 8, *supra*, the judge does not determine in all instances whether a preliminary fact exists or does not exist. At times, the judge must admit the proffered evidence if there is prima facie evidence—i.e., evidence sufficient to sustain a finding of the preliminary fact. See, e.g., *Reed v. Clark*, 47 Cal. 194, 200 (1873). Subdivision (3) has been added to Revised Rule 8 to cover those situations in which the judge is required to admit the proffered evidence upon a prima facie showing of the preliminary fact.

Some writers have distinguished those situations where the judge must admit the proffered evidence upon a prima facie showing of the preliminary fact from those situations where the judge must be persuaded as to the existence of the preliminary fact on the ground that

the former situations involve the *relevancy* of the proffered evidence while the latter situations involve the *competency* of the evidence that is relevant. Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929). Accordingly, the term "relevancy" is used in this Comment to characterize those preliminary fact questions to be decided by the judge under subdivision (3).

Paragraph (a)

When evidence is admissible if relevant, and its relevancy depends on the existence of some preliminary fact, the judge is required by subdivision (3)(a) to admit the proffered evidence if there is evidence sufficient to sustain a finding of the preliminary fact. The judge does not decide whether or not the preliminary fact actually exists. The judge determines only the sufficiency of the evidence to sustain a finding of the preliminary fact because he is passing on the basic issues in dispute between the parties; hence, the judge's function is merely to determine whether there is sufficient evidence to permit a jury to decide the question. If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.

For example, if the question of *A*'s title to land is in issue, *A* may seek to prove his title by a deed from former owner *O*. URE Rule 67 requires that the deed be authenticated, and the judge, under Revised Rule 8, must rule on the question of authentication. If *A* introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the rule were otherwise and the judge, on the basis of the adverse party's evidence, were permitted to decide that the deed was spurious and not admissible, the judge would be resolving the basic factual issue in the case and *A* would be deprived of a jury finding on the issue, even though he is entitled to a jury decision and even though he has introduced evidence sufficient to warrant a jury finding in his favor.

Hence, in ruling on questions of relevancy, the judge's rulings are preliminary only. He does not decide finally whether a document is authentic or, for example, whether a witness has personal knowledge; if he did so, he would be usurping the function of the jury.

Existing California law is in accord. Thus, if *P* seeks to fasten liability upon *D*, evidence as to any action of *A* is inadmissible because irrelevant unless, for example, *A* is shown to be the agent of *D*. On this question, the California cases agree: Evidence as to the actions of *A* is admissible upon only a prima facie showing of agency. *Brown v. Spencer*, 163 Cal. 589, 126 Pac. 493 (1912). The same rule is applicable when a person is charged with criminal responsibility for the acts of another because they are conspirators. See discussion in *People v. Steccone*, 36 Cal.2d 234, 238, 223 P.2d 17, 19 (1950).

Because it is not always clear when a preliminary question is one of relevancy, subdivision (3)(a) specifies certain preliminary fact questions that may arise under the rules that should be decided by the

judge under this subdivision. Illustrative of the preliminary fact questions under these rules that should be decided under subdivision (3) are:

Rule 19—Requirement of personal knowledge. A prima facie showing of a witness' personal knowledge seems to be sufficient under the existing California practice. See, e.g., *People v. Avery*, 35 Cal.2d 487, 492, 218 P.2d 527, 530 (1950) ("Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under section 1845 of the Code of Civil Procedure."); *People v. McCarthy*, 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910). See also *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 711-713 (1964).

Rule 21(1)—Conviction for a crime when offered to attack credibility. In this situation, the preliminary fact issue to be decided under subdivision (3) would be whether the person convicted was actually the witness. This involves the relevancy of the evidence (since, obviously, the conviction of another does not affect the witness' credibility) and should be a question to be resolved by the jury. The judge should not be able to decide finally that it was the witness who was convicted and, thus, to prevent a contest on that issue before the jury. The existing law is uncertain in this regard; however, it seems likely that prima facie evidence identifying the witness as the person convicted is sufficient to warrant admission of the evidence. See *People v. Theodore*, 121 Cal. App.2d 17, 28, 262 P.2d 630, 637 (1953) (relying on presumption of identity of person from identity of name). Subdivision (3) does not affect the special procedural rule provided in Rule 21 that requires the proponent of the evidence to make the preliminary showing out of the presence and hearing of the jury. See Revised Rule 21 and the Comment thereto in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 715-718 (1964).

Rule 56(1)—Requirement that lay opinion be based on personal perception. The requirement specified in Rule 56(1) is merely a specific application of the personal knowledge requirement in Rule 19. See this Comment, *supra*. See also *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901 (1964).

Rule 63(1)—Previous statements of witnesses. Prior inconsistent statements, prior consistent statements made before bias arose, and recorded memory are dealt with in Rule 63(1). See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 312-314, 425-439 (1963). In each case, the evidence is relevant and probative if the witnesses to the statements are credible. The credibility of the witnesses testifying to these statements should be decided finally by the jury. Hence, evidence should be admitted upon prima facie evidence of the preliminary fact. Few California cases discuss the nature of the foundational showing required in this situation. However, the practice seems to be consistent with subdivision (3), fo-

the cases permit the prior statements to be admitted merely upon a prima facie showing. See *Schneider v. Market Street Ry.*, 134 Cal. 482, 492, 66 Pac. 734, 738 (1901) ("Whether the [prior inconsistent] statements made to Glassman and Hubbell were made by Meley, or by some other man, was a question for the jury. Both witnesses testified that they were made by him."); *People v. Neely*, 163 Cal. App.2d 289, 312, 329 P.2d 357, 371 (1958) (two prior consistent statements held admissible because the "jury could properly infer . . . the motive to fabricate did arise after the making of the two statements"); *People v. Zammora*, 66 Cal. App.2d 166, 224, 152 P.2d 180, 209-210 (1944) (recorded memory).

Rule 63(7)—Admissions of a party. With respect to an admission, existing California law apparently requires only a prima facie showing that the party made the alleged statement. See *Eastman v. Means*, 75 Cal. App. 537, 242 Pac. 1089 (1925). This analysis seems sound. Obviously, an admission of liability by *X* is irrelevant to a determination of *D*'s liability. The relevancy of an admission depends on the fact that a party made the statement.

Rule 63(8)—Authorized and adoptive admissions. The admissibility of both authorized admissions (by an agent of a party) and adoptive admissions involves the relevancy of the proffered evidence. Both kinds of admissions are admitted because they are statements made by a party (either under principles of agency or by his act of adoption) that are inconsistent with his position at the trial. Hence, like direct admissions, their relevancy depends on the fact that the party made the proffered statement through an agent or by his own act of adoption. Accordingly, the proffered evidence is admissible upon a prima facie showing of the foundational fact. Existing law is in accord. *Sample v. Round Mountain Citrus Farm Co.*, 29 Cal. App. 547, 156 Pac. 983 (1916) (authorized admission); *Southers v. Savage*, 191 Cal. App.2d 100, 12 Cal. Rptr. 470 (1961) (adoptive admission).

Rule 63(9)(b)—Admission of co-conspirator. The admission of a co-conspirator is another form of an authorized admission. Hence, the proffered evidence is admissible upon merely a prima facie showing of the conspiracy. Existing law is in accord. *People v. Robinson*, 43 Cal.2d 132, 137, 271 P.2d 865, 868 (1954).

Rule 63(9)(c)—Admissions of third persons whose liability is in issue. Under existing California law, the preliminary showing required in regard to this class of admissions is the same as if the declarant were being sued directly; hence, a prima facie showing of the making of the statement is sufficient to warrant its admission. See *Langley v. Zurich General Acc. & Liab. Ins. Co.*, 219 Cal. 101, 25 P.2d 418 (1933).

Rules 62-66—Identity of hearsay declarant. For most hearsay evidence, admissibility depends upon two preliminary determinations: (1) Did the declarant actually make the statement as claimed by the proponent of the evidence? (2) Does the statement meet certain standards of trustworthiness required by some exception to the hearsay rule?

The first determination involves the relevancy of the evidence. For example, if the issue is the state of mind of *X*, a person's statement as to his state of mind has no tendency to prove *X*'s state of mind unless the declarant was *X*. Relevancy depends on the fact that *X* made the

statement. Accordingly, if otherwise competent, a hearsay statement should be admitted upon a prima facie showing that the claimed declarant made the statement.

The second determination involves the competency of the evidence. It must meet the requisite standards of any exception to the hearsay rule or, despite its relevancy, it must be kept from the trier of fact because it is too unreliable or because public policy requires its suppression. For example, if an admission is in fact made by a defendant to a criminal action, the admission is relevant. But public policy requires that the admission be held inadmissible if it is not given voluntarily.

The admissibility of some hearsay declarations is dependent solely upon the determination that the statement was made by the particular declarant claimed by the proponent of the evidence. Some of these exceptions to the hearsay rule—such as prior statements of trial witnesses and admissions—have been specifically mentioned above. Since the only preliminary fact to be determined in regard to these declarations involves the relevancy of the evidence, they should be admitted upon merely a prima facie showing of the preliminary fact.

When the admissibility of hearsay depends both upon a determination that a particular declarant made the statement and upon a determination that the requisite standards of a hearsay exception have been met, the former determination is to be made upon evidence sufficient to sustain a finding of the preliminary fact. Paragraph (a)(iv) is included in subdivision (3) to make this clear.

Rules 67, 67.5, 68, 69—Authentication of writings. Under existing California law, an otherwise competent writing is admissible upon the introduction of evidence sufficient to sustain a finding of the authenticity of the writing. *Verzan v. McGregor*, 23 Cal. 339 (1863). Subdivision (3) retains this existing law.

Rule 71—Proof of execution of witnessed writings. The only preliminary fact issue apt to arise with respect to proof of witnessed writings is whether a witness actually saw the writing executed. This is merely a specific application of the personal knowledge requirement of Rule 19. See this Comment, *supra*.

Paragraph (b)

Subdivision (3)(b) restates the provisions of Section 1834 of the Code of Civil Procedure, which permits the judge to receive evidence that is conditionally relevant subject to the presentation of evidence of the preliminary fact later in the course of the trial.

Paragraph (c)

Subdivision (3)(c) relates to the instructions to be given the jury when evidence is admitted whose relevancy depends on the existence of a preliminary fact. When such evidence is admitted, the jury is required to make the ultimate determination of the existence of the preliminary fact. Unless the jury is persuaded that the preliminary fact exists, it is not permitted to consider the evidence.

For example, if *P* offers evidence of his negotiations with *A* in his contract action against *D*, the judge must admit the evidence if there is other evidence sufficient to sustain a finding that *A* was *D*'s agent.

If the jury is not persuaded that *A* was in fact *D*'s agent, then it is not permitted to consider the evidence of the negotiations with *A* in determining *D*'s liability.

Frequently, the jury's duty to disregard conditionally relevant evidence when it is not persuaded of the existence of the preliminary fact on which relevancy is conditioned is so clear that an instruction to this effect is unnecessary. For example, if the disputed preliminary fact is the authenticity of a deed, it hardly seems necessary to instruct the jury to disregard the deed if it should find that the deed is not genuine. No rational jury could find the deed to be not genuine and, yet, to be still effective to transfer title from the purported grantor.

At times, however, it is not quite so clear that conditionally relevant evidence should be disregarded unless the preliminary fact is found to exist. In such cases, the jury should be appropriately instructed. For example, the theory upon which agent's and co-conspirator's statements are admissible is that the party is vicariously responsible for the acts and statements of agents and co-conspirators within the scope of the agency or conspiracy. Yet, it is not always clear that statements made by a purported agent or co-conspirator should be disregarded if not made in furtherance of the agency or conspiracy. Hence, the jury should be instructed to disregard such statements unless it is persuaded that the statements were made within the scope of the agency or conspiracy. *People v. Geiger*, 49 Cal. 643, 649 (1875); *People v. Talbott*, 65 Cal. App.2d 654, 663, 151 P.2d 317, 322 (1944). Paragraph (c), therefore, permits the judge in any case to instruct the jury to disregard conditionally relevant evidence unless it is persuaded as to the existence of the preliminary fact, and, further, paragraph (c) requires the judge to give such an instruction whenever he is requested by a party to do so.

Subdivision (4)—Determination of Whether Evidence Is Self-Incriminating

(4) When the proffered evidence is claimed to be privileged under Rule 25, the person claiming the privilege has the burden of showing that the proffered evidence might incriminate him as provided in Rule 24, and the proffered evidence is inadmissible unless it clearly appears to the judge that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Comment: Subdivision (4) has been added to Revised Rule 8 to provide a special procedure to be followed by the judge when an objection is made in reliance upon the privilege against self-incrimination.

Subdivision (4) provides that the objecting party has the burden of showing that the testimony sought might incriminate him. However, the party is not required to produce evidence as such. Under Revised Rule 24, in addition to considering evidence, the judge must consider the matters disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors. See Revised Rule 24 and the Comment thereto in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 213-215 (1964). Nonetheless,

the burden is on the objector to present to the judge information of this sort sufficient to indicate that the proffered evidence might incriminate him. Subdivision (4) requires the judge to sustain the claim of privilege unless it clearly appears that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Subdivision (4) is consistent with existing California law: The party claiming the privilege "has the burden of showing that the testimony which was being required might be used in a prosecution to help establish his guilt"; the court may require testimony to be given only if it clearly appears to the court that the claim of privilege is mistaken and that any answer "'cannot possibly'" have a tendency to incriminate the witness. *Cohen v. Superior Court*, 173 Cal. App.2d 61, 68, 70-72, 343 P.2d 286, 290, 291-292 (1959) (italics in original).

Subdivision (5)—Determination of Preliminary Fact in Other Cases

(5) *Except as provided in subdivisions (3) and (4):*

(a) *When the existence of a preliminary fact is disputed, the judge shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule under which the question arises. The judge shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule under which the question arises.*

(b) *If a preliminary fact is also a fact in issue in the action, the judge shall not inform the jury of his determination of the preliminary fact. The jury shall make its determination of the fact without regard to the determination made by the judge. If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the judge's determination of the preliminary fact.*

Comment: Subdivision (5) requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations covered by subdivisions (3) and (4). Under subdivision (5), the judge first indicates to the parties who has the burden of proof and the burden of producing evidence on the disputed issue as implied by the rule under which the question arises. For example, URE Rule 63 indicates that the burden of proof is usually on the proponent of the evidence to show that the proffered evidence is within a hearsay exception. Thus, for example, if the disputed preliminary fact is whether the proffered statement was spontaneous, as required by Rule 63(4), the proponent would have the burden of persuading the judge as to the spontaneity of the statement. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301 (1963). On the other hand, the privilege rules usually place the burden of proof on the objecting party to show that a privilege is applicable. Thus, if the disputed preliminary fact is whether a witness is married to a party and, hence, privileged to refuse to testify against that party under Proposed Rule 27.5, the burden of proof is on

the witness to persuade the judge of the existence of the marriage. See Proposed Rule 27.5 and other rules of privilege in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201 (1964).

After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is persuaded by the party with the burden of proof, he finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule under which the question arises. If the judge is not persuaded by the party with the burden of proof, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by the rule under which the question arises.

Subdivision (5) is generally consistent with existing California law. CODE CIV. PROC. § 2102 ("All questions of law, including the admissibility of testimony, [and] the facts preliminary to such admission, . . . are to be decided by the Court").

Illustrative of the preliminary fact issues to be decided under subdivision (5) are the following:

Rule 17—Disqualification of a witness for lack of mental capacity. Under existing law, as under these rules, the party objecting to a proffered witness has the burden of proving the witness' lack of capacity. *People v. Craig*, 111 Cal. 460, 469, 44 Pac. 186, 188 (1896); *People v. Tyree*, 21 Cal. App. 701, 706, 132 Pac. 784, 786 (1913) (disapproved on other grounds in *People v. McCaughan*, 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957)).

Rule 21(3)—Conviction for a crime when offered to attack credibility. If the disputed preliminary fact is whether a pardon or some similar relief has been granted to a witness convicted for a crime, the judge's determination is made under subdivision (5). Cf. Comment to subdivision (3), *supra*.

Rules 23-40—Privileges. Under these rules, as under existing law, the party claiming privilege has the burden of proof on the preliminary facts. *San Diego Professional Ass'n v. Superior Court*, 58 Cal.2d 194, 199, 23 Cal. Rptr. 384, 387, 373 P.2d 448, 451 (1962) ("The burden of establishing that a particular matter is privileged is on the party asserting that privilege."); *Chronicle Publishing Co. v. Superior Court*, 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 117, 354 P.2d 637, 645 (1960). The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary to show that an exception to the privilege is applicable. See *Agnew v. Superior Court*, 156 Cal. App.2d 838, 840, 320 P.2d 158, 160 (1958); *Abbott v. Superior Court*, 78 Cal. App.2d 19, 21, 177 P.2d 317, 318 (1947) (suggesting that a prima facie showing by the proponent is sufficient where the issue is whether a communication between attorney and client was made in contemplation of crime); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201 (1964).

Rules 52, 52.5, 53—Admissions made during compromise negotiations. With respect to admissions during compromise negotiations, the disputed preliminary fact to be decided by the judge is whether the admission occurred during compromise negotiations or at some other time. These rules place the burden on the objecting party to satisfy the judge that the admission occurred during such negotiations. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 620-622 (1964).

Rule 55.5—Qualifications of an expert witness. Under Proposed Rule 55.5, as under existing law, the proponent must show his expert to be qualified, and it is error for the judge to submit the qualifications of the expert to the jury. *Fairbank v. Hughson*, 58 Cal. 314 (1881); *Eble v. Peluso*, 80 Cal. App.2d 154, 181 P.2d 680 (1947). See Proposed Rule 55.5 in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901, 908 (1964).

Rules 62-66—Hearsay evidence. When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration—was the statement actually made by the person alleged to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence—*e.g.*, was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under these rules, questions relating to the authenticity of the proffered declaration are decided under subdivision (3). See the Comment to subdivision (3), *supra*. But other preliminary fact questions are decided under subdivision (5).

For example, the court must decide whether a statement offered as a dying declaration was made under a sense of impending doom, and the proponent of the evidence has the burden of proof on this issue. *People v. Keelin*, 136 Cal. App.2d 860, 873, 289 P.2d 520, 528 (1955); *People v. Pollock*, 31 Cal. App.2d 747, 753-754, 89 P.2d 128, 131 (1939). Under these rules, the proponent of a hearsay declaration would have the burden of proof on the unavailability of the declarant as a witness under Revised Rule 63(3) or Revised Rule 63(10); but, the party objecting to the evidence would have the burden of proving under Revised Rule 62(7) that the unavailability of the declarant was procured by the proponent to prevent the declarant from testifying. See the revised rules relating to hearsay evidence in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301 (1963).

Rules 70, 72—Best evidence rule and photographic copies. Under subdivision (5), as under existing law, the trial judge is required to determine the preliminary fact necessary to warrant reception of secondary evidence of a writing, and the burden of proof on the issue is on the proponent of the secondary evidence. See *Cotton v. Hudson*, 42 Cal. App.2d 812, 110 P.2d 70 (1941).

Spontaneous statements, dying declarations, and confessions. Subdivision (5) is generally consistent with existing California law regarding the matters previously discussed herein. However, it will make a substantial change in the existing law relating to spontaneous statements, dying declarations, and confessions. Under existing California law, the judge considers all of the evidence and decides whether evidence of this sort is admissible, as indicated in subdivision (5). But if he decides the proffered evidence is admissible, he submits the preliminary question to the jury for a final determination whether the confession was voluntary, whether the dying declaration was made in realization of impending doom, or whether the spontaneous statement was in fact spontaneous; and the jury is instructed to disregard the statement if it does not believe that the condition of admissibility has been satisfied. *People v. Baldwin*, 42 Cal.2d 858, 866-867, 270 P.2d 1028, 1033-1034 (1954) (confession—see the court's instruction, *id.* at 866, 270 P.2d at 1033); *People v. Gonzales*, 24 Cal.2d 870, 876-877, 151 P.2d 251, 254 (1944) (confession); *People v. Singh*, 182 Cal. 457, 476, 188 Pac. 987, 995 (1920) (dying declaration); *People v. Keelin*, 136 Cal. App.2d 860, 871, 289 P.2d 520, 527 (1955) (spontaneous declaration).

Under subdivision (5), the judge's rulings on these questions will be final; the jury will not have an opportunity to determine the issue. This elimination of a "second crack" is desirable. The existing rule is a temptation to the weak judge to avoid difficult decisions by shifting the responsibility to the jury. The existing rule operates under complex instructions that require jurors to perform the impossible task of erasing the hearsay statement from their minds if they conclude that the condition of admissibility has not been met. See, *e.g.*, CALJIC (2d ed. 1958) Nos. 29-A (Rev.), 29-A.1, 330. Frequently, the evidence presented to the judge out of the jury's presence must again be presented to the jury so that it can rule intelligently on the admissibility question.

Revised Rule 8 deals only with the admission of evidence at the trial level. Hence, the finality of the judge's rulings on the admissibility of confessions will have no effect on the well-settled rule that an appellate court will make an independent determination of the voluntariness of a confession upon the basis of the uncontradicted facts or the facts as found by the trial court. *Watts v. Indiana*, 338 U.S. 49, 50-52 (1948); *People v. Trout*, 54 Cal.2d 576, 583, 6 Cal. Rptr. 759, 763, 354 P.2d 231, 235 (1960); *People v. Baldwin*, 42 Cal.2d 858, 867, 270 P.2d 1028, 1033-1034 (1954).

Subdivision (6)—Evidence Affecting Weight or Credibility

(6) *This rule does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.*

Comment: Other subdivisions in the revised rule provide that the judge determines whether proffered evidence is admissible, *i.e.*, whether it may be considered by the trier of fact. Subdivision (6) simply makes it clear that the judge's decision on a question of admissibility does not preclude the parties from introducing before the trier of fact evidence relevant to weight and credibility.

EXISTING STATUTES TO BE REPEALED

Set forth below are a number of existing statutes that should be repealed in light of the Commission's tentative recommendation concerning Article I (General Provisions) of the Uniform Rules of Evidence. The reason for the suggested repeal is given after each section. References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission. All the sections listed below are in the Code of Civil Procedure.

Section 1823 provides:

1823. DEFINITION OF EVIDENCE. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Section 1823 should be repealed. It is superseded by the definition of "evidence" in Rule 1(1).

Section 1824 provides:

1824. DEFINITION OF PROOF. Proof is the effect of evidence, the establishment of a fact by evidence.

Section 1824 should be repealed. It is superseded by the definition of "proof" in Rule 1(3).

Section 1825 provides:

1825. DEFINITION OF LAW OF EVIDENCE. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining, in certain cases, the value and effect of evidence.

Section 1825 should be repealed. This section, which merely states in general terms the content of Part IV of the Code of Civil Procedure, serves no useful purpose. No case has been found where the section was pertinent to the decision.

Section 1827 provides:

1827. FOUR KINDS OF EVIDENCE SPECIFIED. 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.

Section 1827 should be repealed. It is superseded by the definition of "evidence" in Rule 1(1). Though judicial notice is not included in the definition of "evidence" in Rule 1(1), the subject is covered in the

Commission's separate recommendation and study on judicial notice. *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article II. Judicial Notice)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801 (1964).

Section 1828 provides:

1828. There are several degrees of evidence:

One—Primary and secondary.

Two—Direct and indirect.

Three—Prima facie, partial, satisfactory, indispensable, and conclusive.

Section 1828 attempts to classify evidence into a number of different categories, each of which in turn is defined by the sections that follow, i.e., Sections 1829 through 1837. This very elaborate classification system represents the analysis of evidence law of a century ago. Writers, courts, and lawyers today use different classifications and different terminology. Accordingly, Section 1828 should be repealed. To the extent that the terms defined in Sections 1829 through 1837 should be retained, those terms are defined in the revised rules.

Sections 1829 and 1830 provide:

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.

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.

Sections 1829 and 1830 should be repealed. These sections serve no definitional purpose in the existing statutes and appear to state a "best evidence" rule that is inconsistent with Revised Rule 70 and existing law. See the Study, *infra* at 49-51, and see also *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 101, 117-121, 148-159 (1964).

Sections 1831 and 1832 provide:

1831. DIRECT EVIDENCE DEFINED. 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.

1832. INDIRECT EVIDENCE DEFINED. 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.

Sections 1831 and 1832, together with Section 1957 (set out in the text, *infra* at 35), should be repealed. Sections 1831 and 1832 draw a distinction between “direct” and “indirect” evidence, the more common name for “indirect” evidence being circumstantial evidence. The distinction between “direct” and “indirect” evidence is not drawn in the tentative recommendations of the Law Revision Commission; under the tentative recommendations, circumstantial evidence, when relevant, is as admissible as direct evidence.

Except for the use of “direct evidence” in Section 1844, the defined terms are not used in the existing statutes in Part IV of the Code of Civil Procedure. The Commission will consider whether the substance of Section 1844 should be included in its final recommendation and, if so, whether the phrase “direct evidence” should be used and how it should be defined, if used.

The repeal of Sections 1831 and 1832 will not affect the instructions that are to be given to the jury in appropriate cases as to the difference between direct and circumstantial evidence. See the Study, *infra* at 51-52. Nor will the repeal of these sections affect the case law or other statutes relating to what evidence is sufficient to sustain a verdict or finding.

Section 1834 provides:

1834. PARTIAL EVIDENCE DEFINED. 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.

Section 1834 should be repealed. The substance of this section is stated as a rule of law, rather than as a definition, in paragraph (b) of subdivision (3) of Rule 8.

Section 1836 provides:

1836. INDISPENSABLE EVIDENCE DEFINED. Indispensable evidence is that without which a particular fact cannot be proved.

Section 1836 should be repealed. This section serves no useful purpose. The defined term is not used in the existing statutes and is not used in the tentative recommendations of the Law Revision Commission. See the Study, *infra* at 53.

Section 1837 provides:

1837. CONCLUSIVE EVIDENCE DEFINED. 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.

Section 1837 should be repealed. This section is unnecessary and is inconsistent with the definition of “evidence” stated in Rule 1(1). See the Study, *infra* at 53-55.

Section 1838 provides :

1838. CUMULATIVE EVIDENCE DEFINED. Cumulative evidence is additional evidence of the same character, to the same point.

Section 1838 should be repealed. The defined term is not used in the existing statutes and is not used in the tentative recommendations of the Law Revision Commission. The deletion of Section 1838 will have no effect on Rule 45, which states the principle that cumulative evidence may be excluded but does not use the words "cumulative evidence." Nor will the deletion of Section 1838 have any effect on the last sentence of Code of Civil Procedure Section 2044, which reads: "The Court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt." See discussion of Rule 45 in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612, 639-644 (1964).

Section 1839 provides :

1839. CORROBORATIVE EVIDENCE DEFINED. Corroborative evidence is additional evidence of a different character, to the same point.

Section 1839 should be repealed. One outdated case indicates that an instruction on what constitutes corroborating evidence is adequate if given in the words of Section 1839. *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201 (1896). See also *People v. Monteverde*, 111 Cal. App.2d 156, 244 P.2d 447 (1952). On the other hand, recent cases do not cite or rely on Section 1839 in defining what constitutes corroborating evidence, and *California Jury Instructions, Criminal*, provides definitions of corroborating evidence derived from the case law rather than from Section 1839. See, e.g., CALJIC (2d ed. 1958) Nos. 203 (Rev.) (possession of stolen property), 235 (Rev.) (possession of stolen property), 592-C (Rev.) (abortion), 766 (perjury), and 822 (Rev.) (corroboration of testimony of accomplices). See the Study, *infra* at 56-57.

Thus, the repeal of Section 1839 will have no effect on the interpretation of the sections in various codes that require corroborating evidence; the case law that has developed under these sections will continue to determine what constitutes corroborating evidence for the purposes of the particular sections. The repeal of Section 1839 will, however, eliminate the inconsistency between Section 1839 (which restricts corroborative evidence to "additional evidence of a different character") and the case law (which apparently includes *any* "additional evidence," *i.e.*, other evidence either of the same kind or differing in kind).

Section 1868 provides :

1868. EVIDENCE CONFINED TO MATERIAL ALLEGATION. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the Court to permit inquiry into a collateral fact, when such fact is

directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

Section 1868 should be repealed. It is superseded by Rules 1(2), 7(3), and 45. See Rules 1 and 7, *supra*; *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612 (1964).

Subdivisions 1, 15, and 16 of Section 1870 provide:

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

1. The precise fact in dispute;

* * * * *

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.

Subdivisions 1, 15, and 16 of Section 1870 are superseded by the definition of "relevant evidence" in Rule 1(2).

Section 1957 provides:

1957. INDIRECT EVIDENCE CLASSIFIED. Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

Section 1957 should be repealed. See the discussion, *supra* at 33, concerning the repeal of Section 1832 (defining indirect evidence).

Section 2103 provides:

2103. QUESTIONS OF FACT BY COURT OR REFEREES. The provisions contained in this part of the Code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a Court, referee, or other officer.

Section 2103 should be repealed. It is superseded by Rule 2 and the definitions contained in Rules 1(10) ("judge") and 1(11) ("trier of fact").

**A STUDY RELATING TO THE GENERAL PROVISIONS
ARTICLE OF THE UNIFORM RULES OF EVIDENCE ***

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* This study was made at the request of the California Law Revision Commission and, except as noted herein, was prepared by Professor James H. Chadbourn of the Harvard Law School. The portion of the study relating to Suggested Disposition of Definitional Sections in Part IV of the Code of Civil Procedure (pp. 46-57, *infra*) was prepared by Professor Ronan E. Degnan of the School of Law, University of California at Berkeley. The opinions, conclusions, and recommendations contained herein are entirely those of the authors and do not necessarily reflect or represent the opinions, conclusions, or recommendations of the Law Revision Commission.

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INTRODUCTION

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.¹

The present study, made at the request of the Law Revision Commission, is directed to the question whether California should adopt the provisions of the Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") relating to general provisions—i.e., Rules 1 through 8 and other related provisions of the Uniform Rules. The study undertakes both to point up what changes would be made in the California law of evidence if these URE provisions were adopted and also to subject these provisions to an objective analysis designed

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

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

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

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

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

The Uniform Rules of Evidence, with a few changes necessary to conform with local conditions, were adopted in the Virgin Islands in 1957. See 5 V.I.C. §§ 771-956 (1957).

to test their utility and desirability. In some instances, modifications of the provisions of the Uniform Rules are suggested. The problem of incorporating these provisions of the Uniform Rules into the California codes is also discussed.

Rules 1 through 8 provide the general scheme for all of the Uniform Rules. The other rules are either restatements of or limitations on the general provisions contained in Article I. Therefore, since these introductory rules affect and are affected by the other rules, they should be considered in connection with the separate studies on the other articles of the URE.²

² See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301 (1963); 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1 *et seq.* (1964), containing at the pages noted a separate tentative recommendation and study relating to each of the following articles of the Uniform Rules of Evidence: *Article I. General Provisions* at 1, *Article II. Judicial Notice* at 801, *Burden of Producing Evidence, Burden of Proof, and Presumptions* (replacing URE Article III. Presumptions) at 1001, *Article IV. Witnesses* at 701, *Article V. Privileges* at 201, *Article VI. Extrinsic Policies Affecting Admissibility* at 601, *Article VII. Expert and Other Opinion Testimony* at 901, *Article IX. Authentication and Content of Writings* at 101.

RULE 1

Introduction

Rule 1 contains 13 subdivisions which define certain terms used throughout the Uniform Rules.

In considering how best to incorporate the Uniform Rules into the California law, these definitions must be reviewed in the light of their present statutory counterparts, if any. The text of Rule 1 reads as follows:

RULE 1. *Definitions.*

(1) "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.

(2) "Relevant evidence" means evidence having any tendency in reason to prove any material fact.

(3) "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 non-existence of such fact.

(4) "Burden of Proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

(6) "Conduct" includes all active and passive behavior, both verbal and non-verbal.

(7) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state.

(9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a *sui juris* person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(10) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.

(11) "Trier of fact" includes a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence.

(12) "Verbal" includes both oral and written words.

(13) "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. [Brackets in original.]

Present California Law

Taking a broad view of the present California evidence statutes, there now is a group of code sections somewhat comparable to the above definitions. Part IV of the Code of Civil Procedure (consisting of Sections 1823 through 2103) regulates evidence. The introductory portion of this Part (Sections 1823-1839) consists of definitions and preliminary statements which bear the same relation to Part IV that Rule 1 bears to the Uniform Rules.

Since the Uniform Rules are, broadly speaking, a substitute for Code of Civil Procedure Part IV as presently constituted, the preliminary provisions of Part IV (Sections 1823-1839) should be repealed in connection with the enactment of the Uniform Rules of Evidence. If this recommendation is accepted, the result would be that, in some instances, the essence of a present code section would be re-enacted in different terms. (For example, instead of defining "evidence" as Code of Civil Procedure Section 1823 now does,³ the definition would become that of URE Rule 1(1).) In other instances, some terms now defined by code sections would be without statutory definition. (For example, "cumulative evidence" and "corroborative evidence" are now defined by Code of Civil Procedure Sections 1838 and 1839,⁴ respectively, but are not defined by URE Rule 1.)

An obvious alternative to the second result is to amend Rule 1 to include definitions of those terms now defined in Part IV of the Code of Civil Procedure but not defined by the rule. This alternative is not recommended, however, because these terms are obvious in meaning; broadening Rule 1 to include such definitions would make that rule needlessly prolix.

Section 17 of the Code of Civil Procedure and certain definitional sections of the Probate Code also may be affected by adoption of Rule 1. These provisions are considered in the discussion of Rule 1(13) and Rule 1(9), respectively, *infra*.

In the following discussion, only those subdivisions of Rule 1 which would modify presently existing California definitions are considered.⁵ However, all of the sections of the California Codes which would be affected by the adoption of Rule 1 are set out and commented upon.

³ The text of Section 1823 is set out in the text, *infra* at 43.

⁴ The text of these sections is set out in the text, *infra* at 56.

⁵ The following subdivisions of Uniform Rule 1 define terms not discussed in this study: Rule 1(2) ("relevant evidence"), Rule 1(6) ("conduct"), Rule 1(7) ("hearing"), Rule 1(8) ("finding of fact"), Rule 1(10) ("judge"), Rule 1(11) ("trier of fact"), Rule 1(12) ("verbal"). These terms are broadly defined and, generally speaking, are self-explanatory.

Subdivision (1) and Code of Civil Procedure Section 1823. Rule 1(1) provides the following definition of "evidence":

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

The analogous California provision is Code of Civil Procedure Section 1823:

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

The basic difference between the two definitions seems to be that Section 1823 restricts the concept of "evidence" to that which is admissible (*i.e.*, "sanctioned by law"), whereas Rule 1(1) expands the concept to include that which is inadmissible (*i.e.*, "testimony in the form of opinion, and hearsay"). URE Rule 1(1) is a recognition of the reality that opinion and hearsay testimony possess probative force and should, therefore, be classified as "evidence." Thus, under Rule 1(1), when hearsay or opinion is admitted without objection, there is no doubt that it constitutes "evidence." Under Section 1823, strictly construed and applied, hearsay and opinion technically are not "judicial evidence," because these are not "sanctioned by law." Rule 1(1) seems preferable to Section 1823 because it clarifies that which Section 1823 leaves in doubt, namely, that matters possessed of probative force should be considered as "evidence" and, having been admitted without objection, should be weighed as "evidence." Adoption of Rule 1(1) and repeal of Section 1823 are, therefore, recommended.⁶

Subdivision (3) and Code of Civil Procedure Section 1824. 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 non-existence of such fact.

The analogous provision in present California law is Code of Civil Procedure Section 1824:

Proof is the effect of evidence, the establishment of a fact by evidence.

The only difference between Rule 1(3) and Section 1824 appears to be that Section 1824 conceives of proof as establishing a fact whereas Rule 1(3) speaks in terms of tending to establish the fact. This may be a significant difference from a philosophical point of view; for practical purposes, however, the difference seems insignificant. Adoption of Rule 1(3) and repeal of Section 1824 would, therefore, not alter in practical terms the present California law.

⁶Uniform Rule 1(1) will also have a significant effect on the present California law relating to presumptions, since Rule 1(1) does not define presumptions as evidence, as does the present law. The separate study on Article III of the Uniform Rules of Evidence discusses those sections of the Code of Civil Procedure relating to presumptions which will need to be repealed or amended if Rule 1(1) is adopted. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001 (1964).

Subdivisions (4) and (5). Rules 1(4) and 1(5) define "burden of proof" and "burden of producing evidence," respectively. These definitions can most profitably be discussed in relation to the rules relating to presumptions; consideration of these rules is, therefore, included in the separate study on Article III of the Uniform Rules of Evidence.⁷

Subdivision (9) and the Definition of "Guardian." Rule 1(9) provides:

"Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a *sui juris* person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law. [Brackets in original.]

Various sections of the Probate Code define and use the terms "guardian," "ward," "incompetent," "conservator," and "conservatee."⁸ Likewise, various sections of the Code of Civil Procedure use the expressions "general guardian" and "guardian ad litem."⁹ All of these sections appear to be comprehended by and compatible with the definition in Uniform Rule 1(9).

The definition in Rule 1(9) is, of course, germane to the URE privilege rules that declare a guardian of a person to be the holder of the privilege. The privilege rules should be so correlated with present provisions as to guardianship that the reference in the Uniform Rules to guardian will embrace all forms of guardianship now provided.¹⁰ Rule 1(9) seems to be designed to achieve this purpose, and it appears to be sufficiently inclusive to accomplish it. Hence, its approval is recommended.

⁷ See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001 (1964).

⁸ CAL. PROB. CODE § 1400 ("A guardian is a person appointed to take care of the person or property of another. The latter is called the ward of the guardian."), § 1435.2 ("As used in this chapter the word incompetent shall be construed to include insanity as well as incompetency arising by reason of old age, disease, weakness of mind, physical disability or other cause rendering a person unable, unassisted, properly to manage and take care of his property, and by reason thereof likely to be deceived or imposed upon by artful or designing persons. The word guardian means a guardian or conservator duly appointed by the Superior Court of California."), § 1435.18 (reference to guardian or guardianship estate deemed to include conservator, conservatorship estate), § 1460 ("As used in this division of this code, the phrase 'incompetent person,' 'incompetent,' or 'mentally incompetent,' shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."), § 1650 ("As used in this chapter: . . . 'Guardian' means any fiduciary for the person or estate of a ward."), § 1701 ("A conservator is a person appointed to take care of the person and property or person or property of a conservatee as defined in Section 1751."), § 1751 (conservatee is "any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons, or for whom a guardian could be appointed under Division 4 of this code, or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor").

⁹ CAL. CODE CIV. PROC. §§ 372-373.5 (appointment and powers of guardian ad litem).

¹⁰ See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 383-384, 406 (1964).

A formal change by way of clarification is, however, recommended in order to include "conservator" within the definition of "guardian." The form of Rule 1(9) recommended for adoption should, therefore, read as follows:

"Guardian" *includes conservator and* means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent or of a *sui juris* person having a guardian and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

Subdivision (13) and Code of Civil Procedure Section 17. Section 17 of the Code of Civil Procedure is a general section defining terms used in and prescribing canons for the construction of that code. Section 17 would thus apply to the Uniform Rules of Evidence if they were incorporated in Part IV of the Code of Civil Procedure.

The introductory portion of Section 17 reads, in part:

[W]riting includes printing and typewriting; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose."

The definition of the term "testify" in Section 17 seems to be consistent with the usage of that term in the Uniform Rules. However, URE Rule 1(13) makes the term "writing" a more inclusive term than does the provision of Section 17 above quoted. Thus, Rule 1(13) provides:

"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.

Although Rule 1(13) is broader than Section 17, subdivision (13) probably would be understood to apply only to the Uniform Rules of Evidence and, therefore, would not present any irreconcilable conflict with Section 17. Thus, it is recommended that Rule 1(13) be adopted.

California Definitions Not in Rule 1

Part IV of the Code of Civil Procedure includes a number of definitions not found in URE Rule 1. All of these definitions appear to be superfluous, either because they are firmly embedded in the common law or because they state propositions that are too obvious to require legislation. It is, therefore, recommended that Sections 1825-1839¹¹ and Section 1878¹² of the Code of Civil Procedure be repealed simultaneously with the adoption of the Uniform Rules of Evidence.

¹¹ The text of these sections is set out in full in the detailed discussion of existing statutes, *infra* at 46-57.

¹² Section 1878 provides:

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.

Suggested Disposition of Definitional Sections in Part IV of the Code of Civil Procedure *

Several existing sections in Part IV of the Code of Civil Procedure relate to the same subject matter covered by the General Provisions Article of the Uniform Rules of Evidence. This portion of the study is directed to an examination of these existing statute sections with a view to suggesting their appropriate disposition in light of the proposed adoption of the Uniform Rules.

It should be noted at the outset that the Uniform Rules of Evidence do not purport to be a comprehensive code of evidence. The Uniform Rules are concerned primarily with the question of the admissibility and exclusion of evidence. With few exceptions they do not regulate the manner in which evidence is to be obtained, the use which may be made of it after introduction, nor how the jury is to be instructed concerning its weight and effect. This is made clear in the introductory comment to the Uniform Rules:

One substantial variation from the Model Code approach lies in the omission from the present draft of procedural rules which are thought to be either unnecessary or not within the scope of the general scheme to deal primarily with problems of admissibility of evidence.¹

Comparison of this confined purpose with the scope of Part IV of the Code of Civil Procedure shows that many of the existing code sections deal with matters which would remain wholly unaffected by the adoption of the Uniform Rules. To make this discussion meaningful, therefore, the following assumptions underlie the recommendations made in this study:

(1) There will continue to be a Part IV of the Code of Civil Procedure which will include the Uniform Rules as well as some existing provisions governing the gathering and offering of evidence.

(2) Some of the existing sections will be repealed entirely upon the adoption of the Uniform Rules. Others will be modified. Still others will have to be reclassified if they are to conform to the general classification system upon which the Uniform Rules are constructed. Also, some sections which have only a tenuous connection with the law of evidence (such as those dealing with maxims for the construction of documents or statutes² or for the reconstructing of records destroyed by "conflagration" or "calamity"³) might be removed from Part IV or even removed entirely from the Code of Civil Procedure.

In the following discussion, the nature of Code of Civil Procedure Sections 1823-1839 and the effect which the adoption of the Uniform Rules would have on them is considered. Considered together, these code sections perform the same function as URE Rule 1 in that each

* This portion of the study (pp. 46-57) was prepared at the request of the California Law Revision Commission by Professor Ronan E. Degnan of the School of Law, University of California at Berkeley. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

¹ UNIFORM RULES OF EVIDENCE, *Prefatory Note* (1953).

² See CAL. CODE CIV. PROC. §§ 1858-1860.

³ See CAL. CODE CIV. PROC. §§ 1953-1953.06.

contains definitions that apply generally to the subsequent provisions.⁴ However, some of the definitions in the existing code have no counterpart in the Uniform Rules. This is taken into consideration when repeal, reclassification, or retention of a section is recommended.

Code of Civil Procedure Section 1823 provides :

1823. DEFINITION OF EVIDENCE. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

This section is superseded by the definition of evidence contained in Uniform Rule 1(1) and should, therefore, be repealed.

Code of Civil Procedure Section 1824 provides :

1824. DEFINITION OF PROOF. Proof is the effect of evidence, the establishment of a fact by evidence.

There is a school of thought which uses the word "proof" to describe "things."⁵ Everyone uses it that way occasionally, as when filing a "proof of loss" with an insurance company. Uniform Rule 1(3) seems to employ the word "proof" in this sense, for it states that: "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 non-existence of such fact." This definition is not satisfactory because "proof" is not a tangible thing.

Section 1824 should be preserved because its wording is more consistent with American usage and with familiar California terminology.

Code of Civil Procedure Section 1825 provides :

1825. DEFINITION OF LAW OF EVIDENCE. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law :

1. For declaring what is to be taken as true without proof ;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive ; and,
3. For the production of legal evidence ;
4. For the exclusion of whatever is not legal ;
5. For determining, in certain cases, the value and effect of evidence.

Some of the subjects listed in Section 1825 are also covered in the Uniform Rules. For example, subdivision 1 refers to judicial notice.

⁴ Sections 1826 and 1833 relate more to the burden of producing evidence and the burden of proof ; hence, they are considered in the separate study relating to these subjects. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001 (1964). These sections provide :

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.

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.

⁵ See Michael & Adler, *Real Proof* : I, 5 VAND. L. REV. 344 (1952) .

This same subject is covered in detail in Article II (Rules 9-12) of the Uniform Rules.⁶ Similarly, subdivisions 3 and 4 of Section 1825 generally describe the admission and exclusion of evidence. (Subdivision 3 might also be thought to include the *means* of obtaining evidence—such as the various pretrial discovery procedures—as well as the regulation of the manner in which evidence is offered in court.) As noted previously,⁷ all of the Uniform Rules deal almost exclusively with the admission and exclusion of evidence.

The Uniform Rules do not entirely supersede this section, however, for some of the topics listed in Section 1825 are not covered in the URE. Thus, the URE does not include the *creation* of presumptions as does subdivision 2 of Section 1825. (Only the *management* of presumptions is regulated by URE Rules 13-16.) Moreover, subdivision 5 deals with the weight and effect of evidence—matters that the Uniform Rules deliberately avoid by concentrating primarily on the admission and exclusion of evidence.

Thus, the adoption of the Uniform Rules would not seem to entirely replace all of the matters specified in Section 1825. Standing alone, this might be thought to indicate that the URE does not eliminate whatever need there might be for Section 1825. However, when coupled with the absence of any cases involving this section, the conclusion is inescapable that the section is useless. It is recommended, therefore, that Section 1825 be repealed.

Code of Civil Procedure Section 1827 provides :

1827. FOUR KINDS OF EVIDENCE SPECIFIED. 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.

This section states a fact which doubtless is true. However, it may be seriously doubted whether such truisms require statutory statement or whether such statutory statement serves any useful purpose. Section 1827 clearly is not a definition. Its structure merely anticipates the format of Title 2 of Part IV, which covers the matters listed in this section in Chapters 1 through 4 (Sections 1875-1954), respectively.

The only use the courts seem to have made of Section 1827 is to employ it to rule that judicial notice is a form of evidence⁸ and to align California with those authorities holding that what a trier of fact sees on a view is independent evidence sufficient to support a finding.⁹ As noted previously, the Uniform Rules sufficiently cover the subject of judicial notice.¹⁰ The remaining items specified in Section 1827 are

⁶ See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article II. Judicial Notice)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801 (1964).

⁷ See the text, *supra* at 46.

⁸ *People v. Chee Kee*, 61 Cal. 404 (1882).

⁹ *Cutting v. Vaughn*, 182 Cal. 151, 187 Pac. 19 (1920). See also MCCORMICK, EVIDENCE § 183 (1954) [hereinafter cited as MCCORMICK].

¹⁰ See the text, *supra*.

quite adequately covered by the broad definition of "evidence" in Rule 1(1). Thus, since there appears to be no reason for retaining this section, it is recommended that it be repealed.

Code of Civil Procedure Section 1828 provides:

1828. There are several degrees of evidence:

One—Primary and secondary.

Two—Direct and indirect.

Three—Prima facie, partial, satisfactory, indispensable, and conclusive.

Section 1828 purports to classify evidence into several different categories, each of which is defined by the succeeding sections (Sections 1829-1837). Assessment of this section is best made by an examination of the individual classifications defined in the appropriate sections.

Primary and secondary evidence. Code of Civil Procedure Sections 1829 and 1830 provide:

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.

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.

It is interesting to note that both sections read differently when the Code was adopted in 1872:

1829. ORIGINAL EVIDENCE DEFINED. Original evidence is an original writing or material object introduced in evidence.

1830. SECONDARY EVIDENCE DEFINED. Secondary evidence is a copy of such original writing or object, or oral evidence thereof.

These original sections actually were definitions of terms employed in Section 1855, the substance of the so-called "best evidence" rule. (As used here, of course, "best evidence" refers to that ancient rule regarding the best proof that the nature of a particular subject will afford¹ and not to the subsisting original documents rule.²) There may well have been a "best evidence" rule at the time the present wording of these sections was inserted in the Code of Civil Procedure by the code amendments of 1873-1874. Thus, Greenleaf states:

A FOURTH RULE, which governs in the production of evidence, is that, which requires the *best evidence, of which the case, in its nature, is susceptible*. This rule does not demand the greatest amount of evidence, which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the posses-

¹ McCORMICK § 195.

² See CAL. CODE CIV. PROC. § 1855. See also CAL. CODE CIV. PROC. § 1937: "The original writing must be produced and proved, except as provided in [Section 1855]. . . ." For a discussion of the "best evidence" rule in California, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 101, 143-159 (1964).

sion of the party. It is adopted for the prevention of fraud; for when it is apparent, that better evidence is withheld, it is fair to presume, that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice.³

Greenleaf goes on to say that this rule:

. . . naturally leads to the division of evidence into PRIMARY and SECONDARY. *Primary evidence* is that, which we have just mentioned, as the best evidence, or, that kind of proof which, under any possible circumstances, affords the greatest certainty of the fact in question; and it is illustrated by the case of a written document; the instrument itself being always regarded as the primary, or best possible evidence of its existence and contents.⁴

In many respects, Greenleaf's statement of the "best evidence" rule is carried forward in subdivisions 6 and 7 of Section 2061 of the Code of Civil Procedure. These subdivisions provide that the jury is to be instructed to weigh evidence in light of what was in the power of one party to produce or another party to contradict, and that, if weaker evidence is offered when stronger was available, "the evidence offered should be viewed with distrust."⁵ From this, it is apparent that the second quotation from Greenleaf, *supra*, is the source of the 1873-1874 code amendments to Sections 1828, 1829, and 1830. However, despite Greenleaf's apparent influence on the original Code Commissioners, the Commissioners were too sophisticated to believe (as did Greenleaf) that the so-called "best evidence" rule was a rule of exclusion of which the original documents rule was but an illustration. But, the broad statement of this rule in Sections 1829 and 1830, standing alone, suggests such a rule of exclusion that is inconsistent with the narrower original documents rule presently in force.⁶ Hence, these sections are erroneous as statements of a rule of law or even a general principle of evidence, since there clearly is no "best evidence" rule in this broader sense.

Because of the change in wording by the code amendments of 1873-1874, Sections 1829 and 1830 no longer serve a definitional purpose. Thus, Chapter 3 of Title 2 of Part IV of the Code of Civil Procedure contains a number of sections that deal with proving the content of records by the introduction of copies.⁷ However, the language in these sections employs neither the "original-secondary" distinction used in the 1872 version of Sections 1829 and 1830 nor the "primary-secondary" distinction presently used in these sections as enacted in 1873-1874. As definitional sections, therefore, they serve no useful purpose. Also, as illustrated above, they are not valid expressions

³ I GREENLEAF, EVIDENCE 97 (2d ed. 1844).

⁴ *Id.* at 98-99.

⁵ CAL. CODE CIV. PROC. § 2061. See also CAL. CODE CIV. PROC. § 1963(6) (presumption "that higher evidence would be adverse from inferior being produced").

⁶ For a discussion of the "best evidence" rule in California, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 101, 143-159 (1964).

⁷ *E.g.*, CAL. CODE CIV. PROC. § 1919 (public record of private writing); §§ 1905, 1906 (judicial records).

of current substantive law. Hence, it is recommended that they be repealed. At the same time, of course, subdivision 1 should be stricken from Section 1828.

Direct and indirect evidence. Code of Civil Procedure Sections 1831 and 1832 provide:

1831. DIRECT EVIDENCE DEFINED. 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.

1832. INDIRECT EVIDENCE DEFINED. 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.⁸

The difference between "direct" and "indirect" evidence is frequently noted, although the more common name for the latter is "circumstantial evidence."⁹ This distinction is not drawn in the URE. As previously noted,¹⁰ the Uniform Rules are designed primarily to govern the admission and exclusion of evidence. Under the URE, circumstantial evidence is as admissible as direct evidence. Thus, as under existing law, circumstantial evidence will support a finding of fact even in the face of contradictory evidence.¹¹ The only limitation which appears to exist in existing law is that "circumstantial evidence alone is not sufficient to support a conviction of perjury."¹²

It is apparent that these two sections serve little definitional purpose, for the code does not further distinguish between the two forms of evidence. Jury instructions, however, do differentiate between "direct" and "indirect" evidence; in both civil and criminal cases, it may be error to refuse to instruct on this difference in appropriate cases.¹³ For this purpose alone, it is possible that Sections 1831 and 1832 should be retained. (If retained, of course, the word "indirect" should be changed to "circumstantial" in both Sections 1828 and 1832.)

⁸ Chapter 5 of Title 2 of Part IV further divides indirect evidence into inferences and presumptions (Section 1957), which are defined in Sections 1958 and 1959, respectively.

⁹ See BAJI (4th ed. 1956) No. 22 (Rev.).

¹⁰ See the text, *supra* at 46.

¹¹ See *Bruce v. Ullery*, 58 Cal.2d 702, 711, 25 Cal. Rptr. 841, 846, 375 P.2d 833, 838 (1962); *McNulty v. Copp*, 91 Cal. App.2d 484, 205 P.2d 438 (1949).

¹² *People v. O'Donnell*, 132 Cal. App.2d 840, 844, 283 P.2d 714, 717 (1955). Whether this is because of Code of Civil Procedure Section 1968 ("Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.") or the similar language of Penal Code Section 1103a is not clear. Perhaps it derives from some more general command. See Comment, *Proof of Perjury: The Two Witness Requirement*, 35 So. CAL. L. REV. 86, 96 (1961). However, the Supreme Court has indicated that less evidence is needed to prove perjury in a non-criminal contest. *Fischer v. State Bar*, 6 Cal.2d 671, 58 P.2d 1277 (1936).

¹³ *Trapani v. Holzer*, 158 Cal. App.2d 1, 8, 9, 321 P.2d 803, 808 (1958) (three opinions); *People v. Navarro*, 74 Cal. App.2d 544, 169 P.2d 265 (1946).

However, it is likely that the present case law would be sufficient to support the continued distinction in jury instructions, thereby making these sections, as well as subdivision 2 of Section 1828, unnecessary.

Prima facie, partial, satisfactory, indispensable, and conclusive evidence. These terms are defined in Sections 1833-1837 of the Code of Civil Procedure.

Section 1833 defines prima facie evidence. However, it pertains more to the discussion of the burden of producing evidence and the burden of proof; hence, it is discussed in the separate study relating to these subjects.¹

Section 1834 provides:

1834. PARTIAL EVIDENCE DEFINED. 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.

Section 1834 states a principle without which it would be impossible to try a lawsuit. Thus, a court may admit evidence even if a necessary foundation element is not yet shown.² However, if the foundation or other connecting element is not later supplied, the evidence already received may be stricken on motion.³ This is merely a specific example of the necessarily great control that the judge has over the order of proof.⁴

It is apparent that this section is more than a mere definition of terms; it authorizes the receipt of this type of evidence. Since there is no comparable provision in the Uniform Rules, this section should be retained; but it should be moved to a more logical grouping that deals with the general conduct of the trial. Since this section should be relocated in the Code of Civil Procedure, the word "partial" should be stricken from Section 1828.

Section 1835, defining satisfactory evidence, was repealed in 1923.⁵ Since this section no longer exists, there is no reason for retaining the word "satisfactory" in Section 1828; hence, it should be stricken.

¹ See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001 (1964). The text of this section is set out in note 4, *supra* at 47.

² *Brea v. McGlashan*, 3 Cal. App.2d 454, 39 P.2d 877 (1934).

³ *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303 (1911).

⁴ See CAL. CODE CIV. PROC. § 2042. Compare Revised Rule 63(9)(b), indicating that the judge has no discretion to receive declarations of conspirators against each other until the existence of the conspiracy has been proved by independent evidence. *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 321 (1963).

⁵ Cal. Stats. 1923, Ch. 110, § 1, p. 237. Prior to its repeal, Section 1835 read as follows:

That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

Section 1836 provides:

1836. **INDISPENSABLE EVIDENCE DEFINED.** Indispensable evidence is that without which a particular fact cannot be proved.

The principal utility of Section 1836 is to anticipate the matters dealt with in Chapter 6 of Title 2 of Part IV (Sections 1967-1974) of the Code of Civil Procedure, entitled "Indispensable Evidence." Thus, the section purports to be a definition. However, it does not function as one because the term "indispensable evidence" is not employed in the sections referred to. Instead, these sections simply state substantive requirements of law as to the matters dealt with therein without reference to "indispensable evidence." Thus, Section 1968 states a "two witness" rule for perjury and treason convictions. The remainder of Chapter 6 constitutes a statute of frauds. Nowhere in this chapter is the term "indispensable evidence" used. It is apparent, therefore, that Section 1836 serves no useful purpose as a definition. Moreover, it is unnecessary as a rule of law because the principle is well established that in some cases it is necessary to produce evidence of a particular type in order to prove certain facts.⁶ Accordingly, the section should be repealed and the word "indispensable" deleted from Section 1828.

Section 1837 provides:

1837. **CONCLUSIVE EVIDENCE DEFINED.** 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.

Generally speaking, Section 1837 does serve some definitional purpose; at least, the term "conclusive" is used in an evidentiary sense in several other sections within Part IV of the Code of Civil Procedure. Thus, Section 1978 states that: "No evidence is by law made conclusive or unanswerable, unless so declared by this Code." The introductory portion of Section 1962 provides that: "The following presumptions, and no others, are deemed conclusive."⁷ Section 1908 employs the term "conclusive" in stating an outmoded conception of the doctrine of

⁶ See *Standard Livestock Co. v. Bank of California*, 67 Cal. App. 381, 227 Pac. 962 (1924) (cited with approval in *Standard Livestock Co. v. Pentz*, 204 Cal. 618, 627, 269 Pac. 645, 648 (1928)).

⁷ The full text of Code of Civil Procedure Section 1962 is as follows:

The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;
2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;
3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;
4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;
5. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;
6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings

res judicata.⁸ Other declarations in Part IV (and elsewhere) also employ the term "conclusive."⁹

It is apparent, however, that the Code Commissioners intended Section 1837 to be something more than a mere definition of the word "conclusive." The example contained in the section itself—that the record of a court of competent jurisdiction cannot be contradicted by the parties to it—suggests some additional purpose, for this is in fact not a problem of "judicial evidence" (as that term is defined in Section 1823) but rather a problem of establishing the sanctity of a record on appeal. As such, it is clear that Section 1837 does not merely define

if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

7. Any other presumption which by statute is expressly made conclusive.

Considering the subjects covered, it is apparent that only subdivision 5 may properly be categorized as a presumption. The stability of this presumption was affirmed in *Kusior v. Silver*, 54 Cal.2d 603, 619, 7 Cal. Rptr. 129, 140, 354 P.2d 657, 668 (1960), in which the court, in dictum, quite properly noted that "a conclusive presumption is in actuality a substantive rule of law . . ."

The remaining subdivisions cannot properly be classified as presumptions. Subdivision 1 is tautological; it is not an instance of deducing one fact from the existence of another. Thus, the deliberate commission of an unlawful act for the purpose of injuring another is considerably more than simply evidence of malice—it *is* malice. As the Supreme Court said in *People v. Gorshen*, 51 Cal.2d 716, 731, 336 P.2d 492, 501 (1959):

This 'conclusive presumption' has little meaning, either as a rule of substantive law or as a rule of evidence, for the facts of deliberation and purpose which must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent.

Subdivision 3 states the principal ingredients of estoppel. Subdivision 4 was a general common law rule that was subject to several exceptions not stated in the subdivision. See, e.g., *Yuba River Sand Co. v. City of Marysville*, 78 Cal. App.2d 421, 177 P.2d 642 (1947) (tenant can deny title when landlord sues to quiet title as well as for possession). Subdivision 6 appears to be little more than a reference to the matter covered in Code of Civil Procedure Section 1908, set out in note 8, *infra*. Subdivision 7 appears to be designed to incorporate such matters as Labor Code Section 3501 (certain persons conclusively presumed to be dependent upon employee for workmen's compensation purposes).

⁸ The full text of Code of Civil Procedure Section 1908 is as follows:

The effect of a judgment or final order in an action or special proceeding before a court or judge of this State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

This is an attempt to state the mid-nineteenth century conception of the operation of the doctrine of res judicata. It has had no discernible effect upon the formulation and development of that doctrine in California, however; here, as elsewhere, the law has looked to the policy bases. See Comment, *Res Judicata in California*, 40 CAL. L. REV. 411 (1952).

The same may be said of CAL. CODE CIV. PROC. § 1913 (full faith and credit to judgments of sister states) and § 1915 (judgments of foreign countries).

⁹ See, e.g., CAL. CODE CIV. PROC. § 1903, which provides:

The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

See also CAL. LABOR CODE § 3501 (certain persons conclusively presumed to be dependent upon employee for workmen's compensation purposes).

a term that is used elsewhere in the Code of Civil Procedure; rather, it is used as a vehicle to deal with matters of substantive and procedural law that have little relevance to the admission and exclusion of evidence.

Before turning to other possible uses of the term defined in Section 1837, it should be noted that the problem dealt with by way of example in this section was the precise problem in *Hahn v. Kelly*,¹⁰ the case cited in the Commissioners' Note.¹¹ In this case, the court held in substance that inquiry into jurisdiction was limited to matters properly included in the judgment roll on which the appeal in that case had been taken.¹² It is thus clear that this procedural limitation upon collateral attack exists quite independently of Section 1837.

Aside from its somewhat frequent use in other statutes, the concept of "conclusive" evidence has possible application in the type of case mentioned in *Blank v. Coffin*,¹³ that is, where there is sufficient evidence standing by itself to warrant a finding of fact. But, "if the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law."¹⁴ However, this rule of "conclusiveness" is distinguishable on two grounds. First, the contrary evidence is "conclusive" not because the law "does not permit" contradiction but because there has not been *sufficient* contradiction. Second, this principle of conclusiveness does not apply to any particular item of evidence but rather to the whole record.

Does Section 1837 serve any useful purpose as a definition? If Part IV of the Code of Civil Procedure continues to treat estoppel, res judicata, and other doctrines of substantive law as matters of evidence, the definition provided by this section seems possibly useful (although far from necessary). However, in light of the definition of "evidence" stated in Uniform Rule 1(1) (*i.e.*, "'Evidence' is the means from which inferences may be drawn as a basis of proof . . ."), it is clearly self-contradictory to say that evidence is conclusive. In other words, the admissibility of evidence under the Uniform Rules depends upon its tendency to prove or disprove a fact in dispute. However, the kinds of conclusive evidence defined in Part IV are, without exception, instances in which as a matter of policy the fact cannot be disputed. For reasons wholly apart from the probabilities involved, policy decisions reflected in the various sections dealing with "conclusive" evidence preclude an examination into their factual predicate.

It is recommended, therefore, that Section 1837 be repealed and that the word "conclusive" be eliminated from Section 1828.

Summary. From the above examination of the various terms classified in Section 1828, it is apparent that the section serves no useful purpose; hence, it should be repealed.

¹⁰ 34 Cal. 391 (1868).

¹¹ See Code Commissioners' Notes in CAL. CODE CIV. PROC. § 1837 (West 1955).

¹² It remains the California view that inquiry cannot go behind the record on a collateral attack; the appropriate remedy is by a direct attack on the judgment in the court which rendered it. However, when the judgment is a foreign judgment, inquiry may go behind the record. See 3 WITKIN, CALIFORNIA PROCEDURE, *Attack on Judgment in Trial Court*, §§ 3-6 (1954).

¹³ 20 Cal.2d 457, 126 P.2d 868 (1942).

¹⁴ *Id.* at 461, 126 P.2d at 870.

Code of Civil Procedure Section 1838 provides:

1838. CUMULATIVE EVIDENCE DEFINED. Cumulative evidence is additional evidence of the same character, to the same point.

This definition is significant for several reasons. For example, the court may prevent repeated examination of the same witness when the question has already been "asked and answered."¹ It may also limit proof of the same thing from other sources where the issue is already adequately proved.² However, when the issue is still in doubt, the tribunal may not refuse to hear further testimony on the ground that it is merely cumulative.³

At another stage of the proceedings, it may be significant whether or not evidence is cumulative. Thus, under Code of Civil Procedure Section 657(4), newly discovered evidence is usually not sufficient support for a motion for a new trial if this evidence is merely cumulative.⁴ However, this is not a hard and fast rule.⁵

Neither Section 2044 nor Section 657(4) employs the word "cumulative," although cases applying these sections do use the term. For that reason alone, it seems advisable to retain some form of this definition.

Code of Civil Procedure Section 1839 provides:

1839. CORROBORATIVE EVIDENCE DEFINED. Corroborative evidence is additional evidence of a different character, to the same point.

Section 1839 should be repealed. The case law that has developed under the various code sections requiring corroborative evidence provides better definitions of this term than does Section 1839. In fact, few cases cite or rely on Section 1839.⁶

Some cases indicate that an instruction on what constitutes corroborative evidence is adequate if given in the words of Section 1839.⁷ However, a better definition of corroborative evidence is provided by *California Jury Instructions, Criminal*.⁸ This definition is derived from the case law rather than from Section 1839. Similar instructions dealing

¹ *Spitler v. Kaeding*, 133 Cal. 500, 503, 65 Pac. 1040, 1041 (1901).

² The last sentence of Code of Civil Procedure Section 2044 reads:

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

³ *Evans v. Industrial Acc. Comm'n*, 71 Cal. App.2d 244, 162 P.2d 488 (1945).

⁴ *Dayton v. Landon*, 192 Cal. App.2d 739, 13 Cal. Rptr. 703 (1961).

⁵ See 3 WITKIN, CALIFORNIA PROCEDURE, *Attack on Judgment in Trial Court*, § 14 (1954).

⁶ See, e.g., *People v. Bowley*, 59 Cal.2d 855, 31 Cal. Rptr. 471, 382 P.2d 591 (1963) (corroboration of film in issue but Section 1839 neither cited nor relied upon by the court).

⁷ E.g., *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201 (1896). See also *People v. Monteverde*, 111 Cal. App.2d 156, 244 P.2d 447 (1952).

⁸ See, e.g., CALJIC (2d ed. 1958) No. 822 (Rev.) (corroboration of testimony of accomplices):

Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may consist of other evidence of circumstances, the testimony of a witness

with the requirement of corroborating evidence in other types of criminal cases are contained in the same publication.⁹

The repeal of Section 1839 will have no effect on the interpretation of the various code sections requiring corroborative evidence.¹⁰ The case law that has developed under these sections will continue to determine what constitutes corroborative evidence for the purposes of the particular sections. Because of this, the present form of Section 1839 is misleading. Thus, it is apparent that the corroboration required under these sections might be satisfied by the kind of evidence defined in Section 1838 as "cumulative" (*i.e.*, "additional evidence of the same character, to the same point") as well as that defined under Section 1839 as "corroborative" (*i.e.*, "additional evidence of a different character, to the same point"). The Code Commissioners apparently used the term "cumulative" in the sense of unnecessarily duplicative, for their notes refer to proof of that which "has already been established by other evidence."¹¹

other than an accomplice, or the testimony or admissions, if any, of the defendant.

In determining whether an accomplice has been corroborated you must first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence then his testimony is corroborated. But before you may convict the defendant you must find from all the evidence that it carries the convincing force required by law.

⁹ See CALJIC (2d ed. 1958) Nos. 203 (Rev.) (possession of stolen property), 235 (Rev.) (possession of stolen property), 592-C (Rev.) (abortion), and 766 (perjury).

¹⁰ See, *e.g.*, CAL. CIVIL CODE § 130 (divorces not granted upon uncorroborated testimony of parties); CAL. CODE CIV. PROC. §§ 1844, 1968 (necessity for corroborative evidence in perjury and treason convictions); CAL. PENAL CODE § 653f (solicitation to commit certain crimes); § 1103a (perjury); § 1108 (abortion or inducing previously chaste woman into prostitution; her testimony not sufficient unless corroborated). See also CAL. CONST., Art I, § 20 (treason, two witness requirement).

¹¹ Code Commissioners' Notes, CAL. CODE CIV. PROC. § 1838 (West 1955). (Emphasis added.)

RULE 2

Present California Law

Rule 2 provides :

RULE 2. *Scope of Rules.* Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

Assuming that the Uniform Rules of Evidence, as revised, are to be incorporated into Part IV of the Code of Civil Procedure, Part IV would continue to be (as it is today) the main source of evidence law applicable alike to civil, criminal, and probate actions and proceedings. This would result not only from the terms of Uniform Rule 2, but also from Penal Code Section 1102, which provides that rules of evidence in civil actions are applicable also to criminal actions, and from Probate Code Section 1230, which provides that issues of fact in probate proceedings are triable as in civil actions. Nonetheless, a statement of the general applicability of the Uniform Rules seems advisable. Hence, URE Rule 2 is recommended for adoption.

By its express terms, Rule 2 does not affect any of the present California statutes relaxing rules of evidence for specified purposes. Hence, these statutes would and should be retained. Examples of such statutes are set out in the appended note.¹

However, the addition of Rule 2 to Part IV of the Code of Civil Procedure would make present Section 2103 superfluous. Accordingly, it should be repealed.²

Privileges and Rule 2

As is indicated in the study on the Privileges Article of the Uniform Rules (Article V), it is desirable to have the rules of privilege extend to nonjudicial proceedings as well as to judicial proceedings.³ Since Rule 2 restricts the application of the Uniform Rules of Evidence to proceedings "conducted by or under the supervision of a court," it should be amended to extend the privilege rules to nonjudicial proceedings. Briefly stated, the reason for this recommendation lies in the

¹ See, e.g., CAL. CODE CIV. PROC. § 117g (judge of small claims court may make informal investigation either in or out of court), § 956a (Judicial Council may prescribe rules for taking evidence by appellate court), § 988i (similar to § 956a), § 1768 (hearing of conciliation proceeding to be conducted informally), § 2016(b) (not ground of objection to testimony sought from deponent that such testimony inadmissible at trial, provided reasonably calculated to lead to discovery of admissible evidence); CAL. PENAL CODE § 190.1 (on issue of penalty, evidence may be presented of circumstances surrounding crime and of defendant's background and history).

² This section provides:

The provisions contained in this part of the Code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a Court, referee, or other officer.

³ See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 326-327 (1964).

strong public policy favoring certain statutory privileges, a public policy that would be too easily frustrated by narrowly restricting the availability of privilege to strictly judicial proceedings. Such an amendment was made for the same purpose by New Jersey in its adoption of Rule 2.⁴ This could serve as a model for California.

⁴ See N. J. REV. STAT. § 2A :84A-16, which provides as follows:

(1) The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.

(2) All other rules contained in this act, or adopted pursuant hereto, shall apply in every proceeding, criminal or civil, conducted by or under the supervision of a court, in which evidence is produced.

(3) Except to the extent to which the rules of evidence may be relaxed by or pursuant to statute applicable to the particular tribunal and except as provided in paragraph (1) of this rule, the rules set forth in this act or adopted pursuant hereto shall apply to formal hearings before administrative agencies and tribunals.

(4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication.

For a general discussion regarding the scope of the URE Privileges Article, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 309-327 (1964).

RULE 3

Introduction

Rule 3 provides as follows:

RULE 3. *Exclusionary Rules Not to Apply to Undisputed Matter.* If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.

Rule 3 is a rule of admissibility. By this rule, the judge is empowered to admit evidence which but for the rule would be inadmissible. Insofar as Rule 3 invests the trial judge with discretion, it is conversely similar to Rule 45, which empowers a judge to exclude otherwise admissible evidence. The discussion of the discretionary power of the judge under Rule 45 is, therefore, of relevance here.⁵

History of the Rule

In the second edition of his *Treatise on Evidence*, in 1923, Professor Wigmore proposed the principle of URE Rule 3.⁶ In 1927, the Committee of the Commonwealth Fund⁷ recommended adoption of this principle, phrasing it in these words:

Any rule of evidence need not be enforced if the trial judge, on inquiry made of counsel or otherwise, finds that there is no *bona fide* dispute between the parties as to the existence or non-existence of the facts which the offered evidence tends to prove, even though such fact may be in issue under the pleadings.⁸

In 1938, the American Bar Association Committee on the Improvement of the Law of Evidence recommended adoption of the rule formulated by the Commonwealth Fund Committee,⁹ and the American Bar Association approved the recommendation.¹⁰ In 1942, the American Law Institute included the principle as Rule 3 of the Model Code of Evidence, requiring, however, that the judge make a *formal finding* of no bona fide dispute before the principle should apply. The Uniform Rule omits this condition but otherwise copies the substance of the Model Code Rule.

⁵ See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 625, 639-644 (1964).

⁶ 1 WIGMORE, EVIDENCE § 8a (2d ed. 1923).

⁷ The Committee was composed of six law professors and two judges. Professor Morgan was chairman and Professor Wigmore was a member.

⁸ MORGAN *et al.*, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM 6 (1927) [hereinafter cited as MORGAN]. Another part of the proposal was as follows:

No error can be assigned or predicated upon the violation of any rule of evidence, either at law or in equity, when it appears from statements of counsel or from other evidence in the case or is shown in any other lawful way, that there is no *bona fide* dispute between the parties as to the fact sought to be proved or disproved by the offered evidence, even though such fact may be in issue under the pleadings. [*Ibid.*]

⁹ See 1 WIGMORE, EVIDENCE § 8b at 257-259, § 8c at 264-265 (3d ed. 1940) [hereinafter cited as WIGMORE].

¹⁰ See AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rule 3 *Comment* (1942).

Policy of the Rule

The manifest purpose of the rule is to eliminate the necessity of proving a matter by strict proof conforming to normal rules when such matter is not *really* disputed.¹¹

It is not to be denied that, as the American Bar Association Committee said, there is "frequent invocation of Evidence rules to defeat an opponent for lack of proper evidence, when the objecting party does not really dispute the fact that the opponent is seeking to prove with his inadequate evidence."¹² Nor can it be seriously doubted that, as the Committee justly pointed out, this practice is "one of the notable features that go to increase the technical disputatiousness of trials."¹³ Moreover, the American Law Institute's Comment on Model Code Rule 3 is certainly on sound ground in emphasizing that such practice makes extensive demands upon the time of the courts and imposes expense upon litigants and the public.

Evaluation of Rule 3

Rule 3 is proposed as a remedy whereby a party may avoid formal proof of a matter by convincing the judge at the trial that there is no bona fide dispute regarding the matter. Having so convinced the judge, the party could then establish the matter by *any* relevant evidence that is not privileged, subject only to the judge's broad exclusionary discretion defined in Uniform Rule 45.

It is important to emphasize that the remedy afforded by Rule 3 becomes operative only "upon the hearing." Thus, Rule 3 provides a remedy available only at the trial. As such, it is comparable to the various pretrial devices (*e.g.*, discovery, pretrial hearing, summary judgment) designed to eliminate from a case those matters about which there is no bona fide dispute even though they are formally put in issue by the pleadings. As the Comment on Model Code Rule 3 states:

This Rule applies to matters of evidence the principle which the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, make applicable to matters of substance in their provisions for pretrial procedure and for summary judgment. To permit parties to insist upon a strict observance of the rules of evidence or procedure in the proof of formal matters and of evidentiary facts as to the truth of which there is no dispute is to encourage waste of time of the courts and to impose unnecessary expense upon litigants and the public.

Thus, Uniform Rule 3 may be viewed as an extension, in the form of a remedy at the trial itself, of the principles which underlie the pretrial remedies referred to above. This point of view furnishes valuable clues as to the procedure which may be thought appropriate to implement and enforce Rule 3.

Suppose in the action of "P v. D," *P*'s cause of action consists of three elements—*a*, *b*, and *c*—which *P* has alleged in his complaint and which *D* in his answer has denied. Suppose, further, that *P* has only hearsay evidence in support of element *a*. As a foundation for this

¹¹ MORGAN at 1-7.

¹² Quoted in 1 WIGMORE § 8c at 264.

¹³ *Ibid.*

hearsay, *P* may call *D* and, by examining *D*, demonstrate *D*'s equivocation and evasion respecting matter *a*. On the basis of this demonstration, the court may rule that there is no bona fide dispute of matter *a* and, therefore, may permit *P* to introduce his hearsay evidence. This is, of course, quite analogous to a pretrial request to *D* to admit matter *a*, an unsatisfactory response thereto, and an order that matter *a* be taken as established in *P*'s favor.¹⁴

Another possible procedure is Wigmore's view:

Let the Court decline to enforce the rule [of evidence] if, on counsel's admission, there is no need for it in the case in hand; and *let the Court require counsel to make proper avowals.*¹⁵

The following case is cited by Wigmore to illustrate how this procedure could usefully be employed:

[A] plaintiff suing on a contract for goods offers a copy of a shipping receipt affecting part of the goods. The rule of Evidence requires that he should first show loss of the original. His showing does not disclose due diligence. The rule forecloses him; the copy is rejected; the proof fails for that part of the case. Meanwhile, the opposing counsel, except for his objection, sits silent; the Court never once asks him, "Do you really dispute the correctness of this copy? Is there any word in it that is falsified?" For all that the trial Court or the Supreme Court knows or asks, the copy may be exactly correct, and the opponent may have no "bona fide" doubt at all on that point. If so, the rule's enforcement is a vain piece of legal tactics; for the sole and acknowledged purpose of that rule is to secure accurate copies. Why use it merely to penalize the party?¹⁶

There are, of course, limits to the use of this procedure. If the attorney's "avowals" would entail any breach of the attorney-client privilege, or if the making of the avowal would infringe the broader privilege respecting the attorney's so-called "work product,"¹⁷ it would seem to be improper for the court to insist upon the avowal. It may well be, therefore, that the procedure of examining the party would possess more utility than that of extracting avowals from counsel.

What has been said above applies only to civil actions. Criminal cases are on a different footing. In such cases, there is no pretrial discovery comparable to that in civil cases. Moreover, there would be no possibility of enforcing Uniform Rule 3 by calling the defendant to the stand. Finally, the historic tradition that a criminal defendant may

¹⁴ See CAL. CODE CIV. PROC. §§ 2033-2034.

¹⁵ 1 WIGMORE § 8c at 264 (emphasis added).

¹⁶ 1 WIGMORE § 8a at 248-249.

¹⁷ On the "work product" doctrine, see *Hickman v. Taylor*, 329 U.S. 495 (1947). See generally LOUISELL, MODERN CALIFORNIA DISCOVERY, *Attorney-Client Confidential Communications and "Work Product,"* 281-314 (1963).

In a footnote (included in his second edition but omitted from his third), Wigmore recognizes the difficulties of obtaining useful avowals from disingenuous counsel:

How the Court should deal with disingenuous counsel is a large problem, which itself also needs attention. This shows how the improvement of Evidence rules is bound up with other improvements. [1 WIGMORE, EVIDENCE § 8a n.2 (2d ed. 1923).]

always put the prosecution to proof beyond a reasonable doubt as to *all* matters relating to his guilt has a much stronger hold than any comparable tradition in civil actions. The procedures for enforcing Uniform Rule 3 are, therefore, inappropriate in criminal actions. For these reasons, it is recommended that the nonapplicability of Rule 3 to criminal cases be made explicit by the following amendment:

If upon the hearing of a *civil action or proceeding* there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.

Conclusion and Recommendation

In proposing the principle of Uniform Rule 3, the Commonwealth Fund Committee spoke as follows:

If intelligently and vigorously applied, it will tend to confine the issues at the trial to matters actually in controversy; it will prevent the miscarriage of justice by failure of formal proof of matters not actually in dispute, and it will shorten trials by the elimination of useless evidence and still more useless objections. It cannot be said to place undue power in the trial judge, for whether such fact is honestly in dispute can be readily determined, and the judge's finding thereon treated in the same manner as other findings of fact in the course of the trial. It must be conceded that with a spineless judge, it may work little good; but its possibilities of harm are nil.¹⁸

This is a sound evaluation. Rule 3 is, therefore, recommended for approval as amended.

Incorporating Rule 3 Into California Law

If Rule 3, as amended, becomes part of the Code of Civil Procedure, it qualifies all exclusionary rules except those relating to privilege. However, no special statutory adjustments appear to be necessary in connection with the enactment of Rule 3.

¹⁸ MORGAN at 6-7.

RULES 4 AND 5

Introduction

Rules 4 and 5 state the conditions requisite for setting aside a verdict or finding, or for reversing a judgment by reason of erroneous admission or exclusion of evidence. These rules provide:

RULE 4. *Effect of Erroneous Admission of Evidence.* A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

RULE 5. *Effect of Erroneous Exclusion of Evidence.* A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

Present California Law

The doctrine of no reversal for nonprejudicial error respecting admission or exclusion of evidence, as stated in Rules 4 and 5, is fully in agreement with present California law.

Article VI, Section 4½ of the California Constitution provides:

Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of *the improper admission or rejection of evidence*, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. [Emphasis added.]

Like Rule 4, California law provides that the wrongful *admission* of evidence is a valid basis for a new trial or reversal of judgment only if (1) proper objection was made, (2) such objection should have been

sustained, and (3) the evidence probably had a substantial influence in bringing about the verdict or finding.¹

Wrongful *exclusion* of evidence is a valid basis for a new trial or reversal of judgment in California, as under Rule 5, only if (1) a proper offer of proof or its equivalent was made, (2) the evidence should have been admitted, and (3) the evidence, if admitted, probably would have exerted a substantial influence toward producing a verdict or finding different from the actual verdict or finding.²

Conclusion and Recommendation

The California Constitution, Article VI, Section 4½, together with Code of Civil Procedure Section 475 and Penal Code Section 1258, states the doctrine of Rules 4 and 5 as fully and as clearly as do these rules. Therefore, it is recommended that Rules 4 and 5 be omitted in California's adoption of the Uniform Rules of Evidence.

¹ Proper objection is required. *Perry v. McLaughlin*, 212 Cal. 1, 297 Pac. 554 (1931); *People v. Owens*, 123 Cal. 482, 56 Pac. 251 (1899). Prejudicial error also is required. CAL. CONST., Art. VI, § 4½; CAL. CODE CIV. PROC. § 475; *Inouye v. McCall*, 35 Cal. App.2d 634, 96 P.2d 386 (1939); *Erickson v. Geranson*, 123 Cal. App. 575, 11 P.2d 907 (1932).

² An offer of proof or its equivalent is required. *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61 (1889); *People v. Pereles*, 125 Cal. App. Supp. 787, 12 P.2d 1093 (1932). Prejudicial error is also required. CAL. CONST., Art. VI, § 4½; CAL. CODE CIV. PROC. § 475; *People v. McGee*, 31 Cal.2d 229, 243, 187 P.2d 706, 714 (1947); *Estate of Fisher*, 202 Cal. 205, 259 Pac. 755 (1927).

RULE 6

Present California Law

Rule 6 states:

RULE 6. *Limited Admissibility.* When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

Both Uniform Rule 6 and the California case law requires that, when evidence is admitted for a restricted purpose, the court must, upon request, give to the jury an appropriate limiting instruction.³ However, no statute has been found stating this rule or bearing upon its subject matter.

Conclusion and Recommendation

In view of the lack of statutory statement of the principle of Rule 6, it is recommended that this rule be adopted in California. No adjustment in presently existing statutes is necessary.

³ *Adkins v. Brett*, 184 Cal. 252, 193 Pac. 251 (1920); *Robinson v. McKnight*, 103 Cal. App. 718, 284 Pac. 1056 (1930).

RULE 7

Introduction

Rule 7 deals with the "general abolition of disqualifications and privileges of witnesses, and of exclusionary rules." It provides:

RULE 7. *General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.* Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

All of the general statements in Rule 7 are subject to the qualification "Except as otherwise provided *in these Rules*" (emphasis added). Thus, Rule 7 is meaningful only if it is considered in relation to the exceptions to the rule that are stated in the other articles of the Uniform Rules of Evidence. Frequent reference to other URE articles is, therefore, necessary in the following discussion; for a full appreciation of Rule 7, the studies on the other articles of the Uniform Rules should be consulted.⁴

Before discussing Rule 7 in connection with specific articles of the URE, it should be noted that Rule 7 does not affect the power of the judge under Rule 45 to exclude otherwise admissible evidence if he finds that its probative value is substantially outweighed by the risk that its admission will necessitate undue consumption of time or will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.⁵

Privileges and Rule 7

Subdivisions (b), (d), and (e) of Rule 7 provide:

Except as otherwise provided in these Rules, . . . (b) no person has a privilege to refuse to be a witness, and . . . (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing.

By way of exception to subdivisions (b), (d), and (e) of Rule 7, Rules 23 to 40 state the conditions under which evidentiary privileges

⁴ For a list of other studies on the various articles of the Uniform Rules of Evidence, see note 2, *supra* at 40.

⁵ See the discussion of Rule 45 in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612, 639-644 (1964).

are recognized. Thus subdivisions (b), (d), and (e) of Rule 7, in conjunction with Rules 23 to 40, purport to establish a complete system governing the matter of privilege.

The separate research study on the Privileges Article discusses the provisions of the Uniform Rules of Evidence relating to privileges and the present California law on this subject, as well as the requirements for making the two consistent should the Uniform Rules be adopted in California.⁶

It is recommended that some of the rules of privilege presently found in California law and not clearly contained in Rules 23 to 40 should be retained. For example, a number of statutes designate as confidential a wide variety of records and files used for governmental purposes and grant a privilege with respect to their nondisclosure.⁷

⁶ *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201 (1964).

⁷ CAL. AGRIC. CODE § 2846 (information obtained under Agricultural Products Marketing Law confidential and not to be disclosed except under stated circumstances) and § 3351 (similar to § 2846, *supra*); CAL. CIV. CODE § 79.06 (court may order hearing upon application for marriage license "to be confidential and private"), § 79.09 (data regarding premarital examination "confidential and shall not be divulged"), § 226m (adoption proceedings "shall be held in private"), § 227 (certain documents in adoption proceedings "shall not be open to inspection"); CAL. CODE CIV. PROC. § 1747 (files of conciliation court shall be closed; communications shall be deemed made in official confidence under CAL. CODE CIV. PROC. § 1881(5) [Note that Section 1747 should be amended to substitute for the present reference to Section 1881(5) a reference to whatever section URE Rule 34 becomes.]); CAL. EDUC. CODE § 14026 (data filed by members of Teachers' Retirement System with Retirement Board confidential); CAL. FIN. CODE § 8754 (Commissioner may withhold audit or information in audit of savings and loan association for such time as in his judgment is necessary); CAL. FISH & GAME CODE § 7923 (licensee's record of fish taken confidential and not a public record); CAL. GOVT. CODE § 15619 (member or ex-member of State Board of Equalization not to divulge certain information), § 18573 (source of pay data furnished Personnel Board not "open to the public or admissible as evidence"), § 18934 (application for civil service exam and exam questions and booklet "confidential records open to inspection only if and as provided by board rule"), § 18952 (employee's appeal to State Personnel Board and any communication in connection therewith is confidential and shall not be disclosed without the consent of the employee), § 20134 (similar to CAL. EDUC. CODE § 14026, *supra*), § 31532 (sworn statement of members of County Employees' Retirement System shall be confidential and shall not be disclosed); CAL. HARB. & NAV. CODE § 656 (boat collision report shall not be any evidence of negligence or due care nor be referred to); CAL. HEALTH & SAF. CODE § 211.5 (records of interviews in connection with morbidity and mortality studies shall be confidential insofar as identity is concerned and shall be used solely for purposes of study), § 410 (certain diagnoses of epilepsy shall be kept confidential and used solely to determine eligibility for driver's license); CAL. INS. CODE § 735 (certain examinations private unless Commissioner deems it necessary to publish result), § 855 (Commissioner may withhold certain insurance records for such time as in his judgment is necessary); CAL. LABOR CODE § 6319 (confidential information concerning failure to keep place of employment safe or violation of safety order shall not be divulged); CAL. PENAL CODE § 290 (registration data of sexual deviate not "open to inspection by the public"), § 938.1 (clerk not to divulge contents of grand jury transcript until defendant in custody), § 3046 (statements and recommendations by judge, district attorney, and sheriff regarding parole of life-sentence prisoner "shall be and remain confidential"), § 3107 (names and records of men granted special service paroles "shall be kept in the confidential files"), § 11105 (information on file with Bureau of Criminal Identification not to be furnished to assist "private citizen in carrying on his personal interests or in maliciously or uselessly harassing, degrading or humiliating any person"); CAL. PUB. RES. CODE § 3234 (restricted use of certain records); CAL. REV. & TAX. CODE § 16563 (information and records acquired by Controller confidential), §§ 19281-19289 ("information as to the amount of income or any particulars set forth or disclosed in any report or return"

It cannot be confidently stated that all of these sections would be construed as relating to the "official information" privilege granted in Uniform Rule 34(1).⁸ In order that these statutory provisions clearly be recognized as exceptions to Rule 7, the following amendment to the introductory clause of Rule 7 is recommended:

Except as otherwise provided in these Rules by statute . . .

Given this amendment of Rule 7, there would be no doubt that all of the present California code sections designating certain matters as confidential will be retained. This amendment would, of course, affect the other subdivisions of Rule 7 as well as subdivisions (b), (d), and (e). The impact of the amendment on the other subdivisions, however, will be equally favorable, as is demonstrated in the following discussion and in the separate studies on the other articles of the Uniform Rules which provide exceptions to Rule 7.⁹

Witnesses and Rule 7

Subdivisions (a) and (c) of Rule 7 provide:

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

As an exception to subdivisions (a) and (c) of Rule 7, Uniform Rule 17 states the conditions under which a person is disqualified to be a witness. Thus, subdivisions (a) and (c) of Rule 7, in conjunction with Rule 17, purport to establish a complete system governing the disqualification of witnesses and, together with Rule 19, the disqualification of a witness to testify to a particular matter.

shall not be disclosed, except under certain circumstances); CAL. UNEMPL. INS. CODE § 1094 (certain information furnished to director not open to public or admissible in evidence except under certain circumstances), § 2111 (certain information confidential and shall not be published or open to public inspection in any manner), § 2714 (medical records confidential and not admissible in evidence except under certain circumstances); CAL. VEHICLE CODE § 1808 (records of department relating to physical or mental condition of any person are confidential), §§ 16005, 20012, 20013 (accident report without prejudice to individual reporting and for confidential use of Vehicle and Highway Departments and shall not be used as evidence), §§ 20014-20015 (restricted use of peace officers' accident reports), § 40832 (record of license suspension or revocation not admissible), § 40833 (neither accident report nor departmental action thereon evidence of negligence or due care in damage action); CAL. WATER CODE § 12516 (information and records of Colorado River Board confidential and not available to public except upon authorization of Board); CAL. WELF. & INST. CODE § 118 (certain records confidential), §§ 638, 639, 733 (Provisions of Juvenile Court Law, to effect that certain records not open to public and providing for private hearing. See discussion in Note, 10 STAN. L. REV. 471, 508 (1958)).

Certain code provisions have not been included in the above tabulation because such provisions specifically permit disclosure upon court order. *E.g.*, CAL. AGRIC. CODE §§ 2091 and 1300.22(b); CAL. EDUC. CODE § 10751; CAL. FIN. CODE § 1582; CAL. PUB. UTIL. CODE § 3709.

⁸ URE Rule 34(1) provides:

As used in this Rule, "official information" means information not open or theretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.

⁹ For a list of other studies on the various articles of the Uniform Rules of Evidence, see note 2, *supra* at 40.

There are several California code provisions presently in force which treat the matters covered in Rules 7(a), 7(c), and Rule 17. In the study on Article IV (Witnesses), a number of these provisions are recommended for repeal in order to bring California law into harmony with the Uniform Rules.¹⁰ Certain sections of the California codes, however, contain principles which should be retained in force¹¹ but which would be repealed by the sweeping effect of URE Rules 7(a) and 7(c). The amendment of the introductory phrase of Rule 7, set out above, would permit the retention of these sections. Though proposed for a different purpose above, the amendment would also be desirable for this purpose.

Subdivision (f) of Rule 7

Rule 7(f) provides:

Except as otherwise provided in these Rules, . . . (f) all relevant evidence is admissible.

It is the purpose of this subdivision—as it is of this entire rule—to eliminate prior rules governing the admission or exclusion of evidence. The Uniform Rules of Evidence, as originally drafted, are intended to be the exclusive source of law excluding relevant evidence. If nothing in the URE permits or requires the exclusion of an item of relevant evidence, it is to be admitted, notwithstanding any pre-existing law which requires its exclusion (except, of course, for constitutional provisions).

However, some of the present exclusionary rules in California deserve to survive;¹² they probably would not do so if Rule 7 were to be enacted in its present form. Therefore, the amendment of the introductory phrase of Rule 7 suggested above is found to be desirable for this purpose as well.

¹⁰ *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 738-742 (1964).

¹¹ See CAL. PENAL CODE § 2603 (a special provision applicable to a particular situation whereby a prisoner whose civil rights are suspended or who is deemed civilly dead may nevertheless testify by affidavit or deposition in civil cases or by affidavit or deposition or personally in a criminal case); CAL. VEHICLE CODE §§ 40803, 40804 (a deliberate legislative choice of policy alternatives, electing to let speeders escape rather than to condone the use of "speed trap" evidence).

¹² *E.g.*, CAL. INS. CODE § 10381.5 provides:

The insured shall not be bound by any statement made in an application for a policy unless a copy of such application is attached to or endorsed on the policy when issued as a part thereof. If any such policy delivered or issued for delivery to any person in this State shall be reinstated or renewed, and the insured or the beneficiary or assignee of such policy shall make written request to the insurer for a copy of the application, if any, for such reinstatement or renewal, the insurer shall within 15 days after the receipt of such request at its home office or any branch office of the insurer, deliver or mail to the person making such request, a copy of such application. *If such copy shall not be so delivered or mailed, the insurer shall be precluded from introducing such application as evidence in any action or proceeding based upon or involving such policy or its reinstatement or renewal.* [Emphasis added.]

RULE 8

Introduction

Rule 8 provides:

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

Rule 8 is discussed with reference to particular situations in other studies on the Uniform Rules of Evidence.¹ It is appropriate, however, to consider here a general evaluation of the rule.

Rule 8 Is the Common Law Rule

The common law rule requires the judge to try and to determine disputes as to the existence of facts which are prerequisite to the qualification of a witness, the admissibility of relevant evidence, or the existence of a privilege. As McCormick states it, the "traditional view and the accepted principle" is:

[T]hat the trial judge decides with finality those preliminary questions of fact upon which depends the admissibility of an item of evidence which is objected to under an exclusionary rule of evidence. The same practice extends to the determination of preliminary facts conditioning the application of the rules as to the competency and privileges of witnesses. On all these preliminary questions the judge, on request, will hold a hearing in which each side may produce evidence.²

Rule 8 is in accord with this traditional view to which California adheres as a general principle. Thus Code of Civil Procedure Section 2102 provides, in part:

All questions of law, including the admissibility of testimony [and] the facts preliminary to such admission . . . are to be decided by the Court.³

¹ For a list of other studies on the various articles of the Uniform Rules of Evidence, see note 2, *supra* at 40.

² MCCORMICK § 53 at 123.

³ As to the California view respecting confessions, dying declarations, and spontaneous statements, see notes 9-11, *infra* at 73.

Limited Scope of Rule 8

It is well to emphasize that Rule 8 does *not* apply to *all* preliminary, foundational questions. For example, under Uniform Rule 67, "authentication of a writing is required before it may be received in evidence"; however, that rule also provides that "authentication may be by evidence sufficient to sustain a finding of . . . authenticity." Thus, although the question of authentication is for the judge, he does not decide the ultimate question of genuineness (as Rule 8 would require if it were applicable), but, rather, he decides only whether there is *prima facie* evidence (*i.e.*, evidence sufficient to sustain a finding of authenticity).

Likewise, under Uniform Rule 19, a witness' personal knowledge is a prerequisite for his testimony on a relevant or material matter; however, this means only that "there must be evidence" of such knowledge, *i.e.*, *prima facie* evidence. In other words, the judge does not resolve the preliminary questions of authenticity (genuineness of document) and personal knowledge the way he resolves such preliminary questions as whether a proposed witness is the spouse of a party. As to authenticity and personal knowledge, the judge should require only *prima facie* evidence and should not himself decide the issue as trier of fact. On the other hand, the judge should fully investigate (hearing evidence *pro* and *con*) and finally decide the marital question; in this instance, the judge is trier of fact in respect to the issue.

Thus, there is a basic difference between what McCormick calls the "competency cases" (which involve such preliminary questions as spousal relationship or attorney-client relationship) and "relevancy cases" (which involve such preliminary questions as authentication of documents or identification).⁴ Only the former are within the principle of Rule 8.

The Rationale of Rule 8

As an illustration of the rationale of Rule 8, suppose a person is offered as a witness and objection is made to his competency. Suppose his competency depends upon whether he is married to a party or upon whether he is an expert. Or, suppose secondary evidence of the terms of a document is offered and objected to; admissibility turns upon whether the original is lost.

Conceivably, the California system *might* be that, upon objection, the issue should be forthwith submitted to the jury for a special interlocutory verdict. (The witness is or is not married to the party. The original document is or is not lost.) However, this procedure might be rejected as too cumbersome; in its stead, there *might* be the system of reserving all such questions for jury determination upon submission to the jury of the whole case. This alternative would, of course, require such charges to the jury as: Disregard the testimony of *X*, but only if you find he is *D*'s spouse; disregard the secondary evidence, but only if you find the original is not lost. The manifest objection to this procedure is that it would require of the jury impossible feats of forgetfulness.

⁴ McCORMICK § 53.

The common law practice recognizes that any procedures attempting to procure *jury* determination of such issues as those described in Rule 8 are unwise and impracticable; therefore, determination of such issues is committed to the judge.⁵

California Modifications of the Common Law Practice

One of the cardinal features of the common law practice (and of the practice prescribed by Rule 8) is that under such practice the judge decides the preliminary question *with finality*.⁶ For example, suppose *X* is offered as a witness and his competency is challenged on the ground that he is married to *D*; if the judge finds that *X* is not so married, such finding is final. The judge does *not* submit this question to the jury for its determination.

This principle of the finality of the judge's determination extends to such findings as whether a confession which is offered in evidence was voluntarily made by accused⁷ or whether a statement made by the victim of a homicide was made by him in the belief that he was dying.⁸ In practical effect, this means that only the question of the credibility of such evidence is left open for determination by the jury.

In California, however, this feature of the common law practice of the finality of the judge's determination is rejected insofar as confessions,⁹ dying declarations,¹⁰ and spontaneous statements¹¹ are con-

⁵ See MCCORMICK § 53.

⁶ See MCCORMICK § 53 at 123.

⁷ See MCCORMICK §§ 53, 112.

⁸ See MCCORMICK §§ 53, 259.

⁹ *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 480 (1963).

¹⁰ See *People v. Singh*, 182 Cal. 457, 476, 188 Pac. 987, 995 (1920), in which the Court states as follows:

Section 1870 of the Code of Civil Procedure provides, in part: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: . . . 4. . . . In criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death."

The weight of authority in respect to the relative functions of the court and the jury touching the admission and determination of dying declarations is that the court alone shall pass on the admissibility of this character of evidence, and that the jury shall exclusively determine its probative value. (56 L. R. A. 434; 16 L. R. A. (N. S.) 660; 52 L. R. A. (N. S.) 152; 4 Ency. of Evidence, 947.) Whatever the law may be in other jurisdictions, it is well-settled in this state that it is the function of the trial court primarily to pass upon the admissibility of the alleged dying declarations and of the jury to determine whether they were in fact made under a sense of impending death, and, if so, then to determine the credibility and weight to which they are entitled. If the jury is not convinced beyond a reasonable doubt that the declarant was *in extremis* and believed at the time that he was, they must, in arriving at their verdict, disregard such declarations. But if, on the other hand, the jury are satisfied beyond a reasonable doubt that the declarant acted under a sense of impending death, they must then determine what facts, if any, are established by his declarations and apply them accordingly.

See also *People v. Gonzales*, 87 Cal. App.2d 867, 879, 198 P.2d 81, 89 (1948).

¹¹ See *People v. Keelin*, 136 Cal. App.2d 860, 871-872, 289 P.2d 520, 527 (1955), in which the court spoke as follows:

Research has not disclosed any ruling by the appellate courts of this state on the subject of whether or not, when conflicting evidence has been received or conflicting inferences can be drawn touching the matter of qualification of spontaneous statements, the ruling of the trial court admitting the statements is final, or, on the contrary, whether or not that issue must be resolved by the jury under instructions by the court defining spontaneous declarations and telling the jury how they are to determine whether or not

cerned. In the study on the Hearsay Evidence Article of the Uniform Rules, abrogation of the present California rule by the adoption of Rule 8 is recommended.¹² What is there said regarding the present California practice respecting confessions is applicable *mutatis mutandis* to the present practice respecting dying declarations and spontaneous statements.

"Boot-strap" Cases

In the discussion of Uniform Rule 63(4) in the separate study on the Hearsay Evidence Article,¹³ the "boot-strap" cases are discussed and the following addition to Rule 8 is recommended:

In the determination of the issue aforesaid, exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.

Summary and Recommendation

Subject to certain exceptions regarding confessions, dying declarations, and spontaneous statements, California law is in accord with Rule 8. It is submitted that these exceptions should be abrogated. It is, therefore, recommended that Rule 8, amended as advised, be approved.

Incorporating Rule 8 Into California Law

If Rule 8 is adopted, the first sentence of Section 2102 is superfluous. Hence, Section 2102 should be revised as follows:

~~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.~~¹⁴

the statements were qualified; and that if they find them not to have been qualified they are to disregard them. However, we think the issue must be submitted to the jury. We think the ruling of the trial court is preliminary only and that the jury must ascertain the ultimate fact of admissibility before it can consider the evidence. We can see no difference between the issue of admissibility of spontaneous declarations and the issue of admissibility of dying declarations. Both sorts of declarations can only be admitted as exceptions from the exclusionary hearsay rule. Both sorts of declarations are hearsay and both, if the conditions for admission are found to exist, may nevertheless be received in evidence. The proper procedure as to dying declarations and the rule as to who shall ultimately determine if the declarations are dying declarations is well settled in this state.

See note 10, *supra*, as to dying declarations.

¹² See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 478-481 (1963).

¹³ *Id.* at 468-471.

¹⁴ The second sentence of this section also is recommended for repeal in the separate study on the Judicial Notice Article of the Uniform Rules. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article II, Judicial Notice)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 826 (1964).

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