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Some Recent Cases in Evidence

THE Field Code of Civil Procedure blocked out the law of evidence in the State of California along the lines established by the English practice of the first half of the Nineteenth Century. Judicial decisions have modified certain provisions and have included subjects not covered by the Code, but on the whole the system remains as codified. Since the constitutional amendments of 1911 and 1914,¹ reversals for errors in the admission or rejection of evidence have become scarce and as a result fewer points in evidence are raised. Such, however, is the tremendous increase in litigation that the number of cases in evidence for the last five years in California alone is so large that nothing short of an encyclopedic treatment could cover them. The profession, however, finds valuable such a work as Wigmore on Evidence, which while it does not profess to cover every case, includes many from each jurisdiction and groups them under scientific general principles. There is also room for a short treatise which gives the general principles and a few of the leading cases. The work of Burr Jones on Evidence supplied this demand. A skilled and experienced practitioner, he had a keen sense for the rule and case that would best serve the practitioner in the rush of office preparation and court practice. In its new edition by the late Dean of the School of Jurisprudence of the University of California, William Carey Jones, the original text is preserved, the annotations brought up to date, and there is embodied the results of the best work of the modern scholars in this field.

In reviewing recent decisions there will be no attempt to cover everything, but to discuss a few cases which present points of practical importance or show tendencies in the development of the subject or reveal defects in the established system.

¹ California Constitution, Article VI, Section 4½.

DOCUMENTARY EVIDENCE

The production of documents before trial is covered by section 1000 of the Code of Civil Procedure and by the provisions for the taking of depositions. Neither by statute nor by decision have the difficulties been lessened.² The same old objections under section 1000 still exist, and the same cumbersome penalty for failure to appear or answer at the taking of a deposition. If the witness refuses on his deposition to produce a document or to answer a question the only remedy is a contempt proceeding and as the materiality of the question must be shown it is in practice a cumbersome procedure. As there were other grounds for refusing the application in *People v. Nields*³ the court refused to decide whether section 1000 of the Code of Civil Procedure applied to a criminal case. Obviously the prosecution could not invoke the section and at common law the defendant had no means of getting an inspection of the evidence of the prosecution. The Code gives the defendant a copy of the testimony before the grand jury,⁴ and the preliminary hearing is public. If it is desired to give the defendant anything more, as a few states have done, it would seem to require a special statute, for section 1000 in its scope and wording seems entirely inapplicable.

The subpoena duces tecum gets documents from third parties at a deposition or at a trial and the notice to produce from an opponent. After production the party offering the document must first authenticate it and then prove its contents. The court is quite liberal in allowing slight evidence of authentication where there is no objection. In *Fielding v. Iler*⁵ the court said "furthermore, the respondent testified that the letter was received by her from Mrs. Anderson and was the latter's reply to an earlier letter of inquiry. In the absence of specific objection, this is sufficient proof of the signature to a letter." Usually in actual practice in the trial of a case each party offers documents in evidence with practically no authentication. Where, however, specific objection is made there may be some diffi-

² The court scrutinizes the application with such care that it is not often that it can run the gauntlet of objections as to materiality, fishing excursion, etc. *Commercial Bank of Spanish America v. Supreme Court* (1923) 192 Cal. 395, 220 Pac. 422. 2 Cal. Law Review, 236. The objector should show real, not fancied prejudice. Apparently that is what he did in *Hirshfeld v. Dana* (1924) 193 Cal. 142, 223 Pac. 451, where the plaintiff was compelled to produce all letters signed by the defendant. The plaintiff could then know what to admit and what to deny.

³ (1924) 45 Cal. App. Dec. 910, 232 Pac. 985.

⁴ Penal Code, § 925.

⁵ (1919) 39 Cal. App. 559, 179 Pac. 519.

culties in proof. In *People v. Frank*⁶ it was necessary to the introduction of the testimony on preliminary examination to show the absence of a witness from the state. The District Attorney offered a letter and a telegram purporting to come from the witness in another state, but even the District Attorney's own statement did not connect up the letter and telegram with the communications sent by him. The Supreme Court would have accepted a stipulation or the sworn testimony of the District Attorney, or possibly his own statement, had no objection been made. The preliminary examination itself contained the statement that the witness expected to leave the state and this might have been sufficient under a well established exception to the hearsay rule to show continued absence from the state, but no witness was offered to prove that this testimony had been given, and as no foundation had been laid for the introduction of the testimony on preliminary examination the case had to be reversed.

The most important recent case on documentary evidence is *Hughes v. Pacific Wharf Company*.⁷ There the Supreme Court held that a partly signed carbon copy of a letter addressed to plaintiff by defendant should have been allowed in evidence on proof that the originals of all letters written by the defendant were placed in a certain receptacle and taken by a certain person and deposited in a mail box. In both *Fielding v. Iler* and *Hughes v. Pacific Wharf Company* the letter was to a party to the action, and perhaps less formal methods of proof might be sustained than where the letter has been sent to a third person. No objection seems to have been offered in the *Hughes* case on the ground that a carbon is a copy and, therefore, the case cannot be taken as a decision on that point. Some careful lawyers still cling to the old fashioned letter press copy as being more probative than a carbon, which indeed it is, for alterations in the original and in the carbon are quite common; on the other hand a letter press copy is not made until the letter is ready to be sent, but our court long ago decided that a letter press was a copy and the non-production of the original must first be accounted for.⁸ It seems a trifle odd that carbon copies should be accepted. The analogy of the carbon is with the printing press, but changes and erasures are not made in printed matter after it comes off the press, while they are common in typewritten documents. The cases in

⁶ (1924) 67 Cal. Dec. 375, 225 Pac. 448.

⁷ (1922) 188 Cal. 210, 205 Pac. 105.

⁸ *Ford v. Cunningham* (1890) 87 Cal. 209, 25 Pac. 453.

other jurisdictions nearly all sustain the view that a carbon is a duplicate original and when proof has been made, as in the Hughes case, that the original was sent the contents can be proved by the carbon without further foundation, that is without the necessity of serving a notice to produce or subpoena duces tecum.⁹

Many trials are unduly prolonged and the record inordinately extended by the practice of dumping all the documents into the case indiscriminately. On the other hand the technical requirements of authentication by witnesses and the production of originals are sometimes difficult to comply with. One never knows when his opponent will be technical and make specific objections.¹⁰ The English and Canadian practice offer the best solution.¹¹ The English practice has been described as follows:

"Without wasting a moment the entire correspondence was brought before the jury in chronological sequence so that the full significance and bearing of each document could be understood. Of course this was in a matter where there was no controversy over the genuineness or admissibility of the papers, and no chance for either side to gain a point by surprise. I was told that there was some method of procedure by which the letters were proved before a Commissioner in advance of the trial. It seemed to me that the system was thoroughly practical and that it avoided much of the delay and confusion that our method of introducing correspondence often involves."¹²

In *Thomas v. Fursman*¹³ a case was nearly lost because the plain-

⁹ Jones on Evidence (3d ed.) § 209, n. 44; Wigmore on Evidence, (2d ed.) §1234; Chamberlayne on Evidence, § 3571.

¹⁰ If no witness can testify from having seen the persons write some other proof must be offered. There is an ambiguity in § 1943 of the Code of Civil Procedure. The section states that "the handwriting of a person may be proved by anyone who . . . has seen writing purporting to be his, upon which he has acted or been charged," the cases do not clear whether the section means the witness or the writer must have acted or been charged. *Estate of Henri Cartery* (1880) 56 Cal. 470; *People v. Gordon* (1910) 13 Cal. App. 678, 684, 110 Pac. 469; Jones on Evidence (3d ed.) § 847. For unsigned typewritten documents there may be an additional difficulty as the court has intimated that expert testimony that a certain person wrote the document would not be received. *Wolf v. Gall* (1917) 176 Cal. 787, 169 Pac. 1017. To an expert a sheet of typewriting discloses the identity of the writer in many cases.

¹¹ Wigmore on Evidence (2d ed.) § 1223 gives the statutes, e. g.: "*Ont. Rev. St. 1914, c. 76, § 49* ('telegrams, letters, shipping bills of lading, delivery orders, receipts, accounts, and other written instruments used in business and other transactions' are provable by copy, on ten day's notice before trial to the opponent; unless the opponent, within four days after the time mentioned in the notice offering opportunity of inspection, gives notice of intention to dispute the correctness of genuineness of the copy and to 'require proof of the original')."

¹² 5 Mass. Law Quarterly 63.

¹³ (1918) 177 Cal. 550, 178 Pac. 870.

tiff failed to authenticate the assignment of the claim on which he was suing. On petition for rehearing it was discovered that the assignment was acknowledged and therefore proved itself. This section of the Code¹⁴ should be used in practice oftener than it is. Many contracts are signed by parties who expect to leave the jurisdiction, or are signed at a distance without witnesses and mailed. After the lapse of some years there may be technical difficulties in proving signatures. The acknowledgement before a notary makes it possible to put the document in evidence without further proof. This only covers proof of execution. If the instrument is recorded the certified copy of the record proves the record, but not the execution of the document.¹⁵ In other words, a certified copy of a record of a deed of real property was not admissible to prove the execution of the deed until Section 1951 of the Code of Civil Procedure was amended.¹⁶ The amendment covers real property only, so it would seem that such things as chattel mortgages could not even now be proved by a certified copy of the record.

TESTIMONIAL EVIDENCE

California has long since swept away the technical common law disqualification of witnesses on the ground of interest, lack of religious belief, conviction of felony, etc.,¹⁷ and limited the disqualifications to the fundamental abilities to observe, recollect and narrate. The leading case on the subject is *People v. Delaney*.¹⁸ The court there holds that in the case of a four year old no religious belief or knowledge of the nature of an oath is necessary. The court refused

¹⁴ Cal. Code Civ. Proc. § 1948.

¹⁵ Cal. Code Civ. Proc. § 1919.

¹⁶ *Brown v. Griffiths* (1886) 17 Cal. 14, 11 Pac. 500.

¹⁷ Cal. Code Civ. Proc. § 1879. Sections 673, 675 of the Pen. Code specifically state that they must not be construed to render persons civilly dead or whose civil rights are suspended incompetent as witnesses upon the trial of a criminal action. This could not properly be interpreted as making them incompetent as witnesses in civil cases in view of the sweeping language of § 1879 of the Code Civ. Proc. There may be administrative difficulties in getting the testimony, but there would seem to be no prohibition. These sections on civil death could surely be repealed. They are historical survivals whose principal effect is to embarrass innocent third parties. How far the common law disqualifications apply in criminal cases in the Federal Court is a matter of some doubt, although the opinion in *Rosen v. United States* (1918) 245 U. S. 467, 62 L. Ed. 406, 38 Sup. Ct. Rep. 148, seems clear that as far as conviction of a felony is concerned the dead hand of the common law rule of 1789 should no longer be applied. Not long before, however, in *People v. Miller* (1916) 236 Fed. 798, the Federal Court held an atheist incompetent as a witness.

¹⁸ (1921) 52 Cal. App. 765, 199 Pac. 896.

to decide a matter on which the authorities seem uncertain, namely, whether the court may refuse to allow a preliminary cross examination by counsel as to capacity, but held that in this case there should have been further evidence brought out by the court itself, or permission given to counsel to question further as to capacity. Is the doubt as to whether counsel may examine as a matter of right justified? Unquestionably it is. Our procedure for eliciting truth by specific question and answer is not the only rational method. Much ridicule has been heaped on the French and Italian courts for permitting opposing witnesses to face each other, contradict, give the lie and shout in chorus. A most competent American observer skilled in criminal trials, Mr. Arthur Train, in his book "Courts, Criminals and the Camora" finds much to commend in continental practice. A trained judge watches the witnesses keenly. When their passions are aroused they speak with less premeditation, and in their emotional discharge reveal much of importance. The judge had entire control of the situation. When he got what he wanted he stopped the witnesses and went on to something else. It is, however, generally conceded that cross examination is a most valuable and acid test to apply to the story of a witness. But is it suitable for young children? Or is examination in open court by counsel assisted by the judge the best way? The court in the Delaney case points to the suggestibility of children and the great difficulty of determining whether the story represents the facts observed or something put in their minds by others. These cases usually involve sex offenses.¹⁹ The charges are hard to disprove. Innocent men have suffered cruelly from false accusations which there was no way to disprove. It is greatly to be hoped that psychology will develop methods by which even in the case of young children the facts observed can be separated from matter suggested. At present there is little that can be done in court, but is it too much to ask in view of the seriousness of the charges that investigation be made by the district attorney

¹⁹ *People v. Thourwald* (1920) 46 Cal. App. 261, 189 Pac. 124; *People v. Dant* (1924) 45 Cal. App. Dec. 141, 229 Pac. 983; *People v. Reyes* (1924) 68 Cal. Dec. 353, 229 Pac. 947; *People v. Mendez* (1924) 193 Cal. 39, 223 Pac. 65, a murder case where the court said: "The real basis of the complaint of the defendant Cazares in this respect, as well as of the contention of the defendant Mendez, that the evidence is insufficient to support the verdict, rests upon the contention that the facts as testified to by Joe were not facts which he actually remembered, but were things which had been told to him by others and which he thought he remembered; in other words, that his testimony was the product of suggestions which had been made to him by peace officers and others engaged in investigating the crime and preparing the case for trial. There is some apparent basis for this contention in the record."

thoroughly at the earliest possible opportunity, and that competent and experienced psychologists be employed to examine the child privately and that the defendant be given the opportunity, if he desires to avail himself of it, to submit to the lie detector or any other device that will assist in determining the facts? Perhaps our procedure will develop along the line of increasing the importance of the committing magistrate and give him the power to make such investigations. In the meantime the district attorney can do much to punish the guilty and quash the prosecution of the innocent. The Delaney and Mendez cases leave the procedure as open as possible under existing laws.

In *People v. Yeager*,²⁰ as the court says, there was no merit in the argument that in the prosecution of two defendants one of the defendants could not be a witness on behalf of the prosecution, himself or his co-defendant if he so wished.

The one technical disqualification still remaining is that of the plaintiff in an action on a claim against the representative of a decedent. The injustice of this has been sufficiently commented upon. In *Kinley v. Largent*²¹ the Supreme Court held decisively that the section might be waived by the representative correcting the unfortunate language in *Rose v. Southern Trust Company*.²² The numerous technical points raised by the provision constitute a serious objection to its perpetuation.²³ Usually the decisions have limited the scope of the section but not always. It has been held to exclude testimony in another action between the present plaintiff and the decedent although in the latter action the representative offered his decedent's testimony.²⁴ It has been held to apply in an action to leave property by will, although the breach does not occur until death.²⁵ It has been held to apply to a plaintiff who is suing as the representative of a decedent.²⁶ On the other hand the defendant may waive

²⁰ (1924) 68 Cal. Dec. 239, 229 Pac. 40, 55.

²¹ (1921) 187 Cal. 71, 200 Pac. 937.

²² (1918) 178 Cal. 580, 174 Pac. 28.

²³ 9 California Law Review, 347.

²⁴ *Rose v. Southern Trust Company*, supra, n. 22.

²⁵ *Ruble v. Richardson* (1922) 188 Cal. 150, 204 Pac. 572.

²⁶ *Roncelli v. Fugazi* (1919) 44 Cal. App. 249, 186 Pac. 373. It does not apply to an action to quiet title. *Maguire v. Cunningham* (1923) 64 Cal. App. 536, 222 Pac. 838, where the court said: "Under all the authorities, and especially under *Bollinger v. Wright*, supra, the section cannot apply to actions to quiet title to real property. With equal reason it cannot apply to an action to quiet title to personal property in the shape of a herd of cattle. It seems to follow clearly, as well, that it cannot apply to an action to quiet title to personal property in the form of cash." In *Bayless v. Reed* (1920) 47 Cal. App. 139, 190 Pac. 211, the provision was held not to apply to a wife where the husband was suing for her earnings. Under the 1921 amendment

the disqualification not only by calling the plaintiff or by an express waiver, but by taking the plaintiff's deposition; in such case the plaintiff may put the deposition in evidence.²⁷ For a sensible statute sensibly construed see *Epes' Administrator v. Hardaway*.²⁸

Under the common law although parties were disqualified the plaintiff might in some cases introduce his books under an American exception to the hearsay rule. In *Dyer v. Minturn*²⁹ it was held that it was proper for the plaintiff to testify that the claim filed was a correct copy of the account as shown by his books. Had he testified that it was a copy of a correct account as shown by his books it would have been error.³⁰ This would seem wrong. The common law suppletory oath included a statement that the account was correct.³¹ The question does not seem to have been raised in California whether the common law limitations on shopkeepers' books (small amounts, not special contract, etc.) apply to the introduction of the plaintiff's books of account against a representative of a decedent. Logically there should be this limitation and this is another reason for abolishing the rule.

PRIVILEGE

The usual topics about which a person is privileged not to answer, such as votes, religious beliefs, etc., are not covered by the Code, but the common law would doubtless apply. The privilege for trade secrets was recognized in a case but properly denied under the circumstances,³² and there was no privilege for secrecy for an illegal voter.³³ The plaintiff in a personal injury action has no privilege not to be examined, but can object to an X-ray examination unless a bond is given to cover possible injury.³⁴

to section 370 of the California Code of Civil Procedure a wife may now sue for her earnings without joining her husband. It would seem good policy, however, for the husband to continue to sue as the wife may then be a witness.

²⁷ *McClenahan v. Keyes* (1922) 188 Cal. 574, 206 Pac. 454; *Hussey v. Loeb* (1923) 60 Cal. App. 469, 213 Pac. 271.

²⁸ (1923) 135 Va. 80, 115 S. E. 712, 96 Central Law Journal, 381.

²⁹ (1920) 47 Cal. App. 1, 189 Pac. 1046.

³⁰ *Stuart v. Lord* (1903) 138 Cal. 672, 72 Pac. 142; *Colburn v. Parrett* (1915) 27 Cal. App. 541, 150 Pac. 786.

³¹ *Wigmore, Evidence* (2d ed.) §§ 1554, 1559; *Chamberlain, Evidence*, § 3082; *Jones, Evidence*, § 573; *Roche v. Ware* (1886) 71 Cal. 375, 12 Pac. 284; 60 Am. Rep. 539, is more accurate in this respect than later cases which have criticized it.

³² *Willson v. Superior Court* (1924) 43 Cal. App. Dec. 681, 225 Pac. 881.

³³ *Robinson v. McAbee* (1923) 64 Cal. App. 709, 222 Pac. 871.

³⁴ 13 California Law Review, 272, where the ruling is discussed.

The most important privileged subject is the one against crimination. It has been held not to apply to disbarment proceedings³⁵ but does apply to Juvenile Court proceedings.³⁶ The Juvenile Court has been brought under Chancery powers and the ordinary constitutional guarantees against arbitrary criminal action do not apply. As, however, the juvenile may be tried in a criminal court before or after the Juvenile Court proceedings he retains the privilege against self crimination.³⁷ This is a matter of some importance because there is a tendency to assimilate all criminal jurisdiction to Chancery proceedings. Probation, sentence and parole are all subjects in which discretion is but slightly controlled. The Juvenile Court law of California even permits detention after reaching the age of 21³⁸ and some modern criminologists seem to look with favor on the extension of the procedure of the Juvenile Court to all criminal proceedings.³⁹ If the constitutional guarantees in criminal cases are worthy of preserving, this is a matter worthy of attention.

A privilege which has become inextricably entangled with the crimination privilege is that of protection against illegal searches and seizures. The older decisions were practically all cases involving directly the legality of the search and seizure and had nothing to do with a possible later use as evidence at a trial. It was generally held that the fact that the evidence had been illegally obtained had nothing to do with its admission and this view is strongly advocated by Dean Wigmore and is the California law.⁴⁰ The argument on the other side is that if the people are to be protected against illegal searches and seizures it can only be done effectively by refusing to allow the government the advantage of the evidence illegally obtained.⁴¹ This has been attempted in the United States courts by sanctioning a motion in advance of the trial to return the evidence illegally obtained.⁴² Apparently the attempt so far has not been successful. The federal reports teem with illegal searches, evasion and quibbles and the law is so unsettled and complicated that it will take many decisions to straighten out the matter. The California courts have

³⁵ *In re Vaughan* (1922) 189 Cal. 491, 209 Pac. 353, 24 A. L. R. 858, 11 California Law Review, 137.

³⁶ *Ex parte Tahbel* (1920) 46 Cal. App. 755, 189 Pac. 804.

³⁷ 13 California Law Review, 162.

³⁸ Cal. Statutes (1921) p. 809, § 12.

³⁹ Sutherland, *Criminology*.

⁴⁰ Wigmore, *Evidence* (2d ed.) §§ 2183, 2184; *People v. Mayen* (1922) 188 Cal. 237, 205 Pac. 435, 24 A. L. R. 1383; 10 California Law Review, 165, on case in Appellate Court.

⁴¹ 8 California Law Review, 347.

⁴² *Weeks v. United States* (1914) 232 U. S. 383, 58 L. Ed. 652, 34 Sup. Ct. Rep. 341, L. R. A. 1915B 834, Ann. Cas. 1915C 1177.

resisted several attempts to limit the Mayen case and have followed it to its logical conclusion. The search may be illegal but if it discloses a crime (say the presence of intoxicating liquor) the officer has a right to arrest for a crime committed in his presence.⁴³

Section 1881 of the Code of Civil Procedure contains the absurd provision that a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent. How can a spouse testify for the other without his consent, especially since California limits the privilege to cases in which a spouse is a party?⁴⁴ Again the section makes the privilege that of the party spouse. On the other hand section 1322 of the Penal Code requires the consent of both in criminal cases. If the husband calls the wife to testify for him why should she have the privilege of declining? Some peculiar points are raised by the privilege in *In re Pusey's Estate*,⁴⁵ where a will of a deceased woman was contested on the ground that it had been revoked by her marriage. The proponents contended the marriage was invalid because a previous marriage of the husband had not been legally dissolved. The proponents offered the former spouse as a witness. The court held that the general objection of the contestants was insufficient to raise the point that the testimony was privileged. It would seem also that the estoppel suggested by the court was well founded. "The appellants who were seeking to establish the validity of the decree of divorce, cannot, then, well be allowed to claim that by their general objection they were seeking the benefit of a relation which they claimed did not in fact exist." It is not like the case of a trial for bigamy where the second marriage is disputed and the defendant objects to the testimony of the first wife. There the defendant consistently asserts the validity of the first marriage.⁴⁶ The privilege of a spouse not to testify in a case where the other spouse is a party should be abolished.⁴⁷ When asserted it is invariably to promote injustice. *Marple v. Jackson*⁴⁸ is a good example. A judgment was obtained against the husband. He conveyed his property to his wife. The judgment creditor levied on the property. The wife sought to enjoin the execution. The judgment creditor put the husband on the stand and the wife's objection to his testimony was sustained. As a matter of fact the husband answered several preliminary ques-

⁴³ *In re Ajuria* (1922) 57 Cal. App. 667, 207 Pac. 515.

⁴⁴ *People v. Langtree* (1883) 64 Cal. 256, 30 Pac. 813.

⁴⁵ (1919) 180 Cal. 368, 181 Pac. 648.

⁴⁶ *Miles v. United States* (1880) 103 U. S. 304, 26 L. Ed. 481.

⁴⁷ 2 California Law Review, 148.

⁴⁸ (1920) 184 Cal. 411, 193 Pac. 940.

tions before any objection was made. Should not a spouse claiming this privilege be required to assert it at the moment the witness spouse is called to the stand?

The privilege that a spouse need not testify where the other spouse is a party has, of course, no relation to the privilege that exists between husband and wife as to communications. That privilege exists for all communications in California and continues during and after the marriage whether the spouse is a party to the action or not. The Code has a number of other privilege communications. For those between a physician and patient the court and later the legislature removed one of the worst features, that of a plaintiff in a personal injury suit refusing to allow his physician to testify.⁴⁹ No case has arisen recently to call attention to the other evils of the privilege—the closing of the mouth of the physician in insurance cases and in will contests. Perhaps if a flagrant instance arises the entire privilege can be abolished. So long as a privilege exists it would seem essential for its preservation that no comment on the exercise of it be permitted, and the court has so held.⁵⁰

Suppose a trial court erroneously sustains a claim of privilege. Competent evidence has been excluded and that constitutes error. But suppose the trial court erroneously overrules the claim of privilege. All that has happened is that the privilege of some one witness or third party has been violated, but that is no concern of the party. He could not have complained if the person entitled to the privilege had waived it. The California cases support this view. In *Clark v. Reese*⁵¹ a witness was asked a question which tended to degrade. The question, however, was pertinent to the case, although not to the very fact in issue. The denial of the privilege to the witness was not error as to a party.⁵² This has been recently affirmed in *People v. Gonzales*⁵³ and it is the clear implication of *People v. Mayen*.⁵⁴ On

⁴⁹ 6 California Law Review, 300.

⁵⁰ *Cook v. Los Angeles Railway Corporation* (1915) 169 Cal. 113, 145 Pac. 1013. If the evidence is obtained in any other way, say a letter from a husband to a wife gets into the hands of a third person, there is no privilege if the third person puts it in evidence. *People v. Baender* (1924) 44 Cal. App. Dec. 630, 228 Pac. 536.

⁵¹ (1868) 35 Cal. 89. In *Sharon v. Sharon* (1889) 79 Cal. 633, 674, 22 Pac. 26, this case was carefully distinguished. In the *Sharon* case a witness was asked as to specific wrongful acts which had nothing to do with the case, and the only effect of which was to discredit the witness. Witnesses cannot be impeached that way, and a party whose witness has been discredited by improper methods has just cause of complaint.

⁵² Wigmore, Evidence (2d ed.) § 2196.

⁵³ (1922) 56 Cal. App. 330, 204 Pac. 1088.

⁵⁴ *Supra*, n. 40.

the other hand where the privilege has been that of a party its denial has been considered error, and this is the implication of *People v. Singh*.⁵⁶ There the objection was overruled because a general objection was held not to raise the specific point of privilege where a wife was called to the stand in a criminal case in which her husband was the defendant. Apparently had the objection been specific the defendant could have claimed error. In *Humphrey v. Pope*⁵⁷ the defendant objected to the plaintiff testifying as to communications to the plaintiff from her husband, who from all that appears was not in court. The overruling of the objection was held error. The court held that a general objection was sufficient as the testimony was incompetent, apparently because, as all communications from a husband to a wife are privileged in California, such communications stand on a different footing from those between attorney and client, physician and patient, etc., where only confidential communications are privileged. This peculiar notion of competency is probably the same idea repudiated in *Kinley v. Largent*.⁵⁷ But if a specific objection had been made on the ground of privileged communication it would seem the objection should have been overruled on the principle of the other cases in California. The privilege violated was not the party's privilege but that of a stranger to the action. The case can be sustained only on the theory that where the person entitled to the privilege is not there to claim it a party may claim it for him and assert error if it is denied. *Humphrey v. Pope* has been discredited on both grounds on which it was decided and is probably entitled to little weight today.

CALLING AND EXAMINATION OF WITNESSES

The California decisions have definitely established the practice that the court may call a witness, although it does not have to, even where one or both parties object.⁵⁸ The usual case probably is where both parties are somewhat afraid, but are willing for the court to

⁵⁶ (1920) 182 Cal. 457, 482; *People v. Mullings* (1890) 83 Cal. 138, 23 Pac. 229; *People v. Warner* (1897) 117 Cal. 637, 49 Pac. 841. This seems to be the rule at any rate where the party is a defendant in a criminal case.

⁵⁷ (1905) 1 Cal. App. 374, 82 Pac. 223.

⁵⁷ *Supra*, n. 21. Also repudiated in *People v. Singh*, *supra*, n. 55. There is no incompetency in the evidence in these cases. There is merely a privilege that some person has to exclude it. The privilege may be waived—the evidence is therefore not incompetent.

⁵⁸ *Marin Water, etc. Company v. Railroad Commission* (1916) 171 Cal. 706, 154 Pac. 864, Ann. Cas. 1917C 114; *Roth v. Moeller* (1921) 185 Cal. 415, 197 Pac. 62; *Pacific Gas and Electric Company v. Devlin* (1922) 188 Cal. 33, 203 Pac. 1058; *Anderson v. United Stages* (1923) 192 Cal. 250, 219 Pac. 748.

call the witness so that the opportunity for full impeachment will not be lost. But one or both parties may object. Surely even in that case the court ought to have the right to call the witness anyway. The English case to the contrary seems to look upon a trial as a contest between the parties in which the court is merely an umpire instead of a proceeding in which the state is interested in seeing justice done.⁵⁹ In the examination of witnesses one has often heard the opponent move to strike out an answer as nonresponsive. *Hirshfeld v. Dana*⁶⁰ holds that it is only the party asking the question who can raise that objection. But why should either be able to strike out an answer? If the answer contains irrelevant or incompetent matter it is conceded that either may strike it out, but if the answer is relevant to the issues and there is no other objection why should either party have the privilege of striking it out simply because it was not responsive to the question?⁶¹

The rules in California in regard to order of proof, examination of witnesses, reopening a case and the calling of witnesses are very liberal. The trial court has practically unlimited discretion. In one respect only has that discretion been impaired. In some strange way it was considered reversible error to exceed in cross examination

⁵⁹ 159 Law Times, 142, citing *Re Enoch & Zaretsky* (1910) 1 K. B. 327. After a witness has been called it is the right and the duty of the trial judge to interrogate the witness when it is desirable for the elucidation of the issues. Were it not for the constitutional prohibition against charging on matters of fact this power could be exercised more freely. "When it appeared that the boy was confused in this manner, the trial judge would intervene and by questions of his own would help to 'straighten out' the witness and clarify his testimony. Upon one or two occasions when counsel read isolated portions of the testimony at the coroner's inquest which apparently conflicted with the testimony at the trial, the trial judge intervened of his own motion, compelling them to read other portions of the context which revealed that the apparent conflict was not a real conflict. In all of these things the trial judge was but doing his duty. The circumstance that in so doing he may have incidentally aided the prosecution is of no consequence. The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered. It is not only the right but the duty of a trial judge to so supervise and regulate the course of a trial that the truth shall be revealed in so far as it may be, within the established rules of evidence." *People v. Mendez* (1924) 193 Cal. 39, 223 Pac. 65.

"The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished when a few questions asked from the bench might elicit the truth. It is his primary duty to see that justice is done both to the accused and to the people." *People v. Golsh* (1923) 63 Cal. App. 609, 219 Pac. 456.

⁶⁰ *Supra*, n. 2.

⁶¹ *Wigmore, Evidence* (2d ed.) § 785; but *Jones, Evidence* (3d ed.) § 815, supports the rule that objection must be made.

the scope of the direct. Since the constitutional amendments on immaterial error there has been no case reversed on this ground and it is hoped that the absurdity is at an end of reversing a case because relevant evidence came in at the wrong time.

IMPEACHMENT

The question is often asked on cross examination, "Did you not testify differently on a preliminary examination or at some other time?" Objection is interposed to the effect that if the question is meant for impeachment no foundation has been laid. This objection is usually sustained. In *People v. Jones*⁶² the court says:

"A misconception seems to exist upon the subject of the permissibility of inquiries such as this. To such a question the objection here stated is usually interposed and usually the objection is sustained upon the ground that the question is intended to impeach and being intended to impeach the 'proper foundation' of time, place, circumstances, and persons present is not laid because these matters have not been called to the attention of the witness. It is true that when a question is asked for the purpose of impeachment its 'foundation' must be laid to the end that the witness's attention may be called to every circumstance which will tend to refresh his memory and prevent him from falling into error. But it by no means follows that every such question is or is meant to be an impeaching question. . . . Thus, it was proper to ask the witness if he had so testified. His answer might have been that he did not, when an impeaching question would properly follow. His answer might have been that he did so testify with explanation of the variance between his answers, in which case no impeaching question would be necessary, and it is an unwarranted curtailment of legitimate cross-examination to exclude such questions, as was here done, upon the ground that they are necessarily impeaching questions and the proper foundation for them has not been laid. (*People v. Hart*, 153 Cal. 261, 94 Pac. 1042.)"

The case has been reaffirmed⁶³ and is satisfactory as it simplifies the procedure while preserving the spirit of the rule that before the

⁶² (1911) 160 Cal. 358, 117 Pac. 176.

⁶³ *People v. Williams* (1919) 43 Cal. App. 60, 184 Pac. 498. In *People v. Jones* the impeachment was by testimony at a preliminary examination. Although the point was not raised it would seem authority for the proposition that prior testimony is not a statement in writing which must be shown to a witness before any question is put to him concerning it under Cal. Code Civ. Proc. § 2052. It ought to be sufficient as a foundation for contradiction if the statements are related to the witness. There has been some doubt on this question, but besides *People v. Jones*, *People v. Talman* (1915) 26 Cal. App. 348, 146 Pac. 1063, would seem to sustain this view, although in that

witness can be contradicted his attention must be called specifically to the contradictory statements. It would seem, however, that the questions are intended for impeachment. In *People v. Champion*⁶⁴ the court said :

"The testimony of Dr. Parkin was to the effect that the witness was not insane at the time he was called to the witness stand, and the major portion of the doctor's testimony tended to show no more than that the witness was possessed of a weak and uncertain memory. A witness not affected by mental disease or mental derangement may be impeached only in the manner and for the reasons provided in Sections 2051 and 2052 of the Code of Civil Procedure. (*People v. Harrison*, 18 Cal. App. 288, 296.)"

This may be correct on the exact facts, but there is danger in the approval of the *Harrison* case. There the jury was withdrawn while strenuous objection was made to the competency of a witness. The judge held the witness competent and after she had testified refused to allow her credibility to be impeached by the evidence that had been previously directed to competency. The court said that the testimony could not be offered for the purpose of impeachment for the reason that it is not one of the modes prescribed by the statute, Code Civil Procedure, sections 2051, 2052, for impeaching a witness. This seems unsound. The Code sections cannot be taken to lay down the only methods of impeachment. There is no necessity for considering them exclusive. Furthermore, the courts never limit impeachment to the grounds stated in the Code sections. It will be observed that the Code provides for impeachment by character, contradiction and inconsistent statements, but nothing is said as to other grounds. Yet it has always been held in California and elsewhere that a witness may be impeached by anything that goes to his ability to observe, recollect and narrate. Seriously defective vision, hearing, interest, bias, relationship, corruption, etc., can always be shown.⁶⁵

case the prior statement was an informal one taken down by the district attorney. In *People v. Vogel* (1918) 36 Cal. App. 216, 171 Pac. 978, the same practice was approved. *People v. Ching Hing Chang* (1887) 74 Cal. 389, 16 Pac. 201, and *People v. Lopez* (1913) 21 Cal. App. 188, 131 Pac. 104, would seem to be overruled on this point. After all, prior testimony is not the writing of the witness—it is simply an oral statement and there is no need of applying the rule that the writing must first be shown to a witness before the question is asked. It seems strange that California should have adopted the rule that statements in writing must be shown to a witness before any question is put to him concerning them. The rule ruins cross examination and was abolished in England years before the Code was adopted. Wigmore, *Evidence* (2d ed.) §§ 1259, 1260.

⁶⁴ (1924) 193 Cal. 441, 225 Pac. 278.

⁶⁵ If it is a statement of bias the same foundation must be laid before calling the impeaching witness as in the case of inconsistent statements. *Ash v. Soo Sing Lung* (1918) 177 Cal. 356, 170 Pac. 843.

If, therefore, *People v. Champion* is confined to the proposition that a question as to whether the witness has a defective memory may be asked on cross examination, but that the witness' answer cannot be contradicted by other witnesses unless the defect shows a substantial deviation from the normal, no objection can be made to the opinion. If, however, it means what *People v. Harrison* seems to imply, that if the witness is once held competent he cannot thereafter be impeached for mental defect, the opinion is dangerous. There is a wide difference between the minimum ability to observe, recollect and narrate that makes it worth while to hear a witness' story and psychiatric defects which seriously impair the credibility of the story. The pathological liar could hardly be considered incompetent as a witness yet serious injustice would be done if he could not be impeached.

*Kahn v. Zemansky*⁶⁶ illustrates the proper rule in the contradiction of a witness. In an action for the conversion of property a witness testified she was married in Montana. The refusal of the trial court to allow her to be contradicted by witnesses who were willing to testify that she had stated that she was married in California was held proper. The place of marriage had nothing to do with the case. On the other hand, another witness testified for the defendant that he saw the defendant deliver the property in question to the plaintiff on the date claimed by defendant. He fixed the date by a sale of oil stock he had made to one of defendant's employees on that date. Held proper to show by other witnesses that the oil stock sale was made on a different date. It is true that the oil stock sale was not an issue in the principal case, but the testimony of the witness was extremely probative and the discrediting of his story that he was in defendant's store and saw the property delivered on that date was important. In proving reputation it is recognized that the witness need not have discussed the reputation or heard it discussed.⁶⁷ The best reputation is perhaps that which is not talked about. But mere personal knowledge is not enough, such as one gets from employing a man. There must have been a community life in which there were relations with other people.⁶⁸ The court inclines a little too much to the old requirement that reputation must be in the community in which one lives.⁶⁹ In these days of urban

⁶⁶ (1922) 59 Cal. App. 324, 210 Pac. 529.

⁶⁷ *People v. Pauli* (1922) 58 Cal. App. 594, 209 Pac. 88; *People v. Stennett* (1921) 51 Cal. App. 370, 197 Pac. 372.

⁶⁸ *Supra*, n. 67.

⁶⁹ *People v. Heape* (1925) 46 Cal. App. Dec. 999; *Khan v. Zemansky*, *supra*, n. 66, leaves the question more open.

conditions a man may live in an apartment for years and have scarcely a bowing acquaintance with his transitory neighbors. On the other hand, in the business world he may have a well-established reputation among men whom he meets every day in business but who live at homes as widely separated as the expanding limits of commutation travel make practicable. One must be meticulously careful in his questions if he wants to claim error when objections are sustained. The court struck out this question: "I will ask you if you know his reputation for truth, honesty and integrity in the city of Sacramento." The ruling of the court was sustained on the ground that the question should have been not as to the reputation but as to the general reputation.⁷⁰

A witness' character may be impeached by showing that he has been convicted of a felony. What is the conviction—the verdict of the jury or the judgment? The court holds that the verdict of the jury is sufficient.⁷¹ If a witness has been convicted of a felony he may be impeached even though he has been pardoned. A pardon does not blot out guilt.⁷² How about probation? In view of the large number of probationers the question is of some practical importance. In *People v. Mackey*⁷³ the court held that a witness who had been granted probation which he had successfully completed could not be impeached for conviction of a felony. Suppose, however, the question is asked the witness what should be his reply? The only way in that case to keep the impeaching fact from the jury would be to deny that he had ever been convicted.

It has long been established that when a defendant in a criminal case takes the stand he may be impeached like any other witness. Where prior convictions have been charged against the defendant and he has admitted them and they have not been read to the jury the defendant should not take the stand. If he does the prior convictions which have been carefully concealed up to that time will be brought out to impeach him. The same result follows if the defendant offers character witnesses.⁷⁴ In the impeachment of a character witness it is proper to ask whether he has not heard that

⁷⁰ *Khan v. Zemansky*, supra, n. 66.

⁷¹ *People v. Kepford* (1921) 52 Cal. App. 508, 199 Pac. 64. A judgment of conviction was necessary for disqualification under the old common law rule, but not necessary for impeachment.

⁷² *Rittenberg v. Smith* (1913) 214 Mass. 343, 101 N. E. 989, 47 L. R. A. (N. S.) 215; Williston, 28 Harvard Law Review, 647; Wigmore, Evidence (2d ed.) § 980.

⁷³ (1922) 58 Cal. App. 123, 208 Pac. 135.

⁷⁴ *People v. Stennett*, supra, n. 67. They may be asked on cross examination if they have not heard of the prior conviction.

the defendant had been convicted of a felony. This is the preferable form of question although occasionally the court sustains a question that asks for the fact of conviction and not as to what the witness has heard.⁷⁵

A sound rule forbids the impeachment of one's own witness by proof of bad character, the reason generally given being that otherwise the threat of character impeachment might be held as a club over the witness. Contradiction of the statements of a witness is of course permitted, also inconsistent statements, although the Code in this respect has been by judicial decision limited to the case where the witness has given testimony on the stand which is damaging and where it came as a surprise.⁷⁶ How about other grounds of impeachment of one's own witness—interest, bias, etc.? The Supreme Court has forbidden it.⁷⁷ The foregoing rules are most of them fair enough when applied to an ordinary witness, but ridiculous when applied to an opponent. The decisions in California, however, left considerable doubt.⁷⁸ Section 2055 of the Code of Civil Procedure (added by statute 1917) attempted to clear the difficulty, but owing to its defective wording has already caused some unnecessary litigation.

The section states that a party calling such adverse party shall not be bound by his testimony, as if a party were ever bound by the testimony of any witness. What was meant was that an adverse party called as a witness might be examined and impeached to the same extent as the ordinary witness. The plaintiff called his opponent and elicited evidence in the defendant's favor. The plaintiff then contended that as under the Code section he was not bound by this testimony that, therefore, the testimony would not justify a judgment for the defendant. The Supreme Court properly repudiated this contention.⁷⁹

In the interpretation of this section the court has laid down liberal rules. Where plaintiff calls one of several defendants each defendant may cross examine. Furthermore, the cross examination may take a wide range. "As seen, the defendants were called for cross-examination by the plaintiff and when turned over to the attorney

⁷⁵ *People v. Hightower* (1924) 65 Cal. App. 331, 224 Pac. 110. The correct form is given in *People v. Hendricks* (1925) 46 Cal. App. Dec. 799.

⁷⁶ *People v. Spencer* (1922) 58 Cal. App. 197, 208 Pac. 380. *Agalianos v. American Central Insurance Company* (1923) 62 Cal. App. 349, 217 Pac. 107; *People v. Sliscovich* (1924) 67 Cal. Dec. 416, 226 Pac. 611.

⁷⁷ *McLaughlin v. Los Angeles Railway Corporation* (1919) 180 Cal. 527, 182 Pac. 44.

⁷⁸ *Hopkins v. White* (1912) 20 Cal. App. 234, 128 Pac. 780.

⁷⁹ *Figari v. Olcese* (1921) 184 Cal. 775, 195 Pac. 425, 15 A. L. R. 192; *Cioli v. Kenourgios* (1922) 59 Cal. App. 690, 211 Pac. 838.

for the defendants for examination the latter in examining them had the right to question them concerning any matter as to which they had testified in the cross-examination. But we go further and say that we know of no reason why the attorney for the defendants should not have been permitted at that time to make the defendants their own witnesses and question them regarding other matters pertinent to the case which were not brought out by their examination by counsel for the plaintiff."⁸⁰ Some question might be raised over *Koeberle v. Friganza*.⁸¹ There two defendants were sued for goods sold and delivered. One defendant claimed that in the purchase she was acting merely as agent for the co-defendant and cheerfully admitted all the facts as to sale, price, etc. The other defendant protested against her examination by the plaintiff. The protest was overruled. The decision can be sustained on the ground that the utmost damage that resulted to the complaining defendant was the examination of the other defendant by the plaintiff by means of leading questions. But leading questions are entirely in the discretion of the court so there was no reversible error. It would perhaps have been well had the case pointed out that leading questions have no necessary connection with direct examination or cross examination. Leading questions should be permitted of a hostile witness and not of a friendly witness, but a witness is not necessarily hostile because he is a party opponent or because he has been called by the opponent. The trial court should have the utmost freedom in allowing and disallowing leading questions according to the attitude of the witness being examined, and there is nothing in section 2055 to prevent this.

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(To be continued)

⁸⁰ *Bitsekas v. Parechian* (1924) 44 Cal. App. Dec. 176, 226 Pac. 974; *Goehring v. Rogers* (1924) 44 Cal. App. Dec. 239, 227 Pac. 689. In re Carson's Estate (1920) 184 Cal. 437, 194 Pac. 5.

⁸¹ (1924) 43 Cal. App. Dec. 709, 226 Pac. 35. *Imperial Water Company No. 1 v. Imperial Irrigation District* (1923) 62 Cal. App. 286, 217 Pac. 88. In re McDonald's Estate (1923) 191 Cal. 161, 215 Pac. 545.