Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically LODGED on 5/13/2020 by Tao Zhang, Deputy Clerk

S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

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

MOTION FOR JUDICIAL NOTICE EXHIBITS 1 – 6

VOLUME 7 OF 14, PAGES 1400-1642 OF 3537

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

HORVITZ & LEVY LLP
*FREDERIC D. COHEN (BAR NO. 56755)
LISA PERROCHET (BAR NO. 132858)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
fcohen@horvitzlevy.com
lperrochet@horvitzlevy.com

SANDERS ROBERTS LLP
JUSTIN H. SANDERS (BAR NO. 211488)
DARTH K. VAUGHN (BAR NO. 253276)
SABRINA C. NARAIN (BAR NO. 299471)
1055 WEST 7TH STREET, SUITE 3050
LOS ANGELES, CALIFORNIA 90017
(213) 426-5000 • FAX: (213) 234-4581
jsanders@sandersroberts.com
dvaughn@sandersroberts.com
snarain@sandersroberts.com

ATTORNEYS FOR REAL PARTY IN INTEREST
FORD MOTOR COMPANY

#34 7/31/64

First Supplement to Memorandum 64-49

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 10--Hearsay Evidence)

Attached to this memorandum is a revised outline of Division 10 and a revision of pages 1000 through 1004 of the Hearsay Division. Also attached is a revision of pages 1000 through of the Comments relating to the Hearsay Division. This memorandum will discuss the problems presented in these revised pages. Memorandum 64-49 discusses the problems presented by pages 1005 et seq. of the Hearsay Division and the related Comments.

The following matters should be noted in regard to these revised pages:

Section 1200

Section 1200 has been revised to reflect the actions of the Commission at the July meeting. The Commission instructed the staff to include the definition of "hearsay evidence" in the section. Whether the definition should be repeated in the definitions division was left to the staff's discretion. We did not repeat the definition; instead, we provided in Section 155 as follows:

155. "Hearsay evidence" is defined in Section 1200.

The cross-reference avoids the necessity for amending two sections whenever the definition is to be altered.

The Commission also instructed the staff to redraft the rule to permit the courts to develop additional hearsay exceptions. Section 1200 has been amended to reflect these changes.

Section 1205

At the July meeting, the Commission instructed the staff to prepare a

recommended Section 1205 and to state the policy reasons for including some hearsay exceptions and excluding others. Section 1205 has been prepared to carry out that instruction.

The policies applicable seem to be the following: We deleted Rule 64 from the URE originally because the right of discovery provided in civil actions seemed adequate to protect the parties to civil actions against unfair surprise. When we considered the comments to our tentative recommendation, we discovered that our rationale did not take criminal cases into account. In criminal cases, the defendant has quite a broad right of discovery. The prosecution's right of discovery was, until recently, non-existent; and the scope of the prosecution's recently discovered right of discovery is still largely unknown. If the Supreme Court's decisions are construed as broadly as possible, it may be possible for the prosecution to discover any documentary evidence the defendant intends to introduce at the trial. In any event, the Commission believed that the greatest need for Section 1205 was caused by the limited right of the prosecution to discovery in criminal cases. Hence, the exigencies of the prosecution should be of paramount concern in considering the details of Section 1205.

The especial need for Section 1205 stems from the lack of opportunity to confront and cross-examine the hearsay declarant. Concern over the accuracy of the evidence of the hearsay statement is not involved. If we were concerned with the accuracy of the evidence offered, we would have no reason to limit Section

1205 to hearsay evidence. Since we are not creating a similar condition for the admissibility of other documentary evidence, we must believe that ordinary discovery techniques and the right to confront and cross-examine the witnesses at the trial are sufficient protection against the introduction of unreliable evidence. Therefore, hearsay exceptions should be included within the section only when there is especial need to check the accuracy of the perceptions and the veracity of the declarant as distinguished from the accuracy of the perceptions and the veracity of the witness who testifies to the hearsay statement.

Another consideration is the extent to which particular kinds of hearsay appear in writing. If statements within an exception usually are not in writing, a party might be unfairly trapped by the 1205 requirement in the rare case in which he seeks to introduce a written statement of the particular kind.

Finally, we think the matters included should fall in easily recognized, broadly defined categories. Counsel should not be required to make subtle distinctions between similar kinds of evidence in order to comply with a procedural requirement of this sort when such distinctions otherwise are principally of academic interest.

With the foregoing policies in mind, we have concluded that we should include and exclude hearsay exceptions as indicated in the following list. In some cases, we may have made seemingly inconsistent decisions. However, lines have to be drawn somewhere, and where we think policies indicate the line should be

one place, others may think that the line should be in a slightly different place. Nonetheless, these are our recommendations:

Article 1 (Confessions and Admissions). EXCLUDE. So far as direct and adoptive admissions are concerned, it seems clear enough that we are concerned solely with the accuracy of the evidence given at the trial. There is no need for a party to confront and cross-examine the declarant to test the accuracy of the hearsay statement. He was the declarant.

We think that the same rule should apply to authorized admissions and to admissions of persons whose right or duty is in issue. The real problem is whether the party in fact authorized the admission or whether the declarant in fact made the statement; and whether he did or not is a matter involving the veracity of witnesses at the trial who may be confronted and cross-examined.

Possibly unauthorized written statements of agents, partners, and employees, that relate to the subject matter of the agency, partnership, or employment should be subject to the procedure; but there is such a subtle distinction between these and authorized admissions, and so few of such statements are in writing, that we think to include them would probably trap more parties unjustifiably than the inclusion would ever protect.

Article 2 (Declarations Against Interest). EXCLUDE. Here, we think the real need for cross-examination relates to the witnesses at the trial. Some may disagree, but we think that the "against interest" test sufficiently verifies the hearsay statement that pretrial notice is not required. Then, too, most of such statements will not be in writing.

Article 3 (Prior Statements of Witnesses). EXCLUDE. Inconsistent statements cannot be included without destroying the efficacy of this form of impeachment. It is impractical to include consistent statements because a party cannot anticipate when his witness is going to be attacked in the requisite manner. It is unnecessary to include recorded memory because the declarant is at the trial and subject to cross-examination.

Article 4 (Spontaneous, etc. Declarations). EXCLUDE. Here, few of the declarations, if any, will ever be in writing. The fact that such statements are natural effusions, not deliberative statements, seems sufficient to warrant omitting these statements so long as there is adequate opportunity to cross-examine the trial witness. The main question involves the foundational facts of spontaneity, etc., and a party has an adequate opportunity to examine into those facts at the trial. Dying declarations are excluded because, in addition, it would be impossible to cross-examine the declarant even if notice were given.

Article 5 (State of mind, physical symptoms). EXCLUDE. There is an additional problem associated with the state of mind exception that does not appear in regard to the others. Frequently state of mind evidence consists of statements that are circumstantial evidence of the state of mind, not hearsay evidence. For example, a homicide victim's prior statements that she feared the defendant are hearsay evidence of her state of mind, but her statements that the defendant threatened her or beat her are circumstantial evidence of her state of mind. The two varieties of

state of mind evidence shade into each other. We see no reason to compel pretrial notice of intention to offer one variety and require no such notice of intention to offer the other. Compelling such a nice distinction--which will be of academic interest only in most cases--will, we think, entrap more parties than it will protect.

Then, too, most of these statements are not in writing; hence, the 1205 requirement would apply to only a few. We don't think that it is desirable to impose the requirement on only a few of the statements that are within a particular exception.

Article 6 (Statements Relating to Wills, Claims Against Estates). EXCLUDE. These exceptions are, for all practical purposes, limited to civil actions. Hence, the normal discovery techniques may be used. The need for 1205 is minimal.

Then, too, a decedent's statements concerning his will are quite similar to the statements within the state of mind exception in that they are statements of his belief concerning certain facts. Other evidence that is circumstantial in nature may also be introduced concerning that belief. To require compliance with Section 1205 would force a discrimination in treatment between the two kinds of evidence that we do not think is warranted. Moreover, it is the declarant's own intent the court is seeking to discover and to carry out. Hence, it seems to us that the principal question before the court is whether the decedent in fact made the statement --and this involves the veracity and reliability of the evidence offered, not the veracity and reliability of the declarant.

The exception for the statements of a decedent in actions against his estate was created to balance the fact that we are permitting the claimant to testify in the action. The claimant does not have to give pretrial notice of his testimony; hence, we see no reason for the estate to give pretrial notice of the decedent's hearsay.

Article 7 (Business Records). INCLUDE. A business record is authenticated by the custodian. He is likely to have little or no knowledge concerning the subject matter of the particular entry. Yet the adverse party's principal concern is with the veracity of the original declarant and the reliability of his perceptions. Here we are not dealing with natural or spontaneous effusions; we are dealing with carefully considered declarative statements. In McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696 (1945), the court held that the business records exception justified admission of a medical diagnosis appearing in a hospital record. In People v. Gorgol, 122 Cal.App.2d 281 (1953), a hospital record was admitted under the business records exception even though it contained the statement (the defendant was already under investigation for the charged crime): "I believe that the patient may be endeavoring to manipulate his way into the hospital in order to strengthen his defense." The court justified admitting the statement under the business records exception because the physician making the report would have been permitted to say the same thing in substance--but perhaps not the same words--if he had testified as a witness. See 122 Cal.App.2d at 302. We think that the policy underlying 1205 requires that the adverse party be given an opportunity to check

these statements prior to trial. Cross-examination of the custodian affords no protection at all.

Moreover, our decision on business records is strongly influenced by our decision on official records, for frequently official records can be qualified under both exceptions. We would not want to create a large gap in our requirement relating to official records by permitting those records to be offered under another exception that does not require compliance with 1205. Then, too, to distinguish between a record of a private hospital and a record of a public hospital insofar as 1205 is concerned seems to make little sense. And, to distinguish between the records of private schools and public schools, privately owned utilities and publicly owned utilities, etc., similarly makes little sense.

Accordingly, we think the need for determining the identity of the original declarant and his reliability is sufficiently great insofar as business records are concerned that they should be included in Section 1205.

Article 8 (Official Records). INCLUDE. Many of the considerations discussed in regard to business records are applicable here. But, in addition, an official record will be admitted in some cases without an appearance even by the custodian. Hence, the opportunity for cross-examination at the trial may be totally lacking. Our principal concern is with the accuracy and reliability of the original declarant--there is not much chance that the evidence offered will be incorrect--hence, the official records

exception seems to fall clearly within the criteria we discussed that indicate a need for inclusion within 1205.

Article 9 (Former Testimony). INCLUDE. Here, again, we are concerned principally with the reliability of the original declarant. There seems to be little likelihood that there will be serious dispute over the evidence of the former testimony in the usual case. The party concerned will have no opportunity to test the declarant by cross-examination at the trial. He is being compelled to rely on cross-examination at another place, in another trial, under different circumstances. Hence, he might at least be given some advance warning so that he can substitute investigation for cross-examination if he so desires.

Possibly former testimony offered against a person who was a party to the former proceeding might be excluded on the ground that opportunity for personal examination of the declarant has already been provided. However, we think the rule will be easier to administer if parties are not required to distinguish between different kinds of former testimony for procedural purposes. Moreover, direct examination under different circumstances, or even cross-examination under different circumstances, may not be an adequate substitute for pretrial notice and an opportunity for further investigation.

Article 10 (Judgments). EXCLUDE. Here we are concerned almost exclusively with the accuracy of the evidence being offered. The party is not going to call the judge for cross-examination. He is not going to question the jurors. They have no personal know-

ledge to impart. We see no reason for the inclusion of judgments that is not applicable to all other forms of evidence.

Moreover, it seems to us unwise to create a procedural distinction between judgments offered as hearsay and judgments offered for some other purpose--such as credibility.

Article 11 (Family History). EXCLUDE ALL EXCEPT CHURCH RECORDS AND CERTIFICATES. We include church records and certificates for the reasons applicable to business and official records. The remainder of the sections in the article are excluded for a variety of reasons. Many of the statements will not be in writing, so a uniform rule applicable to substantially all of the evidence admissible under the article will not be achieved. Other articles included in 1205 refer to evidence that is almost always in writing. We think, too, that our primary concern is with the accuracy of the testimony at the trial. Did the declarant actually make a statement, ante litem motam, concerning his own pedigree? Was the declarant actually so closely associated with the family whose history he stated that he was virtually a member of the family? The determination of these questions involves principally the veracity of trial witnesses, and we see no particular need to investigate the substance of their expected testimony that is distinguishable in any degree from the need to investigate the testimony of any other witness.

Entries in family bibles, carvings on crypts and gravestones, etc., will of course be in writing. But, nonetheless, we think the principal concern is again with the accuracy of the evidence at the trial.

Article 12 (Reputation; Statements Concerning Boundary). EXCLUDE. We have excluded the reputation exceptions because reputation evidence is usually not in writing. Moreover, the principal concern seems to be with the sufficiency of the trial witness's actual knowledge of the reputation.

The exception for statements concerning boundary might be included, for there appears to be some need to investigate the accuracy of the declarant's perception and narration as well as the accuracy of the evidence offered. However, the exception is little used. It has appeared in but three cases--two in 1860. The original declaration is likely to be oral, so that a general rule applicable to most statements within the exception will not be created by inclusion of it within Section 1205. Hence, on balance, we have concluded that it is more desirable to exclude it.

Article 13 (Dispositive Instruments and Ancient Writings. INCLUDE. It may be that there is little to distinguish these exceptions in principle from the family history exceptions. However, the declarations involved here are required to be in writing. Hence, unlike the family history exceptions, we can here impose a procedural requirement applicable to a complete category of evidence.

There are other reasons indicating exclusion. The principal matters to be investigated seem to be the foundational facts for admissibility--have the dealings with the property been consistent with the statement?--has the statement actually been acted upon as if true by the persons interested? These questions involve the veracity of the trial witnesses, not the reliability of the hearsay declarant.

Nonetheless, we recommend inclusion because there does seem to be some need to investigate the reliability of the original declarant's information as well.

Article 14 (Commercial, Scientific, and Similar Publications). INCLUDE. The early California cases (the only authorities on the subject) excluded commercial lists and the like--stock market quotations, price lists, etc.--unless an adequate foundation was laid in the form of evidence of the manner in which the list was prepared. The proponent was supposed to show whether the report was based on reports of actual sales, the sources of information, etc. Section 1340 dispenses with this foundation and substitutes the foundation of reliance by persons engaged in a particular occupation. The previous foundational facts, however, would seem to be an appropriate subject for inquiry and a proper basis for an attack on the reliability of the hearsay evidence. Hence, the 1205 notice is required in order to provide a party with opportunity to make the requisite investigation.

The California cases have limited the exception in Section 1341 (historical works, books of science or art) to matters which almost qualify for judicial notice. See Hearsay Study on URE 63(31). Certainly the facts of general notoriety and interest provable under Section 1341 shade into the indisputable facts or facts of common knowledge of which judicial notice may be taken. As a party must give adequate opportunity to the adverse party to meet his request for judicial notice of these matters, we think a party should also give adequate opportunity to the adverse party to meet

his evidence when he decides to prove such facts by evidence instead of relying on judicial notice.

The foregoing are our recommendations on inclusion and exclusion of hearsay exceptions from Section 1205. You will notice that the first subdivision of Section 1205 refers to all official writings. This is because many official writings may be admitted under some specific statute relating thereto instead of the general official records exceptions found in Article 8.

The second subdivision of Section 1205 is worded as it is in order that evidence that qualifies under an exception other than one listed may be admitted without regard to Section 1205 even though it might also be admissible under one of the exceptions listed in Section 1205.

We have followed in general the form of the rule recommended by the New Jersey Supreme Court Committee in Section 1205 instead of the URE Rule 64. For comparison, URE Rule 64 is as follows:

> Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such a copy.

The version now recommended by the New Jersey Committee is contained in Memorandum 64-49, p. 5.

Section 1223.

You instructed the staff to see if the parenthetical phrase "or in the judge's discretion as to the order of proof subject to" could be moved from its location immediately after the word "after". Subdivision (b) reflects this change. As similar provisions appear in Sections 1224 and 1225, we made comparable changes in those sections.

Section 1224.

The Commission directed the staff to revise Section 1224 to provide for the admission of co-conspirators' statements made before the party became a participant in the conspiracy as well as such statements that are made while the party was a participant in the conspiracy. This change, together with the change conforming to the revision of Section 1223(b), necessitated some redrafting. The revision of the section is indicated below:

> 1224. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> (a) The statement [~~is that of a co-conspirator of the party~~] was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and within the scope of his expressed or implied authority to act in furtherance of the objective of that conspiracy;
>
> (b) The statement was made [~~during the existence of the conspiracy and in furtherance of the common object thereof~~] prior to or during the time that the party was also participating in that conspiracy; and
>
> (c) The evidence is offered either after [~~, or in the judge's discretion as to the order of proof subject to,~~] admission of evidence sufficient to sustain a finding of the [~~existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made~~] facts specified in subdivisions (a) and (b) or, in the judge's discretion as to the order of proof, subject to the admission of such evidence.

Note particularly the revision of subdivision (a). Several times when this section has been under consideration doubt has been expressed as to the exact meaning of the phrase "in furtherance of the common object thereof". We have spelled the meaning out at greater length in subdivision (a) so that it will be abundantly clear that we are dealing here with one kind of an authorized admission.

Sections 1226 and 1227.

The Commission asked the staff to consider Section 1226 as revised to determine whether its reference to "right" is too broad--are more cases covered by the amended section than were intended to be covered by the amendment? The Commission also asked the staff to consider whether there are other situations analogous to those mentioned in Sections 1226 and 1227 where the same principle should be applied.

Sections 1226 and 1227 do, as a matter of fact, touch upon a larger principle. It is discussed at some length in Wigmore, Evidence §§ 1077-1086. The two branches of the principle are as follows:

> So far as one person is privy in obligation with another, i.e., is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. [4 Wigmore, Evidence 118.]
>
> The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (ante, § 1077). Having the same interest to learn the facts and the same motive to make correct statements, and being identical with the party (either contemporaneously or antecedently) in respect to his

> ownership of the right in issue, his admissions may, both in fairness and on principle, be proffered in impeachment of the present claim. [4 Wigmore, Evidence 134-135.]

Section 1226 (before its amendment at the July meeting) expressed the first branch of this principle. If a party--for example, a surety--is liable to be affected by the acts of another--in our example, his principal--the statements of the other are as admissible against the party as they are against the declarant. Wigmore gives as examples the principal-surety case, authorized admissions, and statements of joint obligors.

The amendment made of Section 1226 at the July meeting (inserting "right") was an attempt to articulate the second branch of the principle. Wigmore gives as examples statements of a decedent offered against his executor (under our statute as it read before the July meeting, such statements could be offered against the executor in an action against the estate but not in an action brought by the estate), statements of a bankrupt offered against the trustee in bankruptcy, and statements of a grantor of property offered against a grantee.

The common law carried this principle to the point of making admissible against a party any statement of a co-owner, joint obligor, joint obligee, etc. The Commission rejected this aspect of the common law when it decided that Section 1870(5) of the Code of Civil Procedure should be repealed. The Commission at one time also rejected the principle that the statement of a predecessor in title should be admissible against the successor and decided that Section 1849 should be repealed. See Hearsay Study pp. 597-598.

The rationale in the study that previously was deemed persuasive would justify omitting entirely Sections 1226 and 1227 as well as the existing Code

of Civil Procedure sections relating to statements of joint owners and predecessors in interest. It still persuades us there should be no general exception for statements of persons jointly interested. But, to permit admissions of a decedent to be introduced in actions against his estate and to require their exclusion in actions brought by his estate seems totally unjustifiable. Accordingly, we recommend the retention of Sections 1226 and 1227 with certain modifications. The modifications have necessitated a certain amount of redrafting. We have now articulated the principles involved in three sections--Sections 1226, 1227, and 1228.

The principles that we have identified and have attempted to draft in statutory form are as follows:

1. When the liability of a party is dependent upon the liability of another, a statement by that other is as admissible against the party as it would be against the declarant in an action on that liability. Conversely, where the right of a party that is being asserted in action--such as a right to damages for the defendant's negligence--may be defeated by a showing of a breach of duty on the part of another--such as contributory negligence--a statement by that other person is as admissible against the party as it would be against the declarant if he were the party.

Section 1226 now expresses this principle. We have eliminated the word "right" from the draft so that the admissibility of statements of declarants whose right or title is in issue might be handled in a separate section. The principal change in Section 1226 from the form in which it appeared at the July meeting is the insertion of the reference to "breach of duty". We believe this specific reference is necessary because the word "duty" alone does not appear to pick up the cases we believe should be

included. The word "duty" by itself appears to refer to some existing duty that is to be enforced as distinguished from a past duty that has been breached.

2. When a right or title asserted in an action requires a determination that such right or title existed or exists in another--as, for example, when an executor brings an action upon a cause of action of his decedent--a statement made by that other person while the holder of the right or title in question is as admissible against the party as it would be against the declarant if he were the party.

The insertion of the word "right" in Section 1226 was an attempt to state this principle. We believe that it is now stated more accurately in Section 1227. Under Section 1227, as under the common law, a statement made by the prececessor in interest after parting with title is inadmissible under this principle.

Subdivision (b) of Section 1227 contains the phrase "while the declarant was claimed by the party to be the holder . . ." for the following reasons stated by Wigmore:

> It is to be noted that, upon this principle, statements made before title accrued in the declarant will not be receivable. On the other hand, the time of divestiture, after which no statements could be treated as admissions, is the time when the party against whom they are offered has by his own hypothesis acquired the title; thus, in a suit, for example, between A's heir and A's grantee, A's statements at any time before his death are receivable against the heir; but only his statements before the grant are receivable against the grantee. [4 Wigmore, Evidence 153.]

3. Wrongful death cases, and wrongful injury of a child (C.C.P. § 376) cases, need separate treatment. At the July meeting, the Commission decided that the plaintiff in a wrongful death case stands so completely

on the right of the decedent that the decedent's admissions of the nonliability of the defendant should be admitted against plaintiff, even though as a technical matter the plaintiff is asserting an independent right. Because the wrongful death, wrongful child-injury causes of of action are technically independent, a separate section is needed to make the statements of the person injured or deceased admissible as admissions. Section 1228 does so.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§ 1200. The hearsay rule.

1200. (a) "Hearsay evidence" is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated.

(b) Except as provided by rule of law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

§ 1201. Multiple hearsay.

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

§ 1202. Credibility of hearsay declarant.

1202. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to the hearsay rule is not inadmissible for the purpose of discrediting the declarant, though he is given and has had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

§ 1203. Cross-examination of hearsay declarant.

1203. (a) Except as provided in subdivisions (b) and (c), the declarant of a statement that is admitted as hearsay evidence may be called as a witness by the adverse party and examined as if under cross-examination concerning the statement and its subject matter.

(b) This section is not applicable if the declarant is (1) a party, (2) an agent, partner, or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended, or (4) a witness who has testified in the action.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not inadmissible under this section because the declarant who made the statement is unavailable for cross-examination pursuant to this section.

§ 1204. Hearsay statement offered against criminal defendant.

1204. A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action unless the statement would be admissible under Section 1220 against the declarant if he were the defendant in a criminal action.

§ 1205. Pretrial notice of certain hearsay statements.

1205. The judge may exclude evidence of a writing that is offered as hearsay evidence if the proponent's intention to offer the evidence was not made known to the adverse party at such a time as to provide him with a fair opportunity to prepare to meet it and:

(a) The writing is a record or other writing in the custody of a public employee; or

(b) The evidence is inadmissible under the hearsay rule except under Article 7 (commencing with Section 1270), Article 8 (commencing with Section 1280), Article 9 (commencing with Section 1290), Article 13 (commencing with Section 1330), or Article 14 (commencing with Section 1340) of Chapter 2 of this division, or Sections 1315 or 1316 of this code.

§ 1206. No implied repeal.

1206. Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Confession or admission of criminal defendant.

1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the defendant in a criminal action if the statement was made by him freely and voluntarily and was not made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

§ 1221. Admission of party to civil action.

1221. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in a civil action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

§ 1222. Adoptive admission.

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption of it or his belief in its truth.

§ 1223. Authorized admissions.

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the judge's discretion as to the order of proof, subject to the admission of such evidence.

§ 1224. Admission of co-conspirator.

1224. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and within the scope of his express or implied authority to act in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was also participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the judge's discretion as to the order of proof, subject to the admission of such evidence.

§ 1225. Statement of agent, partner, or employee.

1225. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement is that of an agent, partner, or employee of the party;

(b) The statement concerned a matter within the scope of the agency, partnership, or employment and was made during that relationship;

(c) The statement would be admissible if made by the declarant at the hearing; and

(d) The evidence is offered either after proof of the existence of the relationship between the declarant and the party or, in the judge's discretion as to the order of proof, subject to such proof.

§ 1226. Statement of declarant whose liability or breach of duty is in issue.

1226. Evidence of a statement offered against a party in a civil action is not made inadmissible by the hearsay rule if:

(a) The liability, obligation, or duty of the declarant, or a breach of duty by the declarant, is in issue between the party and the proponent of the evidence; and

(b) The evidence would be admissible if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

§ 1227. Statement of declarant whose right or title is in issue.

1227. Evidence of a statement offered against a party in a civil action is not made inadmissible by the hearsay rule if:

(a) A right or title of the declarant is in issue between the party and the proponent of the evidence;

(b) The statement was made while the declarant was claimed by the party to be the holder of such right or title; and

(c) The evidence would be admissible if offered against the declarant in an action upon that right or title.

§ 1228. Statement of declarant in action for his wrongful injury or death.

1228. Evidence of a statement is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for the injury or death of the declarant.

Article 2. Declarations Against Interest

§ 1230. Declaration against interest.

1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Article 3. Prior Statements of Witnesses

1235. Prior inconsistent statement.

1235. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if:

(a) The statement would have been admissible if made by him while testifying, and

(b) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 787.

1236. Prior consistent statement.

1236. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if:

(a) The statement would have been admissible if made by him while testifying, and

(b) The statement is consistent with his testimony at the hearing and is offered in compliance with Section 788.

1237. Past recollection recorded.

1237. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying at the hearing and the statement concerns a matter as to which the witness has no present recollection and is contained in a writing which:

(a) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(b) Was made by the witness himself or under his direction or by some other person for the purpose of recording the witness' statement at the time it was made;

(c) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(d) ~~Is offered after the writing is authenticated as an accurate~~ record of the statement.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

1240. Spontaneous statement.

1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to state what the declarant perceived relating to an act, condition, or event which the statement narrates, describes, or explains; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

1241. Contemporaneous statement.

1241. Evidence of a statement that narrates, describes, or explains an act, condition, or event is not made inadmissible by the hearsay rule if the statement was made while the declarant was perceiving the act, condition, or event.

1242. Dying Declaration.

1242. Evidence of a statement made by a person since deceased is not made inadmissible by the hearsay rule if the statement would be admissible if made by the declarant at the hearing and was made under a sense of impending death, voluntarily and in good faith, and in the belief that there was no hope of his recovery.

Article 5. Statements of Mental or Physical State

1250 Statement of declarant's then existing physical or mental condition.

1250. (a) Subject to Section 1253, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) Such mental or physical condition is in issue and the evidence is offered on that issue; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

1251. Statement of declarant's previously existing physical or mental condition.

1251. Subject to Section 1253, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

(a) The declarant is unavailable as a witness; and

(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

1252. Statement of previous symptoms.

1252. Subject to Section 1253, evidence of a statement of the declarant's previous symptoms, pain, or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, is not made inadmissible

by the hearsay rule when relevant to an issue of the declarant's bodily condition.

1253. Limitation on admissibility of statements of mental or physical state.

1253. This article does not make evidence of a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

Article 6. Statements Relating to Wills and to Claims Against Estates

1260. Statement concerning declarant's will.

1260. (a) Evidence of a statement by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

(b) This section does not make evidence of a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1261. Statement of decedent offered in action against his estate.

1261. Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear and when the declarant in making such statement had no motive or reason to deviate from the truth.

Article 7. Business Records

1270. "A business."

1270. As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

1271. Business record.

1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business, at or near the time of the act, condition, or event;

(b) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1272. Absence of entry in business records.

1272. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the non-occurrence of the act or event, or the non-existence of the condition, if:

(a) It was the regular course of that business to make records of all such acts, conditions, or events, at or near the time of the act, condition, or event, and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business are such as to indicate that the absence of a record of an act, condition, or event warrants an inference that the act or event did not occur or the condition did not exist.

Article 8. Official Reports and Other Official Writings

1280. Report of public employee.

1280. Evidence of a writing made as a record or report of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made by and within the scope of duty of a public employee of the United States or a public entity of any state;

(b) The writing was made at or near the time of the act, condition, or event; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1281. Report of vital statistic.

1281. Evidence of a writing made as a record or report of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by statute to file the writing in a designated public office and the writing was made and filed as required by the statute.

1282. Finding of presumed death by authorized federal employee.

1282. A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (50 U.S.C. App. Supp. 1001-1016), as enacted or as heretofore or hereafter amended shall be received in any court, office or other place in this State as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

1283. Report by federal employee that person is missing, captured, or the like.

1283. An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force,

beleaguered by a hostile force, or besieged by a hostile force, or is dead, or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force, or is dead, or is alive, as the case may be.

1284. Statement of absence of public record.

1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

Article 9. Former Testimony

1290. "Former testimony."

1290. As used in this article, "former testimony" means testimony given under oath or affirmation in:

(a) Another action or in a former hearing or trial of the same action;

(b) A proceeding to determine a controversy conducted by or under the supervision of a governmental agency having the power to determine such a controversy;

(c) A deposition taken in compliance with law in another action; or

(d) An arbitration proceeding if the evidence of such former testimony is a correct verbatim transcript thereof made by a certified shorthand reporter.

1291. Former testimony offered against party to former proceeding.

1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine with an interest and motive similar to that which he has at the hearing, except that testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not made admissible by this paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action.

(b) Except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying in person.

1292. Former testimony offered against person not a party to former proceeding.

1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the people in a criminal action; and

(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying in person.

Article 10. Judgments

1300. Judgment of felony conviction.

1300. Evidence of a final judgment adjudging a person guilty of a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.

1301. Judgment against person entitled to indemnity.

1301. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment.

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment.

(c) Recover damages for breach of warranty substantially the same as a warranty determined by the judgment to have been breached.

1302. Judgment determining liability of third person.

1302. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

Article 11. Family History

1310. Statement concerning declarant's own family history.

1310. (a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, legitimacy, relationship by blood or marriage, racial ancestry, or other similar fact of his family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) This section does not make evidence of a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1311. Statement concerning family history of another.

1311. (a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, legitimacy, racial ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) This section does not make evidence of a statement admissible if the statement was made under circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1312. Entries in family records and the like.

1312. Evidence of entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, legitimacy, racial ancestry, or other similar fact of the family history of a member of the family by blood or marriage.

1313. Reputation in family concerning family history.

1313. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, legitimacy, racial ancestry, or other similar fact of the family history of a member of the family by blood or marriage and the evidence is offered to prove the truth of the matter reputed.

1314. Community reputation concerning family history.

1314. Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed.

1315. Church records concerning family history.

1315. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, racial ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if:

(a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271;

(b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing; and

(c) The writing was made as a record of a church, religious denomination or religious society.

1316. Marriage, baptismal, and similar certificates.

1316. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, racial ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

(a) The certificate was made by a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and

(b) The certificate was issued by such person at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

Article 12. Reputation and Statements Concerning Community History, Property Interests, and Character

1320. Reputation concerning community history.

1320. Evidence of reputation in a community is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

1321. Reputation concerning public interest in property.

1321. Evidence of reputation in a community is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed if the reputation concerns the interest of the public in property in the community and the reputation, if any, arose before controversy.

1322. Reputation concerning boundary or custom affecting land.

1322. Evidence of reputation in a community is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation, if any, arose before controversy.

1323. Statement concerning boundary.

1323. Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section if the statement was made under such circumstances

that the declarant in making such statement had motive or reason to deviate from the truth.

1324. Reputation concerning character.

1324. Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed.

Article 13. Dispositive Instruments and Ancient Writings

1330. Recitals in writings affecting property.

1330. Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

1331. Recitals in ancient writings.

1331. Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

Article 14. Commercial, Scientific, and Similar Publications

1340. Commercial lists and the like.

1340. Evidence of a statement, other than an opinion, contained in a tabulation, list, director, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon by persons engaged in an occupation as accurate.

1341. Publications concerning facts of general notoriety and interest.

1341. Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§1200. The hearsay rule.

Comment. Section 1200 states the hearsay rule. That hearsay evidence is inadmissible unless the evidence is within an exception to that rule has been the law of California since the earliest days of the state. See, e.g., People v. Bob, 29 Cal.2d 321, 175 P.2d 12 (1946); Kilburn v. Ritchie, 2 Cal. 145 (1852). Nevertheless, Section 1200 is the first statutory statement of the rule. Code of Civil Procedure Section 1845 (superseded by Evidence Code § 702) permits a witness to testify concerning those facts only that are personally known to him "except in those few express cases in which . . . the declarations of others, are admissible"; and that section has been considered to be the statutory basis for the hearsay rule. People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964). It has been recognized, however, as an insufficient basis for the hearsay rule. The section merely states the requirement of personal knowledge, and a witness testifying to the hearsay statement of another must have personal knowledge of that statement just as he must have personal knowledge of any other matter concerning which he testifies. Sneed v. Marysville Gas etc. Co., 149 Cal. 704, 708, 87 Pac. 376, 378 (1906).

Under Section 1200, exceptions to the hearsay rule must be created by statute. This will change the California law; for inasmuch as the rule excluding hearsay was not statutory, the courts have not been bound by the statutes in recognizing exceptions to the rule. See, People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964).

"Hearsay evidence" is defined in Section 155 as "evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." Under existing case law, too, the hearsay rule applies only to out-of-court statements that are offered to prove the truth of the matter asserted. If the statement is offered for some purpose other than to prove the fact stated therein, the evidence is not objectionable under the hearsay rule. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892, (1944); Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892). See WITKIN, CALIFORNIA EVIDENCE §§ 215-218 (1958).

The word "statement" that is used in the definition of "hearsay evidence" is defined in Section 225 as "oral or written expression" or "nonverbal conduct . . . intended . . . as a substitute for words in expressing the matter stated." Hence, evidence of a person's out-of-court conduct is not inadmissible under the hearsay rule expressed in Section 1200 unless that conduct is clearly assertive in character. Nonassertive conduct is not hearsay.

Some California cases have regarded evidence of nonassertive conduct as hearsay evidence if it is offered to prove the actor's belief in a particular fact as a basis for an inference that the fact believed is true. See, e.g., Estate of De Laveaga, 165 Cal. 607, 624, 133 Pac. 307, (1913)("the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extra-judicial expression of opinion on the part of the family"); People v. Mendez, 193 Cal. 39, 52, 223 Pac. 65, (1924) ("Circumstances of flight [of other persons from the scene of a crime] are in the nature of confessions . . . and are, therefore, in the nature of hearsay evidence").

Other California cases, however, have admitted evidence of nonassertive conduct as evidence that the belief giving rise to the conduct was based on fact. See, e.g., People v. Reifenstuhl, 37 Cal. App.2d 402, 99 P.2d 564 (1940)(hearing denied)(incoming telephone calls made for the purpose of placing bets admissible over hearsay objection to prove that place of reception was bookmaking establishment).

Under the Evidence Code, nonassertive conduct is not regarded as hearsay for two reasons: First, such conduct, being nonassertive, does not involve the veracity of the declarant; hence, one of the principal reasons for the hearsay rule--to exclude declarations where the veracity of the declarant cannot be tested by cross-examination--does not apply. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct because the actor has based his actions on the correctness of his belief. To put the matter another way, in such cases actions speak louder than words.

Of course, if the probative value of evidence of nonassertive conduct is outweighed by the likelihood that such evidence will confuse the issues, mislead the jury, or consume too much time, the judge may exclude the evidence under Section 352.

§ 1201. Multiple hearsay.

Comment. Section 1201 makes it possible to use admissible hearsay to prove another statement was made that is also admissible hearsay. For example, under Section 1201, an official reporter's transcript of the testimony at another trial may be used to prove the nature of the testimony previously given (Section 1280), the former testimony may be used

as hearsay evidence (under Section 1291) to prove that a party made an admission. The admission is admissible (Section 1221) to prove the truth of the matter stated. Thus, under Section 1201, the evidence of the admission contained in the transcript is admissible because each of the hearsay statements involved is within an exception to the hearsay rule.

Although no California case has been found where the admissibility of "multiple hearsay" has been analyzed and discussed, the practice is apparently in accord with the rule stated in Section 1201 See, e.g., People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946)(transcript of former testimony used to prove admission).

§ 1202. Credibility of hearsay declarant.

Comment. Section 1202 deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it makes clear that the rule applying to impeachment of a witness--that a witness may be impeached by a prior inconsistent statement only if he is provided with an opportunity to explain it--does not apply to a hearsay declarant.

The California courts have permitted a party to impeach hearsay evidence given under the former testimony exception with evidence of an inconsistent statement by the hearsay declarant, even though the declarant had no opportunity to explain or deny the inconsistency, when the inconsistent statement was made after the former testimony was given. People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946). The courts have also permitted dying

declarations to be impeached by evidence of contradictory statements by the deceased, although no foundation was laid. People v. Lawrence, 21 Cal. 368 (1863). Apparently, however, former testimony may not be impeached by evidence of an inconsistent statement made prior to the former testimony unless the would-be impeacher either did not know of the inconsistent statement at the time the former testimony was given or provided the declarant with an opportunity to deny or explain the inconsistent statement. People v. Greenwell, 20 Cal. App.2d 266, 66 P.2d 674 (1937) as limited by People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946).

Section 1202 substitutes for this case law a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to deny or explain the inconsistency. If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach. Cf., People v. Lawrence, 21 Cal. 368, 372 (1863). If the hearsay declarant is available, the party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies.

Of course, the trial judge may curb efforts to impeach hearsay declarants if he determines that the inquiry is straying into remote and collateral matters. Section 352.

Section 1202 provides that inconsistent statements of a hearsay declarant may not be used to prove the truth of the matters stated. In contrast, Section 1235 provides that evidence of prior inconsistent statements made by a trial witness may be admitted to prove the truth of the matters stated. Unless the declarant is a witness and subject to cross-examination upon the

subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

§ 1203. Cross-examination of hearsay declarant.

Comment. Hearsay evidence is generally excluded from evidence because of the lack of opportunity for the adverse party to cross-examine the hearsay declarant before the trier of fact. People v. Bob, 29 Cal.2d 321, 325, 175 P.2d 12, (1946). In some situations, hearsay evidence is admitted because of some exceptional need for the evidence and because there is some circumstantial evidence of trustworthiness that justifies a violation of a party's right of cross-examination. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, (1957); Turney v. Sousa, 146 Cal. App.2d 787, 791, 304 P.2d 1025, (1956).

Even though it is necessary or desirable to permit some hearsay evidence to be received without guaranteeing the adverse party the right to cross-examine the declarant, there seems to be no reason to prohibit the adverse party from cross-examining the declarant altogether. The policy in favor of cross-examination that underlies the hearsay rule, therefore, indicates that the adverse party should be accorded the right to call the declarant of a statement that has been received and to cross-examine him concerning the subject matter of his statement.

Hence, Section 1203 has been included in the Evidence Code to reverse, insofar as a hearsay declarant is concerned, the traditional rule that a witness called by a party is a witness for that party and may not be cross-examined by him. As a hearsay declarant is in practical effect a witness

against that party, Section 1203 gives the party against whom a hearsay statement is admitted the right to call and cross-examine the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at the trial.

§ 1204. Hearsay statement offered against criminal defendant.

Comment. In People v. Underwood, 61 Cal.2d ___, ___ P.2d ___, 37 Cal. Rptr. 313 (1964), the California Supreme Court held that a prior inconsistent statement of a witness could not be introduced to impeach him in a criminal trial when the prior inconsistent statement would have been inadmissible as an involuntary confession if the witness had been the defendant. Section 1204 applies the principle of the Underwood decision to all hearsay statements.

§ 1205. Pretrial delivery of copy of certain hearsay statements.

Comment. [The form of this rule has not yet been formulated.]

§ 1206. No implied repeal.

Comment. Although some of the statutes providing for the admission of hearsay evidence will be repealed when the Evidence Code is enacted, there will remain in the various codes a number of statutes which, for the most part, are narrowly drawn to make a particular type of hearsay evidence admissible under specifically limited circumstances. It is neither desirable nor feasible to repeal these statutes. Section 1206 makes it clear that these statutes will not be impliedly repealed by the enactment of the Evidence Code.

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Confession or admission of criminal defendant.

Comment. Section 1220 restates the existing law governing the admissibility of the confession or admission of a defendant in a criminal action. People v. Jones, 24 Cal.2d 601, 150 P.2d 801 (1944); People v. Rogers, 22 Cal.2d 787, 141 P.2d 722 (1943); People v. Loper, 159 Cal.6, 112 P. 720 (1910); People v. Speaks, 156 Cal. App.2d 25, 319 P.2d 709 (1957); People v. Haney, 46 Cal. App. 317, 189 Pac. 338 (1920); People v. Lisenba, 14 Cal.2d 403, 94P.2d 569 (1939); People v. Atchley, 53 Cal.2d 160, 346 P.2d 764 (1959). See also 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 at 475-482 (1963).

Although subdivision (b) is technically unnecessary, for the sake of completeness it is desirable to give express recognition to the fact that any rule of admissibility established by the Legislature is subject to the requirements of the Federal and State Constitutions.

§ 1221. Admission of party to civil action.

Comment. Section 1221 states existing law as found in Code of Civil Procedure Section 1870(2). The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant, since the party himself made the statement. Moreover, the party can cross-examine the witness who testifies to the party's statement and can deny or explain the purported admission. The statement need not be one which would be admissible if made at the hearing. See Shields v. Oxnard Harbor Dist., 46 Cal. App.2d 477, 116 P.2d 121 (1941).

§ 1222. Adoptive admission.

Comment. Section 1222 restates and supersedes subdivision 3 of Code of Civil Procedure Section 1870. 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 at 484 (1963).

§ 1223. Authorized admission.

Comment. Section 1223 provides a hearsay exception for authorized admissions. Under this exception, if a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same conditions as if they had been made by the party himself. Section 1223 restates and supersedes the first portion of subdivision 5 of Code of Civil Procedure Section 1870. 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 at 484-490 (1963).

§ 1224. Admission of co-conspirator.

Comment. Section 1224 is a specific example of a kind of authorized admission that is admissible under Section 1223. The statement is admitted because it is an act of the conspiracy for which the party, as a co-conspirator, is legally responsible. People v. Lorraine, 90 Cal. App. 317, 327, 265 Pac. 893, (1928). See CAL. CONT. ED. BAR, CALIFORNIA CRIMINAL LAW PRACTICE 471-472 (1964). Section 1224 restates and supersedes the provisions of subdivision 6 of Code of Civil Procedure Section 1870.

§ 1225. Statement of agent, partner, or employee.

Comment. Section 1223 makes authorized extrajudicial statements admissible. Section 1225 goes beyond this, making admissible against a party

specified extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under Section 1225, however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions.

The practical scope of Section 1225 is quite limited. The spontaneous statements that it covers are admissible under Section 1240. The self-inculpatory statements which it covers are admissible under Section 1230 as declarations against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by Section 1225 would be admissible as inconsistent statements under Section 1235. Thus, Section 1225 has independent significance only as to unauthorized, nonspontaneous, noninculpatory statements of agents, partners and employees who do not testify at the trial concerning the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under Section 1230, it would be inadmissible as an authorized admission under Section 1223, it would be inadmissible under Section 1235 unless the employee testified inconsistently at the trial, it would be inadmissible under Section 1240 unless made spontaneously, but it would be admissible under Section 1225.

Section 1225 goes beyond existing California law as found in subdivision 5 of Section 1870 of the Code of Civil Procedure (superseded by Evidence Code Section 1223). Under existing California law only the statements that the principal has authorized the agent to make are admissible. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 (1903).

There are two justifications for the limited extension of the exception for agents' statements provided by Section 1225. First, because of the relationship which existed at the time the statement was made, it is unlikely that the statement would have been made unless it were true. Second, the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

§ 1226. Statement of declarant whose liability is in issue.

Comment. Section 1226 restates in substance a hearsay exception found in Section 1851 of the Code of Civil Procedure (superseded by Evidence Code Sections 1226 and 1302). Cf., Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115 (1888); Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956); Standard Oil Co. v. Houser, 101 Cal. App.2d 480, 225 P.2d 539 (1950). Section 1226, however, limits this hearsay exception to civil actions. Much of the evidence within this exception is also covered by Section 1230, which makes admissible declarations against interest. However, to be admissible under Section 1230 the statement must have been against the declarant's interest when made whereas this requirement is not stated in Section 1226.

Section 1302 supplements the rule stated in Section 1226. Section 1302 permits the admission of judgments against a third person when one of the issues between the parties is the liability, obligation, or duty of the third person and the judgment determines that liability, obligation, or duty. Together, Sections 1226 and 1302 codify the holdings of the cases applying Code of Civil Procedure Section 1851. 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 at 491-496 (1963).

Article 2. Declarations Against Interest

§ 1230. Declaration against interest.

Comment. Section 1230 codifies the hearsay exception for declarations against interest as that exception has been developed in the California courts. People v. Spriggs, 60 Cal.2d ___, 389 P.2d 377, 36 Cal. Rptr. 841 (1964). It is not clear, however, whether existing law extends the declaration against interest exception to include statements that make the declarant an object of hatred, ridicule, or social disgrace in the community.

Section 1230 supersedes the partial and inaccurate statements of the declarations against interest exception found in Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). See People v. Spriggs, 60 Cal.2d at ___, 389 P.2d at 380-381, 36 Cal. Rptr. at 844-845 (1964).

Article 3. Prior Statements of Witnesses

§ 1235. Prior inconsistent statement.

Comment. Under existing law, a prior statement of a witness that is inconsistent with his testimony at the trial is admissible, but because of the hearsay rule such statements may not be used as evidence of the truth of the matters stated. They may be used only to cast discredit on the testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 456, (1917).

Section 1235, however, permits a prior inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise

admissible under the rules relating to the impeachment of witnesses. In view of the fact that the declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter, there seems to be little reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that they cannot believe a witness was telling the truth on a former occasion when they believe the contrary story given at the trial is not true. Moreover, in many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to litigation.

Section 1235 will permit a party to establish a prima facie case by introducing prior inconsistent statements of witnesses. This change in the law, however, will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

§ 1236. Prior consistent statement.

Comment. Under existing law, a prior statement of a witness that is consistent with his testimony at the trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is admitted, however, only to rehabilitate the witness--to support his credibility--and not as evidence of the truth of the matters stated. People v. Kynette, 15 Cal.2d 731, 753-754, (1940).

Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible

under the rules relating to the rehabilitation of impeached witnesses. The reasons for this change in the law are much the same as those discussed in the Comment to Section 1235.

§ 1237. Past recollection recorded.

Comment. Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." The section makes no radical departure from existing law, for its provisions are taken largely from the provisions of Section 2047 of the Code of Civil Procedure. There are, however, two substantive differences between Section 1237 and existing California law:

First, existing law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the fact recorded in the writing actually occurred or at such other time when the fact was fresh in the witness' memory and (3) that the witness "knew that the same was correctly stated in the writing." Under Section 1237, however, the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness' statement at the time it was made. In addition, Section 1237 permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under Section 1237 the document or other writing embodying the statement is itself admissible in evidence whereas under the present law the declarant reads the writing on the witness stand and the writing is not otherwise made a part of the record unless it is offered in evidence by the adverse party.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

§ 1240. Spontaneous statement.

Comment. Section 1240 is a codification of the existing exception to the hearsay rule which makes excited statements admissible. Showalter v. Western Pacific R.R., 16 Cal.2d 460, 106 P.2d 895 (1940); 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 465-466 (1963). The rationale of this exception is that the spontaneity of such statements and the declarant's state of mind at the time when they are made provide an adequate guarantee of their trustworthiness.

§ 1241. Contemporaneous statement.

Comment. Section 1241, which provides a hearsay exception for contemporaneous statements, may go beyond existing law, for no California case in point has been found. Elsewhere the authorities are conflicting in their results and confused in their reasoning owing to the tendency to discuss the problem only in terms of res gestae. 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 at 466-468 (1963).

The statements admissible under subdivision (2) are highly trustworthy because: (1) the statement being simultaneous with the event, there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who has equal opportunity to observe and check misstatements. In applying this exception, the courts should insist on actual contemporaneousness; otherwise, the trustworthiness of the statements becomes questionable.

§ 1242. Dying declaration.

Comment. Section 1242 is a broadened form of the well-established exception to the hearsay rule which makes dying declarations admissible. The existing law--Code of Civil Procedure Section 1870(4) as interpreted by our courts--makes such declarations admissible only in criminal homicide actions and only when they relate to the immediate cause of the declarant's death. People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). 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 472-473 (1963). The rationale of the exception--that men are not apt to lie in the shadow of death--is as applicable to any other declaration that a dying man might make as it is to a statement regarding the immediate cause of his death. Moreover, there is no rational basis for differentiating, for the purpose of the admissibility of dying declarations, between civil and criminal actions, or among various types of criminal actions.

Under Section 1242, the dying declaration is admissible only if it would be admissible if made by the declarant at the hearing. Thus, the dying declaration is admissible only if the declarant would have been a competent witness and made the statement on personal knowledge.

Article 5. Statements of Mental or Physical State

§ 1250. Statement of declarant's then existing physical or mental condition.

Comment. Section 1250 provides an exception to the hearsay rule for statements of the declarant's then existing physical or mental condition. It

codifies an exception that has been developed by the courts.

Thus, under Section 1250 as under existing law, a statement of the declarant's state of mind at the time of the statement is admissible when that state of mind is itself in issue in the case. Adkins v. Brett, 184 Cal. 252, 193 Pac. 5 (1920). A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior to the statement. Watenpaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959); Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530 (1942); Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921); Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915). Section 1250 also makes a statement of then existing state of mind admissible to "prove or explain acts or conduct of the declarant." Thus, a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944); Benjamin v. District Grand Lodge, 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition are also admissible to prove the existence of such condition. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496 (1919); People v. Wright, 167 Cal. 1, 138 Pac. 349 (1914).

A statement is not admissible under Section 1250 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

In light of the definition of "hearsay evidence" in Section 155, a distinction should be noted between the use of a declarant's statements of his then existing mental state to prove such mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state.

Under the Evidence Code, if the declarant's statements are not being used to prove the truth of their contents but are being used as circumstantial evidence of the declarant's mental state, no hearsay problem is involved. See the Comment to Section 1200.

Section 1250 (b) does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind--his memory or belief--concerning the past event. If the evidence of that state of mind--the statement of memory--were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.

The limitation in Section 1250(b) is, in general, in accord with the law developed in the California cases. Thus, in Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921), a declaration of a testatrix made after the execution of a will to the effect that the will had been made at an aunt's request was held to be inadmissible hearsay "because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it." 185 Cal. at 720, 198 Pac. at 415 (1921).

A major exception to the principle expressed in Section 1250(b) was created in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that statements made by the victims of a double homicide relating threats by the defendant were admissible to show the victims' mental state--their fear of the defendant. Their fear was not itself in issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct

engendering the fear, i.e., that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. In People v. Purvis, 56 Cal.2d 93, 362 P.2d 713, 13 Cal. Rptr. 801 (1961), the doctrine of the Merkouris case was limited to cases where identity is in issue.

Section 1250(b) is contrary to the Merkouris case. The doctrine of that case is repudiated because it is an attack on the hearsay rule itself. Other exceptions to the hearsay rule are based on some peculiar reliability of the evidence involved. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, (1957). The exception created by Merkouris was not based on any evidence of the reliability of the declarations, it was based on a rationale that destroys the very foundation of the hearsay rule.

§ 1251. Statement of declarant's previously existing physical or mental condition.

Comment. Section 1250 forbids the use of a statement of memory or belief to prove the fact remembered or believed. Section 1251, however, permits a statement of memory or belief of a past mental state to be used to prove the previous mental state when the previous mental state is itself in issue in the case. If the past mental state is to be used merely as circumstantial evidence of some other fact, the limitation in Section 1250 still applies and the statement of the past mental state is inadmissible hearsay.

Section 1251 is generally consistent with the California case law, which also permits a statement of a prior mental state to be used as evidence of that

mental state. See, e.g., People v. One 1948 Chevrolet Conv. Coupe, 45 Cal.2d 613, 290 P.2d 538 (1955) (statement of prior knowledge admitted to prove such knowledge). However, Section 1251 requires that the declarant be unavailable as a witness. No similar condition on admissibility has been imposed by the cases. Note, too, that no similar condition appears in Section 1250.

A statement is not admissible under Section 1251 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

§ 1252. Statement of previous symptoms.

Comment. Under existing California law, a statement of previous symptoms made to a physician for purposes of treatment is considered inadmissible hearsay; although the physician may relate the statement as a matter upon which he based his diagnosis of the declarant's ailment. See discussion in People v. Brown, 49 Cal.2d 577, 585-587, 320 P.2d 5, (1958).

Section 1252 permits statements of previous symptoms made to a physician for purposes of treatment to be used to prove the facts related in the statements. If there is no motive to falsify such statements, they are likely to be highly reliable, for the declarant in making them has based his actions on his belief in their truth--he has consulted the physician and has permitted the physician to use them as a basis for prescribing treatment. Statements made to a physician where there is a motive to manufacture evidence or any other motive to deceive are inadmissible under this section because of the limitation in Section 1253.

§ 1251
§ 1252

§ 1253. Limitation on admissibility of statements of mental or physical state.

Comment. Section 1253 limits the admissibility of hearsay statements that would otherwise be admissible under Sections 1250, 1251, and 1252. If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence. The limitation expressed in Section 1253 has been held to be a condition of admissibility in some of the California cases. See, e.g., People v. Hamilton, 55 Cal.2d 881, 893, 895, 13 Cal. Rptr. 649, , , 362 P.2d 473, , (1961); People v. Alcalde, 24 Cal.2d 177, 187, 148 P.2d 627, (1944).

The Hamilton case mentions some further limitations on the admissibility of statements of mental state. These are not given express recognition in the Evidence Code. However, under Section 352, the judge may in a particular case exclude such evidence if he determines that its prejudicial effect will substantially outweigh its probative value. The specific limitations mentioned in the Hamilton case have not been codified because they are difficult to understand in the light of conflicting and inconsistent language in the case and because in a different case, prosecuted without the excessive prejudice present in the Hamilton case, a court might be warranted in receiving evidence of the kind involved there where its probative value is great.

For example, the opinion states that statements of a homicide victim that are offered to prove his state of mind are inadmissible if they refer solely to alleged past conduct on the part of the accused. 55 Cal.2d at 893-894, 13 Cal. Rptr. at , 362 P.2d at . But the case also states, nonetheless, that statements of "threats . . . on the part of the accused" are admissible on the

issue. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . The opinion also states that the statements, to be admissible, must refer primarily to the state of mind of the declarant and not the state of mind of the accused. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . But the case also indicates that narrations of threats made by the accused--statements of his intent--are admissible, but statements of conduct by the accused having no relation to his intent or mental state are not admissible. 55 Cal.2d at 893, 895-896, 13 Cal. Rptr. at 362 P.2d at .

Much of the evidence involved in the Hamilton case is not classified as hearsay under the Evidence Code. It is classified as circumstantial evidence. Hence, the problem presented there is not essentially a hearsay problem. It is a problem of the judge's discretion to exclude highly prejudicial evidence when its probative value is not great. Section 352 of the Evidence Code continues the judge's power to curb the use of such evidence. But the Evidence Code does not freeze the courts to the arbitrary and contradictory standards mentioned in the Hamilton case for determining when prejudicial effect outweighs probative value.

Article 6. Statements Relating to Wills and to Claims Against Estates

§ 1260. Statement concerning declarant's will.

Comment. Section 1260 codifies an exception recognized in California case law. Estate of Morrison, 198 Cal. 1, 242 Pac. 939 (1926); Estate of Tompson, 44 Cal. App.2d 774, 112 P.2d 937 (1941). The section is, of course, subject to the provisions of Probate Code Sections 350 and 351 which relate to the establishment of a lost or destroyed will.

The limitation in subdivision (b) is not mentioned in the few decisions involving this exception. The limitation is desirable, however, to assure the reliability of the hearsay admissible under this section.

§ 1261. Statement of decedent offered in action against his estate.

Comment. The Dead Man Statute (subdivision 3 of Code of Civil Procedure Section 1880) prohibits a party suing on a claim against a decedent's estate from testifying to any fact occuring prior to the decedent's death. The theory apparently underlying the statute is that it would be unfair to permit the surviving claimant to testify to such facts when the decedent is precluded from doing so by his death. Because the dead cannot speak, the living may not.

The Dead Man Statute operates unsatisfactorily. It prohibits testimony concerning matters of which the decedent had no knowledge. It does not prohibit testimony relating to claims under, as distinguished from against, the decedent's estate even though the effect of such a claim may be to frustrate the decedent's plan for the disposition of his property. See the Comment to Code of Civil Procedure Section 1880 and Recommendation and Study Relating to the Dead Man Statute, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at D-1 (1957). Hence, the Dead Man Statute is not continued in the Evidence Code.

To equalize the positions of the parties, the Dead Man Statute excludes otherwise relevant and competent evidence--even if it is the only available evidence. This forces the courts to decide cases with a minimum of information concerning the actual facts. See the Supreme Court's complaint in Light v. Stevens, 159 Cal. 288, 292, 113 Pac. 659, 660 (1911): "Owing to the fact that the lips of one of the parties to the transaction are closed by death and those of the other party by the law, the evidence on this question is somewhat unsatisfactory."

Section 1261 balances the positions of the parties in the opposite manner. It is based on the belief that the problem at which the Dead Man Statute is directed is better solved by throwing more light, not less, on the actual facts. Instead of excluding the competent evidence of the claimant, Section 1261 permits the hearsay statements of the decedent to be admitted, provided that they would have been admissible had the decedent made the statements as a witness at the hearing. Certain additional safeguards--recent perception, absence of motive to falsify--are included in the section to provide some protection for the party against whom the statements are offered, for he has no opportunity to test the hearsay by cross-examination.

Article 8. Business Records

§ 1270. "A business."

Comment. This article restates and supersedes the Uniform Business Records as Evidence Act appearing in Sections 1953e-1953h of the Code of Civil Procedure. The definition of "a business" in Section 1270 is substantially the same as that appearing in Code of Civil Procedure Section 1953e. A reference to "governmental activity" has been added to the Evidence Code definition to make it clear that records maintained by any governmental agency are admissible if the foundational requirements are met. This does not change existing California law, for the Uniform Act has been construed to be applicable to governmental records. See, e.g., Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569 (1952); Fox v. San Francisco Unified School Dist., 11 Cal. App.2d 885, 245 P.2d 603 (1952).

The definition is sufficiently broad to encompass institutions not customarily thought of as businesses. For example, the baptismal and wedding records of a church would be admissible under the section to prove the events recorded. 5 WIGMORE, EVIDENCE 371 (3d ed. 1940). Cf. EVIDENCE CODE § 1315.

§ 1271. Business record.

Comment. Section 1271 is the business records exception to the hearsay rule. It is stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e-1953h of the Code of Civil Procedure). Section 1271 does not, however, include the language of Section 1953f.5 of the Code of Civil Procedure because that section is not contained in the Uniform Act and inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf or some other form. The case-law rule is satisfactory and Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act. 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 at 516 (1963).

§ 1272. Absence of entry in business records.

Comment. Technically, evidence of the absence of a record may not be hearsay. Section 1272 removes any doubt that there might be, however, concerning the admissibility of such evidence under the hearsay rule. It codifies existing case law. People v. Torres, 201 Cal. App.2d 290, 20 Cal. Rptr. 315 (1962).

Article 8. Official Reports and Other Official Writings

§ 1280. Report of public employee.

Comment. Section 1280 restates in substance and supersedes Code of Civil Procedure Sections 1920 and 1926.

The evidence that is admissible under this section is also admissible under Section 1271, the business records exception. However, Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance. Under Section 1280, as under existing law, the court may admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court has judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness. See, e.g., People v. Williams, 64 Cal. 87, 27 Pac. 939 (1883) (census report admitted, the court noting the statutes prescribing the method of preparing the report); Vallejo etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 Pac. 238, 250 (1915) (statistical report of state agency admitted, the court noting the statutory duty to prepare the report).

§ 1281. Report of vital statistic.

Comment. Section 1281 provides a hearsay exception for official reports concerning birth, death, and marriage. Reports of such events occurring within California are now admissible under the provisions of Section 10577 of the Health and Safety Code. Section 1281 provides a broader exception which includes similar reports from other jurisdictions.

§ 1282. Finding of presumed death by authorized federal employee.

Comment. Section 1282 restates and supersedes the provisions of Code of Civil Procedure Section 1928.1. The evidence admissible under Section 1282 is limited to evidence of the fact of death and of the date, circumstances, and place of disappearance.

The determination of the date of the presumed death by the federal employee is a determination ordinarily made for the purpose of determining whether the pay of a missing person should be stopped and his name stricken from the payroll. The date so determined should not be given any consideration in the California courts since the issues involved in the California proceedings require determination of the date of death for a different purpose. Hence Section 1282 does not make admissible the finding of the date of presumed death. On the other hand, the determination of the date, circumstances, and place of disappearance is reliable information that will assist the trier of fact in determining the date when the person died and is admissible under this section. Often the date of death may be inferred from the circumstances of the disappearance. See, In re Thornburg's Estate, 186 Or. 570, 208 P.2nd 349 (1949); Lukens v. Camden Trust Co., 2 N.J. Super. 214, 62 A.2nd 886 (1948).

Section 1282 provides a convenient and reliable method of proof of death of persons covered by the Federal Missing Persons Act. See, e.g., In re Jacobsen's Estate, 208 Misc. 443, 143 N.Y.S.2nd 432 (1955)(proof of death of 2-year old dependent of serviceman where child was passenger on plane lost at sea).

§ 1283. Report by federal employee that person is missing, captured, or the like.

Comment. Section 1283 restates and supersedes the provisions of Code of Civil Procedure Section 1928.2. The language of Section 1928.2 has been revised to reflect the 1953 amendments to the Federal Missing Persons Act.

§ 1284. Statement of absence of public record.

Comment. Just as the existence and content of a public record may be proved under Section 1510 by a copy accompanied by the attestation or certificate of the custodian reciting that it is a copy, the absence of such a record from a particular public office may be proved under Section 1284 by a writing made by the custodian of the records in that office stating that no such record was found after a diligent search. The writing must, of course, be properly authenticated. See Sections 1401, 1451. The exception is justified by the likelihood that such statement made by the custodian of the records is accurate and by the necessity for providing a simple and inexpensive method of proving the absence of a public record.

Article 9. Former Testimony

§ 1290. "Former testimony."

Comment. The purpose of Section 1290 is to provide a convenient term for use in the substantive provisions in the remainder of this article. It should be noted that depositions taken in another action are considered former testimony under Section 1290, and their admissibility is determined by Sections 1291 and 1292.

The use of a deposition taken in the same action, however, is not covered by this article. Code of Civil Procedure Sections 2016-2035 deal comprehensively with the conditions and circumstances under which a deposition taken in a civil action may be used at the trial of the action in which the deposition was taken, and Penal Code Sections 1345 and 1362 prescribe the conditions for admitting the deposition of a witness that has been taken in the same criminal action. These sections will continue to govern the use of depositions in the action in which they are taken.

§ 1291. Former testimony offered against party to former proceeding.

Comment. Section 1291 provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given. For example, if a series of cases arise involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met.

Former testimony is admissible under Section 1291 only if the declarant is unavailable as a witness.

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. This evidence, in effect, is somewhat analogous to an admission. If the party finds that the evidence he originally offered in his favor now works to his disadvantage, he can respond as any party does to an admission. Moreover, since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine.

Paragraph (2) of subdivision (a) of Section 1291 provides for the admissibility of former testimony where the party against whom it is now offered had the right and opportunity in the former proceeding to cross-examine the declarant with an interest and motive similar to that which he now has. Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence--lack of opportunity to cross-examine the declarant--is not applicable. On the other hand, paragraph (2) does not make the former testimony admissible where the party against whom it is offered did not have a similar motive and interest to cross-examine. In determining the similarity of interest and motive to cross-examine, the judge should be guided by practical considerations and not merely by the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

Under paragraph (2), testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not admissible against the defendant in a criminal case unless it was received in evidence at the trial of such other action. This limitation insures that the person accused of crime will have an adequate opportunity to cross-examine the witnesses against him.

Section 1291 supersedes Code of Civil Procedure Section 1870(8) which permits former testimony to be admitted in a civil case only if the former proceeding was an action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial of the action in which the testimony is offered. Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under Penal Code Section 686. Under that section, former testimony has been admissible against the defendant in a criminal action only if the former testimony was given in the same action--at the preliminary examination, in a deposition, or in a prior trial of the action.

Subdivision (b) of Section 1291 makes it clear that objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given, but others indicate that competency and privilege are to be determined as of the time the former testimony is offered in evidence. 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 at 581-585 (1963).

Subdivision (b) also provides that objections to the form of the question may not be used to exclude the former testimony. Where the former testimony is offered under paragraph (1) of subdivision (a), the party against whom the former testimony is now offered himself phrased the question; and where the former testimony comes in under paragraph (2) of subdivision (a), the party against whom the testimony is now offered had the opportunity to object to the form of the question when it was asked on the former occasion. Hence, the

party is not permitted to raise this technical objection when the former testimony is offered against him.

§ 1292. Former testimony offered against person not a party to former proceeding.

Comment. Section 1292 provides a hearsay exception for former testimony given at the former proceeding by a person who is now unavailable as a witness when such former testimony is offered against a person who was not a party to the former proceeding but whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant when the former testimony was given. For example, if a series of cases arise involving one occurence and one defendant but several plaintiffs, Section 1292 permits testimony given against the plaintiff in the first trial to be used against a plaintiff in a later trial if the conditions of admissibility stated in the section are met.

Code of Civil Procedure Section 1870(8) (which is superseded by this article), does not permit admission of the former testimony made admissible by Section 1292. The out-dated "identity of parties" and "identity of issues" requirements of Section 1870 are too restrictive, and Section 1292 substitutes what is, in effect, a more flexible "trustworthiness" approach characteristic of other hearsay exceptions. The trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine with an interest and motive similar to that of the present adverse party. Although the party against whom the former testimony is offered did not himself have an opportunity to cross-examine the witness on the former occasion, it can be generally assumed that most prior cross-examination is

adequate, especially if the same stakes are involved. If the same stakes are not involved, the difference in interest or motivation would justify exclusion. And, even where if the prior cross-examination was inadequate, there is better reason here for providing a hearsay exception than there is for many of the presently recognized exceptions to the hearsay rule. As Professor McCormick states:

> . . . I suggest that if the witness is unavailable, then the need for the sworn, transcribed former testimony in the ascertainment of truth is so great, and its reliability so far superior to most, if not all the other types of oral hearsay coming in under the other exceptions, that the requirements of identity of parties and issues be dispensed with. This dispenses with the opportunity for cross-examination, that great characteristic weapon of our adversary system. But the other types of admissible oral hearsay, admissions, declarations against interest, statements about bodily symptoms, likewise dispense with cross-examination, for declarations having far less trustworthiness than the sworn testimony in open court, and with a far greater hazard of fabrication or mistake in the reporting of the declaration by the witness. [McCormick, Evidence § 238, p. 501 (1954).]

Section 1292 does not make former testimony admissible against the defendant in a criminal case. This limitation preserves the right of a person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake--as it is in a criminal trial--the accused should not be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.

Subdivision (b) of Section 1292 makes it clear that objections based on competency or privilege are to be determined by reference to the time when the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given but others indicate that competency and privilege are to be determined as of the time

the former testimony is offered in evidence. 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 at 581-585 (1963).

Article 10. Judgments

§ 1300. Judgment of felony conviction.

Comment. Analytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. UNIFORM RULES OF EVIDENCE, RULE 63(20), Comment (1953); 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 at 539-541 (1963). It is in substance a statement of the court that determined the previous action ("a statement made other than by a witness while testifying at the hearing") that is offered "to prove the truth of the matter stated." Section 155. Therefore, unless there is an exception to the hearsay rule provided, a judgment is inadmissible if offered in a subsequent action to prove the matters determined. This article provides hearsay exceptions for certain kinds of judgments, and thus permits them to be used in subsequent actions as evidence despite the restrictions of the hearsay rule.

Of course, a judgment may, as a matter of substantive law, conclusively establish certain facts insofar as a party is concerned. Teitlebaum Furs, Inc. v. Dominion Ins. Co., 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962); Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942). The sections of this article do not purport to deal with the doctrines of res judicata and estoppel by judgment. These sections deal only with the evidentiary use of

judgments in those cases where the substantive law does not require that the judgments be given conclusive effect.

Section 1300 provides an exception to the hearsay rule for a final judgment adjudging a person guilty of a felony. The exception does not, however, apply in criminal actions. Hence, if a plaintiff sues to recover a reward offered by the defendant for the arrest and conviction of a person who committed a particular crime, Section 1300 permits the plaintiff to use a judgment of felony conviction as evidence that the person convicted committed the crime. But, Section 1300 does not permit the judgment to be used in a criminal action as evidence of the identity of the person who committed the crime or as evidence that the crime was committed.

Section 1300 will change the California law. Under existing California law, a conviction of a crime is inadmissible as evidence in a subsequent action. Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856 (1894) (evidence of murder conviction inadmissible to prove insured was intentionally killed); Burke v. Wells, Fargo & Co., 34 Cal. 60 (1867) (evidence of robbery conviction inadmissible to prove identity of robber in action to recover reward). The change, however, is desirable; for the evidence involved is peculiarly reliable. The seriousness of the charge assures that the facts will be thoroughly litigated, and the fact that the judgment must be based upon a unanimous determination that there was not a reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered.

The exception in Section 1300 for cases where the judgment is based on a plea of nolo contendere is a reflection of the policy expressed in Penal Code Section 1016.

§ 1300

§ 1301. Judgment against person entitled to indemnity.

Comment. If a person entitled to indemnity, or if the obligee under a warranty contract, complies with certain conditions relating to notice and defense, the indemnitor or warrantor is conclusively bound by any judgment recovered. CIVIL CODE § 2778(5); CODE CIV. PROC. § 1912; McCormick v. Marcy, 165 Cal. 386, 132 Pac. 449 (1913).

Where judgment against an indemnitee or person protected by a warranty is not made conclusive on the indemnitor or warrantor, Section 1301 permits the judgment to be used as hearsay evidence in an action to recover on the indemnity or warranty. Section 1301 reflects the existing law relating to indemnity agreements. CIVIL CODE § 2778, subdivision 6. Section 1301 probably restates the law relating to warranties, too, but the law in that regard is not altogether clear. Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92 (1905). But see Peabody v. Phelps, 9 Cal. 213 (1858).

§ 1302. Judgment determining liability of third person.

Comment. Section 1302 expresses an exception contained in Code of Civil Procedure Section 1851. Ellsworth v. Bradford, 186 Cal. 316, 199 Pac. 335 (1921); Nordin v. Bank of America, 11 Cal. App.2d 98, 52 P.2d 1018 (1936). Together, Evidence Code Sections 1302 and 1226 restate and supersede the provisions of Code of Civil Procedure Section 1851.

Article 11. Family History

§ 1310. Statement concerning declarant's own family history.

Comment. Section 1310 provides a hearsay exception for a statement concerning the declarant's own family history. It restates in substance and

supersedes Section 1870(4) of the Code of Civil Procedure. Section 1870(4), however, requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Section 240 makes the statement admissible under Section 1310.

The statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. This permits the judge to exclude the statement where it was made under such circumstances as to case doubt upon its trustworthiness. The requirement is basically the same as the requirement of existing case law that the statement be made at a time when no controversy existed on the precise point concerning which the declaration was made. See, e.g., Estate of Walder, 166 Cal. 446, 137 Pac. 35 (1913); Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960).

§ 1311. Statement concerning family history of another.

Comment. Section 1311 provides a hearsay exception for a statement concerning the family history of another. Paragraph (1) of subdivision (a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure, which it supersedes. Paragraph (2) is new to California law, but it is a sound extension of the present law to cover a situation where the declarant was a family housekeeper or doctor or so close a friend as to be included by the family in discussions of its family history.

There are two limitations on admissibility of a statement under Section 1311. First, a statement is admissible only if the declarant is unavailable as a witness within the meaning of Section 240. (Section 1870(4) requires that

the declarant be deceased in order for his statement to be admissible.) Second, a statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. For a discussion of this requirement, see comment to Section 1310.

§ 1312. Entries in family bibles and the like.

Comment. Section 1312 restates in substance and supersedes the provisions of Code of Civil Procedure Section 1870(13).

§ 1313. Reputation in family concerning family history.

Comment. Section 1313 restates in substance and supersedes the provisions of Code of Civil Procedure Sections 1852 and 1870(11). See Estate of Connors, 53 Cal. App.2d 484, 128 P.2d 200 (1942); Estate of Newman, 34 Cal. App.2d 706, 94 P.2d 356 (1939). However, Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." This qualification is not included in Section 1313 because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in Sections 1300 and 1311, might be.

The family tradition admitted under Section 1313 is necessarily multiple hearsay. If, however, such tradition were inadmissible because of the hearsay rule, and if direct statements of pedigree were inadmissible because they are based on such traditions (as most of them are), the courts would be virtually helpless in determining matters of pedigree. 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 at 548 (1963).

§ 1314. Community reputation concerning family history.

Comment. Section 1314 restates what has been held to be existing law under Code of Civil Procedure Section 1963(30) with respect to proof of the fact of marriage. See Estate of Baldwin, 162 Cal. 471, 123 Pac. 267 (1912); People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956). However, Section 1314 has no counterpart in California law insofar as proof of the date or fact of birth, divorce, or death is concerned, proof of such facts by reputation now being limited to reputation in the family. See Estate of Heaton, 135 Cal. 385, 67 Pac. 321 (1902).

§ 1315. Church records concerning family history.

Comment. Church records generally are admissible as business records under the provisions of Section 1271. Under Section 1271, such records would be admissible to prove the occurence of the church activity--the baptism, confirmation, or marriage--recorded in the writing. However, it is unlikely that Section 1271 would permit such records to be used as evidence of the age or relationship of the participants; for the business records act has been held to authorize business records to be used to prove only facts known personally to the recorder of the information or to other employees of the business. Patek & Co. v. Vineberg, 210 Cal. App.2d 20, 23, 26 Cal. Rptr. 293 (1962) (hearing denied); People v. Williams, 187 Cal. App.2d 355, 9 Cal. Rptr. 722 (1960); Gough v. Security Trust & Sav. Bank, 162 Cal. App.2d 90, 327 P.2d 555 (1958).

Section 1315 permits church records to be used to prove certain additional information. Facts of family history such as birth dates, relationships,

marital records, etc., that are ordinarily reported to church authorities and recorded in connection with the church's baptismal, confirmation, marriage, and funeral records may be proved by such records under Section 1315.

Section 1315 continues in effect and supersedes the provisions of Code of Civil Procedure Section 1919a without, however, the special and cumbersome authentication procedure specified in Code of Civil Procedure Section 1919b. Under Section 1315, church records must be authenticated in the same manner that other business records are authenticated.

§ 1316. Marriage, baptismal, and similar certificates.

Comment. Section 1316 provides a hearsay exception for marriage, baptismal, and similar certificates. This exception is somewhat broader than that found in Sections 1919a and 1919b of the Code of Civil Procedure (superseded by Sections 1315 and 1316). Sections 1919a and 1919b are limited to church records and hence, as respects marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure whereas certificates made admissible by Section 1316 need only meet the general authentication requirement of Section 1401.

Article 12. Reputation and Statements Concerning Community History, Property Interest, and Character.

§ 1320. Reputation concerning community history.

Comment. Section 1320 provides a wider rule of admissibility than does Code of Civil Procedure Section 1870(11), which it supersedes in part. Section 1870 provides in relevant part that proof may be made of "common reputation

existing previously to the controversy, respecting facts of a public or general nature more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor is it necessary to include in Section 1320 the requirement that the reputation existed previous to controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy.

§ 1321. Reputation concerning public interest in property.

Comment. Section 1321 preserves the rule in Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524, 192 Pac. 144 (1920). It does not require, however, that the reputation be more than 30 years old, but merely that the reputation arose before controversy. See Comment to Section 1320.

§ 1322. Reputation concerning boundary or custom affecting land.

Comment. Section 1322 restates in substance existing law as found in Code of Civil Procedure Section 1870(11), which it supersedes in part. See Muller v. So. Pac. Ry. Co., 83 Cal. 240, 23 Pac. 265 (1890); Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950 (1931).

§ 1323. Statement concerning boundary.

Comment. Section 1323 restates the substance of existing but uncodified California law found in such cases as Morton v. Folger, 15 Cal. 275 (1860) and Morcom v. Baiersky, 16 Cal. App. 480, 117 Pac. 560 (1911).

§ 1320
§ 1321
§ 1322
§ 1323

§ 1324. Reputation concerning character.

Comment. Section 1324 codifies a well-settled exception to the hearsay rule. See, e.g., People v. Cobb, 45 Cal.2d 158, 287 P.2d 752 (1955). Of course, character evidence is admissible only when the question of character is material to the matter being litigated. The only purpose of Section 1324 is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule.

Article 13. Dispositive Instruments and Ancient Writings

§ 1330. Recitals in writings affecting property.

Comment. Section 1330 restates in substance the existing California law relating to recitals in dispositive instruments. Although language in some cases appears to require that the dispositive instrument be ancient, cases may be found in which recitals in dispositive instruments have been admitted without regard to the age of the instrument. Russell v. Langford, 135 Cal. 356, 67 Pac. 331 (1902) (recital in will); Pearson v. Pearson, 46 Cal. 609 (1873) (recital in will); Culver v. Newhart, 18 Cal. App. 614, 123 Pac. 975 (1912) (bill of sale). There is a sufficient likelihood that the statements made in a dispositive document, when related to the purpose of the document, will be true to warrant the admissibility of such documents without regard to their age.

§ 1331. Recitals in ancient writings.

Comment. Section 1331 clarifies the existing California law relating to the admissibility of recitals in ancient documents by providing that such recitals are admissible under an exception to the hearsay rule. Code of Civil

Procedure Section 1963(34) (superseded by Evidence Code) provides that a document more than 30 years old is presumed genuine if it has been generally acted upon as genuine by persons having an interest in the matter. The Supreme Court has held that a document meeting this section's requirements is presumed to be genuine--presumed to be what it purports to be--but that the genuineness of the document imports no verity to the recitals contained therein. Gwin v. Calegaris, 139 Cal. 384, 389, 73 Pac. 851, 853 (1903). Recent cases decided by district courts of appeal, however, have held that the recitals in such a document are admissible to prove the truth of the facts recited. E.g., Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960); Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1956). And in some of these cases the courts have not insisted that the hearsay statement itself be acted upon as true by persons with an interest in the matter; the evidence has been admitted upon a showing that the document containing the statement is genuine. The age of a document alone is not a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence. Accordingly, Section 1331 makes clear that the hearsay statement itself must have been generally acted upon as true for at least a generation by persons having an interest in the matter.

Article 14. Commercial, Scientific, and Similar Publications

§ 1340. Commercial lists and the like.

Comment. Section 1340 codifies an exception that has been recognized by statute and by the courts in specific situations. See, e.g., COM. CODE § 2724; Emery v. So. Cal. Gas Co., 72 Cal. App.2d 821, 165 P.2d 695 (1946);

Christiansen v. Hollings, 44 Cal. App.2d 332, 112 P.2d 723 (1941).

§ 1341. Publications concerning facts of general notoriety and interest.

Comment. Section 1341 recodifies without substantive change Section 1936 of the Code of Civil Procedure.

§ 1340
§ 1341

#34(L) 9/4/64

Memorandum 64-66

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 10--Hearsay Evidence)

We have received no further comments on the hearsay division. There are, however, several important matters that remain to be considered.

Court-made exceptions; People v. Gould; inconsistent statements

At the last meeting, the Commission considered whether Section 1200 should permit the courts to continue to fashion exceptions to the hearsay rule. There were not enough votes to change the present policy of permitting the courts to continue to fashion exceptions. The Commission considered the fact that the prior identification exception created in People v. Gould will probably be continued as a result of the decision to permit the courts to create exceptions; but there were not enough votes either to codify the People v. Gould exception (in order to make our list as complete as possible) or to expressly deny the existence of such an exception. The Commission indicated that it wished to consider the matter further.

Related to the foregoing problem is the exception for prior inconsistent statements of witnesses. The Commission was concerned about the fact that this exception permits a prior identification inconsistent with the testimony at the trial to be shown as substantive evidence, while if the Gould exception is not continued, a prior identification vouched for by the witness at the trial would not be admissible as substantive evidence. There were insufficient votes to change the prior inconsistent statement exception; but the Commission asked the staff to report on the effect of the exception on trial practice.

Inconsistent statements. We report on the exception for inconsistent statements of witnesses first because we think that the decision here has some

bearing on the decision to be made on the Gould matter.

We all know, of course, that under existing law prior inconsistent statements of trial witnesses are not substantive evidence. Section 1235 will change that rule. It is the existing law, also, that a party cannot impeach his own witness in the absence of surprise, etc. Section 785 will change that rule.

A corollary of the foregoing rules is that even in those situations where a party may impeach his own witness (surprise, etc.) he is not permitted to do so unless the witness has given testimony unfavorable to the party. The party may not impeach merely because the witness has failed to give testimony the party expected--even though the party is surprised by the failure. People v. Mitchell, 94 Cal. 550 (1892). The reason for this rule is that the impeaching evidence is irrelevant when the witness has not given testimony that is damaging to the impeaching party--there is no need to impair the credibility of a witness whose testimony is innocuous.

A change in the inconsistent statement rule and a change in the impeachment rule will also change the corollary rule just mentioned for the inconsistent statement will no longer be irrelevant since it is substantive evidence of the matters stated.

We think the best way to illustrate the effect of these changes is to show how these rules would have operated in the decided cases.

> People v. Jacobs, 49 Cal. 384 (1874). J was convicted of burglary for the purpose of rape. Prosecution called K as a witness and asked if J had previously made threats that he would commit the offense. K testified that no threats were made. The prosecution claimed surprise, cross-examined K concerning such statements by J, and still failed to get the desired answers. After laying the proper foundation, the prosecution called deputy sheriff D who testified that K had stated to him that J had made such threats.
>
> The Supreme Court reversed, for K had given no evidence damaging to the prosecution and the prosecution should not have

been permitted to impeach. McKinstry, J., in concurrence said: "But when a witness has not given adverse testimony, the party calling him ought not to be permitted to prove that he made statements which, if sworn to at the trial, would tend to make out his case. To admit the proof of such statements would enable the party to get the naked declarations of the witness before the jury as independent evidence."

Under the Evidence Code, the decision would be affirmed because the "declarations of the witness" are "independent evidence."

People v. Mitchell, 94 Cal. 550 (1892). C was shot to death about midnight while standing on the back porch of a saloon in Red Bluff. L was prosecuted and acquitted. M was then prosecuted for the murder and was convicted. B was called as a defense witness. B's brother was also charged with being implicated in the crime. B testified that he did not attempt to get money from H to aid L in fleeing and thus save his brother. The prosecution then called H who testified that B had asked for money to aid L's flight, but H testified that B did not say this was to save his brother. The prosecution was then permitted, after laying the proper foundation, to show that H had testified in the first trial--the trial of L for the murder--that B had said the money was to save his brother.

The Supreme Court reversed, for H had not testified against the prosecution; he had "simply failed to testify to a fact which the district attorney thought he could prove by him."

Under the Evidence Code, the trial court's rulings would have been correct.

People v. Crespi, 115 Cal. 50 (1896). C was convicted of criminal libel. The publication complained of reported that A, a newspaper publisher, was paid by "the Camorra" to libel and vilify certain people. "The camorra" was supposed to be a confederation of Italians banded together for dishonest and dishonorable purposes. C called A as a witness in an attempt to prove the existence of the camorra and A's connection with it. He asked A if A had not stated--giving time, place, persons present--that he had instituted the prosecution of C at the instance of others. A denied making the statement. D sought to impeach with evidence of the statement, but the prosecution's objection was sustained.

The Supreme Court affirmed. "It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him. Indeed, he was apparently questioned for the sole purpose of impeachment. Such practice is not permissible."

Under the Evidence Code, the trial court's ruling would be erroneous.

Thiele V. Newman, 116 Cal. 571 (1897). P recovered a judgment for treble damages for injury caused his land by a fire originating on adjoining land. The incident involved three parcels of property. P and D owned the outside parcels and R owned the middle parcel. D hired R to tend D's stock. R testified that D told R to set fire to some grass on D's land. R also testified that, without instruction from D, R set fires on his own land because he thought it would make the grass better the following year. It was a fire set on R's land that escaped and injured P's land. P's theory was the R set the fire on R's land at D's direction and for D's benefit; hence, D was liable under respondeat superior. P was permitted to produce two or three witnesses who testified that R had said that the fire on R's land was set for the benefit of D.

The Supreme Court reversed for lack of evidence to show that R set fire to his own land for the benefit of D.

Under the Evidence Code, the prior statements of R would be admissible to prove the matters stated; but even so, it seems dubious that there was any evidence of an agency on the part of R to set the fire in question.

Albert v. McKay & Co., 174 Cal. 451 (1917). A was killed by machinery in a lumber mill where he was employed. There were no eyewitnesses. The plaintiff widow's theory was that the machine was negligently set in motion while A was working adjacent to it. There was abundant evidence that the machine was not stopped prior to the accident and, hence, that the machine was not negligently started. Plaintiff impeached one defense witness by showing that he had said shortly after the accident that the machinery had not been running and somebody must have started it after A had started working. The plaintiff recovered a judgment.

The Supreme Court reversed for lack of evidence. The impeaching statement was held not to support the verdict because it was not substantive evidence.

Under the Evidence Code, the impeaching statement would be substantive evidence. Whether the result of the case would be changed is uncertain. The facts recited by the court indicate a lack of evidence that the defendant knew or had reason to know A was where he was.

People v. Brown, 81 Cal. App. 226 (1927). B was convicted of the murder of C. The prosecution claimed that B--or a co-conspirator--struck C on the head and killed him. B claimed that C fell off a windmill tower and struck his head on a cogwheel. The prosecution called witness W (who had passed by at the time of the events in question) and asked him what he had seen. W replied that he had merely seen three cars parked there. After laying the proper foundation, including testimony by the distric attorney himself that W had told him that W would testify differently, the prosecution called three witnesses who

testified that W had said that he had seen C, the deceased, staggering out the back door "like a chicken with his head cut off." One witness testified that he had asked W, "like a drunk man?" and that W had replied, "No, worse than that. Like a chicken with the head cut off."

The DCA reversed, holding the admission of this testimony to be error. W had given no testimony damaging to the prosecution; he had merely failed to testify as expected. Hence, it was improper to permit his impeachment.

Under the Evidence Code, the admission of this testimony would have been proper.

People v. Zoffel, 35 Cal. App.2d 215 (1939). Z was prosecuted, and convicted, as an accomplice to an abortion-murder committed by a "defrocked" doctor (he had been convicted of harboring John Dillinger). The prosecution's theory was that Z was living with the doctor and acting as his nurse. The doctor admitted that a woman had been living with him and acting as his nurse, but he denied that she was Z. To prove the nurse and Z were the same, the prosecution called the manager of the apartment house; but the witness testified that the nurse and Z were not the same person. The prosecution then called a detective who testified that the night Z was arrested she was taken to the apartment house and that the manager had then identified her as the woman living in the apartment.

The DCA reversed for lack of evidence that Z was the nurse who participated in the abortion-murder, holding incidentally that prior identification evidence was insufficient to place Z at the apartment house because such evidence merely impeached, it did not prove the matters stated.

Under the Evidence Code, this case might have had a different result. Certainly, the prior identification is substantive evidence under Section 1235. This case is an interesting one to compare with People v. Gould, for both involved prior identifications. If the reference to "law" is changed to "statute" in Section 1200, the prior identification involved here would still be substantive evidence; but if the witnesses at the trial confirmed the prior identification instead of denying it, the prior identification would be inadmissible hearsay.

The foregoing cases amply illustrate the effect that Section 1235 will have on the conduct of trials. Whether the effect is good or bad depends on the relative reliability of the prior statements in comparison with the testimony elicited from the witness at the trial. In some of the cases appearing above, the out-of-court statements seem more reliable than the at-trial testimony.

At least, it seems that the jury, seeing the witness on the stand and under examination, might be in a good position to evaluate the relative reliability of the in-court and out-of-court statements.

There can be no doubt, however, that the change of the hearsay rule together with the change of the impeachment rule will have a dramatic effect on the way cases are tried. I was surprised to find as many cases as I did in which the result on appeal actually turned on the effect of inconsistent statements as substantive evidence. It seems likely that a great many more never appear at the appellate level because correctly decided below, and less well-settled doctrines can be argued for appeal purposes. It seems likely, too, that because cases cannot be tried at the present time by impeaching your own witnesses, cases just aren't prepared for that type of presentation.

The Commission may retain the proposal in Section 1235. Or, the Commission may repeal Section 1235 and let inconsistent statements be used for impeachment purposes only. We recommend, however, that Section 1235 be retained. The jury and judge have the witness before them subject to thorough cross-examination. They have as adequate a basis for determining the truth of the prior statement as they do of the in-court statement.

The Commission might restore the impeachment rule. We do not recommend this course of action, for it represents a return to the idea that a party vouches for the witnesses he produces--and this idea, we have been advised, does not correspond with the actual facts. In truth, a party must use the witnesses available. He has no control over who has witnessed an event. The witnesses are not his champions nor are they on his team. He should be able to utilize such parts of their testifony as are of value to him and repudiate the rest.

The Commission might, too, retain only the rule that a party cannot impeach a witness with inconsistent statements if the witness has not testified

to any damaging facts. This would confine the hearsay exception, then, to those impeaching statements that would come in for impeachment purposes anyway. This change would preclude a party from proving his case by impeaching witnesses who have disappointed him by failing to testify as he desires. We recommend against such a provision, however, for the reasons stated above for not deleting Section 1235.

Court-made exceptions; People v. Gould. There is little we can contribute here. The Commission is familiar with the problem. The problem involves those previously made exceptions that the Commission has specifically considered and failed to approve. The only one we know of is the prior identification exception involved in People v. Gould. Unless the Gould rule is specifically repudiated by statute, Section 1200 will permit the court to create the exception again when the next case is presented involving the issue.

If the Gould case is not to be specifically repudiated, the question is whether it should be given statutory recognition so that our catalog of hearsay exceptions will be complete. We proposed a rule at one time limiting the Gould rule to those cases where the witness testifies that a true identification was made at the prior time and the witness, because of memory failure, is unable to repeat the identification at the trial. The only question under such a rule is the reliability of the evidence of the prior identification; and since that must be proved by a percipient witness, the problems of reliability are no greater and no less than they are with any other kind of eyewitness testimony.

Police reports

At the last meeting, the Commission instructed the staff to add a provision to both the business records rule and the official records rule excluding law enforcement officers' reports from criminal actions. We have added such a provision, but we used the term "peace officer" because it is the more precise term.

Since this action was taken without benefit of a research study to indicate the extent to which such reports are admissible or inadmissible under existing law, we thought we should provide such a report. It may be that there are more refined ways of eliminating the abusive use of police reports--if there is any--than by excluding them altogether. After all, in some cases, such reports may be valuable to the defense as well as to the prosecution. Such a report, made by an unavailable officer, may contain a declaration against penal interest implicating another instead of the defendant, just as such a report may contain an admission by the defendant implicating himself. Then, too, it may be important to either defense or prosecution to prove that the reported arrest took place or took place at a particular time noted in the arrest report.

The following discussion considers civil as well as criminal cases; but, as Justice Peters once noted in a different context (presumptions), unless some provision of law expressly provides otherwise the rules of evidence in criminal cases are the same as they are in civil cases. People v. Hewlett, 108 Cal. App.2d 358, 374 (1951); Pen. C. § 1102. Hence, restrictions on the admissibility of police reports developed in civil cases are applicable to criminal cases as well.

There are two bases for the admission of official documents under existing law: Section 1920 of the Code of Civil Procedure and the Uniform Business Records as Evidence Act. Nilsson v. State Personnel Board, 25 Cal. App.2d 699 (1938)(admitting State personnel record prior to enactment of Uniform Business Records Act; Nichols v. McCoy, 38 Cal.2d 447 (1952)(admitting record of test made in coroner's office as a business record).

Section 1920 states no conditions of admissibility for official records. It says they are prima facie evidence of their contents. Despite the unqualified statement in Section 1920, "[i]t has been held repeatedly that those sections

[1920 and 1926] cannot have universal literal application." Chandler v. Hibberd, 165 Cal. App.2d 39, 65 (1958).

Before exploring the basis upon which the courts admit some official reports and exclude others despite the unqualified statutory language, we will look at the Uniform Business Records Act. Section 1953f of the Code of Civil Procedure (the operative section of the act) requires the court to find that "the sources of information, method and time of preparation were such as to justify its admission." In giving meaning to this vague standard, the courts have held that the person making the record have "had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some person employed in the business whose duty it was to make the same in the regular course of business." Gough v. Security Trust & Savings Bank, 162 Cal. App.2d 90 (1958).

This standard has been applied to official reports--including police and similar reports--whether the report is offered under the official reports exception in Section 1920 or the business records exception in Section 1953f. Thus, a transcript of the testimony given at a coroner's inquest, although an official report, is inadmissible while the coroner's report of matters known to him is admissible. People v. Lessard, 58 Cal.2d 447, 455-456 (1962). A fire inspector's report on the origin of a fire in inadmissible when the report indicates that it is not based on personal knowledge of the inspector. Harrigan v. Chaperon, 118 Cal. App.2d 167 (1953). In Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959), the court held that a fire ranger's investigation report of the origin of a fire was inadmissible as a business record because based on hearsay, and that the report was still inadmissible if the ground urged was Section 1920 of the Code of Civil Procedure ("The above mentioned code sections [§§ 1920, 1926] could never have been intended to apply to reports based entirely upon hearsay").

As a result of the foregoing doctrines, the courts have repeatedly held that police reports are almost always inadmissible. In MacLean v. City & County of San Francisco, 151 Cal. App.2d 133 (1957), the court indicated that most such reports are inadmissible because based on the description of witnesses and others at the scene of the accident. "Such informants, of course, have no business duty to render reports to the police." At p. 143. The court indicated that either a police report should show on its face that it is based on personal knowledge or a qualifying witness should so testify if it is to be held admissible.

Hoel v. City of Los Angeles, 136 Cal. App.2d 295 (1955), is to the same effect. Holding a police report inadmissible, under both Sections 1920 and 1953f, the court said, "The extract from the report which was received at bar was essentially hearsay, as counsel for both sides asserted; it was not admissible under the suggested exceptions to the hearsay rule . . . ." At p. 310.

In contrast with the foregoing cases, however, Harris v. Alcoholic Bev. Con. Appeals Board, 212 Cal. App.2d 106 (1963), held that police reports are admissible to prove the matters known to the police officer making the report--such as the fact that an arrest was made. The question before the court was whether a particular bar constituted a law enforcement problem because of the large number of arrests for drunkenness made on the premises. The licensee produced testimony that few if any arrests for drunkenness were made on the premises. In rebuttal, the ABC Department introduced 101 arrest records of the San Francisco Police Department. To show that the arrests were not frivolous, other records showing the conviction of the arrested persons for drunkenness were also introduced.

One other matter should be noted in regard to the business records and official records exceptions as they have been developed by the courts. Under neither exception is an incompetent opinion admissible merely because it appears in an appropriate record. People v. Terrell, 138 Cal. App.2d 35 (1955), held that a diagnosis of "prob. criminal abortion" was inadmissible even though contained in a hospital record otherwise admissible as a business or official record. "[I]t constituted a conclusion to which the doctor who made the notation could not have testified to if called as a witness." Similarly, in Hutton v. Brookside Hospital, 213 Cal. App.2d 350 (1963), a nurse's notation in a hospital record that a patient "seemed too ill to be moved" was held inadmissible because the matter stated "was not one upon which the nurse was qualified to give an opinion." In Pruett v. Burr, 118 Cal. App.2d 188, 200 (1953), the court quoted the following with approval: "but records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records."

In the light of the foregoing, there does not appear to be any abusive use of police reports sanctioned by the cases under the existing law. The amendments made to Sections 1271 and 1280 at the last meeting were apparently designed to keep out official reports that are not admitted under existing law. They resulted from a fear that the change in the statutory language from that of Section 1920 to that of Section 2180 would encourage the courts to admit reports based on hearsay.

To meet this problem, Sections 1271 and 1280 might be amended to incorporate the limitation that the reports admissible under those sections

be based on the personal knowledge either of the recorder or of a person whose business or official duty it was to make such reports in the regular course of the business or office.

Such an amendment would meet precisely the problem that subdivision (b) of each section was aimed at. The present solution to the problem is too broad. Where alibi is in issue, either the prosecution of the defense might want a particular arrest report admitted to prove or disprove the claimed whereabouts of the defendant. We think that a police report should be admitted to prove such a matter just as a hotel register is admitted under the business records exception for the same purpose.

Section 1203--cross-examination

One minor defect seems to be present in the cross-examination section. As a matter of policy, we think that a party should have the right to cross-examine a hearsay declarant--whether a party, witness, etc.--if the party would otherwise have the right to cross-examine the declarant in the action. For example, in a multi-party case, P may introduce witness W's out-of-court statement. D, the party who called W originally, should not be permitted to cross-examine W concerning the statement as W is his witness. But the rationale underlying Section 1203 indicates that defendant E, who is adverse to defendant D, should have the right to cross-examine W concerning the statement even if the subject involved was not covered on D's direct examination of W.

To accomplish this, Section 1203(b) might be modified as follows:

> (b) Unless the party seeking to cross-examine the declarant has the right apart from this section to cross-examine the declarant in the action, this section is not applicable if the declarant is . . . .

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§ 1200. The hearsay rule.

Comment. Section 1200 states the hearsay rule. The statement of the hearsay rule found here is based on the similar statement of the rule in Rule 63 of the Uniform Rules of Evidence.

That hearsay evidence is inadmissible unless the evidence is within an exception to that rule has been the law of California since the earliest days of the state. See, e.g., People v. Bob, 29 Cal.2d 321, 175 P.2d 12 (1946); Kilburn v. Ritchie, 2 Cal. 145 (1852). Nevertheless, Section 1200 is the first statutory statement of the rule. Code of Civil Procedure Section 1845 (superseded by Evidence Code § 702) permits a witness to testify concerning those facts only that are personally known to him "except in those few express cases in which . . . the declarations of others, are admissible"; and that section has been considered to be the statutory basis for the hearsay rule. People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964). It has been recognized, however, as an insufficient basis for the hearsay rule. The section merely states the requirement of personal knowledge, and a witness testifying to the hearsay statement of another must have personal knowledge of that statement just as he must have personal knowledge of any other matter concerning which he testifies. Sneed v. Marysville Gas etc. Co., 149 Cal. 704, 708, 87 Pac. 376, 378 (1906).

"Hearsay evidence" is defined in Section 1200 as "evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." Under existing case law, too, the hearsay rule applies only to out-of-court statements that are offered to prove the truth of the matter asserted. If the statement is offered for some purpose other than to prove the fact stated therein, the evidence is not objectionable under the hearsay rule. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892, 896 (1944); Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892). See WITKIN, CALIFORNIA EVIDENCE §§ 215-218 (1958).

The word "statement" that is used in the definition of "hearsay evidence" is defined in Section 225 as "verbal conduct" or "nonverbal conduct . . . intended . . . . as a substitute for verbal conduct." Cf., Rule 62(1) of the Uniform Rules of Evidence. Hence, evidence of a person's out-of-court conduct is not inadmissible under the hearsay rule expressed in Section 1200 unless that conduct is clearly assertive in character. Nonassertive conduct is not hearsay.

Some California cases have regarded evidence of nonassertive conduct as hearsay evidence if it is offered to prove the actor's belief in a particular fact as a basis for an inference that the fact believed is true. See, e.g., Estate of De Laveaga, 165 Cal. 607, 624, 133 Pac. 307, 314 (1913)("the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extra-judicial expression of opinion on the part of the family"); People v. Mendez, 193 Cal. 39, 52, 223 Pac. 65, 70 (1924) ("Circumstances of flight [of other persons from the scene of a crime] are in the nature of confessions . . . and are, therefore, in the nature of hearsay evidence").

Other California cases, however, have admitted evidence of nonassertive conduct as evidence that the belief giving rise to the conduct was based on fact. See, e.g., People v. Reifenstuhl, 37 Cal. App.2d 402, 99 P.2d 564 (1940)(hearing denied)(incoming telephone calls made for the purpose of placing bets admissible over hearsay objection to prove that place of reception was bookmaking establishment).

Under the Evidence Code, nonassertive conduct is not regarded as hearsay for two reasons: First, such conduct, being nonassertive, does not involve the veracity of the declarant; hence, one of the principal reasons for the hearsay rule--to exclude declarations where the veracity of the declarant cannot be tested by cross-examination--does not apply. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct because the actor has based his actions on the correctness of his belief. To put the matter another way, in such cases actions speak louder than words.

Of course, if the probative value of evidence of nonassertive conduct is outweighed by the likelihood that such evidence will confuse the issues, mislead the jury, or consume too much time, the judge may exclude the evidence under Section 352.

Under Section 1200, exceptions to the hearsay rule may be found either in statutes or in decisional law. This continues the pre-existing California law; for inasmuch as the rule excluding hearsay was not statutory, the courts have recognized exceptions to the rule in addition to those exceptions expressed in the statutes. See, People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964).

§ 1201. Multiple hearsay.

Comment. Section 1201 makes it possible to use admissible hearsay to prove another statement was made that is also admissible hearsay. For example, under Section 1201, an official reporter's transcript

of the testimony at another trial may be used to prove the nature of the testimony previously given (Section 1280), the former testimony may be used as hearsay evidence (under Section 1291) to prove that a party made an admission. The admission is admissible (Section 1221) to prove the truth of the matter stated. Thus, under Section 1201, the evidence of the admission contained in the transcript is admissible because each of the hearsay statements involved is within an exception to the hearsay rule.

Although no California case has been found where the admissibility of "multiple hearsay" has been analyzed and discussed, the practice is apparently in accord with the rule stated in Section 1201 See, e.g., People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946)(transcript of former testimony used to prove admission).

Section 1201 is based on Rule 66 of the Uniform Rules of Evidence.

§ 1202. Credibility of hearsay declarant.

Comment. Section 1202 deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it makes clear that the rule applying to impeachment of a witness--that a witness may be impeached by a prior inconsistent statement only if he is provided with an opportunity to explain it--does not apply to a hearsay declarant.

The California courts have permitted a party to impeach hearsay evidence given under the former testimony exception with evidence of an inconsistent statement by the hearsay declarant, even though the declarant had no opportunity to explain or deny the inconsistency, when the inconsistent statement was made after the former testimony was given. People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946). The courts have also permitted dying

declarations to be impeached by evidence of contradictory statements by the deceased, although no foundation was laid. People v. Lawrence, 21 Cal. 368 (1863). Apparently, however, former testimony may not be impeached by evidence of an inconsistent statement made prior to the former testimony unless the would-be impeacher either did not know of the inconsistent statement at the time the former testimony was given or provided the declarant with an opportunity to deny or explain the inconsistent statement. People v. Greenwell, 20 Cal. App.2d 266, 66 P.2d 674 (1937) as limited by People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946).

Section 1202 substitutes for this case law a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to deny or explain the inconsistency. If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach. Cf., People v. Lawrence, 21 Cal. 368, 372 (1863). If the hearsay declarant is available, the party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies.

Of course, the trial judge may curb efforts to impeach hearsay declarants if he determines that the inquiry is straying into remote and collateral matters. Section 352.

Section 1202 provides that inconsistent statements of a hearsay declarant may not be used to prove the truth of the matters stated. In contrast, Section 1235 provides that evidence of prior inconsistent statements made by a trial witness may be admitted to prove the truth of the matters stated. Unless the declarant is a witness and subject to cross-examination upon the

subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

Section 1202 is based on Rule 65 of the Uniform Rules of Evidence.

§ 1203. Cross-examination of hearsay declarant.

Comment. Hearsay evidence is generally excluded from evidence because of the lack of opportunity for the adverse party to cross-examine the hearsay declarant before the trier of fact. People v. Bob, 29 Cal.2d 321, 325, 175 P.2d 12, 15 (1946). In some situations, hearsay evidence is admitted because of some exceptional need for the evidence and because there is some circumstantial evidence of trustworthiness that justifies a violation of a party's right of cross-examination. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957); Turney v. Sousa, 146 Cal. App.2d 787, 791, 304 P.2d 1025, 1027-1028 (1956).

Even though it is necessary or desirable to permit some hearsay evidence to be received without guaranteeing the adverse party the right to cross-examine the declarant, there seems to be no reason to prohibit the adverse party from cross-examining the declarant altogether. The policy in favor of cross-examination that underlies the hearsay rule, therefore, indicates that the adverse party should be accorded the right to call the declarant of a statement that has been received and to cross-examine him concerning the subject matter of his statement.

Hence, Section 1203 has been included in the Evidence Code to reverse, insofar as a hearsay declarant is concerned, the traditional rule that a witness called by a party is a witness for that party and may not be cross-examined by him. As a hearsay declarant is in practical effect a witness

against that party, Section 1203 gives the party against whom a hearsay statement is admitted the right to call and cross-examine the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at the trial.

§ 1204. Hearsay statement offered against criminal defendant.

Comment. In People v. Underwood, 61 Cal.2d ___, ___ P.2d ___, 37 Cal. Rptr. 313 (1964), the California Supreme Court held that a prior inconsistent statement of a witness could not be introduced to impeach him in a criminal trial when the prior inconsistent statement would have been inadmissible as an involuntary confession if the witness had been the defendant. Section 1204 applies the principle of the Underwood decision to all hearsay statements.

§ 1205. Pretrial notice of certain hearsay statements.

Comment. The introduction of hearsay evidence will, in many instances, deprive the party against whom the evidence is offered of the right to cross-examine the hearsay declarant. To compensate for this loss, Section 1205 requires that the proponent of certain kinds of hearsay evidence provide the adverse party with pretrial notice of his intention to offer the hearsay. The adverse party is thus afforded the opportunity to investigate the accuracy of the perceptions and the veracity of the original declarant; and, in some cases, he will be able to require the appearance of the original declarant for cross-examination under Section 1203.

The kinds of hearsay mentioned in Section 1205 are limited to those where there appears to be an especial need to investigate the accuracy of the hearsay statement as distinguished from the accuracy of the evidence of the statement that is being offered. For example, business and official

records are included because these writings sometimes contain medical diagnoses and similar opinions of declarants who will not be present to give direct testimony. See, e.g., McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 160 P.2d 797 (1945); People v. Gorgol, 122 Cal.App.2d 281, 265 P.2d 69 (1953). As the introduction of hearsay of this nature deprives the adverse party of his right to cross-examine the author of such an opinion, he should at least have the opportunity to investigate the sufficiency of the basis for the opinion. On the other hand, judgments are excluded; for the veracity of the judge and jurors who determined the matters decided in the judgment is not really involved.

Section 1205 applies only to hearsay statements that are in writing in order to provide easily identifiable categories of evidence that are subject to the notice requirement and, thus, to avoid any possibility of creating a trap for litigants and their counsel.

Section 1205 is based in principle on Rule 64 of the Uniform Rules of Evidence.

§ 1206. No implied repeal.

Comment. Although some of the statutes providing for the admission of hearsay evidence will be repealed when the Evidence Code is enacted, there will remain in the various codes a number of statutes which, for the most part, are narrowly drawn to make a particular type of hearsay evidence admissible under specifically limited circumstances. It is neither desirable nor feasible to repeal these statutes. Section 1206 makes it clear that these statutes will not be impliedly repealed by the enactment of the Evidence Code.

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Confession or admission of criminal defendant.

Comment. Section 1220 restates the existing law governing the admissibility of the confession or admission of a defendant in a criminal action. People v. Jones, 24 Cal.2d 601, 150 P.2d 801 (1944); People v. Rogers, 22 Cal.2d 787, 141 P.2d 722 (1943); People v. Loper, 159 Cal.6, 112 P. 720 (1910); People v. Speaks, 156 Cal. App.2d 25, 319 P.2d 709 (1957); People v. Haney, 46 Cal. App. 317, 189 Pac. 338 (1920); People v. Lisenba, 14 Cal.2d 403, 94P.2d 569 (1939); People v. Atchley, 53 Cal.2d 160, 346 P.2d 764 (1959). See also 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 at 475-482 (1963).

Although subdivision (b) is technically unnecessary, for the sake of completeness it is desirable to give express recognition to the fact that any rule of admissibility established by the Legislature is subject to the requirements of the Federal and State Constitutions.

§ 1221. Admission of party to civil action.

Comment. Section 1221 states existing law as found in Code of Civil Procedure Section 1870(2). The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant, since the party himself made the statement. Moreover, the party can cross-examine the witness who testifies to the party's statement and can deny or explain the purported admission. The statement need not be one which would be admissible if made at the hearing. See Shields v. Oxnard Harbor Dist., 46 Cal. App.2d 477, 116 P.2d 121 (1941).

§ 1222. Adoptive admission.

Comment. Section 1222 restates and supersedes subdivision 3 of Code of Civil Procedure Section 1870. 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 at 484 (1963).

§ 1223. Authorized admission.

Comment. Section 1223 provides a hearsay exception for authorized admissions. Under this exception, if a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same conditions as if they had been made by the party himself. Section 1223 restates and supersedes the first portion of subdivision 5 of Code of Civil Procedure Section 1870. 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 at 484-490 (1963).

§ 1224. Admission of co-conspirator.

Comment. Section 1224 is a specific example of a kind of authorized admission that is admissible under Section 1223. The statement is admitted because it is an act of the conspiracy for which the party, as a co-conspirator, is legally responsible. People v. Lorraine, 90 Cal. App. 317, 327, 265 Pac. 893, (1928). See CAL. CONT. ED. BAR, CALIFORNIA CRIMINAL LAW PRACTICE 471-472 (1964). Section 1224 restates and supersedes the provisions of subdivision 6 of Code of Civil Procedure Section 1870.

§ 1225. Statement of agent, partner, or employee.

Comment. Section 1223 makes authorized extrajudicial statements admissible. Section 1225 goes beyond this, making admissible against a party

specified extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under Section 1225, however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions.

The practical scope of Section 1225 is quite limited. The spontaneous statements that it covers are admissible under Section 1240. The self-inculpatory statements which it covers are admissible under Section 1230 as declarations against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by Section 1225 would be admissible as inconsistent statements under Section 1235. Thus, Section 1225 has independent significance only as to unauthorized, nonspontaneous, noninculpatory statements of agents, partners and employees who do not testify at the trial concerning the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under Section 1230, it would be inadmissible as an authorized admission under Section 1223, it would be inadmissible under Section 1235 unless the employee testified inconsistently at the trial, it would be inadmissible under Section 1240 unless made spontaneously, but it would be admissible under Section 1225.

Section 1225 is based on Rule 63(9)(a) of the Uniform Rules of Evidence; and it goes beyond existing California law as found in subdivision 5 of Section 1870 of the Code of Civil Procedure (superseded by Evidence Code Section 1223). Under existing California law only the statements that the principal has authorized the agent to make are admissible. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 (1903).

There are two justifications for the limited extension of the exception for agents' statements provided by Section 1225. First, because of the relationship which existed at the time the statement was made, it is unlikely that the statement would have been made unless it were true. Second, the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

§ 1226. Statement of declarant whose liability or breach of duty is in issue.

Comment. Section 1226 restates in substance a hearsay exception found in Section 1851 of the Code of Civil Procedure (superseded by Evidence Code Sections 1226 and 1302). Cf., Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115 (1888); Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956); Standard Oil Co. v. Houser, 101 Cal. App.2d 480, 225 P.2d 539 (1950). Section 1226, however, limits this hearsay exception to civil actions. Much of the evidence within this exception is also covered by Section 1230, which makes admissible declarations against interest. However, to be admissible under Section 1230 the statement must have been against the declarant's interest when made whereas this requirement is not stated in Section 1226. A comparable exception is found in Rule 9(c) of the Uniform Rules of Evidence.

Code of Civil Procedure Section 1951 has been construed to admit statements of a declarant whose breach of duty gives rise to a liability on the part of the party against whom the statements are offered. Nye & Nissen v. Central etc. Ins. Corp., 1 Cal. App.2d 570, 163 P.2d 100 (1945). Section 1226 of the Evidence Code refers specifically to

"breach of duty" in order to admit statements of a declarant whose breach of duty is in issue without regard to whether that breach gives rise to a liability of the party against whom the statements are offered or merely defeats a right being asserted by that party. For example, in Ingram v. Bob Jaffe Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956), a statement of a person permitted to operate a vehicle was admitted against the owner of the vehicle in an action seeking to hold the owner liable on the derivative liability of vechicle owners established by Vehicle Code Section 17150. Under Section 1226, the statement of the declarant would also be admissible against the owner in an action brought by the owner to recover for damage to his vehicle where the defense is based on the contributory negligence of the declarant.

Section 1302 supplements the rule stated in Section 1226. Section 1302 permits the admission of judgments against a third person when one of the issues between the parties is the liability, obligation, or duty of the third person and the judgment determines that liability, obligation, or duty. Together, Sections 1226 and 1302 codify the holdings of the cases applying Code of Civil Procedure Section 1851. 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 at 491-496 (1963).

§ 1227. Statement of declarant whose right or title is in issue.

Comment. Section 1227 expresses a common law exception to the hearsay rule that is recognized in part in Code of Civil Procedure Section 1849. Section 1849 (which is superseded by Section 1227) permits the

statements of predecessors in interest of real property to be admitted against the successors; however, the California cases follow the general rule of permitting predecessors' statements to be admitted against successors of either real or personal property. Smith v. Goethe, 159 Cal. 628, 115 Pac. 223 (1911); 4 Wigmore, Evidence §§ 1082 et seq. (3d ed. 1940).

Section 1227 supplements the rule provided in Section 1226. Under Section 1226, for example, a party suing an executor on an obligation incurred by the decedent prior to his death may introduce admissions of the decedent. Similarly, under Section 1227, a party sued by an executor on an obligation claimed to have been owed to the decedent may introduce admissions of the decedent.

It should be noted that, under subdivision (b), "statements made before title accrued in the declarant will not be receivable. On the other hand, the time of divestiture, after which no statements could be treated as admissions is the time when the party against whom they are offered has by his own hypothesis acquired the title; thus, in a suit, for example, between A's heir and A's grantee, A's statements at any time before his death are receivable aginst the heir; but only his statements before the grant are receivable against the grantee." 4 Wigmore, Evidence § 1082, p. 153 (3d ed. 1940).

Despite the limitations of Section 1227, some statements of a grantor made after divestiture of title will be admissible; but another theory of admissibility must be found. For example, later statements of his state of mind may be admissible on the issue of his intent. Sections 1250, 1251. And where it is claimed that a conveyance was in fraud of creditors, the later statements of the grantor may be admissible, not as hearsay, but

as evidence of the fraud itself. (Cf. Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 Pac. 967 (1901)) or they may be admissible as declarations of a co-conspirator in the fraud (Cf. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026 (1936)). See generally 4 Wigmore, Evidence § 1086 (3d ed. 1940).

§ 1228. Statement of declarant in action for his wrongful injury or death.

Comment. Under the pre-existing California law, an admission by a decedent is not admissible against his heirs or representatives in a wrongful death action brought by them. Hedge v. Williams, 131 Cal. 455, 64 Pac. 106 (1901); Carr v. Duncan, 90 Cal. App.2d 282, 202 P.2d 855 (1949); Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243 (1917). The reason is that the action is a new action, not merely a survival of the decedent's action.

This rule has been severely criticized and does not reflect the thinking of most American courts. Carr v. Duncan, 90 Cal. App.2d 282, 285, 202 P.2d 855, 856 (1949). Under Code of Civil Procedure Section 1851 (superseded by Evidence Code Section 1226), the admissions of a decedent are admissible to establish the liability of his executor. Similarly, when the executor brings an action for the decedent's death under Code of Civil Procdure Section 377, the defendant should be permitted to introduce the admissions of the decedent. Without such a rule, in an action between two executors arising out of an accident killing both participants, the plaintiff executor would be able to introduce admissions of the defendant's decedent but the defending executor would be unable to introduce admissions of the plaintiff's decedent.

Section 1228 changes the rule announced in the California cases and makes the admissions of the decedent admissible in wrongful death actions. It provides a similar rule for the analogous cases arising under Code of Civil Procedure Section 376.

Section 1228 recognizes that there is no reason, other than a technical procedural rule, to treat the admissions of a plaintiff's decedent differently from those of a defendant's decedent in an action brought under Code of Civil Procedure Section 377. The plaintiff in a wrongful death case--and the parent of an injured child in an action under Code of Civil Procedure Section 376--in reality stands so completely on the right of the deceased or injured person that such person's admissions of nonliability of the defendant should be admitted against the plaintiff, even though as a technical matter the plaintiff is asserting an independent right.

Article 2. Declarations Against Interest

§ 1230. Declaration against interest.

Comment. Section 1230 codifies the hearsay exception for declarations against interest as that exception has been developed in the California courts. People v. Spriggs, 60 Cal.2d ___, 389 P.2d 377, 36 Cal. Rptr. 841 (1964). It is not clear, however, whether existing law extends the declaration against interest exception to include statements that make the declarant an object of hatred, ridicule, or social disgrace in the community.

Section 1230 supersedes the partial and inaccurate statements of the declarations against interest exception found in Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). See People v. Spriggs, 60 Cal.2d at ___, 389 P.2d at 380-381, 36 Cal. Rptr. at 844-845 (1964). Section 1230 is based in large part on Rule 63(10) of the Uniform Rules of Evidence. The requirement that the declarant have "sufficient knowledge of the subject" continues the similar common law requirement stated in Code of Civil Procedure Section 1853 that the declarant must have had some peculiar means--such as personal observation--for obtaining accurate knowledge of the matter stated. See 5 Wigmore, Evidence § 1471 (3d ed. 1940).

Article 3. Prior Statements of Witnesses

§ 1235. Prior inconsistent statement.

Comment. Under existing law, a prior statement of a witness that is inconsistent with his testimony at the trial is admissible, but because of the hearsay rule such statements may not be used as evidence of the truth of the matters stated. They may be used only to cast discredit on the testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 456, 163 Pac. 666, 668 (1917).

Section 1235, however, permits a prior inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise

admissible under the rules relating to the impeachment of witnesses. In view of the fact that the declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter, there seems to be little reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that they cannot believe a witness was telling the truth on a former occasion when they believe the contrary story given at the trial is not true. Moreover, in many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to litigation.

Section 1235 will permit a party to establish a prima facie case by introducing prior inconsistent statements of witnesses. This change in the law, however, will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

§ 1236. Prior consistent statement.

Comment. Under existing law, a prior statement of a witness that is consistent with his testimony at the trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is admitted, however, only to rehabilitate the witness--to support his credibility--and not as evidence of the truth of the matters stated. People v. Kynette, 15 Cal.2d 731, 753-754, (1940).

Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible

under the rules relating to the rehabilitation of impeached witnesses. The reasons for this change in the law are much the same as those discussed in the Comment to Section 1235.

§ 1237. Past recollection recorded.

Comment. Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." The section makes no radical departure from existing law, for its provisions are taken largely from the provisions of Section 2047 of the Code of Civil Procedure. There are, however, two substantive differences between Section 1237 and existing California law:

First, existing law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the fact recorded in the writing actually occurred or at such other time when the fact was fresh in the witness' memory and (3) that the witness "knew that the same was correctly stated in the writing." Under Section 1237, however, the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness' statement at the time it was made. In addition, Section 1237 permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under Section 1237 the document or other writing embodying the statement is itself admissible in evidence whereas under the present law the declarant reads the writing on the witness stand and the writing is not otherwise made a part of the record unless it is offered in evidence by the adverse party.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

§ 1240. Spontaneous statement.

Comment. Section 1240 is a codification of the existing exception to the hearsay rule which makes excited statements admissible. Showalter v. Western Pacific R.R., 16 Cal.2d 460, 106 P.2d 895 (1940); 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 465-466 (1963). The rationale of this exception is that the spontaneity of such statements and the declarant's state of mind at the time when they are made provide an adequate guarantee of their trustworthiness.

§ 1241. Contemporaneous statement.

Comment. Section 1241, which provides a hearsay exception for contemporaneous statements, may go beyond existing law, for no California case in point has been found. Elsewhere the authorities are conflicting in their results and confused in their reasoning owing to the tendency to discuss the problem only in terms of res gestae. 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 at 466-468 (1963).

The statements admissible under subdivision (2) are highly trustworthy because: (1) the statement being simultaneous with the event, there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who has equal opportunity to observe and check misstatements. In applying this exception, the courts should insist on actual contemporaneousness; otherwise, the trustworthiness of the statements becomes questionable.

§ 1242. Dying declaration.

Comment. Section 1242 is a broadened form of the well-established exception to the hearsay rule which makes dying declarations admissible. The existing law--Code of Civil Procedure Section 1870(4) as interpreted by our courts--makes such declarations admissible only in criminal homicide actions and only when they relate to the immediate cause of the declarant's death. People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). 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 472-473 (1963). The rationale of the exception--that men are not apt to lie in the shadow of death--is as applicable to any other declaration that a dying man might make as it is to a statement regarding the immediate cause of his death. Moreover, there is no rational basis for differentiating, for the purpose of the admissibility of dying declarations, between civil and criminal actions, or among various types of criminal actions.

Under Section 1242, the dying declaration is admissible only if it would be admissible if made by the declarant at the hearing. Thus, the dying declaration is admissible only if the declarant would have been a competent witness and made the statement on personal knowledge.

Article 5. Statements of Mental or Physical State

§ 1250. Statement of declarant's then existing physical or mental condition.

Comment. Section 1250 provides an exception to the hearsay rule for statements of the declarant's then existing physical or mental condition. It

codifies an exception that has been developed by the courts.

Thus, under Section 1250 as under existing law, a statement of the declarant's state of mind at the time of the statement is admissible when that state of mind is itself in issue in the case. Adkins v. Brett, 184 Cal. 252, 193 Pac. 5 (1920). A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior to the statement. Watenpaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959); Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530 (1942); Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921); Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915). Section 1250 also makes a statement of then existing state of mind admissible to "prove or explain acts or conduct of the declarant." Thus, a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944); Benjamin v. District Grand Lodge, 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition are also admissible to prove the existence of such condition. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496 (1919); People v. Wright, 167 Cal. 1, 138 Pac. 349 (1914).

A statement is not admissible under Section 1250 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

In light of the definition of "hearsay evidence" in Section 155, a distinction should be noted between the use of a declarant's statements of his then existing mental state to prove such mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state.

Under the Evidence Code, if the declarant's statements are not being used to prove the truth of their contents but are being used as circumstantial evidence of the declarant's mental state, no hearsay problem is involved. See the Comment to Section 1200.

Section 1250 (b) does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind--his memory or belief--concerning the past event. If the evidence of that state of mind--the statement of memory--were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.

The limitation in Section 1250(b) is, in general, in accord with the law developed in the California cases. Thus, in Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921), a declaration of a testatrix made after the execution of a will to the effect that the will had been made at an aunt's request was held to be inadmissible hearsay "because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it." 185 Cal. at 720, 198 Pac. at 415 (1921).

A major exception to the principle expressed in Section 1250(b) was created in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that statements made by the victims of a double homicide relating threats by the defendant were admissible to show the victims' mental state--their fear of the defendant. Their fear was not itself in issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct

engendering the fear, i.e., that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. In People v. Purvis, 56 Cal.2d 93, 362 P.2d 713, 13 Cal. Rptr. 801 (1961), the doctrine of the Merkouris case was limited to cases where identity is in issue.

Section 1250(b) is contrary to the Merkouris case. The doctrine of that case is repudiated because it is an attack on the hearsay rule itself. Other exceptions to the hearsay rule are based on some peculiar reliability of the evidence involved. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, (1957). The exception created by Merkouris was not based on any evidence of the reliability of the declarations, it was based on a rationale that destroys the very foundation of the hearsay rule.

§ 1251. Statement of declarant's previously existing physical or mental condition.

Comment. Section 1250 forbids the use of a statement of memory or belief to prove the fact remembered or believed. Section 1251, however, permits a statement of memory or belief of a past mental state to be used to prove the previous mental state when the previous mental state is itself in issue in the case. If the past mental state is to be used merely as circumstantial evidence of some other fact, the limitation in Section 1250 still applies and the statement of the past mental state is inadmissible hearsay.

Section 1251 is generally consistent with the California case law, which also permits a statement of a prior mental state to be used as evidence of that

§ 1250
§ 1251

mental state. See, e.g., People v. One 1948 Chevrolet Conv. Coupe, 45 Cal.2d 613, 290 P.2d 538 (1955) (statement of prior knowledge admitted to prove such knowledge). However, Section 1251 requires that the declarant be unavailable as a witness. No similar condition on admissibility has been imposed by the cases. Note, too, that no similar condition appears in Section 1250.

A statement is not admissible under Section 1251 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

§ 1252. Statement of previous symptoms.

Comment. Under existing California law, a statement of previous symptoms made to a physician for purposes of treatment is considered inadmissible hearsay; although the physician may relate the statement as a matter upon which he based his diagnosis of the declarant's ailment. See discussion in People v. Brown, 49 Cal.2d 577, 585-587, 320 P.2d 5, (1958).

Section 1252 permits statements of previous symptoms made to a physician for purposes of treatment to be used to prove the facts related in the statements. If there is no motive to falsify such statements, they are likely to be highly reliable, for the declarant in making them has based his actions on his belief in their truth--he has consulted the physician and has permitted the physician to use them as a basis for prescribing treatment. Statements made to a physician where there is a motive to manufacture evidence or any other motive to deceive are inadmissible under this section because of the limitation in Section 1253.

§ 1251
§ 1252

§ 1253. Limitation on admissibility of statements of mental or physical state.

Comment. Section 1253 limits the admissibility of hearsay statements that would otherwise be admissible under Sections 1250, 1251, and 1252. If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence. The limitation expressed in Section 1253 has been held to be a condition of admissibility in some of the California cases. See, e.g., People v. Hamilton, 55 Cal.2d 881, 893, 895, 13 Cal. Rptr. 649, , , 362 P.2d 473, , (1961); People v. Alcalde, 24 Cal.2d 177, 187, 148 P.2d 627, (1944).

The Hamilton case mentions some further limitations on the admissibility of statements of mental state. These are not given express recognition in the Evidence Code. However, under Section 352, the judge may in a particular case exclude such evidence if he determines that its prejudicial effect will substantially outweigh its probative value. The specific limitations mentioned in the Hamilton case have not been codified because they are difficult to understand in the light of conflicting and inconsistent language in the case and because in a different case, prosecuted without the excessive prejudice present in the Hamilton case, a court might be warranted in receiving evidence of the kind involved there where its probative value is great.

For example, the opinion states that statements of a homicide victim that are offered to prove his state of mind are inadmissible if they refer solely to alleged past conduct on the part of the accused. 55 Cal.2d at 893-894, 13 Cal. Rptr. at , 362 P.2d at . But the case also states, nonetheless, that statements of "threats . . . on the part of the accused" are admissible on the

issue. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . The opinion also states that the statements, to be admissible, must refer primarily to the state of mind of the declarant and not the state of mind of the accused. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . But the case also indicates that narrations of threats made by the accused--statements of his intent--are admissible, but statements of conduct by the accused having no relation to his intent or mental state are not admissible. 55 Cal.2d at 893, 895-896, 13 Cal. Rptr. at 362 P.2d at .

Much of the evidence involved in the Hamilton case is not classified as hearsay under the Evidence Code. It is classified as circumstantial evidence. Hence, the problem presented there is not essentially a hearsay problem. It is a problem of the judge's discretion to exclude highly prejudicial evidence when its probative value is not great. Section 352 of the Evidence Code continues the judge's power to curb the use of such evidence. But the Evidence Code does not freeze the courts to the arbitrary and contradictory standards mentioned in the Hamilton case for determining when prejudicial effect outweighs probative value.

Article 6. Statements Relating to Wills and to Claims Against Estates

§ 1260. Statement concerning declarant's will.

Comment. Section 1260 codifies an exception recognized in California case law. Estate of Morrison, 198 Cal. 1, 242 Pac. 939 (1926); Estate of Tompson, 44 Cal. App.2d 774, 112 P.2d 937 (1941). The section is, of course, subject to the provisions of Probate Code Sections 350 and 351 which relate to the establishment of a lost or destroyed will.

The limitation in subdivision (b) is not mentioned in the few decisions involving this exception. The limitation is desirable, however, to assure the reliability of the hearsay admissible under this section.

§ 1261. Statement of decedent offered in action against his estate.

Comment. The Dead Man Statute (subdivision 3 of Code of Civil Procedure Section 1880) prohibits a party suing on a claim against a decedent's estate from testifying to any fact occuring prior to the decedent's death. The theory apparently underlying the statute is that it would be unfair to permit the surviving claimant to testify to such facts when the decedent is precluded from doing so by his death. Because the dead cannot speak, the living may not.

The Dead Man Statute operates unsatisfactorily. It prohibits testimony concerning matters of which the decedent had no knowledge. It does not prohibit testimony relating to claims under, as distinguished from against, the decedent's estate even though the effect of such a claim may be to frustrate the decedent's plan for the disposition of his property. See the Comment to Code of Civil Procedure Section 1880 and Recommendation and Study Relating to the Dead Man Statute, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at D-1 (1957). Hence, the Dead Man Statute is not continued in the Evidence Code.

To equalize the positions of the parties, the Dead Man Statute excludes otherwise relevant and competent evidence--even if it is the only available evidence. This forces the courts to decide cases with a minimum of information concerning the actual facts. See the Supreme Court's complaint in Light v. Stevens, 159 Cal. 288, 292, 113 Pac. 659, 660 (1911): "Owing to the fact that the lips of one of the parties to the transaction are closed by death and those of the other party by the law, the evidence on this question is somewhat unsatisfactory."

Section 1261 balances the positions of the parties in the opposite manner. It is based on the belief that the problem at which the Dead Man Statute is directed is better solved by throwing more light, not less, on the actual facts. Instead of excluding the competent evidence of the claimant, Section 1261 permits the hearsay statements of the decedent to be admitted, provided that they would have been admissible had the decedent made the statements as a witness at the hearing. Certain additional safeguards--recent perception, absence of motive to falsify--are included in the section to provide some protection for the party against whom the statements are offered, for he has no opportunity to test the hearsay by cross-examination.

Article 8. Business Records

§ 1270. "A business."

Comment. This article restates and supersedes the Uniform Business Records as Evidence Act appearing in Sections 1953e-1953h of the Code of Civil Procedure. The definition of "a business" in Section 1270 is substantially the same as that appearing in Code of Civil Procedure Section 1953e. A reference to "governmental activity" has been added to the Evidence Code definition to make it clear that records maintained by any governmental agency are admissible if the foundational requirements are met. This does not change existing California law, for the Uniform Act has been construed to be applicable to governmental records. See, e.g., Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569 (1952); Fox v. San Francisco Unified School Dist., 11 Cal. App.2d 885, 245 P.2d 603 (1952).

The definition is sufficiently broad to encompass institutions not customarily thought of as businesses. For example, the baptismal and wedding records of a church would be admissible under the section to prove the events recorded. 5 WIGMORE, EVIDENCE 371 (3d ed. 1940). Cf. EVIDENCE CODE § 1315.

§ 1271. Business record.

Comment. Section 1271 is the business records exception to the hearsay rule. It is stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e-1953h of the Code of Civil Procedure). Section 1271 does not, however, include the language of Section 1953f.5 of the Code of Civil Procedure because that section is not contained in the Uniform Act and inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf or some other form. The case-law rule is satisfactory and Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act. 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 at 516 (1963).

§ 1272. Absence of entry in business records.

Comment. Technically, evidence of the absence of a record may not be hearsay. Section 1272 removes any doubt that there might be, however, concerning the admissibility of such evidence under the hearsay rule. It codifies existing case law. People v. Torres, 201 Cal. App.2d 290, 20 Cal. Rptr. 315 (1962).

Article 8. Official Reports and Other Official Writings

§ 1280. Report of public employee.

Comment. Section 1280 restates in substance and supersedes Code of Civil Procedure Sections 1920 and 1926.

The evidence that is admissible under this section is also admissible under Section 1271, the business records exception. However, Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance. Under Section 1280, as under existing law, the court may admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court has judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness. See, e.g., People v. Williams, 64 Cal. 87, 27 Pac. 939 (1883) (census report admitted, the court noting the statutes prescribing the method of preparing the report); Vallejo etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 Pac. 238, 250 (1915) (statistical report of state agency admitted, the court noting the statutory duty to prepare the report).

§ 1281. Report of vital statistic.

Comment. Section 1281 provides a hearsay exception for official reports concerning birth, death, and marriage. Reports of such events occurring within California are now admissible under the provisions of Section 10577 of the Health and Safety Code. Section 1281 provides a broader exception which includes similar reports from other jurisdictions.

§ 1282. Finding of presumed death by authorized federal employee.

Comment. Section 1282 restates and supersedes the provisions of Code of Civil Procedure Section 1928.1. The evidence admissible under Section 1282 is limited to evidence of the fact of death and of the date, circumstances, and place of disappearance.

The determination of the date of the presumed death by the federal employee is a determination ordinarily made for the purpose of determining whether the pay of a missing person should be stopped and his name stricken from the payroll. The date so determined should not be given any consideration in the California courts since the issues involved in the California proceedings require determination of the date of death for a different purpose. Hence Section 1282 does not make admissible the finding of the date of presumed death. On the other hand, the determination of the date, circumstances, and place of disappearance is reliable information that will assist the trier of fact in determining the date when the person died and is admissible under this section. Often the date of death may be inferred from the circumstances of the disappearance. See, In re Thornburg's Estate, 186 Or. 570, 208 P.2nd 349 (1949); Lukens v. Camden Trust Co., 2 N.J. Super. 214, 62 A.2nd 886 (1948).

Section 1282 provides a convenient and reliable method of proof of death of persons covered by the Federal Missing Persons Act. See, e.g., In re Jacobsen's Estate, 208 Misc. 443, 143 N.Y.S.2nd 432 (1955)(proof of death of 2-year old dependent of serviceman where child was passenger on plane lost at sea).

§ 1283. Report by federal employee that person is missing, captured, or the like.

Comment. Section 1283 restates and supersedes the provisions of Code of Civil Procedure Section 1928.2. The language of Section 1928.2 has been revised to reflect the 1953 amendments to the Federal Missing Persons Act.

§ 1284. Statement of absence of public record.

Comment. Just as the existence and content of a public record may be proved under Section 1510 by a copy accompanied by the attestation or certificate of the custodian reciting that it is a copy, the absence of such a record from a particular public office may be proved under Section 1284 by a writing made by the custodian of the records in that office stating that no such record was found after a diligent search. The writing must, of course, be properly authenticated. See Sections 1401, 1451. The exception is justified by the likelihood that such statement made by the custodian of the records is accurate and by the necessity for providing a simple and inexpensive method of proving the absence of a public record.

Article 9. Former Testimony

§ 1290. "Former testimony."

Comment. The purpose of Section 1290 is to provide a convenient term for use in the substantive provisions in the remainder of this article. It should be noted that depositions taken in another action are considered former testimony under Section 1290, and their admissibility is determined by Sections 1291 and 1292.

The use of a deposition taken in the same action, however, is not covered by this article. Code of Civil Procedure Sections 2016-2035 deal comprehensively with the conditions and circumstances under which a deposition taken in a civil action may be used at the trial of the action in which the deposition was taken, and Penal Code Sections 1345 and 1362 prescribe the conditions for admitting the deposition of a witness that has been taken in the same criminal action. These sections will continue to govern the use of depositions in the action in which they are taken.

§ 1291. Former testimony offered against party to former proceeding.

Comment. Section 1291 provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given. For example, if a series of cases arise involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met.

Former testimony is admissible under Section 1291 only if the declarant is unavailable as a witness.

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. This evidence, in effect, is somewhat analogous to an admission. If the party finds that the evidence he originally offered in his favor now works to his disadvantage, he can respond as any party does to an admission. Moreover, since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine.

Prepared for July 1964 Meeting

Paragraph (2) of subdivision (a) of Section 1291 provides for the admissibility of former testimony where the party against whom it is now offered had the right and opportunity in the former proceeding to cross-examine the declarant with an interest and motive similar to that which he now has. Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence--lack of opportunity to cross-examine the declarant--is not applicable. On the other hand, paragraph (2) does not make the former testimony admissible where the party against whom it is offered did not have a similar motive and interest to cross-examine. In determining the similarity of interest and motive to cross-examine, the judge should be guided by practical considerations and not merely by the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

Under paragraph (2), testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not admissible against the defendant in a criminal case unless it was received in evidence at the trial of such other action. This limitation insures that the person accused of crime will have an adequate opportunity to cross-examine the witnesses against him.

Section 1291 supersedes Code of Civil Procedure Section 1870(8) which permits former testimony to be admitted in a civil case only if the former proceeding was an action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial of the action in which the testimony is offered. Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under Penal Code Section 686. Under that section, former testimony has been admissible against the defendant in a criminal action only if the former testimony was given in the same action--at the preliminary examination, in a deposition, or in a prior trial of the action.

Subdivision (b) of Section 1291 makes it clear that objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given, but others indicate that competency and privilege are to be determined as of the time the former testimony is offered in evidence. 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 at 581-585 (1963).

Subdivision (b) also provides that objections to the form of the question may not be used to exclude the former testimony. Where the former testimony is offered under paragraph (1) of subdivision (a), the party against whom the former testimony is now offered himself phrased the question; and where the former testimony comes in under paragraph (2) of subdivision (a), the party against whom the testimony is now offered had the opportunity to object to the form of the question when it was asked on the former occasion. Hence, the

party is not permitted to raise this technical objection when the former testimony is offered against him.

§ 1292. Former testimony offered against person not a party to former proceeding.

Comment. Section 1292 provides a hearsay exception for former testimony given at the former proceeding by a person who is now unavailable as a witness when such former testimony is offered against a person who was not a party to the former proceeding but whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant when the former testimony was given. For example, if a series of cases arise involving one occurence and one defendant but several plaintiffs, Section 1292 permits testimony given against the plaintiff in the first trial to be used against a plaintiff in a later trial if the conditions of admissibility stated in the section are met.

Code of Civil Procedure Section 1870(8) (which is superseded by this article), does not permit admission of the former testimony made admissible by Section 1292. The out-dated "identity of parties" and "identity of issues" requirements of Section 1870 are too restrictive, and Section 1292 substitutes what is, in effect, a more flexible "trustworthiness" approach characteristic of other hearsay exceptions. The trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine with an interest and motive similar to that of the present adverse party. Although the party against whom the former testimony is offered did not himself have an opportunity to cross-examine the witness on the former occasion, it can be generally assumed that most prior cross-examination is

adequate, especially if the same stakes are involved. If the same stakes are not involved, the difference in interest or motivation would justify exclusion. And, even where if the prior cross-examination was inadequate, there is better reason here for providing a hearsay exception than there is for many of the presently recognized exceptions to the hearsay rule. As Professor McCormick states:

> . . . I suggest that if the witness is unavailable, then the need for the sworn, transcribed former testimony in the ascertainment of truth is so great, and its reliability so far superior to most, if not all the other types of oral hearsay coming in under the other exceptions, that the requirements of identity of parties and issues be dispensed with. This dispenses with the opportunity for cross-examination, that great characteristic weapon of our adversary system. But the other types of admissible oral hearsay, admissions, declarations against interest, statements about bodily symptoms, likewise dispense with cross-examination, for declarations having far less trustworthiness than the sworn testimony in open court, and with a far greater hazard of fabrication or mistake in the reporting of the declaration by the witness. [McCormick, Evidence § 238, p. 501 (1954).]

Section 1292 does not make former testimony admissible against the defendant in a criminal case. This limitation preserves the right of a person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake--as it is in a criminal trial--the accused should not be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.

Subdivision (b) of Section 1292 makes it clear that objections based on competency or privilege are to be determined by reference to the time when the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given but others indicate that competency and privilege are to be determined as of the time

the former testimony is offered in evidence. 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 at 581-585 (1963).

Article 10. Judgments

§ 1300. Judgment of felony conviction.

Comment. Analytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. UNIFORM RULES OF EVIDENCE, RULE 63(20), Comment (1953); 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 at 539-541 (1963). It is in substance a statement of the court that determined the previous action ("a statement made other than by a witness while testifying at the hearing") that is offered "to prove the truth of the matter stated." Section 155. Therefore, unless there is an exception to the hearsay rule provided, a judgment is inadmissible if offered in a subsequent action to prove the matters determined. This article provides hearsay exceptions for certain kinds of judgments, and thus permits them to be used in subsequent actions as evidence despite the restrictions of the hearsay rule.

Of course, a judgment may, as a matter of substantive law, conclusively establish certain facts insofar as a party is concerned. Teitlebaum Furs, Inc. v. Dominion Ins. Co., 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962); Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942). The sections of this article do not purport to deal with the doctrines of res judicata and estoppel by judgment. These sections deal only with the evidentiary use of

judgments in those cases where the substantive law does not require that the judgments be given conclusive effect.

Section 1300 provides an exception to the hearsay rule for a final judgment adjudging a person guilty of a felony. The exception does not, however, apply in criminal actions. Hence, if a plaintiff sues to recover a reward offered by the defendant for the arrest and conviction of a person who committed a particular crime, Section 1300 permits the plaintiff to use a judgment of felony conviction as evidence that the person convicted committed the crime. But, Section 1300 does not permit the judgment to be used in a criminal action as evidence of the identity of the person who committed the crime or as evidence that the crime was committed.

Section 1300 will change the California law. Under existing California law, a conviction of a crime is inadmissible as evidence in a subsequent action. Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856 (1894) (evidence of murder conviction inadmissible to prove insured was intentionally killed); Burke v. Wells, Fargo & Co., 34 Cal. 60 (1867) (evidence of robbery conviction inadmissible to prove identity of robber in action to recover reward). The change, however, is desirable; for the evidence involved is peculiarly reliable. The seriousness of the charge assures that the facts will be thoroughly litigated, and the fact that the judgment must be based upon a unanimous determination that there was not a reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered.

The exception in Section 1300 for cases where the judgment is based on a plea of nolo contendere is a reflection of the policy expressed in Penal Code Section 1016.

§ 1301. Judgment against person entitled to indemnity.

Comment. If a person entitled to indemnity, or if the obligee under a warranty contract, complies with certain conditions relating to notice and defense, the indemnitor or warrantor is conclusively bound by any judgment recovered. CIVIL CODE § 2778(5); CODE CIV. PROC. § 1912; McCormick v. Marcy, 165 Cal. 386, 132 Pac. 449 (1913).

Where judgment against an indemnitee or person protected by a warranty is not made conclusive on the indemnitor or warrantor, Section 1301 permits the judgment to be used as hearsay evidence in an action to recover on the indemnity or warranty. Section 1301 reflects the existing law relating to indemnity agreements. CIVIL CODE § 2778, subdivision 6. Section 1301 probably restates the law relating to warranties, too, but the law in that regard is not altogether clear. Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92 (1905). But see Peabody v. Phelps, 9 Cal. 213 (1858).

§ 1302. Judgment determining liability of third person.

Comment. Section 1302 expresses an exception contained in Code of Civil Procedure Section 1851. Ellsworth v. Bradford, 186 Cal. 316, 199 Pac. 335 (1921); Nordin v. Bank of America, 11 Cal. App.2d 98, 52 P.2d 1018 (1936). Together, Evidence Code Sections 1302 and 1226 restate and supersede the provisions of Code of Civil Procedure Section 1851.

Article 11. Family History

§ 1310. Statement concerning declarant's own family history.

Comment. Section 1310 provides a hearsay exception for a statement concerning the declarant's own family history. It restates in substance and

supersedes Section 1870(4) of the Code of Civil Procedure. Section 1870(4), however, requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Section 240 makes the statement admissible under Section 1310.

The statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. This permits the judge to exclude the statement where it was made under such circumstances as to case doubt upon its trustworthiness. The requirement is basically the same as the requirement of existing case law that the statement be made at a time when no controversy existed on the precise point concerning which the declaration was made. See, e.g., Estate of Walder, 166 Cal. 446, 137 Pac. 35 (1913); Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960).

§ 1311. Statement concerning family history of another.

Comment. Section 1311 provides a hearsay exception for a statement concerning the family history of another. Paragraph (1) of subdivision (a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure, which it supersedes. Paragraph (2) is new to California law, but it is a sound extension of the present law to cover a situation where the declarant was a family housekeeper or doctor or so close a friend as to be included by the family in discussions of its family history.

There are two limitations on admissibility of a statement under Section 1311. First, a statement is admissible only if the declarant is unavailable as a witness within the meaning of Section 240. (Section 1870(4) requires that

the declarant be deceased in order for his statement to be admissible.) Second, a statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. For a discussion of this requirement, see comment to Section 1310.

§ 1312. Entries in family bibles and the like.

Comment. Section 1312 restates in substance and supersedes the provisions of Code of Civil Procedure Section 1870(13).

§ 1313. Reputation in family concerning family history.

Comment. Section 1313 restates in substance and supersedes the provisions of Code of Civil Procedure Sections 1852 and 1870(11). See Estate of Connors, 53 Cal. App.2d 484, 128 P.2d 200 (1942); Estate of Newman, 34 Cal. App.2d 706, 94 P.2d 356 (1939). However, Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." This qualification is not included in Section 1313 because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in Sections 1300 and 1311, might be.

The family tradition admitted under Section 1313 is necessarily multiple hearsay. If, however, such tradition were inadmissible because of the hearsay rule, and if direct statements of pedigree were inadmissible because they are based on such traditions (as most of them are), the courts would be virtually helpless in determining matters of pedigree. 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 at 548 (1963).

§ 1314. Community reputation concerning family history.

Comment. Section 1314 restates what has been held to be existing law under Code of Civil Procedure Section 1963(30) with respect to proof of the fact of marriage. See Estate of Baldwin, 162 Cal. 471, 123 Pac. 267 (1912); People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956). However, Section 1314 has no counterpart in California law insofar as proof of the date or fact of birth, divorce, or death is concerned, proof of such facts by reputation now being limited to reputation in the family. See Estate of Heaton, 135 Cal. 385, 67 Pac. 321 (1902).

§ 1315. Church records concerning family history.

Comment. Church records generally are admissible as business records under the provisions of Section 1271. Under Section 1271, such records would be admissible to prove the occurence of the church activity--the baptism, confirmation, or marriage--recorded in the writing. However, it is unlikely that Section 1271 would permit such records to be used as evidence of the age or relationship of the participants; for the business records act has been held to authorize business records to be used to prove only facts known personally to the recorder of the information or to other employees of the business. Patek & Co. v. Vineberg, 210 Cal. App.2d 20, 23, 26 Cal. Rptr. 293 (1962) (hearing denied); People v. Williams, 187 Cal. App.2d 355, 9 Cal. Rptr. 722 (1960); Gough v. Security Trust & Sav. Bank, 162 Cal. App.2d 90, 327 P.2d 555 (1958).

Section 1315 permits church records to be used to prove certain additional information. Facts of family history such as birth dates, relationships,

marital records, etc., that are ordinarily reported to church authorities and recorded in connection with the church's baptismal, confirmation, marriage, and funeral records may be proved by such records under Section 1315.

Section 1315 continues in effect and supersedes the provisions of Code of Civil Procedure Section 1919a without, however, the special and cumbersome authentication procedure specified in Code of Civil Procedure Section 1919b. Under Section 1315, church records must be authenticated in the same manner that other business records are authenticated.

§ 1316. Marriage, baptismal, and similar certificates.

Comment. Section 1316 provides a hearsay exception for marriage, baptismal, and similar certificates. This exception is somewhat broader than that found in Sections 1919a and 1919b of the Code of Civil Procedure (superseded by Sections 1315 and 1316). Sections 1919a and 1919b are limited to church records and hence, as respects marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure whereas certificates made admissible by Section 1316 need only meet the general authentication requirement of Section 1401.

Article 12. Reputation and Statements Concerning Community History, Property Interest, and Character.

§ 1320. Reputation concerning community history.

Comment. Section 1320 provides a wider rule of admissibility than does Code of Civil Procedure Section 1870(11), which it supersedes in part. Section 1870 provides in relevant part that proof may be made of "common reputation

existing previously to the controversy, respecting facts of a public or general nature more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor is it necessary to include in Section 1320 the requirement that the reputation existed previous to controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy.

§ 1321. Reputation concerning public interest in property.

Comment. Section 1321 preserves the rule in Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524, 192 Pac. 144 (1920). It does not require, however, that the reputation be more than 30 years old, but merely that the reputation arose before controversy. See Comment to Section 1320.

§ 1322. Reputation concerning boundary or custom affecting land.

Comment. Section 1322 restates in substance existing law as found in Code of Civil Procedure Section 1870(11), which it supersedes in part. See Muller v. So. Pac. Ry. Co., 83 Cal. 240, 23 Pac. 265 (1890); Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950 (1931).

§ 1323. Statement concerning boundary.

Comment. Section 1323 restates the substance of existing but uncodified California law found in such cases as Morton v. Folger, 15 Cal. 275 (1860) and Morcom v. Baiersky, 16 Cal. App. 480, 117 Pac. 560 (1911).

§ 1320
§ 1321
§ 1322
§ 1323

§ 1324. Reputation concerning character.

Comment. Section 1324 codifies a well-settled exception to the hearsay rule. See, e.g., People v. Cobb, 45 Cal.2d 158, 287 P.2d 752 (1955). Of course, character evidence is admissible only when the question of character is material to the matter being litigated. The only purpose of Section 1324 is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule.

Article 13. Dispositive Instruments and Ancient Writings

§ 1330. Recitals in writings affecting property.

Comment. Section 1330 restates in substance the existing California law relating to recitals in dispositive instruments. Although language in some cases appears to require that the dispositive instrument be ancient, cases may be found in which recitals in dispositive instruments have been admitted without regard to the age of the instrument. Russell v. Langford, 135 Cal. 356, 67 Pac. 331 (1902) (recital in will); Pearson v. Pearson, 46 Cal. 609 (1873) (recital in will); Culver v. Newhart, 18 Cal. App. 614, 123 Pac. 975 (1912) (bill of sale). There is a sufficient likelihood that the statements made in a dispositive document, when related to the purpose of the document, will be true to warrant the admissibility of such documents without regard to their age.

§ 1331. Recitals in ancient writings.

Comment. Section 1331 clarifies the existing California law relating to the admissibility of recitals in ancient documents by providing that such recitals are admissible under an exception to the hearsay rule. Code of Civil

Procedure Section 1963(34) (superseded by Evidence Code) provides that a document more than 30 years old is presumed genuine if it has been generally acted upon as genuine by persons having an interest in the matter. The Supreme Court has held that a document meeting this section's requirements is presumed to be genuine--presumed to be what it purports to be--but that the genuineness of the document imports no verity to the recitals contained therein. Gwin v. Calegaris, 139 Cal. 384, 389, 73 Pac. 851, 853 (1903). Recent cases decided by district courts of appeal, however, have held that the recitals in such a document are admissible to prove the truth of the facts recited. E.g., Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960); Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1956). And in some of these cases the courts have not insisted that the hearsay statement itself be acted upon as true by persons with an interest in the matter; the evidence has been admitted upon a showing that the document containing the statement is genuine. The age of a document alone is not a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence. Accordingly, Section 1331 makes clear that the hearsay statement itself must have been generally acted upon as true for at least a generation by persons having an interest in the matter.

Article 14. Commercial, Scientific, and Similar Publications

§ 1340. Commercial lists and the like.

Comment. Section 1340 codifies an exception that has been recognized by statute and by the courts in specific situations. See, e.g., COM. CODE § 2724; Emery v. So. Cal. Gas Co., 72 Cal. App.2d 821, 165 P.2d 695 (1946);

Christiansen v. Hollings, 44 Cal. App.2d 332, 112 P.2d 723 (1941).

§ 1341. Publications concerning facts of general notoriety and interest.

Comment. Section 1341 recodifies without substantive change Section 1936 of the Code of Civil Procedure.

§ 1340
§ 1341

#34(L) 10/5/64

Memorandum 64-94

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Amendments, Additions, and Repeals)

Attached are two copies of the revised Comments to the Amendments, Additions, and Repeals. Mr. Stanton is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

John H. DeMoully
Executive Secretary

BUSINESS AND PROFESSIONS CODE

Section 2904 (Repealed)

Comment. Section 2904 is superseded by Evidence Code Sections 1010-1026.

Section 5012 (Amended)

Comment. The deleted language in Section 5012 is inconsistent with Evidence Code Section 1452. See the Comment to that section.

Section 25009 (Amended)

Comment. The amendment merely substitutes correct references for the obsolete references in Section 25009.

CIVIL CODE

Section 53 (Amended)

Comment. This revision of Section 53 provides, in effect, that the court may take judicial notice of the matter specified in subdivision (c) and is required to take judicial notice of such matter upon request if the party making the request supplies the court with sufficient information. See EVIDENCE CODE §§ 452 and 453 and the Comments thereto.

Section 164.5 (Added)

Comment. Section 164.5, which is a new section added to the Civil Code, states existing decisional and statutory law. The presumption stated in the first sentence of Section 164.5 is established by a number of California cases. It places upon the person asserting that any property is separate property the burden of proving that it was acquired by gift, devise, or descent, or that the consideration given for it was separate property, or that it is personal injury damages, or that for some other reason the property is not community property. E.g., Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); Meyer v. Kinzer, 12 Cal. 247 (1859). See THE CALIFORNIA FAMILY LAWYER § 4.8 (Cal. Cont. Ed. Bar 1961).

The second sentence of Section 164.5 also states existing case law. E.g., Estate of Rolls, 193 Cal. 594, 226 Pac. 608 (1924); Meyer v. Kinzer, supra.

The third sentence of Section 164.5 states the apparent effect of subdivision 40 of Code of Civil Procedure Section 1963. The meaning of subdivision 40, however, is not clear. See 4 WITKIN, SUMMARY OF CALIFORNIA LAW, Community Property § 26 (7th ed. 1960); Note, 43 CAL. L. REV. 687, 690-691 (1955).

Section 193 (Repealed)

Comment. Sections 193, 194, and 195 are superseded by the more accurate statement of the presumption in Evidence Code Section 661. See the Comment to that section.

Section 194 (Repealed)

Comment. See the Comment to Civil Code Section 193.

Section 195 (Repealed)

Comment. See the Comment to Civil Code Section 193.

Section 3544 (Added)

Comment. Sections 3544-3548 are new sections added to the Civil Code and are compiled among the maxims of jurisprudence. Sections 3544-3548 restate the provisions of subdivisions 3, 19, 28, 32, and 33 of Code of Civil Procedure Section 1963 and supersede those subdivisions. The maxims are not intended to qualify any substantive provisions of law, but to aid in their just application. CIVIL CODE § 3509.

Section 3545 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3546 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3547 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3548 (Added)

Comment. See the Comment to Civil Code Section 3544.

CODE OF CIVIL PROCEDURE

Section 1 (Amended)

Comment. The title of Part IV has been changed to reflect the fact that the evidence provisions in Part IV have been placed in the Evidence Code.

Section 117g (Amended)

Comment. The Uniform Business Records as Evidence Act is codified in the Evidence Code as Sections 1270 and 1271.

Section 125 (Amended)

Comment. Evidence Code Section 777 sets forth precisely the conditions under which witnesses may be excluded.

Section 153 (Amended)

Comment. The deleted language, which relates to the authentication of copies of judicial records, is superseded by Evidence Code Section 1530.

Section 433 (Amended)

Comment. This revision is necessary to conform Section 433 to the judicial notice provisions of the Evidence Code.

Section 657 (Amended)

Comment. The limitation on the kinds of misconduct that can be shown by a juror's affidavit has been deleted as there is no limitation on the nature of the misconduct that can be proved by evidence from jurors under Evidence Code Sections 704 and 1150. See the Comment to EVIDENCE CODE § 704(d).

Section 1256.2 (Repealed)

Comment. Section 1256.2 is superseded by Evidence Code Section 722(b).

Section 1747 (Amended)

Comment. Section 1747 has been amended merely to substitute a reference to the pertinent section of the Evidence Code for the reference to the superseded Code of Civil Procedure section.

Title of Part IV of Code of Civil Procedure (Amended)

Comment. The title of Part IV has been changed to reflect the fact that the evidence provisions contained therein have been superseded by the Evidence Code.

Section 1823 (Repealed)

Comment. Section 1823 is superseded by the definition of "evidence" in Evidence Code Section 140.

Section 1824 (Repealed)

Comment. Section 1824 is substantially recodified as Evidence Code Section 190.

Section 1825 (Repealed)

Comment. Section 1825, 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 1826 (Repealed)

Comment. Section 1826 contains an inaccurate description of the normal burden of proof. 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, 1149-1150 (1964). Section 1826 is superseded by Division 5 (commencing with Section 500) of the Evidence Code. See also EVIDENCE CODE § 430.

Section 1827 (Repealed)

Comment. Section 1827 is superseded by the definition of "evidence" in Evidence Code Section 140. Although judicial notice is not included in the definition of "evidence" in Section 140, the subject is covered in Division 4 (commencing with Section 450) of the Evidence Code; and judicial notice will support a finding by the court.

Section 1828 (Repealed)

Comment. 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 1829-1837. 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 is repealed. To the extent that the terms defined in Sections 1829-1837 should be retained, those terms are defined in the Evidence Code. See, e.g., EVIDENCE CODE § 410, defining "direct evidence."

Section 1829 (Repealed)

Comment. Sections 1829 and 1830 serve no definitional purpose in the existing statutes and appear to state a "best evidence rule" that is inconsistent with both the Evidence Code (Sections 1500-1510) and previously existing law. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 49-51 (1964).

Section 1830 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1829.

Section 1831 (Repealed)

Comment. Section 1831 is substantially recodified as Evidence Code Section 410. The term "direct evidence", which is defined in Section 1831, is not used in Part IV of the Code of Civil Procedure except in Section 1844. Section 1844 is also repealed and its substance is contained in Evidence Code Section 411.

Section 1832 (Repealed)

Comment. "Indirect evidence" as defined in Section 1832 is more commonly known as circumstantial evidence. The defined term has no substantive significance insofar as either the Code of Civil Procedure or the Evidence Code is concerned, for under either statutory scheme circumstantial evidence, when relevant, is as admissible as direct evidence. The defined term is used in the Code of Civil Procedure only in Section 1957 (also repealed), which merely classifies indirect evidence as either inferences or presumptions.

The repeal of Section 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. Nor will the repeal of this section affect the case law or other statutes relating to what evidence is sufficient to sustain a verdict or finding.

Section 1833 (Repealed)

Comment. Section 1833 is inconsistent with Evidence Code Section 602. 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, 1143-1149 (1964).

Section 1834 (Repealed)

Comment. The substance of Section 1834 is stated as a rule of law, rather than as a definition, in Evidence Code Section 403(b).

Section 1836 (Repealed)

Comment. Section 1836 serves no useful purpose. The defined term is not used in either the Evidence Code or in the existing statutes.

Section 1837 (Repealed)

Comment. Section 1837 is unnecessary. The defined term is not used in either the Evidence Code or in the existing statutes.

Section 1838 (Repealed)

Comment. Section 1838 is unnecessary. The defined term is not used in either the Evidence Code or in the existing statutes. The repeal of Section 1838 will have no effect on the principle that cumulative evidence may be excluded, for that principle is expressed in Evidence Code Section 352--without, however, using the term "cumulative evidence".

Section 1839 (Repealed)

Comment. The definition of "corroborative evidence" in Section 1839 (which requires corroborative evidence to be evidence "of a different character") is inconsistent with the case law developed in California which has not required that corroborating evidence be of a "different character". The repeal of Section 1839, therefore, 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.

One out-dated 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, 11 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 CALIFORNIA CRIMINAL LAW PRACTICE 473-477 (Cal. Cont. Ed. Bar 1964);

Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 56-57 (1964).

Section 1844 (Repealed)

Comment. The substance of Section 1844 is recodified as Evidence Code Section 411.

Section 1845 (Repealed)

Comment. Section 1845 is superseded by Evidence Code Sections 702, 800-801, and 1200.

Section 1845.5 (Repealed)

Comment. Section 1845.5 is recodified as Evidence Code Section 830.

Section 1846 (Repealed)

Comment. Section 1846 is recodified in substance in Evidence Code Sections 710 and 711.

Section 1847 (Repealed)

Comment. Section 1847 is inconsistent with the definition of a presumption in Evidence Code Section 600. The right of a party to attack the credibility of a witness by any evidence relevant to that issue is assured by Evidence Code Sections 351, 780, and 785.

Section 1848 (Repealed)

Comment. Insofar as Section 1848 deals with hearsay it is superseded by the hearsay rule, stated in Evidence Code Section 1200, and the numerous exceptions thereto. If Section 1848 has a broader application, its meaning is not clear and its possible applications are undesirable; hence, there is no justification for retaining the section.

Section 1849 (Repealed)

Comment. Section 1849 is superseded by Evidence Code Section 1226.

Section 1850 (Repealed)

Comment. Insofar as Section 1850 relates to hearsay, it is superseded by Evidence Code Sections 1240 and 1241, which provide exceptions to the hearsay rule for contemporaneous and spontaneous declarations. Insofar as Section 1850 relates to declarations that are themselves material, the section is unnecessary; for, inasmuch as Evidence Code Sections 225 and 1200 make it clear that such declarations are not hearsay, they are admissible under the general principal that relevant evidence is admissible. See EVIDENCE CODE §§ 210, 351.

Section 1851 (Repealed)

Comment. Section 1851 is superseded by the exceptions to the hearsay rule stated in Evidence Code Sections 1225 and 1302.

Section 1852 (Repealed)

Comment. Section 1852 is superseded by the exceptions to the hearsay rule stated in Article 11 (commencing with Section 1310) of Chapter 2 of Division 10 of the Evidence Code.

Section 1853 (Repealed)

Comment. Section 1853 is an imperfect statement of the declaration against interest exception to the hearsay rule and is superseded by Evidence Code Section 1230. See the Comment to that section.

Section 1854 (Repealed)

Comment. Section 1854 is recodified as Evidence Code Section 357.

Section 1855 (Repealed)

Comment. Section 1855 is superseded by Evidence Code Sections 1500-1510.

Section 1855a (Repealed)

Comment. Section 1855a is recodified as Evidence Code Section 1601.

Section 1863 (Repealed)

Comment. Section 1863 is superseded by Evidence Code Section 753.

Section 1867 (Repealed)

Comment. Section 1867 is based on the obsolete theory that some allegations are necessary that are not material, i.e., essential to the claim or defense; it provides that only the material allegations need be proved. 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, 1119-1121 (1964). Since Section 1867 is obsolete and is not a correct statement of existing law, it is repealed.

Section 1868 (Repealed)

Comment. Section 1868 is superseded by Evidence Code Sections 210, 350, and 352.

Section 1869 (Repealed)

Comment. Section 1869 is inconsistent with and superseded by Evidence Code Sections 500 and 510. Moreover, it is an inaccurate statement of the manner in which the burden of proof is allocated under existing law. 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, 1122-1124 (1964).

Section 1870 (Repealed)

Comment. Section 1870 is superseded by the provisions of the Evidence Code indicated below:

Section 1870 (subdivision)	Evidence Code (section)
1	210, 351
2	1220
3	1221
4 (first clause)	1310, 1311
4 (second clause)	1230
4 (third clause)	1242
5 (first sentence)	1222, 1224
5 (second sentence)	1225, 1226
6	1223
7	1240, 1241 (See also the Comment to CODE CIV. PROC. § 1850)
8	1290-1292
9 (first clause)	720, 800, 801, 1416
9 (second clause)	720, 801
10	870
11	1314, 1320-1322
12	Unnecessary (See EVIDENCE CODE § 351; CODE CIV. PROC. § 1861; CIV. CODE §§ 1644, 1645. See also COM. CODE § 2208.)
13	1312, 1313, 1320-1322
14	1500-1510
15	210, 351
16	210, 780, 785

Section 1871 (Repealed)

Comment. Section 1871 is recodified in the Evidence Code as indicated below:

Section 1871 (paragraph)	Evidence Code (section)
1	730
2	731
3	733
4	732
5	723

Section 1872 (Repealed)

Comment. Section 1872 is recodified in Evidence Code Sections 721 and 802.

Section 1875 (Repealed)

Comment. Section 1875 is superseded by the provisions of the Evidence Code indicated below:

Section 1875 (subdivision)	Evidence Code (section)
1	451(e)
2	451(a)-(d), 452(a)-(f)
3	451(a)-(d), 452(a)-(c), (e)
4	452(f), 453
5	1452
6, 7, and 8	1452-1454 (official signatures and seals); 451(f), 452(g)(h)(remainder of subdivisions)
9	451(f), 452(g)(h)
Next to last paragraph	454, 455
Last paragraph	311

Section 1879 (Repealed)

Comment. Insofar as Section 1879 declares all persons to be competent witnesses, it is superseded by Evidence Code Section 700; insofar as it requires perception and recollection on the part of the witness, it is superseded in part by Evidence Code Sections 701 and 702. Insofar as it is not superseded by the Evidence Code, Section 1879 treats matters of credibility as matters of competency and is, therefore, disapproved.

Section 1880 (Repealed)

Comment. Subdivisions 1 and 2 of Section 1880 are superseded by Evidence Code Section 701.

Subdivision 3 of Section 1880 is the California version of the so-called "dead man statute." Dead man statutes provide that one engaged in litigation with a decedent's estate cannot be a witness as to any matter or fact occurring before the decedent's death. These statutes appear to rest on the belief that to permit the survivor to testify in the proceeding would be unfair because the other party to the transaction is not available to testify and, hence, only a part of the whole story can be developed. Because the dead cannot speak, the living are also silenced out of a desire to treat both sides equally. See generally Moul v. McVey, 49 Cal. App.2d 101, 121 P.2d 83 (1942); 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to the Dead Man Statute at D-1 (1957).

In 1957, the Commission recommended the repeal of the dead man statute and the enactment of a statute providing that, in certain specified types of actions, written or oral statements of a deceased person made upon his personal knowledge were not to be excluded as hearsay. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to the Dead Man Statute at D-1 (1957). The 1957 recommendation has not been enacted as law. For the legislative history of this measure, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES IX (1957).

Although the dead man statute undoubtedly cuts off some fictitious claims, it results in the denial of just claims in a substantial number of cases. As the Commission's 1957 recommendation and study demonstrates, the statute balances the scales of justice unfairly in favor of decedents' estates. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at D-6, D-43-D-45 (1957).

See also the Comment to EVIDENCE CODE § 1261. Moreover, the dead man statute has been productive of much litigation; yet, many questions as to its meaning and effect are still unanswered. For these reasons, the Commission again recommends that the dead man statute be repealed.

However, repeal of the dead man statute alone would tip the scales unfairly against decedents' estates by subjecting them to claims which could have been defeated, wholly or in part, if the decedent had lived to tell his story. If the living are to be permitted to testify, some steps ought to be taken to permit the decedent to testify, so to speak, from the grave. This is accomplished by relaxing the hearsay rule in Evidence Code Section 1261 to provide a limited hearsay exception for a statement of a deceased person offered in an action against an executor or administrator upon a claim or demand against the estate of such deceased person. This hearsay exception is more limited than that recommended in 1957 and will, it is believed, meet most of the objections made to the 1957 recommendation.

Section 1881 (Repealed)

Comment. Section 1881 is superseded by the provisions of the Evidence Code indicated below.

Subdivision 1. Subdivision 1 of Section 1881 is superseded by Evidence Code Sections 970-973 and 980-987. Under subdivision 1 of Section 1881 [redacted] and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, to prevent his spouse from testifying for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

The "for" privilege. The Commission has concluded that the marital testimonial privilege provided by existing law as to testimony by one spouse *for* the other should be abolished in both civil and criminal actions. There would appear to be no need for this privilege, now given to a party to an action, not to call his spouse to testify in his *favor*. If a case can be imagined in which a party would wish to avail himself of this privilege, he could achieve the same result by simply not calling his spouse to the stand. Nor does it seem desirable to continue the present privilege of the nonparty spouse not to testify in *favor* of the party spouse in a criminal action. It is difficult to imagine a case in which this privilege would be claimed for other than mercenary or spiteful motives, and it precludes access to evidence which might save an innocent person from conviction.

The "against" privilege. Under existing law, either spouse may claim the privilege to prevent one spouse from testifying against the other in a criminal action, and the party spouse may claim the privilege to prevent his spouse from testifying against him in a civil action. The privilege under [redacted] given exclusively to the witness spouse because he instead of the party spouse is more likely to make the determination of whether to claim the privilege on the basis of its probable effect on the marital relationship. For example, because of his interest in the outcome of the action, a party spouse would be under considerable temptation to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse probably would not. Illustrative of the possible misuse of the existing privilege is the recent case of *People* v. *Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958), involving a defendant who murdered his wife's mother and 18-year-old sister. He had threatened to murder his wife, too, and it seems likely that he would have done so had she not fled. The marital relationship was as thoroughly shattered as it could have been; yet, the defendant was entitled to invoke the privilege to prevent his wife from testifying. In such a situation, the privilege does not serve at all its true purpose of preserving a marital relationship from disruption; it serves only as an obstacle to the administration of justice.

Evidence Code Sections 970 and 971 are is

Subdivisions 2-6.

Subdivisions 2-6 of 1881 are superseded by provisions of the Evidence Code indicated below:

Section 1881 (subdivision)	Evidence Code (section)
2	950-962
3	1030-1034
4	990-1006, 1010-1026
5	1040-1042
6	1070-1072

Section 1883 (Repealed)

Comment. Section 1883 is superseded by Evidence Code Sections 703 and 704.

Section 1884 (Repealed)

Comment. Section 1884 is superseded by Evidence Code Section 752.

Section 1885 (Repealed)

Comment. Section 1885 is recodified as Evidence Code Section 754.

Section 1893 (Amended)

Comment. The language deleted from Section 1893 is unnecessary in view of Evidence Code Sections 1506 and 1530.

Section 1901 (Repealed)

Comment. Section 1901 is superseded by Evidence Code Section 1530.

Section 1903 (Repealed)

Comment. Section 1903 is unnecessary to support the validity of statutes, for the California courts have said that statutes are "presumed" to be constitutional. In re Cregler, 56 Cal.2d 308, 311, 14 Cal. Rptr. 289, 291, 363 P.2d 305, 307

(1961). If Section 1903 is deemed to have an evidentiary effect, it is undesirable to the extent that it indicates that the Legislature may exercise the judicial power of making findings on controverted facts and that such findings are conclusive. As the section is unnecessary to accomplish its essential purpose, it is repealed. This repeal will not change the law of California relating to the construction or validity of statutes because the courts have not placed that law upon the footing of this section.

Section 1905 (Repealed)

Comment. Sections 1905, 1906, 1907, 1918, and 1919 relate to hearsay, authentication of official records, and the best evidence rule. They are superseded by Evidence Code Sections 1270-1271, 1280-1284, 1452-1454, 1506-1507, 1530, 1532, and 1600.

Subdivision 4 of Section 1918 provides for the authentication of a published foreign official journal by evidence that it was commonly received in the foreign country as published by the requisite authority. Although no similar provision appears in the Evidence Code, this and other evidence of authenticity not mentioned explicitly in the Evidence Code may be used to authenticate official writings under the general language of Section 1410, which provides that the requirement of authentication may be met by "evidence sufficient to sustain a finding of the authenticity of the writing." See also EVIDENCE CODE §§ 1400 and 1530.

Section 1906 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1907 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1908.5 (Added)

Comment. Section 1908.5 recodifies the rule of pleading stated in subdivision 6 of Section 1962 of the Code of Civil Procedure. See the Comment to that section.

Section 1918 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1919 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1919a (Repealed)

Comment. Sections 1919a and 1919b are superseded by Evidence Code Sections 1315 and 1316.

Section 1919b (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1919a.

Section 1920 (Repealed)

Comment. Section 1920 is superseded by the business records exception contained in Evidence Code Sections 1270 and 1271, by the exception to the hearsay rule for official records and other official writings contained in Evidence Code Sections 1280-1284, and by various specific exceptions to the hearsay rule that will continue to exist under various sections of the Evidence Code and other codes. The broad language of Section 1920 has been limited in Evidence Code Section 1280 to reflect existing law. See the Comment to EVIDENCE CODE § 1280. See also EVIDENCE CODE § 664 (presumption that official duty has been regularly performed).

Section 1920a (Repealed)

Comment. Section 1920a is unnecessary in view of Evidence Code Sections 1506 and 1530. See also EVIDENCE CODE § 1550.

Section 1920b (Repealed)

Comment. Section 1920b is recodified as Evidence Code Section 1551.

Section 1921 (Repealed)

Comment. Sections 1921 and 1922 are superseded by Evidence Code Sections 1270-1271, 1280, 1452, 1453, 1506, and 1530.

Section 1922 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1921.

Section 1923 (Repealed)

Comment. Section 1923 is superseded by Evidence Code Section 1531. See the Comment to that section.

Section 1924 (Repealed)

Comment. Section 1924 is unnecessary because the sections to which it relates are repealed.

Section 1925 (Repealed)

Comment. Section 1925 is recodified as Evidence Code Section 1604.

Section 1926 (Repealed)

Comment. Section 1926 is superseded by Evidence Code Sections 1270-1271 and 1280-1284.

Section 1927 (Repealed)

Comment. Section 1927 is recodified as Evidence Code Section 1602.

Section 1927.5 (Repealed)

Comment. Section 1927.5 is recodified as Evidence Code Section 1605.

Section 1928 (Repealed)

Comment. Section 1928 is recodified as Evidence Code Section 1603.

Sections 1928.1-1928.4 (Repealed)

Comment. Article 2.1 of Chapter 3, Title 2, Part 4 of the Code of Civil Procedure consists of Sections 1928.1-1928.4. The sections are discussed individually below.

Section 1928.1 (Repealed)

Comment. Section 1928.1 is recodified as Evidence Code Section 1282.

Section 1928.2 (Repealed)

Comment. Section 1928.2 is recodified as Evidence Code Section 1283. See also EVIDENCE CODE § 1530 (purported copy of writing in custody of public employee).

Section 1928.3 (Repealed)

Comment. Section 1928.3 is unnecessary in view of Evidence Code Sections 1452, 1453, and 1530.

Section 1928.4 (Repealed)

Comment. Section 1928.4 is unnecessary in view of Evidence Code Section 3.

Section 1936 (Repealed)

Comment. Section 1936 is recodified as Evidence Code Section 1341.

Section 1936.1 (Repealed)

Comment. Section 1936.1 is recodified as Evidence Code Section 1156.

Section 1937 (Repealed)

Comment. Sections 1937, 1938, and 1939 relate to the best evidence rule and are superseded by Evidence Code Sections 1500-1510.

Section 1938 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1937.

Section 1939 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1937.

Section 1940 (Repealed)

Comment. Section 1940 is recodified as Evidence Code Sections 1413 and 1415.

Section 1941 (Repealed)

Comment. Section 1941 is recodified in substance as Evidence Code Section 1412.

Section 1942 (Repealed)

Comment. Section 1942 is recodified in substance as Evidence Code Section 1414.

Section 1943 (Repealed)

Comment. Section 1943 is recodified in substance in Evidence Code Section 1416.

Section 1944 (Repealed)

Comment. Section 1944 is recodified in substance as Evidence Code Section 1417.

Section 1945 (Repealed)

Comment. Section 1945 is recodified as Evidence Code Section 1418.

Section 1946 (Repealed)

Comment. The first subdivision of Section 1946 is superseded by the declaration against interest exception to the hearsay rule contained in Evidence Code Section 1230; the second subdivision is superseded by the business records exception contained in Evidence Code Sections 1270 and 1271; and the third subdivision is superseded by the business records exception contained in

Evidence Code Sections 1270-1271, the official records exceptions contained in Evidence Code Sections 1280-1284, and the various other exceptions to the hearsay rule contained elsewhere in the Evidence Code and in other codes.

Section 1947 (Repealed)

Comment. Section 1947 was a necessary provision when the only hearsay exception for business records was the common law shop-book rule. That rule required that an entry be an original entry in order to qualify for admission in evidence. The business records exception to the hearsay rule contained in Evidence Code Sections 1270 and 1271 does not require that the entry be an original entry so long as it was made in the regular course of the business at or near the time of the act, condition, or event recorded. As the Section 1947 no longer has any significant meaning, it is repealed.

Section 1948 (Repealed)

Comment. Section 1948 is recodified in substance as Evidence Code Section 1451.

Section 1951 (Repealed)

Comment. Section 1951 is superseded by Evidence Code Sections 1451, 1532, and 1600.

Sections 1953e-1953h (Repealed)

Comment. Article 5 of Chapter 3 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1953e-1953h. These sections, which constitute the Uniform Business Records as Evidence Act, are recodified as Evidence Code Sections 1270-1272. Sections 1270-1272 do not, however, include the language of Section 1963f.5, which was added to the Code of Civil Procedure in 1959. Section 1963f.5 is not in the Uniform Act, and it inadequately attempts to make explicit the liberal case law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf, or some other form. The case law rule is satisfactory, and Section 1963f.5 may have the unintended effect of limiting the provisions of the Uniform Act. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 516 (1964).

Sections 1953i-1953L (Repealed)

Comment. Article 6 of Chapter 3 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1953i-1953L. These sections, which comprise the Uniform Photographic Copies of Business and Public Records as Evidence Act, are recodified as Evidence Code Section 1550.

Section 1954 (Repealed)

Comment. Section 1954 is unnecessary in light of Evidence Code Sections 210, 351, and 352.

Sections 1957-1963 (Repealed)

Comment. Chapter 5 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1957 through 1963. The sections are discussed individually below.

Section 1957 (Repealed)

Comment. Sections 1957, 1958, and 1960 are superseded by Evidence Code Sections 140 (defining "evidence") and 210 (defining "relevant evidence"). See the Comments to EVIDENCE CODE §§ 140 and 210. See also the Comment to CODE CIV. PROC. § 1832.

Section 1958 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1957. The substance of Section 1958 is restated in the last sentence of Evidence Code Section 608.

Section 1959 (Repealed)

Comment. Section 1959 is superseded by Evidence Code Section 600.

Section 1960 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1957.

Section 1961 (Repealed)

Comment. Section 1961 is superseded by Chapter 3 (commencing with Section 600) of Division 5 of the Evidence Code, which prescribes the nature and effect of presumptions.

Section 1962 (Repealed)

Comment. Subdivision 1 of Section 1962 is repealed because it "has little meaning, either as a rule of substantive law or as a rule of evidence . . . ." *People v. Gorshen*, 51 Cal.2d 716, 731, 336 P.2d 492, 501 (1959).

Subdivisions 2, 3, 4, and 5 are superseded by Evidence Code Sections 621-624.

The first clause of subdivision 6 states the meaningless truism that judgments are conclusive when declared by law to be conclusive. The pleading rule in the next two clauses has been recodified as Section 1908.5 of the Code of Civil Procedure.

Subdivision 7 is merely a cross-reference section to all other presumptions declared by law to be conclusive. This subdivision is unnecessary.

See EVIDENCE CODE § 620.

Section 1963 (Repealed)

Comment. Many of the presumptions listed in Section 1963 are classified and restated in the Evidence Code. A few have been recodified as maxims of jurisprudence in Part 4 of Division 4 of the Civil Code. Others are not continued at all. The disposition of each subdivision of Section 1963 is given in the table below. Following the table are comments indicating the reasons for repealing those provisions of Section 1963 that are not continued in California law.

Section 1963 (subdivision)	*Superseded by*
1	Evidence Code Section 520
2	Not continued
3	Civil Code Section 3544 (added in this recommendation)
4	Evidence Code Section 621
5	Not continued
6	Not continued
7	Evidence Code Section 631
8	Evidence Code Section 632
9	Evidence Code Section 633
10	Evidence Code Section 636
11	Evidence Code Section 637
12	Evidence Code Section 638
13	Evidence Code Section 634
14	Not continued
15	Evidence Code Section 664
16	Evidence Code Section 666
17	Evidence Code Section 630
18	Not continued
19	Civil Code Section 3545 (added in this recommendation)
20	Not continued
21	Commercial Code Sections 3306, 3307, and 3408
22	Not continued
23	Evidence Code Section 640
24	Evidence Code Section 641
25	Not continued
26	Evidence Code Section 607
27	Not continued
28	Civil Code Section 3546 (added in this recommendation)
29	Not continued
30	Not continued
31	Evidence Code Section 661
32	Civil Code Section 3547 (added in this recommendation)
33	Civil Code Section 3548 (added in this recommendation)
34	Evidence Code Section 643
35	Evidence Code Section 644
36	Evidence Code Section 645
37	Evidence Code Section 642
38	Not continued
39	Unnecessary (duplicates Civil Code Section 1614)
40	Civil Code Section 164.5 (added in this recommendation)

Subdivision 2 is not continued because it has been a source of error and confusion in the cases. An instruction based upon it is error whenever specific intent is in issue. *People v. Snyder*, 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Maciel*, 71 Cal. App. 213, 234 Pac. 877 (1925). A person's intent may be inferred from his actions and the surrounding circumstances, and an instruction to that effect may be given. *People v. Bezold*, 154 Cal. 363, 97 Pac. 871 (1908).

Subdivisions 5 and 6 are not continued because, despite Section 1963, there is no presumption of the sort stated. The "presumptions" merely indicate that a party's evidence should be viewed with distrust if he could produce better evidence and that unfavorable inferences should be drawn from the evidence offered against him if he fails to deny or explain it. A party's failure to produce evidence cannot be turned into evidence against him by reliance on these presumptions. *Hampton v. Rose*, 8 Cal. App.2d 447, 56 P.2d 1243 (1935); *Girvetz v. Boys' Market, Inc.*, 91 Cal. App. 2d 827, 830, 206 P.2d 6, 8-9 (1949). The substantive effect of these "presumptions" is stated more accurately in [redacted] recommendation.

Evidence Code Section 646 (jury instruction)

Subdivision 14. The presumption stated in subdivision 14 is not continued, for it is inaccurate and misleading. The cases have used this presumption to sustain the validity of the official acts of a person acting in a public office when there has been no evidence to show that such person had the right to hold office. See, *e.g.*, *City of Monterey v. Jacks*, 139 Cal. 542, 73 Pac. 436 (1903); *Delphi School Dist. v. Murray*, 53 Cal. 29 (1878); *People v. Beal*, 108 Cal. App.2d 200, 239 P.2d 84 (1951). The presumption is unnecessary for this purpose, for it is well settled that the "acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it." *In re Redevelopment Plan for Bunker Hill*, 61 Cal.2d, ___, ___, 37 Cal. Rptr. 74, 88, 389 P.2d 538, 552 (1964); *Oakland Paving Co. v. Donovan*, 19 Cal. App. 488, 494, 126 Pac. 388, 390 (1912). Under the de facto doctrine, the validity of the official acts taken is conclusively established. *Town of Susanville v. Long*, 144 Cal. 362, 77 Pac. 987 (1904); *People v. Hecht*, 105 Cal. 621, 38 Pac. 941 (1895); *People v. Sassovich*, 29 Cal. 480 (1866). Thus, the cases applying subdivision 14 are erroneous in indicating that the official acts of a person acting in a public office may be attacked by evidence sufficient to overcome the presumption of a valid appointment. These cases can be explained only on the ground that they have overlooked the de facto doctrine.

In cases where the presumption might have some significance—cases where the party occupying the office is asserting some right of the office-holder—the presumption has been held inapplicable. *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488 (1885).

Subdivision 18. No case has been found where subdivision 18 has had any effect. The doctrine of res judicata determines the issues concluded between the parties without regard to this presumption. *Parnell v. Hahn*, 61 Cal. 131, 132 (1882) ("And the judgment as rendered . . . is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case . . . .").

Subdivision 20. The cases have used this "presumption" merely as a justification for holding that evidence of a business custom will sustain a finding that the custom was followed on a particular occasion. *E.g.*, *Robinson v. Puls*, 28 Cal.2d 664, 171 P.2d 430 (1946); *American Can Co. v. Agricultural Insur. Co.*, 27 Cal. App. 647, 150 Pac. 996 (1915). [redacted] provides for the admissibility of business custom evidence to prove that the custom was followed on a particular occasion. [redacted]. There is no reason to compel the trier of fact to find that the custom was followed by applying a presumption. The evidence of the custom may be strong or weak, and the trier of fact should be free to decide whether the custom was followed or not. No case has been found giving a presumptive effect to evidence of a business custom under subdivision 20.

Evidence Code Section 1105

Subdivision 23. The purpose of subdivision 23 appears to have been to compel an accommodation endorser to prove that he endorsed in accommodation of a subsequent party to the instrument and not in accommodation of the maker. See, *e.g., Pacific Portland Cement Co. v. Reinecke*, 30 Cal. App. 501, 158 Pac. 1041 (1916). The liability of accommodation endorsers is now fully covered by the Commercial Code. Accommodation is a defense which must be established by the defendant. COM. CODE §§ 3307, 3415(5). Hence, subdivision 22 is no longer necessary.

Subdivision 25. Despite subdivision 25, the California courts have refused to apply the presumption of identity of person from identity of the name when the name is common. *E.g., People v. Wong Sang Lung*, 3 Cal. App. 221, 224, 84 Pac. 843, 845 (1906). The matter should be left to inference, for the strength of the inference will depend in particular cases on whether the name is common or unusual.

Subdivision 27 has been rarely cited in the reported cases since it was enacted in 1872. It has been applied to situations where a statement has been made in the presence of a person who has failed to protest to the representations in the statement. The apparent acquiescence in the statement has been held to be proof of belief in the truth of the statement. *Estate of Flood*, 217 Cal. 763, 21 P.2d 579 (1933); *Estate of Clark*, 13 Cal. App. 786, 110 Pac. 823 (1910).

Although it may be appropriate under some circumstances to infer from the lack of protest that a person believes in the truth of a statement made in his presence, it is undesirable to require such a conclusion. The surrounding circumstances may vary greatly from case to case, and the trier of fact should be free to decide whether acquiescence resulted from belief or from some other cause. *Cf. Matt.* 27:13-14 (Revised Standard Version) ("Then Pilate said to him, 'Do you not hear how many things they testify against you?' But he gave him no answer, not even to a single charge . . . .").

Subdivision 29 has been cited in but one appellate decision in its 92-year history. It is unnecessary in light of the doctrine of ostensible authority. See 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 49-51 (7th ed. 1960).

Subdivision 30, in effect, declares that a marriage will be presumed from proof of cohabitation and repute. *Pulos v. Pulos*, 140 Cal. App.2d 913, 295 P.2d 907 (1956). Because reputation evidence may sometimes strongly indicate the existence of a marriage and at other times fail to do so, *requiring* a finding of a marriage from proof of such reputation is unwarranted. The cases have sometimes refused to apply the presumption because of the weakness of the reputation evidence relied on. *Estate of Baldwin*, 162 Cal. 471, 123 Pac. 267 (1912); *Cacioppo v. Triangle Co.*, 120 Cal. App.2d 281, 260 P.2d 985 (1953). Discontinuance of the presumption will not affect the rule that the existence of a marriage may be inferred from proof of reputation. *White v. White*, 82 Cal. 427, 430, 23 Pac. 276, 277 (1890) (" 'cohabitation and repute do not make marriage; they are merely items of evidence from which it may be *inferred* that a marriage had been entered into' ") (italics in original).

Subdivision 38 has not been applied in any reported case in its 92-year history. The substantive law relating to implied dedication and dedication by prescription makes the presumption unnecessary. See 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 27-29 (7th ed. 1960).

Section 1967 (Repealed)

Comment. Section 1967 has no substantive meaning and is unnecessary.

Section 1968 (Repealed)

Comment. Section 1968 unnecessarily duplicates the provisions of Penal Code Sections 1103 and 1103a.

Section 1973 (Repealed)

Comment. Section 1973 is unnecessary. It merely describes in evidentiary terms the Statute of Frauds contained in Civil Code Section 1624.

Section 1974 (Amended)

Comment. The amendment to Section 1974 makes no substantive change in the law; the amendment merely makes it clear that Section 1974 is a substantive rule of law, not a rule of evidence.

Section 1978 (Repealed)

Comment. Section 1978 incorrectly states the existing law of California. Certain things are declared to be "conclusive evidence" in other codes. See, e.g., COM. CODE § 1201(6), (45). Moreover, the California courts have recognized that some evidence may be conclusive in the absence of statute, for a court, "in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit the verdict of a jury to change such facts, because . . . to do so would, in effect, destroy the intelligence of the court." Austin v. Newton, 46 Cal. App. 493, 497, 189 Pac. 471, 472 (1920); Neilson v. Houle, 200 Cal. 726, 729, 254 Pac. 891, 892 (1927). Nonetheless, the California courts have also relied upon this section to sustain a finding of paternity despite

undisputed blood-test evidence showing that the defendant could not have been the father of the child. Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937). The Legislature subsequently rejected this decision by enacting the Uniform Act on Blood Tests to Determine Paternity. Repeal of Section 1978 will remove the statutory basis for a similar decision in the rare case where such certainty is attainable.

Sections 1980.1-1980.7 (Repealed)

Comment. Sections 1980.1-1980.7, which comprise the Uniform Act on Blood Tests to Determine Paternity, are recodified as Evidence Code Sections 890-896.

Sections 1981-1983 (Repealed)

Comment. Chapter 1 of Title 3, Part IV, of the Code of Civil Procedure consists of Sections 1981 through 1983. These sections are discussed individually below.

Section 1981 (Repealed)

Comment. Section 1981 is superseded by Evidence Code Sections 500 and 510. 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, 1124-1125 (1964).

Section 1982 (Repealed)

Comment. Section 1982 is recodified as Evidence Code Section 1402.

Section 1983 (Repealed)

Comment. Section 1983 was held unconstitutional as applied under the Alien Land Law. Morrison v. California, 291 U.S. 82 (1934). It has been applied but once by an appellate court since the Morrison case was decided. People v. Cordero, 50 Cal. App.2d 146, 122 P.2d 648 (1942). Section 1983

appears to have been designed principally to facilitate the enforcement of the Alien Land Law. Since that law has been held unconstitutional (Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952)) and has been repealed (Cal. Stats. 1955, Ch. 316, § 1, p. 767), Section 1983 should no longer be retained in the law of California.

Section 1998 (Repealed)

Comment. Sections 1998-1998.5 provide a special exception to the best evidence rule for hospital records. These sections are recodified as Evidence Code Sections 1560-1566.

Section 1998.1 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.2 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.3 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.4 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.5 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 2009 (Amended)

Comment. Section 2009 has been amended to reflect the fact that statutes in other codes may also authorize the use of affidavits. See, e.g., PROB. CODE §§ 630, 705.

Section 2016 (Amended)

Comment. The amendment of Section 2016 merely substitutes the general definition of "unavailable as a witness" used in the Evidence Code for the substantially similar language in Section 2016.

Sections 2042-2056 (Repealed)

Comment. Article 6 of Chapter 3, Title 3, Part IV, of the Code of Civil Procedure consists of Sections 2042 through 2056. These sections are discussed individually below.

Section 2042 (Repealed)

Comment. Section 2042 is superseded by Evidence Code Section 320.

Section 2043 (Repealed)

Comment. Section 2043 is substantially recodified in Evidence Code Section 777.

Section 2044 (Repealed)

Comment. The first sentence of Section 2044 is recodified as Evidence Code Section 765. The second sentence is superseded by Evidence Code 352.

Section 2045 (Repealed)

Comment. The first sentence of Section 2045 is superseded by Evidence Code Sections 760, 761, and 772. The second sentence of Section 2045 is recodified as Evidence Code Section 773.

Section 2046 (Repealed)

Comment. The first sentence of Section 2046 is recodified as Evidence Code Section 762. The second sentence of Section 2046 is recodified as Evidence Code Section 767.

Section 2047 (Repealed)

Comment. The last sentence of Section 2047 is superseded by Evidence Code Section 1237. The remainder of Section 2047 is superseded by Evidence Code Section 771.

Section 2048 (Repealed)

Comment. Section 2048 is superseded by Evidence Code Sections 767 and 772.

Section 2049 (Repealed)

Comment. Section 2049 is inconsistent with and superseded by Evidence Code Section 785. See the Comment to that section. See also EVIDENCE CODE §§ 769, 770, and 1235.

Section 2050 (Repealed)

Comment. Section 2050 is recodified as Evidence Code Sections 774 and 778.

Section 2051 (Repealed)

Comment. Section 2051 is inconsistent with Evidence Code Sections 780 and 785-788. The provision of Section 2051 excluding evidence of particular wrongful acts is continued in Evidence Code Section 787. The principle of excluding criminal convictions where there has been a subsequent pardon has been broadened to cover analogous situations in Evidence Code Section 788.

Section 2052 (Repealed)

Comment. The first clause of Section 2052 is superseded by Evidence Code Section 780(h). The remainder of Section 2052 is inconsistent with Evidence Code Sections 768-770. See the Comments to those sections.

Section 2053 (Repealed)

Comment. Insofar as Section 2053 deals with the inability to support a witness' credibility until it has been impeached, it is superseded by Evidence Code Section 790. Insofar as Section 2053 deals with the inadmissibility of character evidence in a civil action, it is superseded by Evidence Code Sections 1100-1104.

Section 2054 (Repealed)

Comment. Section 2054 is recodified in substance as Evidence Code Section 768(b).

Section 2055 (Repealed)

Comment. Section 2055 is recodified as Evidence Code Section 776.

Section 2056 (Repealed)

Comment. Section 2056 is recodified in substance as Evidence Code Section 766.

Section 2061 (Repealed)

Comment. The first sentence of Section 2061 is recodified in Evidence Code Section 312. The remainder of Section 2061 is superseded by Chapter 6 (commencing with Section 430) of Division 3 of the Evidence Code.

Section 2065 (Repealed)

Comment. The first clause of Section 2065 is superseded by Evidence Code Sections 351 and 911. [redacted] 2065

Insofar as [redacted] Section permits a witness to refuse to give an answer having a tendency to subject him to punishment for a felony, it is superseded by [redacted] dealing with the self-incrimination privilege. Evidence Code Sections 940 [redacted]

Section 2065 as follows:

The language relating to an answer which would have a tendency to degrade the character of the witness is unnecessary. The meaning of this language seems to be [redacted] A witness must testify to non-incriminating but degrading matter that is relevant to the merits of the case.[6]

[6] Clark v. Reese, 35 Cal. 89 (1869) (breach of promise to marry; defense that plaintiff had immoral relations with X; *held*, X must answer to such relations, though answer degrading); San Chez v. Superior Court, 131 Cal. App.2d 162, 314 P.2d 135 (1957) (separate maintenance on ground of cruelty; defendant required to answer as to cruelty, albeit degrading).

Nevertheless the witness is privileged to refuse to testify to such matter when the matter is relevant only for the purpose of impeachment. However, this privilege seems to be largely—if not entirely—superfluous. [redacted] provides that a witness may not be impeached by evidence of [redacted] Evidence Code Section 787 (specific instances of conduct)

arises of such specific instances of conduct

[redacted] Manifestly, to the extent that the degrading matter referred to in Section 2065 [redacted] makes this portion of Section 2065 unnecessary. [redacted] Moreover, since the witness is protected against impeachment by evidence of specific [redacted] acts, though relevant, and against matter which is degrading but is irrelevant (as to which no special rule is needed), there seems to be little, if any, scope left to the "degrading matter" privilege. For criticisms of this privilege, see 6 WIGMORE, EVIDENCE §§ 2215, 2255 (McNaughton rev. 1961); 3 WIGMORE, EVIDENCE § 984 (3d ed. 1940); McGovney, *Self-Criminating and Self-Disgracing Testimony*, 5 IOWA LAW BULL. 174 (1920). This privilege seems to be seldom invoked in California opinions and, when invoked, it arises in cases in which the evidence in question could be excluded merely by virtue of its irrelevancy, or by virtue of Section 2051, or by virtue of both. See, for example, the following cases: *People* v. *Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956) (homicide case involving cross-examination as to defendant's efforts to evade military service; *held*, irrelevant *and* violative of Section 2065); *People* v. *T. Wah Hing*, 15 Cal. App. 195, 203, 114 Pac. 416, 419 (1911) (abortion case in which the prosecuting witness was asked on cross-examination who was father of child; *held*, immaterial—and, if asked to degrade, "equally inadmissible"); *People* v. *Fong Chung*, 5 Cal. App. 587, 91 Pac. 106 (1907) (defendant's witness in statutory rape case asked whether the witness was seller of lottery tickets and operator of poker game; *held*, improper, *inter alia*, on ground of Section 2065. Note, however, the *additional* grounds for exclusion, *viz.*, immateriality and Section 2051. Thus, Section 2065 was not at all necessary for the decision.). Hence, this portion of Section 2065 is superfluous [redacted] under [redacted] Evidence Code 787. Section

pertinent portion continued as Evidence Code Section 787).

The remainder of [redacted] Section is superseded by [redacted] dealing [redacted] with the [redacted] 2065

Evidence Code Section 788.

Admissibility of criminal convictions for impeachment purposes.

Section 2066 (Repealed)

Comment. Section 2066 is unnecessary in the light of Evidence Code Section 765, which restates the provisions of Code of Civil Procedure Section 2044.

Section 2078 (Repealed)

Comment. Section 2078 is superseded by Evidence Code Sections 1152-1154.

Section 2079 (Repealed)

Comment. Section 2079 is unnecessary because it repeats what is said in Civil Code Section 130. Moreover, it is misleading to the extent that it suggests that adultery is the only ground for divorce which requires corroboration of the testimony of the spouses.

Sections 2101-2103 (Repealed)

Comment. Chapter 4 of Title 5, Part IV, of the Code of Civil Procedure consists of Sections 2101 through 2103. These sections are discussed individually below.

Section 2101 (Repealed).

Comment. Section 2101 is superseded by Evidence Code Section 312.

Section 2102 (Repealed)

Comment. The first sentence of Section 2102 is recodified in Evidence Code Section 310. The second sentence of Section 2102 is superseded by Evidence Code Section 458.

Section 2103 (Repealed)

Comment. Section 2103 is superseded by Evidence Code Section 300.

CORPORATIONS CODE

Section 6602 (Amended)

Comment. This revision of Section 6602 provides, in effect, that the judge may take judicial notice of the matters listed in amended Section 6602, and he is required to take such judicial notice if he is requested to do so and the party supplies him with sufficient information. See EVIDENCE CODE §§ 452 and 453 and the Comments thereto.

The portion of Section 6602 which has been deleted is either unnecessary because it duplicates the provisions of Evidence Code Sections 451 and 452 or undesirable because it conflicts with Evidence Code 1452.

Section 25310 (Amended)

Comment. The deleted language is inconsistent with Evidence Code Section 1452. See the Comment to that section.

GOVERNMENT CODE

Section 11513 (Amended)

Comment. The revision of the last sentence of Section 11513 is necessary because, under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions.

The substitution of "other" for "direct" in the third sentence of subdivision (c) of Section 11513 makes no significant substantive change but is desirable because "direct evidence" is not defined for the purposes of Section 11513. See the Comment to CODE CIV. PROC. § 1831 (Repealed).

Section 19580. (Amended)

Comment. The amendment merely substitutes a reference to the correct Evidence Code section for the reference to the superseded Code of Civil Procedure section.

Section 34330 (Repealed)

Comment. Section 34330 is unnecessary. The matters to be noticed under Section 34330 may be noticed under Division 4 (commencing with Section 450) of the Evidence Code, and that division provides the applicable procedures for taking judicial notice.

HEALTH AND SAFETY CODE

Section 3197 (Amended)

Comment. The revision of Section 3197 merely substitutes references to the pertinent Evidence Code sections that supersede subdivisions 1 and 4 of Code of Civil Procedure Section 1881.

PENAL CODE

Section 270e (Amended)

Comment. The revision of Section 270e merely inserts a reference to the pertinent sections of the Evidence Code.

Section 686 (Amended)

Comment. Section 686 sets forth three exceptions to the right of a defendant in a criminal trial to confront the witnesses against him. These exceptions purport to state the conditions under which the court may admit testimony taken at the preliminary hearing, testimony taken in a former trial of the action, and testimony in a deposition that is admissible under Penal Code Section 882. The section inaccurately sets forth the existing law, for it fails to provide for the admission of hearsay evidence generally or for the admission of testimony in a deposition that is admissible under Penal Code Sections 1345 and 1362, and its reference to the conditions under which depositions may be admitted under Penal Code Section 882 is not accurate. As [redacted] covers the situations in which testimony in another action or proceeding and testimony at the preliminary hearing is admissible as exceptions to the hearsay rule, Section 686 [redacted] revised by eliminating the specific exceptions for these situations and by substituting for them a general cross reference to admissible hearsay. The [redacted] statement of the conditions under which a deposition may be admitted [redacted] also deleted, and in lieu of the deleted language there [redacted] substituted language that accurately provides for the admission of depositions under Penal Code Sections 882, 1345, and 1362. [redacted]

Evidence Code Sections [redacted] 1290 - 1292

has been

has been

is

Section 688 (Amended)

Comment. The language deleted from Section 688 is superseded by Evidence Code Sections 930 and 940.

Section 939.6 (Amended)

Comment. The revision of Section 939.6 makes no substantive change. The amendment, however, states more clearly and precisely the meaning that has been given the section by the California courts. See, e.g., People v. Freudenberg, 121 Cal. App.2d 564, 263 P.2d 875 (1953). See also WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 175, 228 (1963).

Section 961 (Amended)

Comment. This revision of Section 961 makes it clear that matters that will be judicially noticed, whether such notice is mandatory or discretionary, need not be stated in an accusatory pleading. See EVIDENCE CODE §§ 451 and 452.

Section 963 (Amended)

Comment. This revision of Section 963 makes the procedure provided in Evidence Code Sections 454-458 applicable when judicial notice is taken of the matter listed in Penal Code Section 963. Note that, notwithstanding Evidence Code Section 453, notice is mandatory if the private statute or ordinance is pleaded by reference to its title and the day of its passage.

Section 1120 (Amended)

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

as a witness and examined in the presence of the parties.

The section does not make it clear whether this examination in the presence of the parties is for the purpose of determining if "good cause" exists for the juror's discharge in accordance with Penal Code Section 1123 or whether this examination is for the purpose of obtaining the juror's knowledge as evidence in the case. The circumstances under which a juror may testify in a criminal case are fully covered in Evidence Code Section 704. Therefore, Section 1120 has been amended to eliminate the ambiguity in its provisions and to provide assurance the juror's examination is to be used solely to determine whether "good cause" exists for his discharge.

Section 1322 (Repealed)

Comment. Section 1322 is superseded by Evidence Code Sections 970-973 and 980-987. See the Comment to subdivision 1 of Section 1881 of the Code of Civil Procedure, which also is superseded by the same Evidence Code sections.

Section 1323 (Repealed)

Comment. The first clause of the first sentence of Section 1323 is superseded by Evidence Code Sections 930 and 940. The second clause is recodified as Evidence Code Section 772b. The last sentence of Section 1323 is unnecessary because it merely duplicates the provisions of Article I, Section 13 of the California Constitution.

Section 1323.5 (Repealed)

Comment. Section 1323.5 is superseded by Evidence Code Section 930, which retains the only effect the section has ever been given--to prevent the prosecution from calling the defendant in a criminal action as a witness. See People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952). Whether Section 1323.5

provides a broader privilege than Evidence Code Section 930 is not clear, for the meaning of the phrase "persons accused or charged" is uncertain. For example, a witness before the grand jury or at a coroner's inquest is not technically a person "accused or charged," and Section 1323.5 would appear not to apply to such procedings. A person who claims the privilege against self-incrimination before the grand jury, at a coroner's inquest, or in some other proceeding is provided with sufficient protection under Evidence Code Section 913, for his claim of privilege cannot be shown to impeach him or to provide a basis for inferences against him in a subsequent civil or criminal proceeding.

Section 1345 (Amended)

Comment. Section 1345 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Codes Sections 1290-1292.

Section 1362 (Amended)

Comment. Section 1362 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Code Sections 1290-1292.

PUBLIC UTILITIES CODE

Section 306 (Amended)

Comment. The deleted language is inconsistent with Evidence Code Section 1452. See the Comment to that section.

#34(L) 10/13/64

Memorandum 64-70

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Preliminary Portion of Recommendation of Proposed Evidence Code)

Attached are two copies of a rough draft of the preliminary portion of the recommendation on the proposed Evidence Code. This portion will consist of:

Title Page (to be prepared later)

Letter of Transmittal (attached)

Acknowledgments (attached) (We will be correcting and adding names to this list.)

Table of Contents (to be prepared later)

Recommendation

Background (attached)

Recommendations (attached)

Proposed Legislation (will consist of text of statute and Comments to each section)

Various Tables (We will discuss these at the meeting in connection with a separate memorandum)

Index (to be prepared later)

We suggest that all of you read the attached material and mark any editorial changes you believe should be made on one copy to turn in to the staff at the October meeting. In addition, any suggestions for reorganization of the material, additions or deletions, etc., should be made on the copy you turn in to the staff or should be brought up at the October meeting.

We do not plan to send this material to the printer until after the November meeting. We are already aware of some errors in the material and will further check it prior to the meeting. Nevertheless, we are sending it to you now so that you will have an opportunity to read it in connection with the particular divisions of the Evidence Code that you are checking.

Respectfully submitted,

John H. DeMoully
Executive Secretary

STATE OF CALIFORNIA

C A L I F O R N I A L A W R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

UNIFORM RULES OF EVIDENCE

P R O P O S E D E V I D E N C E C O D E

January 1965

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

LETTER OF TRANSMITTAL

January 1965

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 its recommendation on this subject. The legislation recommended by the Commission consists of (1) a proposed Evidence Code that includes the best features of the Uniform Rules and of the existing California law and (2) the necessary conforming adjustments in existing statutory law.

The proposed Evidence Code is not the product of the Commission's efforts alone. Professor James H. Chadbourn (formerly of the School of Law, University of California at Los Angeles, now of the Harvard Law School) prepared comprehensive studies for the Commission of the Uniform Rules of Evidence and the corresponding California law. In addition, the Commission considered other published materials relating to the Uniform Rules, including legislation and court rules based on the Uniform Rules that have been adopted in other states. Several comprehensive reports of committees appointed by the New Jersey Supreme Court and by the New Jersey Legislature were particularly helpful.

Utilizing this research material, the Commission drafted preliminary revisions of the Uniform Rules and submitted them to a special committee of the State Bar of California appointed to work with the Commission on the evidence project. The Commission made further revisions of the Uniform Rules in response to the State Bar committee's analysis and criticism of the Commission's preliminary proposals. A revised version of each article of the Uniform Rules was then published as a tentative recommendation of the Commission in a report which also contained the related research study prepared by Professor Chadbourn. Nine tentative recommendations and research studies relating to the

A C K N O W L E D G M E N T S

A number of former members of the Law Revision Commission participated at the early stages in the formulation of this recommendation: John D. Babbage, Frank S. Balthis, Leonard J. Dieden, George G. Grover, Roy A. Gustafson, Bert W. Levit, Charles H. Matthews, Stanford C. Shaw, Vaino H. Spencer, and Samuel D. Thurman.

Professor James H. Chadbourn and Professor Ronan E. Degnan, the Commission's research consultants, prepared the research studies that were used in formulating the recommendation.

Many other persons and organizations also assisted in this project, primarily by providing the Commission with critical evaluations of all or a portion of its tentative proposals. The following deserve special mention for their substantial contributions.

SENATE FACT FINDING COMMITTEE ON JUDICIARY

Senator Edwin J. Regan, Chairman
Weaverville

Special Subcommittee on Rules of Evidence

Senator Donald L. Grunsky, Chairman
Watsonville

Senator Carl L. Christensen
Eureka

Senator Joseph A. Rattigan
Santa Rosa

ASSEMBLY INTERIM COMMITTEE ON JUDICIARY--CIVIL

Assemblyman George A. Willson, Chairman
Huntington Park

Subcommittee on Law Revision

Assemblyman Alfred H. Song, Chairman
Monterey Park

Assemblyman John Francis Foran
San Francisco

Assemblyman William F. Stanton
San Jose

Assemblyman James E. Whetmore
Los Alamitos

Assemblyman George A. Willson
Huntington Park

ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE

Gordon H. Winton, Jr., Chairman
Merced

SPECIAL COMMITTEE OF THE STATE BAR TO CONSIDER THE UNIFORM RULES OF EVIDENCE

Present Members

Philip F. Westbrook, Jr., Chairman
Los Angeles

Lawrence C. Baker, Vice-Chairman
San Francisco

Albert H. Abramson
San Francisco

John B. Bates
San Francisco

John L. Driscoll
San Francisco

Joseph H. Edgar
Los Angeles

Arthur Groman
Los Angeles

Clark R. Heggeness
Long Beach

George E. Liebermann
San Francisco

Benjamin H. Parkinson, Jr.
San Francisco

W. Burleigh Pattee
San Francisco

Mark P. Robinson
Los Angeles

Jerold S. Schutzbank
Sherman Oaks

William Hugh Wilson
San Bernardino

Former Members

Joseph A. Ball
Long Beach

Bryant M. Bennett
Oakland

Judge Benjamin C. Duniway
San Francisco

Carlos R. Freitas
San Rafael

William J. Hayes
Oakland

Ingemar Hoberg
San Francisco

Stuart L. Kadison
Los Angeles

Francis R. Kirkham
San Francisco

H. Pitts Mack
San Diego

Robert M. Newell
Los Angeles

Judge Robert H. Patton
Los Angeles

William J. Schall
La Jolla

Walter H. Stammer
Fresno

Stanley A. Barker
Los Angeles

Warren M. Christopher
Los Angeles

Morse Erskine
San Francisco

Roy A. Gustafson
Ventura

Robert Henigson
Los Angeles

Judge Shirley M. Hufstedler
Los Angeles

Judge Otto M. Kaus
Los Angeles

Moses Lasky
San Francisco

John W. Martin
San Francisco

Jesse E. Nichols
Oakland

Samuel O. Pruitt
Los Angeles

J. E. Simpson
Los Angeles

SPECIAL SUBCOMMITTEE OF THE JUDICIAL COUNCIL

Members

Justice John B. Molinari, Chairman

Judge Bertram D. Janes

Judge Thomas Kongsgaard

Justice Fredrick E. Stone

Former Member

Chief Justice Roger J. Traynor

Staff

Warren P. Marsden

Stephen Birdlebough

SPECIAL COMMITTEE OF THE CONFERENCE OF CALIFORNIA JUDGES

Judge Leonard A. Diether, Chairman
Los Angeles

Judge Mark Brandler
Los Angeles

Judge Howard E. Crandall
San Pedro

Justice Mildred Lillie
Los Angeles

Judge Raymond J. Sherwin
Fairfield

Judge James C. Toothaker
San Diego

SPECIAL COMMITTEE OF THE MUNICIPAL COURT JUDGES ASSOCIATION OF LOS ANGELES COUNTY

Judge Elizabeth Zeigler, Chairman
Los Angeles

Judge Hector P. Baida
Santa Monica

Judge Alan Campbell
Los Angeles

Judge Peter Cook
Downey

Judge Winthrop Johnson
West Covina

OFFICE OF THE ATTORNEY GENERAL

Thomas Lynch, Attorney General
Sacramento

Albert W. Harris, Jr.
San Francisco

Doris Maier
Sacramento

Norman B. Peek
Los Angeles

Arlo Smith
San Francisco

Willard Shank
Sacramento

Justice Stanley Mosk, Former Attorney General
Sacramento

STATE DEPARTMENT OF PUBLIC WORKS
(Division of Contracts & Rights of Way)

Harry S. Fenton, Chief
Sacramento

Emerson W. Rhyner, Deputy Chief
Sacramento

Robert F. Carlson
Sacramento

CALIFORNIA COMMISSION ON UNIFORM STATE LAWS

Alvin J. Rockwell, liaison member
San Francisco

STATE OFFICE OF ADMINISTRATIVE PROCEDURE

OFFICE OF THE LEGISLATIVE COUNSEL

George Murphy, Chief Deputy
Sacramento

Angus C. Morrison (Deceased)
Legislative Counsel - Sacramento

DISTRICT ATTORNEYS' ASSOCIATION OF CALIFORNIA

Joseph T. Powers, representative at Commission meetings
Los Angeles

Jay Ballantyne, President
Visalia

Spencer M. Williams, Past President
San Jose

Office of County Counsel
Monterey County
Sacramento County
San Bernardino County
Santa Barbara County
Santa Clara County

Office of District Attorney
Alameda County
Contra Costa County
Los Angeles County
Placer County
Ventura County

LEAGUE OF CALIFORNIA CITIES

City Attorneys of Anaheim, Bakersfield, Berkeley, Beverly Hills, Burbank, Coachella, Cudahy, Culver City, El Monte, Eureka, Fresno, Fullerton, Gardena, Inglewood, Long Beach, Los Angeles, Los Gatos, Oakland, Pasadena, Redlands, Richmond, Riverside, Sacramento, San Diego, San Francisco, San Jose, San Leandro, San Marino, Santa Monica, Temple City, Torrance, and West Covina

LOCAL BAR ASSOCIATIONS

The following local bar associations appointed committees or designated members to study the Commission's proposals. Some of them submitted comments for Commission consideration in formulating this recommendation.

Alameda County Bar Association	Beverly Hills Bar Association
Colusa County Bar Association	Compton Judicial District Bar Assn.
Hollywood Bar Association	Lassen County Bar Association
Marin County Bar Association	Long Beach Bar Association
Placer County Bar Association	Merced County Bar Association
San Diego County Bar Association	San Benito County Bar Association
San Mateo County Bar Association	San Gabriel Valley Bar Association
Sonoma County Bar Association	Solano County Bar Association
Tehama County Bar Association	Sunnyvale Bar Association

SAN FRANCISCO BAR ASSOCIATION--TRIAL PRACTICE COMMITTEE

Vernon L. Goodin, Chairman
San Francisco

R. J. Reynolds, Vice-Chairman
San Francisco

John B. Bates
San Francisco

Robert L. Bergmann
San Francisco

Alan L. Bonnington
San Francisco

James Brosnahan, Jr.
San Francisco

J. D. Burdick
San Francisco

Reynold H. Colvin
San Francisco

Donald D. Connors, Jr.
San Francisco

Robert E. Dryden
San Francisco

John W. Herron
San Francisco

Ingemar E. Hoberg
San Francisco

Jay Jackson
San Francisco

Ernest B. Lageson
San Francisco

Glenn Paul Lewis
Oakland

Edward T. Moran
San Francisco

Charles O. Morgan, Jr.
San Francisco

Frederick L. Nelson
San Francisco

W. Burleigh Pattee
San Francisco

Richard A. Raftery
San Francisco

Robert D. Raven
San Francisco

Joseph S. Rogers, Jr.
San Francisco

Harlow P. Rothert
San Francisco

Theodore Sachsman
San Francisco

William W. Schwarzer
San Francisco

Philip Steiner
San Francisco

Bruce Walkup
San Francisco

Jack H. Werchick
San Francisco

INDIVIDUALS

Thomas G. Baggot
Los Angeles

William A. Bellamy, M.D.
San Francisco

Maleta J. Boatman, M.D.
San Francisco

Professor Kenneth C. Davis
University of Chicago Law School
Chicago, Illinois

Jerrold A. Fadem
Los Angeles

Stephen W. Hackett
San Francisco

Edward E. Hause, M.D.
San Francisco

Professor John B. Hurlbut
Stanford Law School

Professor David W. Louisell
University of California Law School

John N. McLaurin
Los Angeles

Timothy W. O'Brien
Ukiah

John A. Stroud, M.D.
Sacramento

B. E. Witkin
Berkeley

Milnor E. Gleaves
Los Angeles

David I. Lippert
Los Angeles

Homer H. Bell
Monrovia

D. Bianco
Bakersfield

Professor Alexander D. Brooks
Rutgers School of Law
Newark, New Jersey

Bernard L. Diamond, M.D.
Berkeley

E. F. Galioni, M.D.
Sacramento

Professor Donald G. Hagman
U.C.L.A. Law School

Albert T. Henley
San Jose

Jess S. Jackson
San Mateo

Judge Philbrick McCoy
Los Angeles

J. Victor Monke, M.D.
Beverly Hills

Professor Arthur H. Sherry
University of California Law School

Fred M. Tetzlaff, M.D.
San Francisco

James H. Denison
Los Angeles

Richard A. Perry
San Francisco

Lloyd Tunik
San Rafael

The California Law Revision Commission has substantially completed its work on the proposed Evidence Code which the Commission will recommend for enactment at the next session of the Legislature. The proposed new code is the product of almost eight years of research and study by the Commission.

The Commission today released a summary of its recommendation to the 1965 Legislature. This summary is set out at the end of this article.

A preliminary draft of the proposed code was published in September as Preprint Senate Bill No. 1 and was distributed to members of the bench and bar at the 1964 Annual Meeting of the State Bar in Santa Monica. The proposed code was also discussed by a panel of experts on evidence law at the Santa Monica meeting.

Copies of the preliminary draft have also been distributed to a large number of persons and organizations who have signified an interest in reviewing and criticizing the preliminary draft. These include a Special Subcommittee on the Rules of Evidence of the Senate Fact Finding Committee on Judiciary; a Special Subcommittee on Law Revision of the Assembly Interim Committee on Judiciary--Civil; a Special Committee of the State Bar; a Special Subcommittee of the Judicial Council; a Special Committee of the Conference of California Judges; a Special Committee of the Municipal Court Judges' Association of Los Angeles County; the Office of the Attorney General; the Department of Public Works; the State Office of Administrative Procedure; the Office of the Legislative Counsel; the District Attorneys' Association of California; the League of California Cities; 19 local bar associations; and a number of individual judges and lawyers.

The Commission is now reviewing the criticisms of these interested persons and organizations and making the necessary revisions in the preliminary draft of the proposed code.

Early in January 1965, the Commission plans to publish a pamphlet containing the text of the proposed code, together with a Comment following each section to explain in some detail the purpose and effect of the section. Copies of this pamphlet may be obtained from the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

The Commission already has published nine pamphlets containing tentative recommendations and research studies relating to the Uniform Rules of Evidence. Except as indicated below, these may be obtained without charge from the Commission's office at Stanford:

Article I. General Provisions
Article II. Judicial Notice
Burden of Producing Evidence, Burden of Proof, and Presumptions
Article IV. Witnesses
Article V. Privileges [Price $5.20 including tax]
Article VI. Extrinsic Policies Affecting Admissibility
Article VII. Expert and Other Opinion Testimony
Article VIII. Hearsay Evidence [Price $5.20 including tax]
Article IX. Authentication and Content of Writings

The two reports that are being sold may be ordered from the Documents Section of the General Services Administration, P. O. Box 1612, Sacramento, California 95807. Sales are subject to payment in advance of shipment of publications.

The summary of the Law Revision Commission's recommendation follows:

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

proposing an

EVIDENCE CODE

BACKGROUND

The California Law Revision Commission was directed by the Legislature in 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."

Pursuant to this directive, the Commission has made a study of the California law of evidence and the recommendations of the Commissioners on Uniform State Laws. The Commission has concluded that the Uniform Rules should not be adopted in the form in which they were proposed but that many features of the Uniform Rules should be incorporated into the law of California. The Commission has also concluded that California should have a new, separate Evidence Code which will include the best features of the Uniform Rules and the existing California law.

The Case for Recodification of the California Law of Evidence

In few, if any, areas of the law is there as great a need for immediate and accurate information as there is in the law of evidence. On most legal questions, the judge or lawyer has time to research the law before it is applied. But questions involving the admissibility of evidence arise suddenly during trial. Proper objections--stating the correct grounds--must be made immediately or the lawyer may find that his objection has been waived. The judge must rule immediately in order that the trial may progress in an orderly fashion. Frequently, evidence questions cannot be anticipated and, hence, necessary research often cannot be done beforehand.

There is, therefore, an acute need for a systematic, comprehensive, and authoritative statement of the law of evidence that is easy to use and convenient for immediate reference. The California codes provide such statements of the law in many fields--commercial transactions, corporations, finance, insurance--where the need for immediate information is not nearly as great as it is in regard to evidence. A similar statement of the law of evidence should be available to those who are required to have that law at their fingertips for immediate application to unanticipated problems. This can best be provided by a codification of the law of evidence which would provide practitioners with a systematic, comprehensive, and authoritative statement of the law.

An attempt at codification of the California law of evidence was made by the draftsmen of the 1872 Code of Civil Procedure. Part IV of that code, entitled "Of Evidence," was apparently intended to be a comprehensive codification of the subject. The existing statutory law of evidence still consists almost entirely of the 1872 codification. Isolated additions to or amendments of Part IV have been made from time to time, but the original 1872 statute has remained as the fundamental statutory basis of the California law of evidence.

Although Part IV of the Code of Civil Procedure purports to be a comprehensive and systematic statement of the law of evidence, in fact it falls far short of that. Its draftsmanship does not meet the standards of the modern California codes. There are duplicating and inconsistent provisions. There are long and complex sections that are difficult to read and more difficult to understand. Important areas of the law of evidence are not mentioned at all in the code, and many that are mentioned are treated in the most cursory fashion. Many sections are based on an erroneous analysis of the common law of evidence upon which the code is based. Others preserve common law rules that experience has shown do more to inhibit than to enhance the search for truth at a

trial. Necessarily, therefore, the courts have had to develop many, if not most, of the rules of evidence with but partial guidance from the statutes.

Illustrative of the deficiencies in the existing code is the treatment of the hearsay rule. Perhaps no rule of evidence is more important or more frequently applied; yet, there is no statutory statement of the hearsay rule in the code. On the other hand, several exceptions to the hearsay rule are given explicit statutory recognition in the code. But the list of exceptions is both incomplete and inaccurate. The Commission has identified and stated in the Evidence Code a number of exceptions to the hearsay rule that are recognized in case law but are not recognized in the existing code, including such important exceptions as the exception for spontaneous statements and the exception for statements of the declarant's state of mind.

Moreover, the exceptions that are mentioned in the existing code sometimes bear little relationship to the actual state of the law. For example, portions of the common law exception for declarations against interest may be found in several scattered sections--Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). Yet, all of these sections taken together do not express the entire common law rule,

nor do they reflect the law of California. Each requires that the declarant be dead when the evidence is offered. Nonetheless, the courts have admitted declarations against interest when the declarant is neither dead nor otherwise unavailable. None of these sections permits an oral declaration against pecuniary interest, not relating to real property, to be admitted except against a successor of the declarant. The courts, however, follow the traditional common law rule and admit such declarations despite the limitations in the code. Recently, too, the Supreme Court decided that declarations against penal interest are admissible despite the fact that the code refers only to declarations against pecuniary interest.

In the area of privilege, the existing code is equally obscure. It does state in general terms the privileges that are recognized in California, but it does nothing more. It does not indicate, for example, that the attorney-client privilege may apply to communications made to persons other than the attorney himself or his secretary, stenographer, or clerk. It does not indicate that the privilege protects only confidential communications. The generally recognized exceptions to the privilege--such as the exception for statements made in contemplation of crime--are nowhere mentioned. Nor does the code mention the fact that the privilege may be waived. Nonetheless, the courts have recognized such exceptions, have protected communications to intermediaries for transmittal to the attorney,

have required the communication to have been in confidence, and have held that the privilege may be waived.

On the question of the termination of a privilege, however, the courts have deemed themselves strictly bound by the language of the code. One case, for example, held that a physician's lips are forever sealed by the physician-patient privilege upon the patient's death--even though it was the patient's personal representative that desired to use the evidence. This strange result was deemed compelled because the code provides that a physician may not be examined "without the consent of his patient," and a dead patient cannot consent. That decision was followed by an amendment permitting the personal representative or certain heirs of a decedent to waive the decedent's physician-patient privilege in a wrongful death action; but, apparently, the law stated in that case still applies in all other actions and to all of the other communication privileges.

Other important rules of evidence either have received similarly cursory treatment in the existing code or have been totally neglected. Such important rules as the inadmissibility of evidence of liability insurance, the rules governing the admissibility and inadmissibility of various kinds of character evidence, and the requirement that documents be authenticated before reception in evidence are entirely nonstatutory. The best evidence rule, while covered by statute, is stated in three sections--Code of Civil Procedure Sections 1855, 1937, and 1938. The code states the judge's duty to determine all questions of fact upon which the admissibility of evidence depends; but there is no indication that, as to some of these facts, a party must persuade the judge of their existence while, as to others, a party need present merely enough evidence to sustain a finding of their existence.

These and similar deficiencies call for a thorough revision and recodification of the California law of evidence. It is true that the courts have filled in many of the gaps contained in the present code. They have also been able to remedy some of the anomalies and inconsistencies in the code by construction of the language used or by actual disregard of the statutory language. But there is a limit on the extent to which the courts can remedy the deficiencies in a statutory scheme. Reform of the California law of evidence can be achieved only by legislation thoroughly overhauling and recodifying the law.

Previous California Efforts to Reform the Law of Evidence

Efforts at legislative reform of the law of evidence in California have been made on several occasions. A substantial revision of Part IV of the Code of Civil Procedure--clarifying many sections and eliminating inconsistent and conflicting sections--was enacted in 1901; but the Supreme Court held the revision unconstitutional because the enactment embraced more than one subject and because of deficiencies in the title of the enactment. About 1932, the California Code Commission initiated a thoroughgoing revision of this field of law. The Code Commission placed the research and drafting in the hands of Dean William G. Hale of the University of Southern California Law School, assisted by Professor James P. McBaine of the University of California Law School and Professor Clarke B. Whittier of the Stanford Law School. The Code Commission's study continued until the spring of 1939, when it was abandoned because the American Law Institute had appointed a

committee to draft a Model Code of Evidence and the Code Commission thought it undesirable to duplicate the Institute's work.

National Efforts to Reform the Law of Evidence

Efforts at reform in the law of evidence have also been made at the national level, for California's law of evidence has been no more deficient than the law of most other states in the union. The widespread deficiencies in the state of the law of evidence caused the American Law Institute to abandon its customary practice of preparing restatements of the common law when it came to the subject of evidence. "[T]he principal reason for the [American Law Institute] Council's abandoning all idea of the Restatement of the present Law of Evidence was the belief that however much that law needs clarification in order to produce certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it. The Council of the Institute therefore felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification." MODEL CODE OF EVIDENCE, Introduction, p. viii (1942).

In 1942, after three years of careful study and formulation by some of the country's most distinguished judges, practicing lawyers, and professors of law, the Institute's Model Code of Evidence was promulgated. It was widely debated, in California and elsewhere. The State Bar of California referred it to the Bar's Committee on the Administration of Justice, which recommended that the Bar oppose the enactment of the Model Code into law. Reaction elsewhere was much the same, and by 1949 adoption of the Model Code was a dead issue.

But the need for revision of the law of evidence was as great as ever. The National Conference of Commissioners on Uniform State Laws began working on a revision of the law of evidence. The work of the Conference was based largely on the Model Code, but the Conference hoped both to simplify that code and to eliminate proposals that were objectionable. Four additional years of study and reformulation resulted in the promulgation of the Uniform Rules of Evidence.

In 1953, the Uniform Rules were approved by both the National Conference of Commissioners on Uniform State Laws and the American Bar Association. Since that time, many of the Uniform Rules have been followed and cited with approval by courts throughout the country, including the California courts. The Uniform Rules of Evidence, with only slight modification, have been adopted by statute in Kansas and the Virgin Islands. In other states, comprehensive studies of the Uniform Rules have been undertaken with a view to their adoption either by statute or in the form of court rules. In New Jersey, as a result of such a study, a revised form of the privileges article was adopted by statute and the remainder of the Uniform Rules, also substantially revised, was adopted by court rule.

RECOMMENDATIONS

The Uniform Rules of Evidence

The Uniform Rules of Evidence are the product of years of careful, scholarly work and merit careful consideration. Nonetheless, the Commission recommends against their enactment in the form in which they were approved by the National Conference of Commissioners on Uniform State Laws. Several considerations underlie this recommendation.

First, in certain important respects, the Uniform Rules would change the law of California to an extent that the Commission considers undesirable. For example, the Uniform Rules would admit any hearsay statement of a person who is present at the hearing and subject to cross-examination. In addition, they do not provide a married person with a privilege to refuse to testify against his spouse. In both respects--and in a number of other respects as well--the Commission has disagreed with the conclusions reached by the Commissioners on Uniform State Laws. Sometimes the disagreement has been upon matters of principle; in others, it has been upon matters of detail. In total, the disagreements have been substantial and numerous enough to persuade the Law Revision Commission that the Uniform Rules of Evidence should not be adopted in their present form.

Second, the existing California statutes contain many provisions that have served the State well and that should be continued but are not found in the Uniform Rules of Evidence. If the Uniform Rules of Evidence were approved in their present form, segregated from the remainder of the statutory law of evidence, California's statutory law of evidence would be seriously complicated.

Yet, the contrasting formats of the Uniform Rules of Evidence and the California evidence statutes make it impossible to integrate these two bodies of evidence law into a single statute while preserving the Uniform Rules in the form in which they were approved by the Commissioners on Uniform State Laws.

Third, the draftsmanship of the Uniform Rules is in some respects defective by California standards. The Uniform Rules contain several rules of extreme length that are reminiscent of several of the cumbersome sections in the 1872 codification. For example, the hearsay rule and all of its exceptions are stated in one rule that has 31 subdivisions. Moreover, different language is sometimes used in the Uniform Rules to express the same idea. For example, various communication privileges (attorney-client, physician-patient, and husband-wife) are expressed in a variety of ways even though all are intended to provide protection for confidential communications made in the course of the specified relationships.

Fourth, the need for nationwide uniformity in the law of evidence is not of sufficient importance that it should outweigh these other considerations. The law of evidence--unlike the law relating to commercial transactions, for example--affects only procedures in this State and has no substantive significance insofar as the law of other states is concerned. Thus, although the adoption of the Uniform Rules elsewhere indicates that they are deserving of weighty consideration, such adoption is not in and of itself a reason to adopt the rules in California.

For all these reasons, the Commission has concluded that California's need for a thorough revision of the law of evidence cannot be met satisfactorily by adoption of the Uniform Rules of Evidence.

The Evidence Code

A new Evidence Code is recommended instead of a revision of Part IV of the Code of Civil Procedure for several reasons. Mechanically, it would be difficult to include a revision of the rules of evidence in Part IV of the Code of Civil Procedure because much of Part IV does not concern evidence at all.[1] Logically, the rules of evidence do not belong in the Code of Civil Procedure because these rules are concerned equally with criminal and civil procedure. But the most important consideration underlying the recommendation that a new code be enacted is the desirability of having the rules of evidence available in a separate volume that will be, in effect, an official handbook of the law of evidence--a kind of evidence bible for busy trial judges and lawyers.

The Evidence Code recommended by the Commission contains provisions relating to every area of the law of evidence. In this respect, it is more comprehensive than either the Uniform Rules of Evidence or Part IV of the Code of Civil Procedure. The code will not, however, stifle all court development of the law of evidence. In some instances--the Privileges division, for example--the code to a considerable extent precludes further development of the law except by legislation. But, in other instances, the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of the law. As a general rule, the code permits the courts

[1] Part IV includes, for example, provisions relating to the safekeeping of official documents, provisions requiring public officials to furnish copies of official documents, provisions creating procedures for establishing the content of destroyed records, provisions on the substantive effect of seals, and the like. By placing the revision of the law of evidence in a new code, the immediate need to recodify these sections is obviated. Of course, the remainder of Part IV should be reorganized and recodified. But such a recodification is not a necessary part of a revision and recodification of the law of evidence.

to work toward greater admissibility of evidence but does not permit the courts to develop additional exclusionary rules. Of course, the code neither limits nor defines the extent of the exclusionary evidence rules contained in the California and United States Constitutions. The meaning and scope of the rules of evidence that are based on constitutional principles will continue to be developed by the courts.

The proposed Evidence Code is to a large extent a restatement of existing California statutory and decisional law. The code makes some significant changes in the law, but its principal effect will be to substitute a clear, authoritative, systematic, and internally consistent statement of the existing law for a mass of conflicting and inaccurate statutes and the myriad decisions attempting to make sense out of and to fill in the gaps in the existing statutory scheme.

The proposed Evidence Code is divided into 11 divisions, each of which deals comprehensively with a particular evidentiary subject. Several divisions

are subdivided into chapters and articles where the complexity of the particular subject requires such further subdivision in the interest of clarity. Thus, for example, each individual privilege is covered by a separate article. A Comment follows each provision

of the proposed legislation set out herein to explain in some detail the reason for the inclusion of each section in the Evidence Code and the reasons underlying any recommended changes in the law of California. The format of the code and its overall impact on existing law are discussed below.

Division 1 - Preliminary Provisions and Construction. Division 1 contains certain preliminary provisions that are usually found at the beginning of the modern California codes. Its most significant provision is the one prescribing the effective date of the code--January 1, 1967. This delayed effective date will provide ample opportunity for the lawyers and judges of California to become familiar with the code before they are required to use it in practice.

Division 2 - Words and Phrases Defined. Division 2 contains the definitions that are used throughout the code. Definitions that are used in only a single division, chapter, article, or section are placed in the particular part of the code where the definition is used.

Division 3 - General Provisions. Division 3 contains certain general provisions governing the admissibility of evidence. It declares the

admissibility of relevant evidence and the inadmissibility of irrelevant evidence. It sets forth in some detail the functions of the judge and jury. It states the power of the judge to exclude evidence because of its prejudicial effect or lack of substantial probative value. The division is, for the most part, a codification of existing law. Section 402 makes a significant change, however: It provides that exclusionary rules of evidence, except privileges, do not apply when the judge is determining the admissibility of evidence.

Division 4--Judicial Notice. Division 4 covers the subject of judicial notice. It makes minor revisions in the matters that are subject to judicial notice. For example, city ordinances may be noticed under the code while, generally speaking, they may not be noticed under existing law. But the principal impact of Division 4 on the existing law is procedural. Thus, the division specifies some matters that the judge is required to judicially notice, whether requested to or not--for example, California, sister-state, and federal law. It specifies other matters that the judge may notice; but he is not required to take judicial notice of any of these matters unless he is requested to do so and is provided with sufficient information to determine the matter. The division also guarantees the parties reasonable notice and an opportunity to be heard before judicial notice may be taken of any matter that is of substantial consequence to the determination of the action.

Division 5--Burden of Proof, Burden of Producing Evidence, and Presumptions. Division 5 deals with the burden of proof, the burden of producing evidence, and presumptions. It makes one significant change: Section 600 abolishes the much-criticized rule that a presumption is evidence. The division

also provides that some presumptions affect the burden of proof while others affect only the burden of producing evidence. Under existing law, presumptions also have these effects; but Division 5 classifies a large number of presumptions as having one effect or the other and establishes certain criteria by which the courts may classify any presumptions not classified by statute.

Division 6 - Witnesses. Division 6 relates to witnesses and makes several significant changes in the existing law. The Evidence Code contains no provision that disqualifies a juror from giving evidence concerning jury misconduct while, under existing law, a juror may give such evidence only when the misconduct consists of the making of a chance verdict or the giving of false answers on voir dire. There is no Dead Man Statute in the code. A party is permitted to attack the credibility of his own witness without showing either surprise or damage. The nature of a criminal conviction that may be shown to impeach a witness has been substantially changed.

There are also several minor revisions of existing law that, while important, will have less effect on the manner in which cases are tried. For example, the conditions under which a judge or juror can testify have been revised, and the foundational requirements for the introduction of a witness' inconsistent statement have been modified.

Despite these changes, the bulk of Division 6 is a recodification of well-recognized rules and principles of existing law.

Division 7 - Opinion Testimony and Scientific Evidence. Division 7 sets forth the conditions under which opinion testimony may be received from both lay and expert witnesses. The division restates existing law with but one significant change. If an expert witness has based his opinion in part upon a statement of some other person, Section 804 permits the adverse

party to call the person whose statement was relied on and examine him as if under cross-examination concerning the subject matter of his statement.

Division 8--Privileges. Division 8 covers the subject of privileges and, unlike most of the other provisions of the code, applies to all proceedings where testimony can be compelled to be given--not just judicial proceedings. The division makes some major substantive changes in the law. For example, a new privilege is recognized for confidential communications made to psychotherapists; and, although the privilege of a married person not to testify against his spouse is continued, the privilege of a spouse to prevent the other spouse from testifying against him is not. But the principal effect of the division is to clarify--rather than to change--existing law. The division spells out in five chapters, one of which is divided into 11 articles, a great many rules that can now be discovered, if at all, only after the most painstaking research. These provisions make clear for the first time in California law the extent to which doctrines that have developed in regard to one privilege are applicable to other privileges.

Division 9--Evidence Affected or Excluded by Extrinsic Policies. Division 9 codifies several exclusionary rules that are recognized in existing statutory or decisional law. These rules are based on considerations of public policy without regard to the reliability of the evidence involved. The division states, for example, the rules excluding evidence of liability insurance and evidence of subsequent repairs. The rules indicating when evidence of character may be used to prove conduct also are stated in this division. The division expands the existing rule excluding evidence of settlement offers to exclude also admissions made in the course of settlement negotiations.

Division 10 - Hearsay Evidence. Division 10 sets forth the hearsay rule and its exceptions. The exceptions are, for the most part, recognized in existing law. A few existing exceptions, however, are substantially broadened. For example, the former testimony exception in the Evidence Code does not require identity of parties as does the existing exception. Dying declarations are made admissible in both civil and criminal proceedings. A few new exceptions are also created, such as an exception for a decedent's admissions in an action for his wrongful death and an exception for prior inconsistent statements of a witness. The division permits impeachment of a hearsay declarant by prior inconsistant statements without the foundational requirement of providing the declarant with an opportunity to explain. The division also permits a party to call a hearsay declarant to the stand (if he can find him) and treat him in effect as an adverse witness, i.e., examine him as if under cross-examination.

Division 11 - Writings. Division 11 collects a variety of rules relating to writings. It defines the process of authenticating documents and spells out the procedure for doing so. The division substantially simplifies the procedure for proving official records and authenticating copies, particularly for out-of-state records. The best evidence rule appears in this division; and there are collected here several statutes providing special procedures for proving the contents of certain writings with copies. For the most part, the division restates the existing California law.

Thus, the bulk of the Evidence Code is existing California law that has been drafted and organized so that it is easy to find and to understand. There

are some major changes in the law, but in each case the change has been recommended only after a careful weighing of the need for the evidence against the policy to be served by its exclusion.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

#34(L) 10/20/64

Memorandum 64-99

Subject: Study No. 34(L) - Uniform Rules of Evidence (Letter of Judge Diether (dated October 5, 1964))

Attached is a copy of a letter from Judge Diether (October 5, 1964). This letter seems to suggest that the Evidence Code not be proposed for enactment at the 1965 legislative session. Please read the letter with care.

Also attached is my reply (October 19, 1964) and a letter (October 6, 1964) I wrote to Judge Diether that crossed his letter of October 5 in the mail.

Also attached is a letter I wrote to Judge Diether on March 12, 1964, to indicate to him the procedure we planned to follow on this study. This letter was written in response to a letter from Judge Diether which stated in part:

> "Since you have already scheduled hearings on said recommendations [Hearsay and Authentication] on March 18th before said subcommittee I am sure that you are not interested in the views of our committee on said recommendations."
>
> "With respect to your future recommendations concerning the Uniform Rules of Evidence, we would appreciate having ample time to review and study them so that we may report our views to you prior to the time you schedule hearings before said subcommittee."

I am sending you these various letters in the event that the Commission wishes to discuss this matter at its October meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

CHAMBERS OF
The Superior Court
LOS ANGELES 12, CALIFORNIA
LEONARD A. DIETHER, JUDGE

October 5, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California

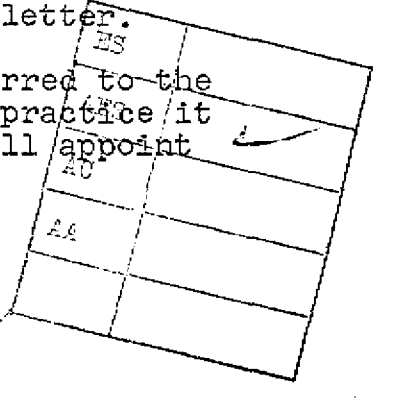
Gentlemen:

I have your letter of September 28 enclosing copy of Preprint Senate Bill No. 1 and I note that you are requesting all committees considering the work of the Commission on the proposed Evidence Code to have their comments to you not later than November 5, 1964.

The new officers of the Conference of California Judges were just installed on September 29 and to date I have not been informed as to whether the Conference will continue its committee to work with the Commission on the study of the Uniform Rules of Evidence nor if the committee is continued who will be appointed to serve on said committee. Even if the Conference should continue the committee and reappoint the same members who served last year, it would be impossible for the committee to make any report to you concerning said Preprint Senate Bill No. 1 by November 5, 1964. It takes some time to schedule a meeting of judges scattered throughout the State and then, if past experience is any criterion, I am sure it would take a considerable period of time before we could send you any report.

During the Conference of California Judges I had a chance to speak briefly with Ralph N. Kleps, Esq., Director of the Administrative Office of the Courts, and we both agreed if the Judicial Council and the Conference of California Judges were to review the work of the Commission in said Preprint Senate Bill No. 1, their efforts should be co-ordinated and we both express the view that it could not possibly be done in any such time as you have stated in your letter.

No doubt the proposed bill will be referred to the Senate Judiciary Committee and if it follows the practice it did in connection with the Commercial Code, it will appoint



an Advisory Committee to consider reports from interested groups. If this course is followed and if the Conference of California Judges continues its committee, it could I believe working alone or with the Judicial Council, prepare a report for said Advisory Committee some time in the late spring of 1965. It is my personal feeling, from talking to members of the bar as well as judges who have had no connection with the proposed Evidence Code, that they would like an opportunity to study and review it before it is submitted to the Legislature for adoption.

Yours very truly,

Leonard A. Diether

Leonard A. Diether

LAD/vhw

cc: Hon. Mildred Lillie
Hon. Mark Brandler
Hon. Raymond J. Sherwin
Hon. James C. Toothaker
Hon. Howard E. Crandall
Hon. Joseph G. Babich
Warren P. Marsden, Esq.

STATE OF CALIFORNIA EDMUND G. BROWN, Governor

CALIFORNIA LAW REVISION COMMISSION
ROOM 30, CROTHERS HALL
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

JOHN R. McDONOUGH, Jr.
Chairman
RICHARD H. KEATINGE
Vice Chairman
SENATOR JAMES A. COBEY
ASSEMBLYMAN ALFRED H. SONG
JOSEPH A. BALL
JAMES R. EDWARDS
SHO SATO
HERMAN F. SELVIN
THOMAS E. STANTON, Jr.
ANGUS C. MORRISON
Ex Officio

October 19, 1964

Hon. Leonard A. Diether
The Superior Court
308 County Courthouse
Los Angeles 12, California

Dear Judge Diether:

Re: Proposed Evidence Code

Your letter of October 5 apparently crossed my letter of October 6 in the mail. I have had your letter reproduced and am sending a copy to each member of the Commission. We plan to discuss your letter at our next meeting.

I can well understand why your Committee cannot have its comments in our hands by November 5. We requested all committees considering the work of the Commission on the proposed Evidence Code to have their comments in our hands not later than November 5, 1964, because we wanted to consider the comments before we printed our report to the Legislature. We plan to have our report on the Evidence Code available in printed form early in January 1965, so that it will be available for the legislative hearings we anticipate will be held on our proposals during that month. (The report will contain a general discussion of the recommended legislation, the text of the Evidence Code bill, and the Commission Comment to each section of the bill.) In order to have the report available early in January, we must send the last portion of the report to the printer immediately after our November meeting. During the months of November and December the State Printing Plant has an exceptionally heavy work load, including the Governor's Budget and reports of various other agencies to the Legislature.

The Commission, of course, plans to consider the comments we receive after November 5, and the bill introduced in the 1965 legislative session will be amended to reflect any revisions that result from these comments. In addition, we anticipate that revisions will result from the decisions made by the legislative committees at the hearings held during the 1965 legislative session. Consequently, even though we do not receive your comments in time to make revisions in the bill before it is introduced, we will be able to make any necessary amendments to the bill before it is finally acted upon.

You will note that much of Senate Preprint Bill No. 1 is based on the published tentative recommendations previously reviewed by your Committee. Accordingly, I hope that it will be possible for your Committee to review the bill in time so that its comments may be considered by the Commission and the necessary amendments made before the bill is finally acted upon by the Legislature.

Attached is a complete set of the Commission's Comments to the various sections of Senate Preprint Bill No. 1, together with a preliminary draft of the general recommendation that will accompany the bill in our printed report to the Legislature. This material, together with Preprint Senate Bill No. 1, will give you the substance of the Commission's report to the Legislature. The Comments are being checked by the members of the Commission and will be revised at the October meeting. Nevertheless, the Comments are in substantially final form. The portion of the recommendation that precedes these Comments has not been reviewed by the Commission and probably will be revised at its October and November meetings. Both the bill and the Comments will be revised to reflect any changes resulting from comments we receive prior to the time we send the report to the printer.

I am sending each member of your Committee a set of the Comments. These Comments should be of substantial assistance to the members of your Committee in reviewing Preprint Senate Bill No. 1.

I also have found that there is great interest in the proposed Evidence Code among the members of the bar as well as among the judges. We already have distributed almost 1,500 copies of the preprinted bill to interested persons and organizations, and a second press run may be necessary when the few remaining copies have been distributed.

In view of your letter, I know that you will be interested to know that the proposed Evidence Code is being studied by two special legislative subcommittees created for this specific purpose. Since early in 1964, a special Subcommittee on Rules of Evidence of the Senate Fact Finding Committee on Judiciary has been holding work sessions to go over the tentative proposals word by word. The subcommittee has had three such sessions and has covered the hearsay evidence provisions. Additional work sessions will be scheduled prior to the 1965 legislative session, the next one being in November.

The Assembly also appointed a special Subcommittee on Law Revision to study the proposed Evidence Code. The Assembly subcommittee has already covered the divisions on Hearsay Evidence and Privileges and has scheduled a two-day meeting in November. At its November meeting, the subcommittee plans to cover the remainder of Senate Preprint Bill No. 1, if possible.

After these work sessions have been completed and the subcommittees know the content of the proposed Evidence Code, I anticipate the subcommittees will solicit the views of all interested persons. I hope that the subcommittees will complete their work sessions in time to begin considering testimony from other interested persons in December. I also am hopeful that a number of hearings on the Commission's proposals will be held by the subcommittees during January, at which time I anticipate that the testimony of interested persons and organizations will be sought.

In addition to the two legislative subcommittees, a substantial number of other interested persons and organizations have been reviewing the tentative recommendations and will be revieving Senate Preprint Bill No. 1 prior to the legislative session. These persons and groups are listed on the green sheets entitled "Acknowledgments" in the general recommendation portion of the attached material. Generally speaking, we have listed on the green sheets only those persons who sent us comments. We have, however, distributed the tentative recommendations and Senate Preprint Bill No. 1 to a great number of other interested persons and organizations who have not sent us any comments to date.

You stated in your letter of October 5 that you do not know whether the Conference will continue its Committee to work on this project nor if the Committee is continued who will be appointed to serve on the Committee. However, in order to keep the former members of the Committee up-to-date on this project, I am sending them a copy of this letter and will send them materials relating to the project from time to time.

If we can do anything to assist your Committee in this matter, please let us know.

Sincerely,

John H. DeMoully
Executive Secretary

Copy to: Members of Committee of Conference of Judges
Members of Law Revision Commission
Mr. Warren P. Marsden

comments
conf of Cal Judges

March 12, 1964

Judge Leonard A. Diether
Judge of the Superior Court
308 County Courthouse
Los Angeles, California

Dear Judge Diether:

This is in response to your letter of March 10. With my letter of March 8, I enclosed six copies of the minutes of the February meeting of the Commission dealing with hearsay evidence. These minutes plus the recommendation on hearsay evidence previously sent to you gave you the substance of the recommendation the Commission will present to the Subcommittee of the Senate Judiciary Committee on March 12.

It might be helpful to indicate the procedure the Commission plans to follow in the study of the Rules of Evidence. The Commission has been preparing tentative recommendations similar to the one on hearsay evidence. As soon as these are available in the form of a printed pamphlet, we plan to send them to a large number of persons, like yourself, who have indicated an interest in this study. We plan to give them an adequate time to study the tentative recommendations and to send us their comments. After the comments are considered, the Commission plans to prepare a comprehensive evidence statute based on the substance of the tentative recommendations and the revisions made therein in view of the comments received. This statute will also include those provisions of existing law not affected by the Uniform Rules. The Commission plans to commence its study of these provisions at its March 1964 meeting and will determine whether the provisions should be retained in substance, revised or repealed. The comprehensive statute will be published in a separate publication which we hope will be available prior to the legislative session.

On March 8 we had available in published form only one tentative recommendation--the tentative recommendation on hearsay evidence. We have since received the tentative recommendation on Authentication and Content of Writings and we are planning to send this out next week for comment. We do not expect to receive comments by March 18 on the tentative recommendation on Authentication and Content of Writings. Subsequent tentative recommendations will be available from time to time in published form and we will send them out for comments as soon as the printed pamphlet is available.

FS	✓
AJS	
AC	JDS
AA	✓

The Senate Judiciary Committee has appointed a Subcommittee which will be considering the tentative recommendations at the same time the tentative recommendations are being considered by other interested persons. This Subcommittee plans to go through the recommendations with great care so that they will be aware of all of the ramifications of the recommendations and will have an opportunity to carefully examine the policies reflected in them. Because it is convenient to the Subcommittee to hold a hearing during the Budget Session of the Legislature, we agreed to present our tentative recommendations on hearsay evidence and authentication and content of writings at the hearing on March 18. At the hearing, the Subcommittee plans to go through these recommendations with great care and does not plan to hear testimony from other persons concerning them, except that, if time permits, the Subcommittee plans to hear from the office of the Attorney General. The Commission plans to take into account the views expressed by the members of the Subcommittee when it reviews the other comments on its tentative recommendations.

We have just completed preparation of the material on hearsay evidence that we will present to the interim committee. This material has not been approved by the Commission, but we believe that it correctly reflects the actions of the Commission as indicated in its printed recommendation on hearsay and in the minutes of its February meeting. The staff is aware of a significant number of problems and defects that exist in the material we are presenting to the interim committee at the March 18 hearing. These will be considered by the Commission during the next few months and necessary revisions will be made. In addition, there are a number of provisions that will need to be added to the hearsay portion of the statute. For example, Code of Civil Procedure Sections 1928.1 - 1928.4 will need to be considered to determine whether their substance should be included in the hearsay portion of the new statute. Accordingly, since the Commission will be further revising the material we are presenting at the interim hearing, we do not plan to distribute it for comments until such revisions have been made.

Senator Grunsky (the Chairman of the Subcommittee) will, we hope, hold a hearing toward the end of this year at which all interested persons will be invited to express their views on a tentative draft of a new evidence statute. Before this draft is prepared, the Commission would hope to have the comments of your committee and of all other interested persons concerning the various tentative recommendations it is planning to send to them.

I can understand your concern that the Subcommittee is holding hearings on the tentative recommendations before the Commission has received your views. I can assure you, however, that your views will be considered before the Commission prepares the final statute on this matter. Because of the magnitude of the task faced by the Subcommittee, it was concluded that the Subcommittee should begin its study of the tentative recommendations even before they had been finalized by the Commission.

I am transmitting with this letter the following materials that may prove helpful to you in connection with this project:

(1) Revised Schedule of Deadlines in Study of Uniform Rules of Evidence (gold pages). Note the column entitled "Tentative Recommendation Available in Printed Form." This column indicates the approximate date that we will be prepared to distribute the printed recommendations and research studies to your committee. The comments will be needed by the first of the month indicated in the column entitled "General Comments Received." We will be making changes in this schedule. For example, we are planning to request that we receive comments on the Tentative Recommendation on Authentication and Content of Writings by June 1, instead of May 1 as indicated on the schedule.

(2) Six copies of the pamphlet containing the tentative recommendation and research study on Article IX (Authentication and Content of Writings). We are now in the process of mailing this pamphlet out to each person and organization that indicated a willingness to comment on the tentative recommendations. This mailing will begin early next week and each member of your committee will receive another copy.

(3) One copy of a preliminary draft of the tentative recommendation on Article I, II, IV, V, VI, and VII of the Uniform Rules. Some of these have been approved for printing with slight revisions. Others are still being considered and being revised by the Commission. We have not sent them out for comments except to a State Bar Committee that reviews them before they are printed. Each of these will soon be available in the form of a printed pamphlet that will contain the research study as well as the tentative recommendation. A tentative recommendation on Article III of the Uniform Rules has not yet been prepared.

(4) Six copies of the material relating to hearsay evidence that will be presented to the Subcommittee on the Rules of Evidence.

I hope that this letter will clear up any misunderstanding that may exist concerning the procedure the Commission plans to follow on this study. If you have any suggestions as to the procedure the Commission plans to follow or any suggestions as to actions we can take to facilitate the work of your committee, we would appreciate receiving them.

If this does not satisfactorily clear up the concern you expressed in your letter of March 10, please let me know.

Very truly yours,

John H. Dennelly
Executive Secretary

JHD:ib
enc

#34 10/27/64

Memorandum 64-93

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Amendments, Additions, and Repeals)

We received two letters concerning sections to be repealed in connection with the proposed Evidence Code. These are attached as Exhibits I and II.

Civil Code Section 130

Mr. Homer H. Bell (Exhibit II) suggests that Civil Code Section 130 be repealed in the bill to enact the proposed Evidence Code. Section 130 (Text on page 1 of Exhibit II) requires corroboration of the acts constituting the cause of action in a divorce matter. We advised Mr. Bell that it was unlikely that the Commission would undertake to repeal this section in the Evidence Code bill, but we call this letter to your attention in case the Commission wishes to repeal Section 130 as suggested by Mr. Bell.

The Dead Man Statute

Mr. Lloyd Tunik (Exhibit I) agrees with our recommendation for the use of hearsay evidence as to statements of a decedent in an action against his estate (Section 1261), but he believes certain prerequisites should be placed upon the plaintiff who seeks to testify in a situation now covered by the Dead Man Statute. He suggests that testimony by a plaintiff in a Dead Man Statute situation be considered admissible only under the following condition:

> Where it is established to the satisfaction of the Court that plaintiff has diligently sought all other evidence as to matters he seeks to testify on and said evidence which is admissible is before the Court, the Court, after considering said evidence may permit plaintiff to testify if said Court determines that it is in the interests of justice to permit such testimony.

As an alternative, he suggests that the plaintiff's testimony might be admissible only if the court was satisfied, in the exercise of its discretion, that sufficient corroboration existed to support such testimony.

Both of these alternatives were, of course, considered when the Commission prepared its recommendation on the Dead Man Statute in 1957. We attach a copy of the 1957 recommendation. The Discretion-of-the-Court Alternative is discussed on pages D-45--D-46; the Corroboration Alternative is discussed on pages D-46--D-47. The Hearsay-Exception Alternative (the one adopted in the Evidence Code_ is discussed on pages D-47--D-50. The case for the repeal of the Dead Man Statute is stated in the Recommendation on pages D-5--D-6.

We recommend that no change be made in the preprinted bill.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-93

EXHIBIT I

CARLOS R. FREITAS
S. J. HUGH ALLEN
BRYAN R. McCARTHY
RICHARD V. BETTINI
JAY R. MacMAHON

LLOYD TUNIK
EDGAR B. WASHBURN

FREITAS, ALLEN, McCARTHY & BETTINI
ATTORNEYS AT LAW
960 FIFTH AVENUE
SAN RAFAEL, CALIFORNIA

TELEPHONE
456-7500
AREA CODE
415

October 12, 1964

California Law Revision Commission
School of Law
Stanford University,
Stanford, California

Re: Tentative Recommendation and Study
Relating to the Uniform Rules of Evidence

Gentlemen:

I am writing with regard to your recommendation that the "Dead Man Statute", as presently known in California, be repealed. I have certain recommendations that I believe to be worthy of consideration.

First, I agree with your recommendation for the use of hearsay evidence as to statements of a decedent.

Secondly, I believe certain prerequisites should be placed upon the plaintiff who seeks to testify, i.e. any testimony by a plaintiff in a "Dead Man Statute" situation be considered admissible only under the following condition:

> Where it is established to the satisfaction of the Court that plaintiff has diligently sought all other evidence as to matters he seeks to testify on and said evidence which is admissible is before the Court, the Court, after considering said evidence may permit plaintiff to testify if said Court determines that it is in the interests of justice to permit such testimony.

The above rule would place upon the person who is probably in the best position of knowledge, a duty to show that the Court has all of the facts, and it serves to forward the equities in a situation where, without such rule, a one-side evidenciary situation would result due to death.

(As an alternative, a plaintiff's testimony might be considered admissible only if the Court was satisfied, in the exercise of its discretion, that sufficient corroboration existed to support said testimony.)

Finally, I believe the presumption of truthfulness created by C. C. P. Section 1847 should apply neither to the testimony of the party plaintiff nor to the hearsay testimony submitted under your suggested rule. In short, a special instruction or rule should apply to such testimony, to wit, no presumption exists that the said testimony is either true or false; in deciding to accept true or reject as false one or both types of testimony, the trier of fact may consider the circumstances involved, as well as the other rules which normally permit the rejection of the truth of testimony.

I hope my suggestions are helpful.

I would appreciate it if you could also forward to me a copy of your Tentative Recommendations and Study concerning the Uniform Rules of Evidence, Article VI.

Very truly yours,

LLOYD TUNIK

LT:ch

EXHIBIT II

Law offices of
HOMER H. BELL
111 EAST COLORADO BOULEVARD
MONROVIA, CALIFORNIA
ELLIOTT 8-2589

October 5, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California, 94305

ATTEN: Mr. John H. DeMoully

Re: Civil Code Section 130

Dear Mr. DeMoully:

For the past couple of years, I have been discussing with and writing to my state senators and assemblymen as well as the Assembly Interim Committee, the advisability of repealing Section 130 of the Civil Code. Having been receiving all of your reports on the subject of a new Evidence Code, it has suddenly occurred to me that my suggestion would more properly be directed to you, since the rule to which I am objecting is fundamentally a rule of evidence.

Section 130 of the Civil Code is perhaps the most ridiculous Code section in all of the Codes of California. It is the section that requires corroboration of the acts constituting the cause of action in a divorce matter. This section, enacted in 1872, reads as follows:

> "130. Default: proof required
> No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the Court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the Court, must be upon written questions and answers. (Enacted 1872. As amended Code Am. 1873-74, c. 612, p. 191, 32.)"

I recommend that the section be repealed in its entirety. For the past thirteen years I have done a very large volume of divorce work, and I have talked to numerous divorce attorneys about this section, and I think I can say without exaggeration that 100% of the attorneys who handle divorce matters, whether representing husbands or wives, are enthusiastically in favor of my suggestion.

That section is antiquated and unrealistic. It causes no end of difficulty and does absolutely no good whatsoever. It unrealistically requires corroboration of the testimony of the plaintiff (or cross-complainant) as to the acts of the defendant constituting grounds of divorce. Every attorney experienced in this field knows that most, and in many cases, all, of the misconduct of the offending party occurs out of the presence of corroborating witnesses. Certainly the technical form of desertion described in Civil Code Section 96 is of this nature, and that Section reads as follows:

> "Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion."

Now, how would a divorce plaintiff find someone to corroborate that, especially if the husband and wife continued to sleep in the same bedroom? As you know, all forms of desertion, including this one, must continue for a full year to constitute a ground of divorce. Even where there have been witnesses to marital misconduct, the witnesses may be out of the state, or at a distant point within the state.

A man may be sent to prison for life or for a long term of years without the necessity of a corroborating witness as a legal prerequisite. I am not talking about the persuasive effect of evidence, but of the legal technicality of having a corroborating witness to the same act. In fact, it is possible for a man to be sent to the gas chamber without the requirement of a corroborating witness. In the civil field, probate matters involving hundreds of thousands of dollars can be determined by the court on the testimony of a single witness, as can matters in civil litigation involving contracts, deeds, and all other types of problems settled by evidence in court.

Moreover, Section 130 is in direct conflict with Section 1844 of the Code of Civil Procedure, which reads as follows:

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

As the Code Section says, only treason and perjury require corroboration of the accusing witness, and in this high crime, the United States Constitution (also P.C. 1103) allows the accused to confess in open court, whereas Civil Code Section 130 doesn't even allow the divorce defendant to do this, in satisfaction of the "corroboration" requirement. Section 130 will not permit a divorce upon the uncorroborated "admission" of the defendant -- even in open court. (I do not overlook P.C. 1111, which will not permit conviction upon the uncorroborated testimony of an accomplice, but this pertains to the credibility of the witness rather than to the nature of the crime.)

Therefore, because Civil Code Section 130 serves no useful purpose, is totally unrealistic and archaic, and is more productive of injustice than of justice, it should be repealed in its entirety. It is doubtful that even corroboration of residence is important here in California, because it would be highly improbable that anyone would deliberately choose a state which had a one-year state residence and a three-month county residence requirement, followed by a one-year interlocutory period, when they could more easily choose Nevada, where they could obtain a "quickie" divorce.

Before you complete your work on the Evidence Code, it is hoped that you will see fit to take this matter under submission with a view of effecting the repeal of Section 130.

Very truly yours,

Homer H. Bell

HOMER H. BELL

HMB:r

#34(L) 10/29/64

First Supplement to Memorandum 64-89

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Division 10 Hearsay Evidence)

A possible defect in the hearsay division has been drawn to our attention.

Section 1300 provides that a final judgment of "a felony" is not inadmissible under the hearsay rule. The problem called to our attention involves the meaning of "felony" in this context.

Under California law, a crime that is punishable as either a felony or a misdemeanor is treated as a felony for all purposes until judgment; but if the sentence imposed is a misdemeanor sentence, the crime is then regarded thereafter as a misdemeanor for all purposes. PENAL CODE § 17; Doble v. Superior Court, 197 Cal. 556, 576-577, 241 Pac. 852 (1925).

Section 1300, then, would make admissible only those judgments where a felony sentence was imposed. The admissibility of the evidence is based on (1) the fact that the seriousness of the charge guarantees that the case was seriously litigated and (2) the fact that guilt had to be established beyond a reasonable doubt. These considerations apply to all crimes tried as felonies whether the actual sentence imposed was a misdemeanor sentence or a felony sentence. We suggest, therefore, that Section 1300 be modified to read:

> 1300. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BERROTERAN v. S.C. (FORD MOTOR COMPANY)**
Case Number: **S259522**
Lower Court Case Number: **B296639**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **fcohen@horvitzlevy.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S259522_OBOM_FordMotorCompany
REQUEST FOR JUDICIAL NOTICE	S259522_MJN_FordMotorCompany
ADDITIONAL DOCUMENTS	S259522_01 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_02 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_03 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_04 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_05 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_06 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_07 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_08 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_09 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_10 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_11 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_12 of 14- Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_13 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_14 of 14 - Exhs. to MJN

Service Recipients:

Person Served	Email Address	Type	Date / Time
Frederic Cohen Horvitz & Levy LLP 56755	fcohen@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Millie Cowley Horvitz & Levy LLP	mcowley@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Steve Mikhov Knight Law Group 224676	stevem@knightlaw.com	e-Serve	5/13/2020 3:42:05 PM
Cynthia Tobisman Greines, Martin, Stein & Richland LLP 197983	ctobisman@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Connie Gutierrez Faegre Drinker Biddle & Reath LLP	connie.gutierrez@dbr.com	e-Serve	5/13/2020 3:42:05 PM

J.Alan Warfield Polsinelli LLP 186559	jalanwarfield@polsinelli.com	e-Serve	5/13/2020 3:42:05 PM
Matthew Proudfoot Gates, O'Doherty, Gonter & Guy, LLP	mproudfoot@gogglaw.com	e-Serve	5/13/2020 3:42:05 PM
Cara Sherman ONGARO PC 269343	csherman@ongaropc.com	e-Serve	5/13/2020 3:42:05 PM
Monique Aguirre Greines Martin Stein & Richland LLP	maguirre@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Julian Senior SJL Law. P.C 219098	admin@sjllegal.com	e-Serve	5/13/2020 3:42:05 PM
Jo-Anne Novik Horvitz & Levy LLP	jnovik@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Alan Lazarus Faegre Drinker Biddle & Reath LLP 129767	alan.lazarus@dbr.com	e-Serve	5/13/2020 3:42:05 PM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	5/13/2020 3:42:05 PM
Justin Sanders Sanders Roberts LLP 211488	breyes@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM
Lisa Perrochet Horvitz & Levy 132858	lperrochet@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Justin Sanders Sanders Roberts LLP	jsanders@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM
Edward Xanders Greines, Martin, Stein & Richland LLP 145779	exanders@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	5/13/2020 3:42:05 PM
John M. Thomas Dykema Gossett 266842	jthomas@dykema.com	e-Serve	5/13/2020 3:42:05 PM
Lauren Ungs	laurenu@knightlaw.com	e-Serve	5/13/2020 3:42:05 PM
Bryan Altman	bryan@altmanlawgroup.net	e-Serve	5/13/2020 3:42:05 PM
Christopher Urner	c.urner@altmanlawgroup.net	e-Serve	5/13/2020 3:42:05 PM
Darth Vaughn	dvaughn@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM
Sabrina Narain	snarain@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM

299471			
FREDERICK BENNETT III	pnguyen@lacourt.org	e-Serve	5/13/2020 3:42:05 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/13/2020

Date

/s/Frederic Cohen

Signature

Cohen, Frederic (56755)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm