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Supreme Court of California
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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 10 OF 14, PAGES 2206-2465 OF 3537

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

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Rule 63(14)—Absence of Entry in Business Records

Writings to which Rule 63(13) applies—namely, writings "to prove the facts stated therein"—are clearly hearsay under Rule 63. An exception to Rule 63, such as Rule 63(13), is clearly a requisite if such writings are to be admitted.

Cases may arise, however, in which a record is silent as to an event or condition and the circumstances may be such that if the event had transpired, or the condition had existed, a record of it would normally have been made. In these circumstances the absence of an entry is clearly relevant evidence of the nonoccurrence of the event or the nonexistence of the condition.[1] Is the evidence, however, hearsay so that a special exception becomes necessary to admit it? Is the omission by the maker of the record to be considered a "statement" by him according to the definition in Rule 62(1)? Perhaps it could be considered a statement. Aware of this possibility and the necessity "to remove any doubt that may exist,"[2] the Commissioners on Uniform State laws include Rule 63(14) as an exception to the hearsay rule (Rule 63).

Rule 63(14) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (14) Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them;

This kind of evidence has been held admissible in California if the business records are otherwise admissible under the Uniform Business Records as Evidence Act (Sections 1953e-1953h of the Code of Civil Procedure).[3]

It should be noted that Rule 63(14) omits the condition stated in Rule 63(13) that the judge must find the sources of information from which the record was made and the method and circumstances of preparation were such as to indicate trustworthiness. Why should not such a finding be required under Rule 63(14) as well as under Rule

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[1] McCormick, Evidence § 289 n.13; 5 Wigmore, Evidence § 1531.

[2] Uniform Rule 63(14) Comment. Uniform Rule 63(17)(b) is a comparable provision relating to public records.

[3] "The primary purpose of admitting evidence of any character in any case, is to arrive at the truth in controversy. Hence, if a business record is otherwise admissible under Section 1953f, we see no reason why it should not be equally as admissible to disprove an affirmative as to prove an affirmative, just as competent to prove the falsity of a fact affirmed as to prove the truth of the fact affirmed. We are unable to conceive of any kind of evidence which does not, in a measure, partake of both an affirmative and negative character. If it proves an affirmative, it thereby logically disproves the reverse. It is this logic of the situation

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63(13)? Basically, the requirement is that the judge be satisfied that the books are reliably kept. If this is germane to affirmative recitals, it would seem to be equally so respecting the absence of entries. The absence of an entry in poorly kept or suspiciously prepared books is as weak evidence of nonoccurrence as is an affirmative entry in such books weak evidence of occurrence. We recommend adding the phrase "and that the memoranda and the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness" at the end of Rule 63(14).

Rule 63(14) is recommended as drafted by the Commissioners on Uniform State Laws with the amendment proposed above.[4]

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which explains the older authorities mentioned above, as well as *People* v. *Walker,* 15 Cal.App. 400 [114 P. 1009], a prosecution for making and passing and uttering a fictitious check. In the Walker case, the business records of the bank in question were admitted and a bank employee allowed to testify that these records showed that one Robert D. Metcalf (the fictitious name the defendant had signed to the check) did not have an account there. This court held that the evidence was admissible as prima facie evidence that the check was fictitious. We think that this case, which despite its early date, is in full accord with the liberalizing provisions of Section 1953f, is good law, and still the law of this State. It fits perfectly into the various decisions under the statute, and is in accord with the rule that the fact that a business record is self-serving does not make it inadmissible but is merely one fact for the jury to consider in weighing its effect." *People* v. *Torres,* 201 Adv. Cal.App. 346, 353-54 (1962).

Under the reasoning of *People* v. *Layman,* 117 Cal.App. 476, 4 P.2d 244 (1931), discussed at page 420 *supra,* it could be argued that this kind of evidence is admissible as non-hearsay.

[4] The N. J. Committee, the N. J. Commission, and the Utah Committee all approve this subdivision without substantial modification. N. J. COMMITTEE REPORT 146; N. J. COMMISSION REPORT 60; UTAH FINAL DRAFT 38.

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Rule 63(15) and (16)—Reports of Public Officials and Persons Exclusively Authorized

Rule 63(15) and (16) provide as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
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> *　　　*　　　*
>
> (15) Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;
>
> (16) Subject to Rule 64, writings made as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

Rule 63(15)

Rule 63(15)(a) and (15)(b). Rule 63(15)(a) and (15)(b) refer to *written reports or findings of fact* made by a *public official* possessed of a *duty to perform* the act reported or a *duty to observe* the act, condition or event reported. These exceptions closely parallel California Code of Civil Procedure Section 1920 which reads as follows:

> Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.[1]

Both Section 1920 and Rule 63(15)(a) and (15)(b) stem from a common-law exception to the hearsay rule (The Official Written Statements Exception) to the effect that "a written statement of a public official which he had a duty to make, and which he has made upon

[1] A companion provision is Code of Civil Procedure Section 1926 which provides as follows:

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

Various specific state, sister-state, United States and foreign public documents are made admissible by portions of the following Code of Civil Procedure Sections: 1901; 1905; 1918(1), (2), (3) (6), (7), (8); 1919.

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first-hand knowledge, is receivable as evidence of the facts recited."[2] A typical case for the application of this principle (in its common law form or as carried forward by Section 1920 or by Rule 63(15)(a) and (15)(b)) is the following: A tax collector conducts a tax sale and records the transaction in the official records kept by him of lands sold. The record, although not conclusive, is admissible to show who the purchasers were and what interests they purchased.[3]

Though Rule 63(15)(a) and (15)(b) parallel Section 1920, these exceptions are broader than Section 1920 with respect to the kinds of writings covered. Section 1920 covers only "entries in public or other official books or records," whereas Rule 63(15)(a) and (15)(b) cover "written reports or findings of fact." The difference here is more than a semantic one. Thus, letters by officials to third persons and interdepartmental memoranda have been held not to constitute "entries" in the sense of Section 1920.[4] On the other hand, the language of Rule 63(15) is broad enough to cover such letters and memoranda (they readily fall within the description "written reports or findings of fact"). Furthermore, it is the clear intent of the Commissioners on Uniform State Laws to include such writings. Witness the following comment on Rule 63(15):

> The writing may or may not be kept in a public office. It may be, and often will be, contained in a register, or record or file maintained in a public office. On the other hand, it may consist of a certificate held by a private person which has never been filed, copied, recorded or even noted in any sort of file or volume in a public office. So long as it was made by an official in the performance of the functions of his office and concerns acts, events or conditions which it was the function of the writer to do, or observe, or about which it was his function to make findings or conclusions after investigation, it falls within this exception.

Is it desirable to extend the principle presently applicable only to "entries" under Section 1920 so that more informal and less public documents are also covered? In our opinion the answer is "Yes." Even though the document is informal and is not spread upon a register open to the public gaze,[5] the document is still—if admissible under Rule 63(15)—the product of an official duty, officially performed. As such the document is undergirded by the same maxim of trustworthiness that supports the formal entry, namely "that official duty has been regularly performed."[6] Furthermore, the proponent of an informal official document under Rule 63(15) can derive no advantage of surprise from the circumstance that his document is not a matter of *public* record, for this rule is made subject to Rule 64, which requires the proponent to deliver a copy to opponent "a reasonable time before

[2] McCORMICK, EVIDENCE § 291. See also *id.* §§ 291-295; 5 WIGMORE, EVIDENCE §§ 1630-1684. See also Wallace, *Official Written Statements*, 46 IOWA L. REV. 256 (1961).

For recognition of the common law exception in California, see Kyburg v. Perkins, 6 Cal. 674 (1856).

[3] Galbreath v. Dingley, 43 Cal. App.2d 330, 110 P.2d 697 (1941).

[4] Pruett v. Burr, 118 Cal. App.2d 188, 257 P.2d 690 (1953).

[5] See 5 WIGMORE, EVIDENCE § 1632(2) and § 1634, discussing the factor of publicity and criticizing the English view that publicity of the writing is an element of the common law exception.

[6] CAL. CODE CIV. PROC. § 1963(15); McCORMICK, EVIDENCE § 291; 5 WIGMORE, EVIDENCE § 1632(1).

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trial." As thus safeguarded,[7] the extension of principle brought about by Rule 63(15)(a) and (15)(b) is a desirable one and is recommended for adoption.

Rule 63(15)(c). Rule 63(15)(a) and (15)(b) cover only situations in which the official has the duty either "to perform the act reported" or "to observe the act, condition or event reported." Manifestly, Rule 63(15)(a) and (15)(b) require firsthand knowledge of the official. In this respect these exceptions coincide with the common-law principle and with that principle as codified by Code of Civil Procedure Section 1920.

Rule 63(15)(c), however, goes beyond the common law tradition to make the written report admissible whenever (though personal knowledge is wanting) there is an official duty "to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation." Is this desirable?

Today, although Section 1920 is limited to entries based on firsthand knowledge,[8] other California statutes applicable to specific situations provide for the admission of certain official investigative and evaluative reports not based wholly on personal knowledge. Thus under Code of Civil Procedure Sections 1928.1 to 1928.4 a written finding of the presumed death of a soldier made by the Secretary of War is admissible. Under the Health and Safety Code a coroner's finding as to cause of a decedent's death is admissible.[9] Each of these is, of course, a specific instance of a report by a "public official" charged with the duty "to investigate . . . and to make findings or draw conclusions based on such investigation" under Rule 63(15)(c).

The question presented by Rule 63(15)(c) is this: Shall we go beyond these and similar specific instances and adopt a general principle that whenever there is such a duty the report is admissible? To what extent should we utilize in the judicial process the investigative and factfinding operations of administrative officials?

At first blush it does seem a large break with tradition to admit in an insurance case a fire marshal's written investigation and conclusion respecting the cause of a fire. It seems an even larger break to admit in a drunk driving case the written report and conclusion of the arresting officer. But if we are to admit the coroner's report why not admit the marshal's or the police officer's report?

Professor McCormick cogently states the case for Rule 63(15)(c) in the following passage:

> Clause (c) is an important extension of the application of the principle on which the admission of official written statements is grounded. It lets in the "findings" and "conclusions" of a public official who has been given the duty to make an investiga-

[7] "Protection is given the adverse party by [Uniform] Rule 64. If he has notice a reasonable time before the evidence is offered, he can prepare to meet it by summoning the maker of the writing or the persons upon whose information it is made, or by gathering material to refute it or to decrease its apparent value." UNIFORM RULE 63(15) Comment.

[8] McGowan v. City of Los Angeles, 100 Cal. App.2d 386, 223 P.2d 862 (1950); Harrigan v. Chaperon, 118 Cal. App.2d 167, 257 P.2d 716 (1953). See also as to the common law exception: 5 WIGMORE, EVIDENCE §§ 1635, 1646, 1670-1671. Wigmore's discussion shows that, even under the common law doctrine, there was some relaxation of the general requirement of firsthand knowledge.

[9] CAL. H. & S. CODE §§ 10250-10252, 10275, 10577.

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> tion of fact. It dispenses with the requirement of personal knowledge, though most often the report would be based in part on personal knowledge and in part on the statements of others. Usually the official will have a special competence, from experience or professional study, for gathering and interpreting the data.
>
> Why, it may be asked, should not the officer be called as a witness to prove the facts? In the first place, he may be unavailable, in which case the need for the use of his report is great. His investigation, usually made near to the event, was based on information that was fresher than the memories of those who depose at the trial. Second, if the officer is available, the rule admitting the report merely places on the adversary the burden of calling the officer to prove the circumstances, if any, which go to weaken the effect of the report. True, this is tactically not as advantageous to the adversary as if the proponent were required to call the officer to testify to the facts reported (using the report only to refresh memory or as a record of past recollection) and to subject himself to cross-examination as to the facts reported, which may now be dim in memory. But if the rule is adopted and the reports become admissible, time will be saved both for the officers and the court, for often the adversary, finding it unprofitable to challenge the basis for the report, will not call the officer. The question is, how far do we wish to facilitate the use, in the judicial process, of the results of the investigative and fact-finding operations of administrative officials? As to most such reports, on account of the nearness of the investigation to the time of the event, and of the element of official responsibility, I believe the courts' fact-finding will gain by their use. Admission need not be indiscriminate. If it appears that the report was not based upon a serious investigation, or is otherwise untrustworthy, the judge may exclude it under Rule 45, as creating "a substantial danger . . . of misleading the jury," that is, the danger that they may give it an exaggerated weight. Moreover, in states like New Jersey, where the judge may advise the jury on the weight of the evidence, it would be appropriate to warn the jury that "it must be vigilant not to permit the conclusion of the person making the certificate to take the place of its own."[10]

Does Rule 63(15)(c) extend to the written findings of a judge in a court-tried case? Is such judge a "public official" in the sense of Rule 63(15)(c)? Does he have a duty to "investigate" within the meaning of the section? In our opinion these questions should be answered in the negative. Used in a broad sense, the term "public official" would include a judge. However, since judges are a special class of officers, proposals drafted in general terms of public officials are probably not intended to cover judges unless they are specifically mentioned in the rule. Furthermore, under Anglo-American tradition, the "duty to investigate" possessed by a judge is altogether different from that pos-

[10] McCormick, *Hearsay,* 10 RUTGERS L. REV. 620, 626-627 (1956). See also McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 IOWA L. REV. 363 (1957). It should be noted that California, like New Jersey, permits the judge to advise the jury on the weight of the evidence. CAL. CONST. art. VI, § 19.

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sessed by a nonjudicial "public official." The latter is required to take the initiative in discovering and tapping all sources of information. The judge, on the other hand, does not carry on investigations in this manner. Rather, under our adversary theory of litigation, he acts as umpire passing upon the results of investigations conducted by others. Because of the uniqueness of the judge's investigative function, he should not be thought of as within the category of a public official with a duty to investigate.

The scheme of Rule 63(15) taken in connection with Rule 64 is to give pretrial notice to the adversary that proponent proposes to use the written report or finding of fact. One purpose of such notice is, of course, to enable the adversary to make inquiries of the official who prepared the report and, if so advised, to subpoena and examine such official at the trial. This scheme would entail a considerable departure from tradition if applied to a judge. It would require him to respond to informal inquiries respecting the basis of his decision and possibly to take the witness stand and defend his decision under examination by the party adversely affected by it.

One would not think that results such as these are intended unless they are *specifically* indicated.[11] Yet to avoid any doubt on the subject it is well to state that such results are not intended. Accordingly, we recommend that Rule 63(15) be amended by adding "(except findings by a judge in the course of litigation)" after the words "findings of fact."

Rule 63(16)

There are at present several instances of statutes requiring private citizens to file official documents respecting their doings. Common examples are the filing of birth, marriage and death certificates by doctors, ministers and undertakers. Our present statute makes such documents admissible.[12] Adoption of Rule 63(16) would continue the same rule.

We have not discovered any situations beyond the birth-marriage-death situations in which this rule would be operative. There are numerous instances of various reports required of private citizens. These, however, do not come within the terms of Rule 63(16). For example, a clergyman who visits a person ill with a contagious disease must report it to health officials.[13] A person who discovers poison in an animal is required to make a report.[14] But no written report is required to be prepared or filed; therefore Rule 63(16) would be inapplicable. The owner of a dry cleaning establishment is required to file a written report of any explosion on his premises.[15] Here, although a written report is required to be filed, no statute authorizes the owner to "perform to the exclusion of persons not so authorized, the functions reflected in the writing" (that is, discovery of and report of the explosion). Again the rule is inapplicable.

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[11] Professor McCormick is of like opinion. McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 627 (1956).

[12] Birth: CAL. H. & S. CODE §§ 10100-10102, 10125-10126. Marriage: CAL. H. & S. CODE §§ 10300, 10325, 10350. Death: CAL. H. & S. CODE §§ 10200-10205, 10225, 10275. Admissibility: CAL. H. & S. CODE § 10577.

[13] CAL. H. & S. CODE § 3125.

[14] CAL. BUS. & PROF. CODE § 4163.

[15] CAL. H. & S. CODE § 13404. Along somewhat the same line is Section 17830 of the Health and Safety Code, requiring reports of fires in apartment houses and hotels.

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Confidential Reports

Section 410 of the Health and Safety Code requires a physician who diagnoses a case as epilepsy to report it in writing to the local health office; the local health office must report it in writing to the State Department of Public Health; the State Department of Public Health must report it to the State Department of Motor Vehicles. It is provided, however, that such "reports shall be for the information of the State Department of Motor Vehicles in enforcing the provisions of the Vehicle Code of California, and shall be kept confidential and used solely for the purpose of determining the eligibility of any person to operate a motor vehicle on the highways of this State." [16]

Unless Rule 63(15) and (16) are appropriately qualified, they might be regarded as removing such restrictions as those illustrated above on classified reports. Therefore, we recommend that these subdivisions be amended by adding after the expression "Rule 64" in the first sentence the following: "and subject to any rule imposing requirements of confidentiality or restricted use."

Rule 63(15) and (16) Compared to Rule 63(13) and (14)

Rule 63(13) and (14) state the Uniform Rules version of the *business* records exception. Rule 62(6) [17] defines "business" so broadly that the holding of a public office could plausibly be said to be a "business" within the meaning of the definition. Why then have Rule 63(15) and (16) at all?

Rule 63(13) and (14) [18] give the trial judge discretion to reject business records for untrustworthiness. No such discretion is given in Rule 63(15) and (16) with reference to official records.[19] Under Rule 63(13) a business record is admissible only when made "at or about the time of the act, condition or event recorded." There is no such requirement of contemporaneity under Rule 63(15) and (16).[20] In view of these differences it is apparent that whereas there is some overlap between Rule 63(13) and (14) and Rule 63(15) and (16), there is not a total coincidence.

Foundation Requirements

Plaintiff wishes to prove the issuance of a certain license to X. Plaintiff offers a bound book entitled "Record of Licenses." Page ten of this book contains the entry "License No. 645 issued to X, June 1, 1957. J.S. Director of Licenses."

If this document is offered under Rule 63(15) it is admissible only "if the judge finds" the document was "made by a public official." As applied to the above case this requires a finding by the judge that first, J.S. is Director, and second, that J.S. made the document. The judge

[16] CAL. H. & S. CODE § 410(4).

[17] "'A business' as used in . . . [Rule 63](13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." UNIFORM RULE 62(6).

[18] As proposed by the Commissioners on Uniform State Laws, Uniform Rule 63(14) omits the provision for this discretion. We have proposed amending Rule 63(14) to include the provision. See discussion on Rules 63(13) and 63(14) *supra*.

[19] The general discretion stated in Uniform Rule 45 would, of course, be operative. See quotation from McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 626-627 (1956) in text at notecall 10, pp. 522-23, *supra*.

[20] Nor is there such requirement today with reference to official records. Thus, for example, birth, marriage and death records are admissible if made within a year of the event. CAL. H. & S. CODE § 10577.

must also find that making the record was "within the scope of duty" of J.S. and likewise it was his "duty to perform the act reported," *i.e.*, issue the license.

A comparable foundation would seem to be required if the document is offered under Section 1920 of the California Code of Civil Procedure.

Now whereas Uniform Rule 68 contains detailed and elaborate provisions respecting authenticating *copies* of official records, the rules are silent as to the authentication of the *originals* of such records (save for the general proposition of Rule 67 that all writings must be authenticated and except for Rule 69 with reference to only one special kind of record). Therefore, under the Uniform Rules, the present law and practice remain operative as to authenticating the originals of public records. Under this law and practice the only authentication required is proof that the document was taken from official custody.[21] Given this in our case, then,

1. It is presumed or judicially noticed that J.S. is Director.[22]

2. It is presumed J.S. made the entry.[23]

3. Laws (domestic or otherwise) defining the duties of J.S. are judicially noticed.[24]

A foundation under Rule 63(16) would also apparently be adequate upon a showing that the writing came from official custody. The statutory authorization of persons such as the purported maker could, of course, be judicially noticed.[25] The fact that the purported maker was in fact the maker would probably be inferred from the fact that the document was accepted for filing.

We deal with authentication of *copies* in our discussion on Rule 63(17).

Conclusion

Rule 63(15) and Rule 63(16), amended as suggested above, are recommended for approval.[26]

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[21] Rogers Brothers Co. v. Beck, 43 Cal. App. 110, 184 Pac. 515 (1919); 7 WIGMORE, EVIDENCE §§ 2158-2159. *Cf.* People v. Wilson, 100 Cal. App. 397, 280 Pac. 137 (1929).

[22] CAL. CODE CIV. PROC. §§ 1875(6), 1963(14); 7 WIGMORE, EVIDENCE § 2168.

[23] CAL. CODE CIV. PROC. § 1963(15); 7 WIGMORE, EVIDENCE § 2159.

[24] CAL. CODE CIV. PROC. § 1875(2), (3), (4).

[25] *Ibid.*

[26] The N. J. Committee approved subdivisions (15) and (16), but it had some reservations concerning subdivision (15). N. J. COMMITTEE REPORT 146-50. The N. J. Commisison approved subdivision (16), but it limited (15) to reports of officials "other than officials acting in a judicial or quasi-judicial capacity." The N. J. Commission also revised (15)(c). The subdivision as revised is as follows: "Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, *other than officials acting in a judicial or quasi-judicial capacity, are admissible* if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make *statistical* findings ***." (*** indicates omissions from URE subdivision; *italics* indicates additions to URE subdivision.) N. J. COMMISSION REPORT 60-61.

The Utah Committee revised subdivision (15) to except traffic accident reports from its provisions and to permit only "factual data contained in written reports or findings of fact" to be admitted pursuant to its provisions. The Utah Committee qualified subdivision (16) with the introductory words, "Except as otherwise privileged . . . ." UTAH FINAL DRAFT 38-39.

Rule 63(17)—Content of Official Record; Rule 68 and Rule 69—Authentication

Rule 63(17) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
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> * * *
>
> (17) Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

We also at this time consider Rules 68 and 69 relating to the authentication of copies of records.

Rule 63(17)(a)

If a public official of this State performs an official act and makes a record of his performance, the record would be hearsay if offered as evidence that the act was performed. Even though it is "evidence of a statement which is made other than by a witness while testifying at the hearing" which is "offered to prove the truth of the matter stated" and hearsay under Rule 63, the original record is admissible under Rule 63(15).[1]

Now if a *copy* of the record is offered, an additional feature is added which produces a case of double hearsay. The copy is a statement by the copyist asserting that its contents are the same as the original record. This statement also "is made other than by a witness while testifying at the hearing" and is "offered to prove the truth of the matter stated," *i.e.,* that the original record states what the copyist says it states. Thus, if the copy is to be accepted as evidence that the official performed the act, it is first necessary to accept the hearsay statement of the copy-maker as to the contents of the original record and then under Rule 63(15) the hearsay statement of the official recorded in the original record can be accepted as evidence that he performed the act.

To what extent should the hearsay of copyists of official records be admissible? Clause (a) of Rule 63(17) provides that (subject to certain conditions to be considered *infra*) any "writing purporting to be a copy of an official record" is admissible, although hearsay. The extent to which this is broad or narrow depends, of course, upon the conditions just adverted to.

[1] The record must be properly authenticated, as explained in our discussion of Rule 63(15) and Rule 63(16), and notice must be given as required by Rule 64.

MJN 2216

The principal condition is that a "writing purporting to be a copy" is admissible only "if meeting the requirements of authentication under Rule 68."[2] The scope of clause (a) of Rule 63(17) is, by reference, thus determined by Rule 68.

Rule 68—Authentication of Copies of Records. Rule 68 provides as follows:

> Rule 68. A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

We shall first discuss clause (a) of Rule 68, then clauses (c) and (d), returning finally to clause (b).

Rule 68(a). A *published* writing may be "a writing purporting to be a copy of an official record or of an entry therein" within the meaning of Rule 63(17)(a). As such it is admissible under that rule, provided it meets the requirements of Rule 68 (and provided the original would be admissible under Rule 63(15) or 63(16)). The only authentication requirement imposed by Rule 68 is that the publication *purport* "to be published by authority of the nation, state or subdivision thereof in which the record is kept." Given the requisite purport or appearance, nothing more is required, for the publication "proves itself." It is "self-authenticating."

[2] Rule 63(17) is also "subject to Rule 64." Rule 64 provides in part: "Any writing admissible under exceptions . . . (17) . . . 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 copy."

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This is in accord with California law and practice insofar as proof by published copy of *certain* official records[3] is concerned. Therefore, we believe it is desirable to extend this principle of proof by published copy (as clause (a) of Rule 68 does) to cover *any* "official record" or "entry therein" (provided, of course, the original would be admissible).

Rule 68(c) and (d). A paper purports to be an attested or certified copy of an official record in this State and is purportedly made by the legal custodian of the original. Under clause (c) of Rule 68 the purport of the paper is sufficient authentication (*i.e.*, the paper "proves itself"). The paper (although hearsay) is therefore admissible under Rule 63(17)(a) (provided, of course, the original would be admissible under Rule 63(15) or 63(16)). Note that while clause (c) of Rule 68 requires that the writing be "attested as a correct copy" it does not require that the writing bear the seal of the ostensible custodian. Currently California admits properly certified copies of official in-state records,[4] but requires a seal "if there be any."[5]

Under clause (d) of Rule 68 if the original is an out-of-state official record, a paper—though it purports to be a copy purportedly made by the official custodian—is not sufficiently authenticated by its mere purport. Without more, such a paper fails to qualify under Rule 63(17)(a)

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[3] Code of Civil Procedure Section 1918 provides, in part:

[O]fficial documents may be proved, in part:

1. Acts of the executive of this state . . . and of the United States . . . may . . . be proved by public documents printed by order of the Legislature or congress, or either house thereof.

2. The proceedings of the Legislature of this state, or of congress, by the journals of those bodies . . . or by published statutes or resolutions, or by copies . . . printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority. . . .

5. Acts of a county or municipal corporation of this state . . . by a printed book published by the authority of such county or corporation.

It is worth noting that Rule 68(a) is phrased in terms of a writing which "*purports* to be published by authority." (Emphasis added.) On the other hand, Code of Civil Procedure Section 1918 is phrased in terms of "documents printed by" authority. The difference is without significance. Code of Civil Procedure Section 1963(35) enacts the following presumption: "That a printed and published book, purporting to be printed or published by public authority, was so printed or published."

[4] CAL. CODE CIV. PROC. §§ 1893, 1905, 1918(6), 1919. Note, Rule 68(c) is phrased in terms of a writing ". . . attested as a correct copy . . . by a person *purporting* to be an officer . . . having . . . custody." (Emphasis added.)

On the other hand, the references in the California statutes are to "certified copies" or to copies "certified by the legal custodian." What the California legislation means, however, is a *purported* certificate by a *purported* legal custodian. Otherwise the apparent certificate would not be self-authenticating and extrinsic evidence would be required as a foundation for the purported certificate. The inconveniences of requiring such extrinsic evidence were pointed out in the early California case of Mott v. Smith, 16 Cal. 533, 553 (1860). Since that time, there seems to have been no doubt that the purport of the apparent certificate is a sufficient foundation for admitting the document. Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172 (1896); People v. Howard, 72 Cal. App. 561, 237 Pac. 780 (1925); Rosenberg v. J. C. Penney Co., 30 Cal. App.2d 609, 86 P.2d 696 (1939). See also 5 WIGMORE, EVIDENCE § 1679.

The certificate which thus authenticates itself likewise authenticates the original. 7 WIGMORE, EVIDENCE § 2158.

In cases under Section 1918(7) of the Code of Civil Procedure, the second certificate is self-authenticating thereby authenticating both the first certificate and the original. People v. Domenico, 121 Cal. App.2d 124, 263 P.2d 122 (1953).

In cases under Section 1918(8) of the Code of Civil Procedure, the third certificate is self-authenticating thereby authenticating the first two certificates and the original. 5 WIGMORE, EVIDENCE § 1679.

[5] CAL. CODE CIV. PROC. § 1923. As to what constitutes sufficient attestation or certification, see *In re* Smith, 33 Cal.2d 797, 205 P.2d 662 (1949) (word "Attest" accompanied by signature and seal held sufficient). And see UNIFORM RULE 68 Comment.

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and therefore is inadmissible under Rule 63. The additional requirement is a certificate that the person attesting the copy "has the custody of the record." If the office in which the record is kept is within the United States, its territories or insular possessions, such "certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office."

Is a certificate *apparently* complying with these conditions self-authenticating? The references here to "judge," "public officer," "seal" and "certificate" omit the qualifying adjective "purported." Nevertheless the terms should be read as thus qualified. Clause (d) of Rule 68 is based upon the Model Code Rule 517(1)(c)(i). The latter referred to "a person purporting to be a judge" or "purporting to be a public officer" whereas in constructing Rule 68(d) the Commissioners on Uniform State Laws probably regarded the qualifications expressly stated in Model Code Rule 517 as necessarily implicit and omitted explicit qualification for the sake of simplicity of statement. When we consider their explanation of the underlying purpose as stated in the comment to Rule 68, which is to simplify "the methods of proving the authenticity of copies of official records," there can be little doubt that the Commissioners on Uniform State Laws intend the ostensible certificate to be self-authenticating.

The apparent certificate of the purported "judge" or "public officer" thus "proves itself" to the extent of establishing a prima facie case that the judge or the officer made it. We have, then, the written statement of the judge or officer that the apparent custodian "has the custody of the record" which is an *original* official hearsay statement admissible under Rule 63(15). This authenticates the apparent custodian's statement under Rule 68(d), which, although hearsay, becomes admissible under Rule 63(17)(a).

As pointed out above, if the original record is an out-of-state record the purport of an apparent official copy by the custodian is not, standing alone, enough to qualify for admissibility under Rule 68(d). In addition "a certificate that such officer [*i.e.*, the apparent custodian] has custody of the record" is required to qualify this evidence for admissibility. If the office in which the record is kept is in a foreign state or country, this certificate "may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office." For reasons comparable to those stated above, a certificate apparently complying with these conditions is self-authenticating.

In some respects clause (d) of Rule 68 is more liberal than present California practice; in other respects it is more strict. As to out-of-state documents specified in subdivisions (1), (2), (3) and (9) of California Code of Civil Procedure Section 1918, California accepts the purported certificate of the official custodian without requiring

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more.[6] As to out-of-state documents specified in subdivision (7) of Section 1918, California requires more than the purported certificate of the custodian *and* more than Rule 68(d) requires. There must be not only the certificate of the custodian but also a certificate of "the Secretary of State, judge of the supreme, superior, or county court, or mayor" that "the copy is duly certified by the officer having the legal custody of the original."[7] Rule 68(d) recognizes that persons other than these are competent to execute the requisite certificate of the custodian's custody. To this extent the rule is more liberal. As to a document located in a foreign country, subdivision (8) of Section 1918 of the California Code of Civil Procedure requires a certificate of the custodian, a certificate by an appropriate official of the country *and* a certificate by a representative of United States foreign service authenticating the signature of the appropriate official of the country. Thus California requires three certificates whereas Rule 68(d) requires only two.[8]

In summarizing this comparison and evaluating the respective merits of Section 1918 and Rule 68(d) it can be said that each is better than the other to the extent that it requires *fewer* certificates or makes it easier to obtain the requisite certificates. From this viewpoint Rule 68(d) is preferable to Section 1918(7)[9] and 1918(8)[10] whereas the other sections of Section 1918 are preferable to Rule 68(d).[11] Under these circumstances the best solution would be to amend Rule 68(d) to incorporate therein the best features of Section 1918.[12]

Since the portions of Section 1918 which are preferable to Rule 68 have reference for the most part[13] to *federal* records, clause (c) of Rule 68 should be amended by adding the phrase "or is an office of the United States government whether within or without this state" after the phrase "the office in which the record is kept is within this state." Clause (d) of Rule 68 should be amended by adding the phrase "or is not an office of the United States government" after the phrase "if the office is not within the state."

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[6] See CAL. CODE CIV. PROC. § 1918(1) (certified copies by Secretary of State to prove the acts of executive); CAL. CODE CIV. PROC. § 1918(2) (certified copies by clerks to prove proceedings of congress); CAL. CODE CIV. PROC. § 1918(3) (similar to above as to acts of executive or proceedings of legislature of sister State); CAL. CODE CIV. PROC. § 1918(9) (documents in the departments of the United States government provable by certificate of the legal custodian); CAL. CODE CIV. PROC. § 1905 (judicial record of the United States provable by copy certified by legal custodian).

[7] CAL. CODE CIV. PROC. § 1918(7). Proof of the judicial record of a sister State by copy requires a certificate by the clerk *and* a certificate by "the chief judge or presiding magistrate." CAL. CODE CIV. PROC. § 1905. As to proof of out-of-state record of the justice of the peace court, see CAL. CODE CIV. PROC. §§ 1921-1922.

[8] CAL. CODE CIV. PROC. § 1918(8). Proof of a foreign judicial record likewise requires three certificates (by the clerk, by the judge, by the representative in United States foreign service). CAL. CODE CIV. PROC. § 1906. Section 1901 could be read as eliminating the necessity for third certificate. Apparently it has never been construed in this manner.

[9] And to CAL. CODE CIV. PROC. § 1905. See note 7, *supra*.

[10] And to CAL. CODE CIV. PROC. § 1906. See note 8, *supra*.

[11] As to proof of United States judicial records Code of Civil Procedure Section 1905 is preferable to Uniform Rule 68(d).

[12] Wigmore has high praise for Code of Civil Procedure Section 1918, and uses it as the basis for a proposed Model Act. See 5 WIGMORE, EVIDENCE §§ 1638a, 1680b.

[13] See CAL. CODE CIV. PROC. Section 1918(3), having reference to proof of the "acts of the executive, or the proceedings of the legislature of a sister state," which permits proof by only an unpublished certified copy. As such it is preferable to Rule 68(d). However, since proof of these matters could normally be by published copy under Rule 68(a), we do not advise any amendment to preserve Section 1918(3).

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Rule 68(b). As we have pointed out, Rule 63(17)(a) is an exception to the hearsay rule, Rule 63. By reference, however, the scope of Rule 63(17)(a) is determined by Rule 68. Considering Rule 63(17)(a) along with Rule 68(a), 68(c) and 68(d), the result is that Rule 63(17)(a) serves to continue in operation the presently recognized processes of proof of official records by published copies and by certified copies of legal custodians. The principal impact of Rule 63(17)(a) here is to liberalize these processes in the respects previously discussed.

When we consider Rule 63(17)(a) in relation to clause (b) of Rule 68 we find, however, that a new exception to the hearsay rule is created and a process of proof presently unavailable is made available.

Subject to Rules 64 [14] and 68, Rule 63(17) makes admissible *any* "writing purporting to be a copy of an official record or of an entry therein." This covers not only published copies and certified copies by legal custodians but also any copy made by anybody. If then we look to Rule 68 to find the authentication requirements for copies other than published copies (under clause (a) of Rule 68) and other than certified copies by custodians (under clauses (c) and (d) of Rule 68) we find such requirement in Rule 68(b). Thus:

> A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if . . . (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry . . . .

This seems to contemplate evidence extrinsic to the writing itself. In other words, the writing here is not self-authenticating (as it is under clauses (a) and (c) of Rule 68). But given sufficient evidence to warrant a finding that the writing is a correct copy, the copy is then admissible even though it is hearsay.

How does this compare with the law of today? Is this really a *new* exception to the hearsay rule?

Today a copy made by a private person must be verified by a witness who can testify from knowledge as to the contents of the original document.[15] This means one who made the copy,[16] or one who compared it with the original [17] or one who read the original while another read the copy (or vice versa) [18] or possibly one who—though he has never before seen the copy—has such a photographic memory of the contents of the original that he can testify to the accuracy of the copy from his present recollection of the original.[19]

To the extent that the "evidence sufficient to warrant a finding that the writing is a correct copy" in the sense of Rule 68(b) is evidence of the kind just described it is obvious that Rule 68(b) does not change the law prevailing today.

However, to the extent that such evidence comes from other sources, a change is involved and this—in combination with Rule 63(17)(a)—

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[14] See note 2, p. 528, *supra*.
[15] 4 WIGMORE, EVIDENCE §§ 1273, 1277-1281.
[16] *Id.* § 1278.
[17] *Id.* § 1280.
[18] *Id.* § 1279.
[19] *Id.* § 1280(2).

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creates a new exception to the hearsay rule. Thus, if it is shown that the copy was made by C, in the course of research for a Ph.D. thesis, and if this is thought to "warrant a finding that the copy is correct" the copy is admissible under this new exception. It is, however, a desirable exception. If the original of the record is in existence, the adversary can check the accuracy of the copy. If the original is not in existence and if the copyist is unavailable, the copy may be indispensable as a source of proof. There is little danger that anonymous or suspicious copies will be received in view of the foundation that is required.

Rule 63(17)(b)

The absence of an official record may be relevant evidence of the nonoccurrence of an event or the nonexistence of a condition.[20] At common law, however, such absence could not be established by the custodian's certificate of due search and inability to find.[21] While the custodian's certificate which purported to copy his records [22] was admissible at common law, his certificate which purported to inventory his records was not admissible. This, says Wigmore, "will some day be reckoned as one of the most stupid instances of legal pedantry in our annals." [23]

Rule 63(17)(b) would create a special exception to the hearsay rule making admissible a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record to prove the absence of a record in a specified office.

Rule 69—Certificate of Lack of Record. Rule 69 provides:

> A writing admissible under exception (17)(b) of Rule 63 is authenticated in the same manner as is provided in clause (c) or (d) of Rule 68.

Accordingly, a purported custodian's certificate under Rule 63(17)(b) would either "prove itself" under Rule 68(c) or would require an additional certificate under Rule 68(d) which would "prove itself" and thus achieve admissibility of a custodian's certificate.

Photographic Copies

Suppose a document is apparently a photograph of a public in-state record. Attached to this document is another document stating: "Attest: A true copy made by photograph June 1, 1957 under my direction and control. Signed J.S. Secretary and Custodian, (Seal)." These documents are admissible today under Section 1920b of the Code of Civil Procedure which provides that the content of an official record

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[20] 5 WIGMORE, EVIDENCE § 1633(6).
[21] *Id.* § 1678.
[22] The practice of admitting certified copies by official custodians is, of course, widespread and, as Professor McCormick stated, "in this country may be said to have common-law sanction, even apart from innumerable particular enabling statutes." MCCORMICK, EVIDENCE § 292, p. 615.
[23] 5 WIGMORE, EVIDENCE § 1678 at 754.

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may be proved by a certified photographic copy.[24] The documents would be likewise admissible under Rules 63(17)(a) and 68. Although these are so phrased that they apply only to "a *writing* purporting to be a copy" (emphasis added), Rule 1(13) defines "writing" to include "photostating" and photography.[25]

Conclusion

In conclusion, Rules 63(17) and 69 are recommended for approval as drafted. Rule 68 is recommended in the amended form proposed *supra*.[26]

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[24] Code of Civil Procedure Section 1920b provides:

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

Presumably Section 1920b is limited by Section 1918(7) and (8).

[25] Uniform Rule 72, which is a simplified version of the Uniform Photographic Copies of Business and Public Records as Evidence Act—currently in force in California as Code of Civil Procedure Sections 1953i-1953*l*—deals only with such photographic copies as "it was in the regular course of . . . official activity to make *and preserve* . . . as a part of the records of such . . . office." (Emphasis added.) This apparently has reference to permanent photographic records, not to intermittent photographic copies supplied by the office as a service to citizens.

[26] The N. J. Committee, the N. J. Commission and the Utah Committee all approved subdivision (17); however, all three groups recommended substantial modification of Rules 68 and 69. N. J. COMMITTEE REPORT 151, 177-81; N. J. COMMISSION REPORT 61, 69-70; UTAH FINAL DRAFT 39, 46-48.

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Rule 63(18)—Certificate of Marriage

Rule 63(18) provides:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> *   *   *
>
> (18) Subject to Rule 64[1] certificates that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;

A recorded certificate of marriage is provable either under Rule 63(16) or (17). Accordingly a proponent may offer the original of the public record under Rule 63(16) or a copy of the record under Rule 63(17). What is the situation, however, if a proponent offers the document which the celebrant delivered to the parties at the time of the ceremony? In this event the proponent is not offering to prove the contents of any public record. He is disregarding the public records as a source of proof (probably because no such record exists) and is seeking a finding of marriage solely on the basis of the written statement by the apparent celebrant. Although the statement is hearsay, it is admissible if the judge finds that the conditions stated in Rule 63(18) are met; thus the certificate is admissible whether the marriage ceremony was civil or religious.

Section 1919a of the Code of Civil Procedure provides that a certificate issued by a clergyman is admissible under certain conditions.[2] Rule 63(18) is broader than Section 1919a in that it covers nonecclesiastical certificates.

Rule 63(18) is also more liberal with respect to authentication. Section 1919b requires authentication of the certificate by requiring an additional certificate from a superior ecclesiastical officer which in turn is authenticated by another certificate of the Secretary of State (or in the case of a foreign marriage by certificates by the sovereign and a representative of the United States foreign service). Is it reasonable to assume that the Legislature intended the authentication prescribed to be the *only* authentication acceptable? Probably so. In creating the

[1] Rule 64 provides in part as follows: "Any writing admissible under exceptions . . . (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 copy."

[2] Section 1919a of the Code of Civil Procedure provides in part as follows: "Church records . . . and/or certificates . . . issued by a clergyman . . . shall be competent evidence of the facts recited therein, if properly proved, attested and authenticated as provided in Section 1919b."

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new exception to the hearsay rule for church records (as the sections in question do), the Legislature may well have meant that the evidence should be admissible *only* under the conditions stated. *If* Sections 1919a and 1919b are to be read as exclusive (*i.e.*, if *expressio unius est exclusio alterius* applies, as we suspect it does) then adoption of Rule 63(18) in this jurisdiction would bring about a minor change respecting authentication.

The foundation required under Rule 63(18) is a showing adequate to convince the judge of the following:

1. The purported maker of the certificate is the actual maker.
2. Authority of the maker.
3. Issuance in a reasonable time.

The mere purport of the instrument is not adequate for this purpose. The document is not of that class of writings which under Rule 68 "prove themselves." But under Rule 67 the document may be authenticated "by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law." This would seem to free the proponent from the restrictive provisions of Section 1919b regarding authentication and to make other means of authentication available. The availability of these other methods, however, would be no great boon to the proponent. Although he would be aided by a presumption that the writing is truly dated,[3] it is doubtful whether any presumption would come to his aid regarding the genuineness of the maker's signature or regarding the authority of the maker.[4] Furthermore, these matters in most cases would probably be beyond the permissible scope of judicial notice.[5] In the end, most proponents would probably find that they must use either the method prescribed by Sections 1919a and 1919b or call the celebrant, his ecclesiastical associate or superior as a witness. The former method would seem to be preferable in most cases. However, for those few cases in which the latter method might be preferable or in which other means might be available, these means should be permitted. Rule 63(18) is desirable in that it not only provides for validating religious certificates by various means, but also provides for admitting civil certificates.[6]

Therefore, Rule 63(18) is recommended for approval.[7]

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[3] CAL. CODE CIV. PROC. § 1963(23).

[4] Query whether Secton 1963(14), (15) would apply and serve to authenticate a *civil* certificate. Query also whether Section 1963(33) would apply and serve to authenticate an ecclesiastical certificate.

[5] CAL. CODE CIV. PROC. § 1875.

[6] Wigmore approves of admitting marriage certificates with the warning, however, that "a certificate given directly by the celebrant is in the lapse of time difficult for honest persons to authenticate and easy for dishonest ones to fabricate." 5 WIGMORE, EVIDENCE § 1645(4), p. 585.

[7] The N. J. Committee and the Utah Committee recommended approval of this subdivision. N. J. COMMITTEE REPORT 151; UTAH FINAL DRAFT 39. The N. J. Commission revised the subdivision to provide that a marriage certificate is admissible if "it purports (a) to have been made within a reasonable time after the marriage ceremony and (b) to have been made by a person who at the time and place of the marriage was authorized by law to perform marriage ceremonies," thus eliminating the requirement of an affirmative finding by the judge to that effect. N. J. COMMISSION REPORT 62.

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Rule 63(19)—Records of Documents Affecting an Interest in Property

Rule 63(19) provides:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
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> * * *
>
> (19) Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

In discussing Rule 63(19) it must first be distinguished from Code of Civil Procedure Section 1948 which provides as follows:

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

This sensible and useful rule would be carried forward under Rule 63(15). The certificate of the certifying officer would in cases of "acknowledged and certified"[1] come under Rule 63(15)(b) and would in cases of "proved and certified"[2] come under Rule 63(15)(c). Since the certificate is admissible, it would authenticate the document and make it admissible evidence.

This, however, has reference only to the original document as evidence. What if the document is recordable, is in fact recorded, and the record is offered? Here the record probably does not come within Rule 63(15)(a), (b) or (c).[3] In this situation a special exception is necessary or at least desirable. Rule 63(19) provides that exception.

Two limitations are of interest. First, Rule 63(19) applies only to instruments that are recordable under the prevailing law of the state which is the situs of the record. Second, this subdivision applies only if the recordable document purports "to establish or affect an interest in property." But when the subdivision is applicable it makes the record effective as evidence of contents, execution and delivery.

[1] CAL. CIV. CODE §§ 1180-1193.
[2] CAL. CIV. CODE §§ 1195-1201.
[3] This point is not entirely clear. See, *e.g.*, 5 WIGMORE, EVIDENCE § 1648, pp. 601-602.

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In regard to the record of a properly recorded instrument "conveying or affecting real property" Rule 63(19), if adopted in California, would merely carry forward that portion of Section 1951 of the Code of Civil Procedure which now provides such record may be "read in evidence . . . without further proof" (which means "read" as evidence of contents, execution and delivery).[4] So far as the record of a properly recorded chattel mortgage is concerned, Rule 63(19), if adopted in California, would merely carry forward that portion of Section 2963 of the Civil Code which provides that recording has the same effect as "the recording of conveyances of real property," which (presumably) means the record may be "read in evidence" as under Section 1951 of the Code of Civil Procedure.

We do not pause here to inquire exhaustively into the subject of what instruments purporting "to establish or affect an interest in property" in Rule 63(19) are recordable under the law of California. It is worth noting, however, that generally speaking such instruments are recordable only if acknowledged and certified or proved and certified.[5] This being so, a general rule, such as Rule 63(19), making the record admissable seems both safe and desirable.

Rule 63(19) deals only with admissibility of the record itself. Usually a properly certified copy of the record is offered. Such a certified copy would be admissible under both Rule 63(17) and Section 1951 of the California Code of Civil Procedure.

Rule 63(19) applies to out-of-state records as well as to in-state records. Its application to out-of-state records is what Wigmore calls the "orthodox view"[6] and the view is seemingly embraced in the general proposition of Code of Civil Procedure Section 1918(7) to the effect that "documents . . . in a sister State [may be proved] by the original."

Thus Rule 63(19) is recommended for approval.[7]

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[4] Thomas v. Peterson, 213 Cal. 672, 3 P.2d 306 (1931); Mercantile Trust Co. v. All Persons, 183 Cal. 369, 376, 191 Pac. 691, 694 (1920).

[5] CAL. GOVT. CODE § 27287.

[6] 5 WIGMORE, EVIDENCE § 1652, p. 629.

[7] The N. J. Committee, the N. J. Commission and the Utah Commission all approved subdivision (19). N. J. COMMITTEE REPORT 152-53; N. J. COMMISSION REPORT 62; UTAH FINAL DRAFT 39-40.

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Rule 63(20)—Judgment of Previous Conviction

Rule 63(20) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (20) Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment;

As Against the Convicted Party

The Commissioners on Uniform State Laws in their comment on Rule 63(20) state, "Analytically a judgment of conviction is hearsay." What is the analysis which leads to this conclusion? Consider the following recitals of the typical judgment:

> Whereas the said defendant, having been duly found guilty in this court of the crime of ROBBERY, a felony as charged in Count 1 of the information which the jury found to be Robbery in the first degree, it is therefore Ordered, Adjudged and Decreed, etc.

This is double hearsay when offered as evidence that defendant *really* committed the crime charged. It is a hearsay statement as to the content of the verdict.[1] In addition, the content of the verdict is a hearsay statement that the defendant committed the crime.

Not only is such a judgment hearsay, it is (if we are to apply ordinary rules enforced in the case of ordinary testimony) also objectionable under the knowledge and opinion rules. The jury's statement of the defendant's guilt is not based on firsthand knowledge. Furthermore, it is phrased in terms of an overall conclusion not permitted in the case of ordinary testimony.

If we were willing to hurdle all of these obstacles to make a judgment of guilt admissible evidence in another case, there would still remain, as Professor Hinton has argued, the practical consideration that if such judgment were the *only* evidence, the jury must either blindly accept it or (with equal blindness) reject it because there is no rational alternative.[2]

In our opinion it is not difficult to answer these objections insofar as they concern the case in which the judgment is offered against the party who was convicted. As to hearsay, the essence of the hearsay rule is the right of cross-examination. In objecting on hearsay grounds to the judgment as evidence the convicted party in effect argues for a right to cross-examine the jurors. He had no such right in the case leading to the judgment. At most his right then was to poll the jury (not cross-examine them). If without any right to cross-examine the

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[1] This hearsay aspect, in and of itself, is no bar to admissibility. The official written statements exception, Rule 63(15), is applicable. The real problem is the other hearsay aspect mentioned in the text.

[2] Note, 27 ILL. L. REV. 195 (1932). See also Bush, *Criminal Convictions as Evidence in Civil Proceedings,* 29 MISS. L. J. 276 (1958); Cowen, *The Admissibility of Criminal Convictions in Subsequent Civil Proceedings,* 40 CALIF. L. REV. 225 (1952); Notes, 46 IOWA L. REV. 400 (1961), 7 U.C.L.A. L. REV. 534 (1960), 14 WASH. & LEE L. REV. 259 (1957).

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jurors he is *bound* by their verdict, in that case, should the judgment not be at least *admissible* against him in the present case? The hearsay statement of an ordinary person, be he biased or unbiased, smart or dumb, corrupt or honest, stands on an entirely different footing from the hearsay statement of a jury. A jury is composed of persons especially screened for bias, honesty, intelligence, and other traits, and especially sworn to make a special kind of solemn statement of extraordinary import. The screening process, the oath "well and truly" to try the case and the solemnity of the occasion may be here regarded as an adequate substitute for the normal test of cross-examination.

If we think of the jury's statement as the very special kind of statement that it is, this hurdles the hearsay objection. It also circumvents the knowledge and opinion objections. Under these peculiar circumstances, want of prior knowledge is here a positive virtue. Under the same circumstances it is peculiarly appropriate that the statement be in the form of a conclusion.

In short, the statement of a jury embodied in its verdict is *sui generis*. It stands apart from other kinds of written and oral statements. Because of this uniqueness, the usual principles applicable to ordinary statements (right of cross-examination, knowledge, opinion) may appropriately be regarded as inapplicable to the jury's statement.

If we now enlarge our point of view to think of the problem in less technical terms than hearsay, knowledge and opinion, we discover that there is no plausible objection to admitting the judgment as evidence against the convicted party on the point of weight of the evidence or on the point of fairness to that party. The judgment possesses great probative force, since it manifests persuasion of the jury beyond a reasonable doubt. The convicted party has had his day in court. Assuming the criminal charge was serious enough to motivate him to put forth his best efforts and to motivate the jury to put forth their best efforts, no unfairness results in using the judgment as evidence against him in another case. These assumptions are clearly sound when the criminal charge was a felony. Possibly they are not sound when the charge was a misdemeanor. At any rate, this is the philosophy of the Commissioners on Uniform State Laws as expounded in the comment on Rule 63(20) which states:

> [T]here is widespread opposition to opening the door to let in evidence of convictions particularly of traffic violations in actions which later develop over responsibility for damages. In other words, trials and convictions in traffic courts and possibly in misdemeanor cases generally, often do not have about them the tags of trustworthiness as they often are the result of expediency or compromise. To let in evidence of conviction of a traffic violation to prove negligence and responsibility in a civil case would seem to be going too far and for that reason this rule limits the admissibility of judgments of conviction under the hearsay exception to convictions of a felony.

Even as thus limited, Rule 63(20) goes beyond the current law. Today, a judgment of guilt upon a plea of not guilty is inadmissible in another action, even though the crime is felony and even though

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the judgment is offered against the convicted party.[3] The judgment may, however, be shown to impeach his credibility as a witness and for other limited purposes.[4] Tomorrow, this could be changed, so far as felony convictions are concerned, by adopting Rule 63(20) and thus admitting the judgment against the convicted party in any action in which his guilt is material. Such judgment would not be conclusive but would, it seems, create a rebuttable presumption under Section 1963(17) of the Code of Civil Procedure.[5]

As Against Parties Other Than the Convicted Party

Thus far we have been thinking of a judgment of guilt offered against the convicted party. Now we must note the fact that under Rule 63(20) admissibility is not so limited. Under this exception the judgment is admissible whenever relevant. Thus, let us suppose that B is charged with receiving from A goods stolen by A, knowing them to have been stolen. Under Rule 63(20) the judgment of A's conviction is admissible against B to prove the theft. This means that if A has fought the charge B must be satisfied with A's day in court to the extent of letting the jury in B's case be advised of the verdict of the jury in A's case (and to the extent of being charged that this creates a presumption). If A has pleaded guilty B is prejudiced (to the extent indicated immediately above) by this plea.[6]

In the first of these two situations the idea of the Commissioners on Uniform State Laws is roughly the same as that underlying Rule 63 (3)(b)(ii) which requires B to be satisfied with A's cross-examination of a witness now unavailable. That idea is now extended to require B to be satisfied with A's conduct of A's defense in its entirety. So far as the second situation is concerned the idea is basically the same as that underlying Rule 63(10) making A's statement against A's interest (statement subjecting him to criminal liability) admissible against B.

Conclusion

Personally we approve of these extensions.[7] If, however, they are unacceptable, they may easily be eliminated from the rule by inserting the following amendment after the word "prove": "as against such person or his successor in interest."

[3] Board of Education v. King, 82 Cal. App.2d 857, 187 P.2d 427 (1947); McCormick, Evidence § 295; 5 Wigmore, Evidence § 1671a.

If defendant pleads guilty, this is, of course, admissible against him as an admission. Olson v. Meacham, 129 Cal. App. 670, 19 P.2d 527 (1933); Kohle v. Sinnett, 118 Cal. App.2d 126, 257 P.2d 483 (1953). This is not, however, admissible against another party. Burke v. Wells, Fargo & Co., 34 Cal. 60 (1867). *Cf.* Ando v. Woodberry, 9 App. Div.2d 125, 192 N.Y.S.2d 414 (1959), which holds that defendant's plea of guilty in a traffic court is inadmissible against him in a civil action. The case is noted in 26 Brooklyn L. Rev. 315 (1959), 9 Buffalo L. Rev. 373 (1960), 28 Fordham L. Rev. 369 (1959), 6 N.Y.L.F. 241 (1959), 11 Syracuse L. Rev. 298 (1960), 13 Vand. L. Rev. 797 (1960).

[4] McCormick, Evidence §§ 43, 157-161.

[5] The presumption is that "a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties."

We deal here only with the effect of the judgment *as evidence,* laying to one side the question of mutuality of estoppel and the effect of a judgment as estoppel. On the latter question see Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942); and see Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 Stan. L. Rev. 281 (1957).

[6] It is otherwise today. See Burke v. Wells, Fargo & Co., 34 Cal. 60 (1867).

[7] The N. J. Committee and the Utah Committee both recommended approval of subdivision (20) without substantial modification. N. J. Committee Report 153-54; Utah Final Draft 40. The N. J. Commission recommended that the applicability of the subdivision be limited to civil cases. N. J. Commission Report 63.

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Rule 63(21)—Judgment Against Persons Entitled to Indemnity

Rule 63, subdivision (21) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
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> * * *
>
> (21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if offered by a judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

A judgment is rendered against a surety on a fidelity bond for wrong of the principal or against a master for the tort of his servant or against a warrantee for want of title. The surety, master or warrantee, as indemnitee, sues the principal, servant or warrantor as indemnitor. If the indemnitee "gave to the indemnitor reasonable notice of the action" against the indemnitee and requested the indemnitor "to defend it or to participate in the defense," then the indemnitor is *bound* by the judgment "as to the existence and extent of the liability of the indemnitee."[1] Under these circumstances, there is no necessity in the action of indemnitee vs. indemnitor to relitigate the issue of the wrong of the principal, or servant or the issue of the want of title. Since the judgment binds the indemnitor, there is no problem of whether the indemnitee may use the judgment merely as an item of evidence. This problem arises only when the indemnitee has neglected to take the steps requisite to make the judgment binding.[2]

The idea underlying Rule 63(21) is that, even though as evidence the judgment is hearsay[3] and even though the indemnitor has not had the notice and opportunity to defend requisite to give the judgment binding force, nevertheless, the judgment should be admissible against the indemnitor as an item of nonconclusive evidence. In behalf of this proposal it may be argued that, even though the indemnitor has not had notice and opportunity to defend the action against the indemnitee, the interests of the indemnitor have probably been safeguarded by adequate representation by the indemnitee and the judgment is prob-

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[1] RESTATEMENT, JUDGMENTS § 107 (1942). See also *id.* § 108.

The same principle is embodied in Code of Civil Procedure Section 1912 and Civil Code Section 2778(5). See also Pezel v. Yerex, 56 Cal. App. 304, 205 Pac. 475 (1922).

[2] The difference between the judgment as binding (as conclusive or as estoppel) and as evidence is recognized in our statutes—CAL. CIV. CODE § 2778(5), (6)—and decisions. Eva v. Andersen, 166 Cal. 420, 137 Pac. 16 (1913).

[3] See discussion in text on UNIFORM RULE 63(20) *supra.*

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ably "right." In exceptional cases where this is not so, the indemnitor may yet protect himself by relitigating the issue and proving the judgment is "wrong."[4] In any event it seems that the principle underlying Rule 63(21) has long been accepted in California.[5]

It is recommended that Rule 63(21) be approved.[6]

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[4] Under Code of Civil Procedure Section 1963(17) the judgment would probably give rise to a disputable presumption.

[5] CAL. CIV. CODE § 2778(6).

[6] The N. J. Committee and the Utah Committee both approved this subdivision, although the N. J. Committee indicated that it might be desirable to limit its application to those cases where the right of indemnity arises out of contract. N. J. COMMITTEE REPORT 154-56; UTAH FINAL DRAFT 40. The N. J. Commission revised the subdivision to make it subject to Rule 64 and added a provision that the judgment is conclusive if the defendant in the second action had notice of and opportunity to defend the first action. N. J. COMMISSION REPORT 63.

See also proposed subdivision (21.1) discussed at pages 495-96, *supra*.

Rule 63(22)—Judgment Determining Public Interest in Land

Rule 63(22) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

Rule 63(22) is derived from American Law Institute Model Code Rule 523. The American Law Institute's official comment on the latter rule is as follows:

> A number of textwriters lay down the rule that a judgment is admissible where evidence of reputation as to a public interest in land is admissible; and a fair number of cases in England and the United States admit evidence of such a judgment. The English courts say that it is better than evidence of reputation.[1]

The source of the rule lies in the cases dealing with reputation. The general English rule relating to reputation is:

> Evidence of reputation is admissible where the question relates to a matter of general or public interest; as, for example, to the boundaries of a town, parish, or manor, or to the boundaries between counties, parishes, hamlets or manors, or between a reputed manor and the land belonging to a private individual, or between old and new land in a manor.
>
> [However,] evidence of reputation is inadmissible in cases of a private nature, for example, as to the boundaries of a waste over which some only of the tenants of a manor claim a right of common appendant, or as to the boundaries between two private estates, except where the private boundaries coincide with public ones.[2]

Originally the rule seems to have been that the verdict of a jury was itself evidence of reputation. The doctrine seems to have arisen in *City of London* v. *Clerke, a Maltman,*[3] decided in 1691. That case did not involve a boundary, but involved the right of the city to collect a duty on malt brought to the city on the west country barges. It was there held that verdicts in four prior cases against west country maltmen were admissible. The reason given was that prior payments of such a duty by other west country maltmen would have been admissible,

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[1] MODEL CODE RULE 523 Comment.
[2] 3 HALSBURY, LAWS OF ENGLAND, 383-85 (3d ed. 1953).
[3] Carth. 181, 90 Eng. Rep. 710 (1691).

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therefore the prior recoveries against the other maltmen should also be admissible. Chief Justice Holt stated by way of illustration:

> If a Lord of a Manor claims Suit of his Tenants *ad molendinum* by Custom, *&c.* and in an Action recovers *against one Tenant,* that Recovery may be given in Evidence in a like Action to be brought *against other Tenants* upon the Reason *supra,* unless the Defendand can shew any Covin or Collusion between the Parties in the first Action, *&c. quod nota.*[4]

In *Tooker* v. *Duke of Beaufort,*[5] decided in 1757, a commission issued under the seal of the Court of Exchequer to inquire as to the boundaries of a manor and the verdict of the jury made upon the inquisition were held admissible in a later action, though not conclusive.

Reed v. *Jackson,*[6] decided in 1801, was an action for trespass. The defendant pleaded a public right of way over the land in question. The plaintiff offered in evidence the verdict he had obtained in another action against a different defendant who had also pleaded a public right of way. The evidence was held admissible. Justice Lawrence said "Reputation would have been evidence as to the right of way in this case; *a fortiori* therefore, the finding of twelve men upon their oaths."

These cases may be explained upon the ground that juries were originally selected from the vicinity and, therefore, should be expected to be familiar with the reputation in the neighborhood as to matters of public interest.[7] Eventually, of course, the English judges recognized that a verdict is not evidence of reputation. Justice Patteson remarked in 1838, "It is difficult to say that this commission was admissible as reputation, because the freeholders, being drawn at large from the County of York, could have no personal knowledge of the subject. . . . The verdicts are not by themselves evidence of reputation; but where reputation is admissible in evidence, verdicts are also."[8] Eventually, too, the doctrine was broadened so that a decree of an equity court could be received. In *Laybourn* v. *Crisp,*[9] a decree was held admissible, Baron Parke stating: "I have never heard it doubted, that a decree of a Court of Equity is evidence of reputation in the same manner as a verdict."[10] Some of the judges, too, became dissatisfied with the basis for the doctrine. During the argument in *Evans* v. *Rees,*[11] Justice Patteson remarked "I never could understand why the opinion of twelve men should be evidence of reputation,"[12] and Justice Coleridge said, "Though the doctrine is perhaps established as to the admissibility of verdicts, it does not appear to be founded on any satisfactory principle."[13]

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[4] *Ibid.*
[5] 1 Burr. 146, 97 Eng. Rep. 238 (1757).
[6] 1 East. 355, 102 Eng. Rep. 137 (1801).
[7] This, at least, was the explanation given by Baron Alderson: "That was when the jury were summoned de vicineto, and their functions were less limited than at present." Pim v. Currell, 6 M. & W. 234, 254, 151 Eng. Rep. 395 (1840). The case of Talbot v. Lewis, 6 Car. & P. 603, 172 Eng. Rep. 1383 (1834) also supports this view. There, Baron Parke held a 1635 verdict showing the boundaries of a manor admissible "as being the opinion of persons whom we must presume to have been cognizant of the facts, it having reference to a subject on which reputation is evidence." *Id.* at 604, 172 Eng. Rep. at 1384. Also see 5 WIGMORE, EVIDENCE 459.
[8] Brisco v. Lomax, 3 N. & P. 308, 317 (1838).
[9] 4 M. & W. 320, 150 Eng. Rep. 1451 (1838).
[10] *Id.* at 326, 150 Eng. Rep. at 1451.
[11] 10 Ad. & E. 151, 113 Eng. Rep. 58 (1839).
[12] *Id.* at 153, 113 Eng. Rep. at 59.
[13] *Ibid.*

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Hence, in *Neill* v. *Duke of Devonshire,*[14] decided in 1882, the House of Lords attempted to give another explanation. There, former equity decrees were held admissible on a question of a public right to use a fishery. Chancellor Selborne conceded that "such evidence, though admissible in cases in which evidence of reputation is received, is not itself in any proper sense, evidence of reputation. It really stands upon a higher and larger principle; especially in cases, like the present, of prescription. An adverse litigation before a competent court, supported by proofs on both sides, and ending in a final decree, comes within the category of res gestae, and of 'declarations accompanying acts' . . . ."[15]

Lord O'Hagan agreed that the decrees "were admissible, not as evidence of reputation, . . . but of something higher and better than reputation;"[16] but he did not ground his decision on "res gestae." Rather, he believed the evidence better than reputation because "the decree was final, determining the only question before the court, and for its determination necessitating the production of evidence, and a judicial conviction founded upon it, that a real, peaceable and unequivocal possession of the very subject matter now in dispute was enjoyed by the Earl of Cork 200 years ago."[17] Lord Blackburn's reasoning was similar. His argument was that, although hearsay is generally excluded, "yet where the point to be proved is ancient possession before the time of living memory there is a wide class of exceptions, grounded on this; that there being no possibility of producing living witnesses to testify as to things that happened so long ago, the matter must remain unproved, unless the best evidence which, from the nature of the thing, can be produced, be received. And where the question is one of public interest, . . . evidence of reputation is admissible. The evidence afforded by a record shewing that a Court of competent jurisdiction inquired into and pronounced upon the state of facts, and the question of usage at a time before living memory, is perhaps not properly evidence of reputation that the state of facts, and the usage at that time were as there pronounced to be. But it is as strong or stronger than reputation, and the authorities are agreed that it is admissible, at least in cases where reputation would be admissible."[18]

Lord Blackburn's argument is the most convincing. It is merely that reputation is received generally because it is usually the best evidence, from the nature of the case, that can be produced. A judgment, however, in an adversely litigated case is a more reliable form of evidence than reputation; hence, since we are seeking the best evidence that from the nature of the case can be produced, a judgment upon a matter of public concern should be received if reputation is going to be received.

In our opinion there is enough merit in this argument to justify Rule 63(22). It is recommended for approval.[19]

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[14] 8 App. Cas. 135 (1882).
[15] *Id.* at 147.
[16] *Id.* at 165.
[17] *Ibid.*
[18] *Id.* at 186.
[19] The N. J. Committee approved this subdivision without modification. N. J. COMMITTEE REPORT 156. The N. J. Commission revised the subdivision to make it subject to Rule 64. N. J. COMMISSION REPORT 63-64. The Utah Committee excluded water rights from the subdivision. UTAH FINAL DRAFT 40.

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Rule 63(23), (24), (25), (26) and (27)(c)—Statements Concerning Family History

Rule 63(23), (24), (25), (26) and (27)(c) provide as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (23) A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;
>
> (24) A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (b) finds that the declarant is unavailable as a witness;
>
> (25) A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;
>
> (26) Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;
>
> (27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if . . . (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

We begin with subdivisions (26) and (27)(c) and then take up subdivisions (23), (24) and (25).

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Rule 63(26) and (27)(c)

These exceptions are based on the Model Code Rule 524(4) which, in turn, is derived from the common law principle of proof of pedigree matters by family reputation.[1] The American Law Institute Committee gives the following illustration of the application of Model Code Rule 524(4):

> In an action to determine whether the son of B is entitled to inherit from J.S., W is offered to testify that there is a uniform and widespread reputation among the members of B's family and that B was the brother of J.S. W's testimony is admissible under Rule 524(4). It is not necessary to prove that W is a member of that family, or that the persons from whom W derived his information are unavailable as witnesses.

This illustrates proof of family reputation by a witness testifying directly to such reputation.[2] Other means of establishing such reputation are the use of inscriptions, entries in family Bibles, and so forth.[3] Apparently family reputation (established by either of these means) may be introduced irrespective of whether other evidence of pedigree is available.[4]

The family tradition thus put in evidence is, of course, hearsay—indeed, it is multiple hearsay. If, however, such tradition were inadmissible because of the hearsay rule and if direct statements of pedigree were inadmissible because they were based on such tradition (as most of them are), the courts would be virtually helpless to inquire into matters of pedigree. Hence, it has long been recognized that evidence of family reputation is admissible.

Rule 63(27)(c), however, expands the principle beyond present limits to cover community reputation as well as family reputation. This modest enlargement[5] of the ancient principle seems reasonable; Wigmore advocates it.[6]

Rule 63(23)

P claims to be nephew of J.S. and, as such, entitled to his estate. P testifies that he is the son of B.[7] P then offers to prove that B, who is now deceased, said to P, "J.S. is my older brother." The evidence is admissible under Rule 63(23). The declaration is "a statement of a matter concerning declarant's . . . relationship by blood" and it is,

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[1] Code of Civil Procedure Section 1870 provides in part as follows:
"[E]vidence may be given upon a trial of the following facts: . . . 11. Common reputation existing previous to the controversy . . . in cases of pedigree . . . ."

[2] 5 WIGMORE, EVIDENCE § 1490.

[3] CAL. CODE CIV. PROC. §§ 1852, 1870(13). The idea is that the acceptance by the family of the inscription, the Bible entry and so forth indicates the family reputation. Therefore it is unnecessary to authenticate the entry or inscription. People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896); 5 WIGMORE, EVIDENCE § 1496.

[4] Hale, *Proof of Facts of Family History,* 2 HASTINGS L. J. 1, 5-7 (1950). See also Note, 46 IOWA L. REV. 414 (1961).

[5] Although Code of Civil Procedure Section 1870(11) uses the expression "common reputation," this is construed to mean family reputation. Estate of Heaton, 135 Cal. 385, 67 Pac. 321 (1902). However, reputation in the community is generally admissible to prove marriage. See Estate of Baldwin, 162 Cal. 471, 488, 123 Pac. 267, 274 (1912).

[6] 5 WIGMORE, EVIDENCE § 1605.

[7] Plaintiff may, of course, so testify. Estate of Ganes, 114 Cal. App. 17, 299 Pac. 550 (1931). As Wigmore says, however, his "testimony is virtually based on family repute." 2 WIGMORE, EVIDENCE § 667, p. 787.

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of course, immaterial that declarant had "no means of acquiring *personal* knowledge" (family repute would be admissible under Rule 63(26); declarant's statement based on such repute is therefore admissible under Rule 63(23)). The statement is likewise admissible today in California.[8] Note that no extrinsic evidence that B and J.S. are brothers is required either by Rule 63(23) or by prevailing California law.[9] In some jurisdictions such evidence is required.

Rule 63(23) seems to be declaratory of the existing law in California.[10]

Rule 63(24)

P testifies that he is a son of B and then offers to prove that G told P "B and J.S. are brothers." On the face of G's declaration nothing appears to suggest that G is asserting *his* relationship to anybody. Hence Rule 63(23) which is limited to a declaration asserting *declarant's* relationship is inapplicable.[11] Rule 63(24) will require evidence to show G is a person described in Rule 63(24). P must, for example, testify G is his paternal grandfather.[12] Upon such showing and upon a showing that G is unavailable, the evidence is admissible.[13]

Suppose P shows G was an intimate friend of B. G's statement is admissible under Rule 63(24) provided the judge finds that G's statement was based on what B had told him or upon what some person related by blood or marriage to B had told him or upon reputation in B's family circle. This is an extension [14] of the traditional pedigree exception to embrace declarations of nonrelatives. However, the conditions of Rule 63(24) requisite for the admission of a statement of a nonrelative give assurance that the basis of declarant's statement is the kind of source which would itself be admissible under Rule 63(23) or Rule 63(26). As thus safeguarded the extension of Rule 63(24) to non-relatives seems desirable.[15]

Rule 63(25)

P claims he is nephew of J.S. and as such is entitled to share in the estate of J.S. P testifies he is a son of B. Then P proposes to testify that B made the following statement, "I heard J.S. say 'B is my brother.' " This is double hearsay. We have, first, the hearsay statement of B that J.S. made the assertion. We have, secondly, the hearsay assertion of J.S. that B is brother of J.S.

B's only contribution to this chain of hearsay is his hearsay statement that J.S. has made another hearsay statement. Unless an excep-

[8] Code of Civil Procedure Section 1870 provides in part as follows:

"[E]vidence may be given upon a trial of the facts: . . . 4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person . . . ."

[9] Estate of Hartman, 157 Cal. 206, 107 Pac. 105 (1910).

[10] Except as to the *lis mota* feature. See notes 19 and 20, p. 550, *infra*.

[11] Section 1870(4) of the Code of Civil Procedure, quoted in note 8, *supra*, is likewise inapplicable for want of any evidence that G is speaking of one of his own relatives.

[12] Plaintiff could, of course, prove G's declaration to this effect under Rule 63(23) or under Code of Civil Procedure Section 1870(4). See notes 8 and 9, *supra*.

[13] *Accord*, CAL. CODE CIV. PROC. § 1870(4).

[14] McBAINE, § 955; 5 WIGMORE, EVIDENCE § 1487; Hale, *Proof of Facts of Family History*, 2 HASTINGS L. J. 1, 3 (1950).

[15] *Ibid.*

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tion exists covering B's statement, the evidence must be excluded notwithstanding the circumstance that an exception—Rule 63(23)—does exist covering the statement of J.S. Without an exception authorizing us to consider B's out-of-court statement, we do not reach the out-of-court statement of J.S. and it is immaterial that if we could reach it we could admit it.

Rule 63(25) is the mechanism tooled for this situation.[16] This exception covers the hearsay statement of one declarant that another declarant has made a hearsay declaration. However, the second declaration must be one that would have been admissible under Rule 63(23) or 63(24) if the case were one of single hearsay.

Ordinarily we do not admit a two-link chain of hearsay just because the second link falls under an exception. Thus in the action of *P* v. *D*, D may not testify X said P made a certain statement to X even though the second link (what P said) amounts to an admission. However, there is much to be said for admitting double hearsay under the conditions prescribed by this Rule 63(25). One of these conditions is that *both* declarants be unavailable. This means that the exception deals only with a situation in which the choice lies between listening to the declarant's extrajudicial assertions or refusing to hear them at all. Whatever may be said for the latter alternative as a general proposition, it seems peculiarly inappropriate in pedigree cases where the sources of information are so likely to be secondary or tertiary.

In our illustrative case the first of the two hearsay declarants is related to claimant and the second declarant asserts his relationship to the first. It is to be noted, however, that all of these interlocking relationships are not required by Rule 63(25). Thus that exception would apply even if the first declarant were a total stranger; that is, P testifies X, a stranger, told P that J.S. said B was the brother of J.S. In this respect Rule 63(25) probably departs from the common law.[17] It is, however, in our opinion a reasonable departure.

Post Litem Requirement

Declarations otherwise admissible under Rule 63(23), (24) or (25) are not necessarily excluded because made *post litem.* That they were made *post litem* is a factor to be considered by the court in exercising the general discretion prescribed by Rule 45.[18] While this is a relaxation of the common law [19] and California rule,[20] in our opinion it is a reasonable one.

Conclusion

Rule 63(23), (24), (25), (26) and (27)(c) are recommended for approval.

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[16] *Cf.* Uniform Rule 66. That, in and of itself, would not suffice to make B's statement admissible.

[17] See 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 301 (1957). Professor Morgan quotes Taylor's text (1 TAYLOR, EVIDENCE § 639 (12th ed. 1931)) to the effect that "no valid objection can be taken to evidence of this kind, on the ground that it is *hearsay upon hearsay,* provided all the declarations come from different members of the family."

It is to be noted, however, that under Rule 63(25) it is not a valid objection that the first of the double hearsay sources is a *nonmember* of the family. This is a departure from the common law.

[18] UNIFORM RULE 63(23) Comment; 18 A.L.I. PROCEEDINGS 186-188 (1941).

[19] 5 WIGMORE, EVIDENCE §§ 1483-1484.

[20] MCBAINE § 961.

Rule 63(27)(a), (27)(b) and (28)—Reputation: Boundaries, General History and Character

Rule 63(27)(a) and (b) and (28) provide as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community . . . ;
>
> (28) If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

Rule 63(27)(a)

Code of Civil Procedure Section 1870(11) provides in part as follows:

> [E]vidence may be given upon a trial of the following facts . . . (11) Common reputation existing previous to the controversy . . . in cases of . . . boundary;

In *Muller* v. *So. Pac. Ry. Co.*,[1] a boundary dispute required that the beginning point of a certain street be located. It was held that under Section 1870(11) of the Code of Civil Procedure a witness who was familiar with community reputation respecting the matter should be allowed to testify to such reputation.

In *Ferris* v. *Emmons*,[2] it was held that under Section 1870(11) evidence was admissible to show the "common reputation and custom in the community of Pomona, prior to the institution of this action as to the meaning of the word 'block'."

Under Section 1870(11) as construed and applied in these cases it seems that we now have the rule affirmed in Rule 63(27)(a).

The Commissioners on Uniform State Laws point out the two following limitations which they intend to abrogate by Rule 63(27)(a):

> Most of the decisions limit evidence of reputation to a *reputation of a former generation.* With that qualification, Clause (a) is accepted in most American states, but in England is limited to matters affecting *public lands* . . . . [Emphasis added.][3]

[1] 83 Cal. 240, 23 Pac. 265 (1890).
[2] 214 Cal. 501, 505, 6 P.2d 950, 951 (1931).
[3] UNIFORM RULE 63(27) Comment.

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The current California rule does not seem to be limited in either of the respects mentioned. The portion of Section 1870(11) in question is so phrased that it is *not* in terms limited to "reputation of a former generation" or to "matters affecting public lands." Nor, it seems, has either of these limitations been read in by construction. The cases above cited admit reputation without any showing it is reputation of a "former generation." Professor McCormick is of the opinion that the "former generation" restriction is inapplicable in California.[4] Wigmore states that in this country the English public-lands restriction is in effect only in Maine and Massachusetts.[5]

We conclude, therefore, that neither of the restrictions adverted to is now operative in California and that adoption of Rule 63(27)(a) in this state would make no change in the rule presently prevailing.

There is another common law exception to the hearsay rule that has been recognized in boundary cases, although it does not appear in present California statutes or in the URE. The exception permits the introduction of the statements of deceased, disinterested persons upon questions of boundary. The exception is a narrow one and has received but limited application in California; however, in particular cases it may be of great importance.

The California cases have defined the scope of the exception as follows:

> [T]he declarations on a question of boundary of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, and whether the boundary be one of a general or public interest, or be one between the estates of private proprietors.[6]

The declarant, apparently, must have direct knowledge of the subject matter of his declaration. In *Morton* v. *Folger*,[7] the testimony given in another action between other parties by the surveyor who originally laid out the boundaries of John A. Sutter's grant was held admissible, the surveyor being dead and his declaration relating to the location of the lines he had surveyed. In *Morcom* v. *Baiersky*,[8] an 1870 map of a subdivision prepared by the surveyor who prepared the recorded subdivision map was held admissible on a question of boundary. Cited with approval in the *Morton* case were numerous cases from other jurisdictions with similar holdings admitting statements such as that of a chain carrier in a survey party as to the location of certain monuments. A declaration of a surveyor as to the location of boundaries and monuments, however, is inadmissible if the surveyor was not the one who originally ran the line or established the monument in question.[9]

Chief Justice Field indicated,[10] and Wigmore corroborates,[11] that the exception has been recognized in many jurisdictions in the United States. It arose because in the early unsettled condition of this country,

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[4] McCormick, Evidence § 299 n. 9.
[5] 5 Wigmore, Evidence § 1587, p. 454.
[6] Morton v. Folger, 15 Cal. 275, 280 (1860).
[7] 15 Cal. 275 (1860).
[8] 16 Cal. App. 480, 117 Pac. 560 (1911).
[9] Almaden Vineyards Corp. v. Arnerich, 21 Cal. App.2d 701, 70 P.2d 243 (1937); Spencer v. Clarke, 15 Cal. App. 512, 115 Pac. 256 (1911).
[10] Morton v. Folger, 15 Cal. 275, 280 (1860).
[11] See 5 Wigmore, Evidence § 1563.

MJN 2241

many boundaries would have been unprovable if subsequent statements by the original surveyor or other members of the survey party were inadmissible. This was certainly true in the *Morton* case for, at the time that boundary line was surveyed, there were only nomadic Indians in the neighborhood. The exception is of considerably less importance now that the State is well settled. Only three California cases have been found applying the exception. One was in 1911 [12] and two were in 1860.[13]

As the exception may be of great importance in specific cases, the following additional subdivision of Rule 63 is suggested:

> (27.1) If the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement concerning the boundary of land unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

Rule 63(27)(b)

Code of Civil Procedure Section 1870(11) provides in part as follows:

> [E]vidence may be given upon a trial of the following facts: . . .
> 11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old . . . ;

It would seem that the conditions here stated for the receipt of evidence of reputation (that is, such reputation must relate to "facts of a public or general interest more than thirty years old") [14] coincide with the conditions requisite for judicial notice.[15] If this be so, the sole significance of this portion of Section 1870(11) of the Code of Civil Procedure is that it gives proponent the option to prove the ancient fact by reputation evidence in lieu of requesting judicial notice. It follows, too, that the significance of Rule 63(27)(b) is that it eliminates the distinction in this regard between ancient and recent facts, thus giving proponent the option of reputation evidence or notice as to both classes.

Proponent's possession of the option of proof by reputation is beneficial when the judge erroneously denies his request for judicial notice. It seems desirable, therefore, to enlarge this option, as Rule 63(27)(a) does, by extending the process of proof by reputation.

Rule 63(28)

The strict common-law view was that only reputation in the neighborhood of a person's residence was acceptable as reputation evidence of his character.[16] This view was at one time the law of California.[17] Wigmore advocates an extension of the common-law principle to cover reputation in commercial and other circles.[18] California has now adopted

[12] Morcom v. Baiersky, 16 Cal. App. 480, 117 Pac. 560 (1911).
[13] Cornwall v. Culver, 16 Cal. 423 (1860); Morton v. Folger, 15 Cal. 275, 280 (1860).
[14] CAL. CODE CIV. PROC. § 1870(11).
[15] See 5 WIGMORE, EVIDENCE § 1599.
[16] 5 WIGMORE, EVIDENCE § 1615.
[17] People v. Markham, 64 Cal. 157, 30 Pac. 620 (1883).
[18] 5 WIGMORE, EVIDENCE § 1616.

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the modernized and enlarged view thus advocated by Wigmore.[19] This is also the view embodied in Rule 63(28). Therefore, adoption here of Rule 63(28) would not change our current law.

Rule 63(28) is, of course, subject to other rules dealing with various phases of character evidence such as Rules 22, 46, 47 and 48.

Conclusion

Adoption of Rule 63(27)(a), (27)(b) and (28) is recommended. Adoption of Rule 63(27.1)—set out above—is also recommended.

[19] People v. Cobb, 45 Cal.2d 158, 287 P.2d 752 (1955). See also Note, 46 IOWA L. REV. 426 (1961).

MJN 2243

Rule 63(29)—Recitals in Documents Affecting Property

Rule 63(29) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (29) Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement;

The "Ancient Documents" Exception to the Hearsay Rule

Code of Civil Procedure Section 1963(34) states the following disputable presumption:

> That a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

A document meeting the conditions specified is presumed genuine. That is to say, it is presumed to be in fact what it appears to be. Therefore it is duly authenticated.[1] The question arises whether the recitals of such a presumably genuine document may be received as evidence of the truth of such recitals. Such recitals are, of course, hearsay. Section 1963(34) covers the question of genuineness. Does it reach beyond to the question of hearsay? Is there, on this or on some other basis,[2] a general exception to the hearsay rule for recitals in ancient documents?

A half-century ago in California the answer was probably negative. As Justice Angellotti then put it (citing Code of Civil Procedure Section 1963(34)): "The rule as to ancient documents, as we understand it, does not import any verity to the recitals contained in these instruments. The documents themselves are presumed to be genuine and the rule has no further effect."[3] Today the answer is probably affirmative. This *volte face* is revealed in the following excerpt from the opinion of Mr. Justice Vallée in the recent case of *Kirkpatrick* v. *Tapo Oil Co.:*[4]

[1] Under Code of Civil Procedure Section 1963(23) it is presumed "that a writing is truly dated." Nothing else appearing, the date of an ostensibly ancient document establishes its age.

[2] Professor McCormick suggests that it is fallacious to deduce admissibility of the recitals from the circumstance that the document is duly authenticated. "Manifestly," he says, "this [*i.e.*, admissibility of the recitals as substantive evidence] is not a logical consequence of the authentication at all." McCORMICK, EVIDENCE § 298, p. 623.

[3] Gwin v. Calegaris, 139 Cal. 384, 389, 73 Pac. 851, 853 (1903).

[4] 144 Cal. App.2d 404, 301 P.2d 274 (1956).

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> It is argued the court erred in using the entries in the ledger "for the asserted truth of the assumed matter asserted by them." Plaintiffs rely on dictum in *Gwin* v. *Calegaris*, . . .: "The rule as to ancient documents, as we understand it, does not import any verity to the recitals contained in these instruments. The documents themselves are presumed to be genuine, and the rule has no further effect." This dictum is not a correct statement of the law. Ancient documents would have no effect or potency as evidence unless they served to import verity to the facts written therein.[5] *The true rule is that an ancient document is admitted in evidence as proof of the facts recited therein, provided the writer would have been competent to testify as to such facts.* [Emphasis added.] [6]

The expression "ancient document" in this "true rule" probably means a document that is presumably genuine under Section 1963(34).[7] Thus recitals in documents less than 30 years old would not come within this exception. Likewise recitals in documents more than 30 years old would not meet the requirements of the exception if the custody of the document is suspicious.

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[5] This seems too broad. The mere making of the recitals in an ancient document may possess relevance and the truth of the recitals may therefore be immaterial. When this is so, the document has "effect or potency as evidence," and the rule as to ancient documents is effective as an authentication device without importing "verity to the facts written." Is this not true, for example, when the ancient document is a quitclaim deed and is offered to show relinquishment of interest by the grantor?

[6] In Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 411-12 n.4, 301 P.2d 274, 279 n.4, (1956), Mr. Justice Vallée quotes from 32 C.J.S. *Evidence* § 745 at 662 (1942), the following exposition of the scope of the exception:

> Ancient documents may be admitted in evidence as proof of the facts recited therein, provided the writers would have been competent to testify as to such facts. Such documents may, therefore, be received to prove or disprove title or possession, or the location of a boundary line, or the existence of a highway or right of way. They may also be admitted to prove matters of pedigree, heirship or widowhood; or to prove or disprove the identity of persons or land, or the existence of a power, or the authority of an executor or administrator to sell.
>
> A recital in an ancient deed or will of any antecedent deed or document, consistent with its own provisions, will after the lapse of a long period be presumptive proof of the former existence of such deed or document, especially in a case where nothing appears to rebut such presumption. Ancient documents coming out of the proper custody, and purporting on their face to show exercise of ownership, such as leases or licenses, have been admitted as being in themselves acts of ownership and proof of possession.

In Ames v. Empire Star Mines Co., 17 Cal.2d 213, 224, 110 P.2d 13, 19 (1941), Mr. Justice Traynor makes brief reference to "recitals in ancient deeds" as a "recognized" exception to the hearsay rule. Like references are in Garbarino v. Noce, 181 Cal. 125, 130, 183 Pac. 532, 534 (1919). See also Geary St. R.R. v. Campbell, 39 Cal. App. 496, 179 Pac. 453 (1919).

[7] When proponent must rely on Code of Civil Procedure Section 1963(34) to authenticate the document, the elements of Section 1963(34) are for all practical purposes elements of the hearsay exception.

Conceivably, however, the proponent could otherwise authenticate the document. Then the question would arise whether he could use the recitals as substantive evidence without meeting the conditions of Section 1963(34). That is, the question would arise whether the conditions of Section 1963(34) are elements of the hearsay exception. Mr. Justice Vallée leaves this question open in Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1956). If, however, we refer to Section 1963(34) to determine what duration is requisite for the exception (as Mr. Justice Vallée seems to assume), should we not regard the exception as incorporating also the other safeguards spelled out in Section 1963(34)?

MJN 2245

Is this a desirable exception? It has been both attacked [8] and defended [9] with vigor. Professor McCormick gives the following resumé of the arguments pro and con:

> The age-requirement of itself limits the use to cases where the existence of a special need for the use of hearsay would usually be clear. The dearth of other sources of proof of the facts, and the usual unavailability of the writer as a witness, whether from death or forgetfulness, would both point to this need. But as to special truthworthiness, the other foundation for exceptions to the hearsay rule, it is argued that the mere age of the writing affords no ground for credence. Lying was as common thirty years ago as today. The defenders of the exception concede this, and concede that no adequate substitute for cross-examination exists in this situation. They contend, however, that standards of reliability must be fixed with regard to the scarcity of sources of proof, and that thus gauged, there are sufficient guaranties of trustworthiness. First, the danger of fabrication, or mistransmission, so apparent in all cases of oral declarations, is here reduced to a minimum by the requirements of authentication. Second, the recital by its very age must have been made at a time before the beginning of the present controversy, and consequently uninfluenced by that source of partisanship. Almost never is there reason to believe that the declarant had any other motive to misrepresent. Moreover, the usual qualification for witnesses and out-of-court declarants, that of personal knowledge, would be insisted upon here so far as practicable, i.e., the recital would be excluded if it appeared that the writer did not have an opportunity to know the facts at first hand. A final question arises. The exception has gained surest foothold in cases of ancient deed-recitals. . . . But many courts . . . have accepted ancient recitals in other writings as evidence of their truth. Certainly, when great judges have advocated that all statements of deceased persons should come in as evidence of the facts stated and Massachusetts has had such a rule on its statute-book for half a century, the acceptance of a general exception for ancient written recitals seems a desirable and conservative position. The Uniform Rule, however, limits the exception to recitals in deeds, wills or other documents purporting to transfer land or personal property.[10]

Effect of Rule 63(29) on the "Ancient Documents" Exception

As Professor McCormick suggests, Rule 63(29) narrows the scope of the ancient documents exception. Under Rule 63(29) the only remaining portion of the present exception is the part which relates to a statement which "would be relevant upon an issue as to an interest in the property" and which is "contained in a deed of conveyance or a will or other document purporting to affect an interest in [the] property." [11] To the extent that the present exception is now broader

[8] Note, 33 YALE L.J. 412 (1924).
[9] Wickes, *Ancient Documents and Hearsay,* 8 TEXAS L. REV. 451 (1930); Note, 83 U. PA. L. REV. 247 (1934). See also Note, 46 IOWA L. REV. 448 (1961).
[10] MCCORMICK, EVIDENCE § 298 at 623-24.
[11] See discussion in text on Uniform Rule 63(29).

MJN 2246

than this,[12] adoption of Rule 63(29) would have the effect of excluding evidence presently admissible.[13]

In our opinion the ancient documents exception should be preserved. There is a genuine *need* for the evidence admitted under this exception owing to the probable unavailability of the declarant. We believe that the Commissioners on Uniform State Laws erred in modeling Rule 63(29) upon its American Law Institute counterpart. Under the American Law Institute Model Code the unavailability of declarant was made the basis of a sweeping exception to its version of the hearsay rule.[14] This broad exception would have served the purpose of retaining the current exception for recitals in ancient documents. Under the American Law Institute system there was, therefore, no special occasion to enact any specific perpetuation of the ancient documents exception. The same is not true for the Uniform Rules of Evidence system. This system does *not* contain a general exception based solely on the unavailability of the declarant. Under this system it is necessary therefore to formulate a provision perpetuating the ancient documents exception unless that exception is to be generally discarded and ancient recitals are in large part to be subject to admission solely on the basis of *other* exceptions to the hearsay rule.

The Dispositive Instruments Exception Created by Rule 63(29)

Rule 63(29) covers only particular statements in certain dispositive documents. As explained above, so far as ancient documents are concerned, the impact of Rule 63(29) is restrictive of current doctrines of admissibility. We will now consider that aspect of subdivision (29) which applies to nonancient documents.

[12] *E.g.*, the present exception covers ancient ledgers. Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1956); Geary St. R.R. v. Campbell, 39 Cal. App. 496, 179 Pac. 453 (1919). Consider also the impact of Rule 63(29) on these cases from other jurisdictions cited by Professor Wickes in Wickes, *Ancient Documents and Hearsay,* 8 TEXAS L. REV. 451 (1930):

> Statements in ancient affidavits have been admitted to evidence a claim of ownership of land, to prove that the lessee named in a lease acquired it as agent and for the benefit of another; and to show that the name of a grantee in a deed was misspelled. Entries in ancient books have been held competent evidence of the meetings and doings of original proprietors of land; the organization and existence of a turnpike company; sales of public lands; nonpayment of subscriptions to the stock of a corporation; and prior use of a trade-mark. Allegations in an ancient petition filed in a probate court that the intestate held certain land in trust for the petitioner have been admitted to prove the fact alleged; an ancient letter, list of property and tax bills have been held admissible to show the size and description of certain lots; an ancient will has been admitted to prove the names of the children of the testator mentioned therein on an issue involving their identity; an ancient map or plan has been admitted to show the location of boundaries; ancient certificates issued by officers of a state reciting that persons named therein had purchased certain lands and paid for the same have been admitted to prove the existence of the named persons and that they purchased the lands; a recital in an ancient marriage certificate of the name of the wife before her marriage has been admitted for the purpose of identifying her; ancient records of births and marriages kept by a church have been admitted on an issue of family relationship; ancient entries in the minutes of a Masonic Lodge have been admitted on an issue of identity; and resolutions on the death of a member appearing in the ancient minutes of an Odd Fellows' lodge have been admitted to prove the fact and time of his death. *Id.* at 455-56.

[13] This assumes, of course, that the evidence is presently admissible solely under that part of the ancient documents exception which Rule 63(29) abrogates.

[14] MODEL CODE Rule 503 provides in part:

> "Evidence of a hearsay declaration is admissible if the judge finds that the declarant: (a) is unavailable as a witness. . . ."

MJN 2247

The following illustration was given by the American Law Institute Committee to illustrate Model Code Rule 527 on which Rule 63(29) is based:

> 1. In an action by P against D to determine adverse claims to Blackacre, P is claiming through X, who, he alleges, was the only son of Y. As tending to prove this relationship between X and Y, he offers a recital in a deed executed by M purporting to convey Whiteacre to N. The recital is that Whiteacre is that same tract of land conveyed by Z to Y by deed dated June 1, 1915, and conveyed by X, the only son and heir of Y, to W by deed dated June 1, 1920, and conveyed by W to M by deed dated June 1, 1930. Admissible if the judge finds from other evidence that the dealings with Whiteacre have not been inconsistent with the recital, i.e., that Whiteacre has been dealt with as if the conveyance by X was valid.

It is to be noted that there is no requirement that M, the declarant, be unavailable. Here the thought seems to be that M's out-of-court statement is as good as, if not better than, his in-court statement. Therefore, there is no requirement of unavailability.

Traditionally, the exception for recitals in deeds and other dispositive instruments has been limited to recitals in *ancient* deeds.[15] In California, however, the cases indicate that recitals in dispositive instruments are admissible without regard to the age of the instrument.[16] Thus, Rule 63(29) does not constitute any great change in existing California law.

Conclusion

Rule 63(29) seems meritorious and is recommended.[17] However, to preserve all of the ancient documents exception we recommend amending Rule 63(29) to add at the end thereof:

> [A]lso evidence of a statement relevant to a material matter contained in a document presumed genuine under Section 1963(34) provided the writer could have been properly allowed to make such statement as a witness.

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[15] 5 WIGMORE, EVIDENCE §§ 1573, 1574.

[16] 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).

[17] The N. J. Committee and the Utah Committee recommended approval of this subdivision without modification. N. J. COMMITTEE REPORT 160-61; UTAH FINAL DRAFT 42.

The N. J. Commission revised the subdivision to require compliance with Rule 64 and to require that the judge find, in addition to the other matters specified in the subdivision, that the dealings with the property since the instrument was made have not been inconsistent with the purport of the instrument:

> *Subject to Rule 64, a statement contained in a conveyance, assignment, will or other instrument purporting to affect an interest in property is admissible to prove the truth of the matter stated if the matter would be relevant to an issue which involved an interest in said property, if the judge finds that the dealings with the property since the instrument was made have not been inconsistent with the truth of the statement or the purport of the instrument;*

N. J. COMMISSION REPORT 66-67.

MJN 2248

Rule 63(30)—Commercial Lists and the Like

Rule 63(30) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (30) Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

The Present Exception in General

Rule 63(30) is intended to perpetuate the presently recognized exception for commercial and professional lists, registers and reports. Wigmore gives the following statement of the rationale supporting this exception:

> [R]ecognition has been given, by way of exception to the Hearsay rule, to certain commercial and professional lists, registers, and reports . . . .
>
> The Necessity in all of these cases lies partly in the usual inaccessibility of the authors, compilers, or publishers in other jurisdictions; but chiefly in the great practical inconvenience that would be caused if the law required the summoning of each individual whose personal knowledge has gone to make up the final result . . . .
>
> The Circumstantial Probability of Trustworthiness is found in the considerations that these lists, registers, reports, etc., are prepared for the use of the trade or profession, and are therefore habitually made with such care and accuracy as will lead them to be relied upon for commercial and professional purposes.[1]

Illustrations of the "commercial and professional lists, registers and reports" embraced by this exception are: market reports, price lists, pedigree registers and so forth.[2]

The Present Exception in California

There is little authority in California regarding this exception. The scant authority there is suggests that the exception does exist in this State.

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[1] 6 WIGMORE, EVIDENCE § 1702 at 22-23.
[2] 6 WIGMORE, EVIDENCE §§ 1704, 1706.

MJN 2249

In *Vogt* v. *Cope*,[3] which was an action for conversion of certain mining stocks, plaintiff's offer of proof and the ruling on it were as follows:

> The record shows that the plaintiff "offered to read in evidence from the published reports of sales of mining stocks in the San Francisco Stock Exchange Board, for the month of September, 1878, to show the highest market value of said stock since the conversion of the same, and which it was agreed might be read with the same effect as the original records of said Stock Exchange, subject to such objections as might be otherwise made. The plaintiff then offered to prove by these reports" that the stocks converted by the defendants sold at certain prices between the date of conversion and the bringing of the suit. The defendants objected to the introduction of the proffered evidence, on the ground, among others, that it was irrelevant, immaterial, and incompetent. The court sustained the objection and the plaintiff submitted his case without making any proof of the value of the stocks converted.
>
> As the case was submitted in the court below, that court could only award the plaintiff nominal damages. And if this ruling, with respect to the plaintiff's offer, was correct, we must affirm the judgment. There was nothing to show, or tending to show, how or in what manner the "reports of sales" were made up, where the information they contained was obtained; or whether the quotations of prices made were derived from actual sales, or otherwise. In the absence of some such proof, the "reports of sales" offered by the plaintiff were incompetent, and the court below was right in its ruling.[4]

We deduce from this case the conclusion that the exception exists in California but requires the kind of foundation indicated in the second paragraph quoted.[5] This, however, seems to be a rather difficult foundation to lay.[6]

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[3] 66 Cal. 31, 32, 4 Pac. 915 (1884).

[4] *Id.* at 32, 4 Pac. at 916.

[5] See also Fishel v. F.M. Ball & Co., 83 Cal. App. 128, 256 Pac. 493 (1927) (price lists admitted without objection).

In neither case is there any claim of any statutory basis for the exception and, in fact, there seems to be none. Compare the exception for *scientific* data—the exception presently codified by Code of Civil Procedure Section 1936 and proposed as Uniform Rule 63(31). The latter deals with such material as tables of weights, measures, etc., whereas the exception presently under consideration concerns *nonscientific* matters. Thus the proponent who would prove an entry in *Who's Who* or the *Martindale-Hubbell Law Directory* would need to invoke the present exception. See as to mercantile credit reports, Note, 44 MINN. L. REV. 719 (1960).

[6] Whelan v. Lynch, 60 N.Y. 469, 474 (1875), the New York case relied on by the California court in Vogt v. Cope, 66 Cal. 31, 4 Pac. 915 (1884), states as follows:

> [T]he court was also in error, I think, in admitting the Shipping and Price Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up; where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. It is not plain how a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out.

Would not such evidence of mode of preparation be both complex and difficult to adduce?

Rule 63(30)

Rule 63(30) is intended to continue in operation the principle underlying the present exception. The foundation requirement of Rule 63(30), that the "compilation is published for use by persons engaged in [the] occupation and is generally used and relied upon by them," is, however, simpler than the mode-of-preparation requirement stated in the *Vogt* case.[7] It is also, it seems, an equally adequate safeguard.

Conclusion

Therefore, in our opinion Rule 63(30) is superior to the present exception as expounded in the *Vogt* case,[8] and is recommended for approval.[9]

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[7] The *Fishel* case suggests the possibility of laying the foundation in terms of "relied upon and consulted by the trade." Fishel v. F.M. Ball & Co., 83 Cal. App. 12?, 256 Pac. 493 (1927).

[8] The "list, register, periodical or other published compilation" mentioned in Rule 63(30) must be authenticated. Under Rule 67 authentication "of a writing is required before it may be received in evidence." However, authentication "may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law." Query: how could authentication of the "list, register," etc. be achieved? Could the courts be persuaded to accept the view that the document is self-authenticating? See generally, Note, 46 IOWA L. REV. 455 (1961).

[9] The N. J. Committee, N. J. Commission and the Utah Committee all approved this subdivision. N. J. COMMITTEE REPORT 163-65; N. J. COMMISSION REPORT 67; UTAH FINAL DRAFT 42.

Rule 63(31)—Learned Treatises

Rule 63(31) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

Learned Treatises—Common Law

There is a common law exception to the hearsay rule dealing with "scientific books" or "books of science and art."[1] The scope of the exception is, however, imprecise. Wigmore states that the exception clearly embraces mortality tables and almanacs but it "is doubtful whether a general rule in favor of standard tables of *scientific calculations* of all sorts can be regarded as established."[2] He states further that "it is doubtful [whether] there is yet any general exception in favor of works of history,"[3] and that the limits within which the use of dictionaries and works of general literature is allowable are "undefined."[4] He concludes, therefore, that the exception does *not* extend broadly to *all* learned treatises. He finds that the exception exists in this broad form only in the state of Alabama[5] and cites many cases from other jurisdictions *rejecting* a wide variety of medical and other professional works.[6]

Learned Treatises—California Statutory Exception

In California we have a statute which, on its face, *seems* to liberalize and clarify the scope of the common law exception. This enactment is Code of Civil Procedure Section 1936, providing as follows:

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

This seems to be both reasonably precise and liberal. However, its appearance is deceiving. The leading California case construing Section 1936 is *Gallagher* v. *Market St. Ry. Co.*,[7] a personal injury case. Plaintiff's attorney called a doctor and had him testify that *Gross on*

[1] 6 WIGMORE, EVIDENCE § 1690, p. 2.
[2] *Id.* § 1698, p. 14.
[3] *Id.* § 1699(b), p. 17.
[4] *Id.* § 1699, p. 15.
[5] *Id.* § 1693.
[6] *Id.* § 1696 n.1.
[7] 67 Cal. 13, 6 Pac. 869 (1885).

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Surgery is a standard authority on the subject. The doctor was then excused and the attorney proposed "to read from said book, as though the author were a witness then and there present in court, and testifying in the case before the jury." Defendant's objections having been overruled, plaintiff's attorney "read the book, at great length, to the jury as evidence." This was held to be in error on the following grounds:

> Under common law procedure it was not competent to read books of science to a jury as evidence, because the statements therein contained were not only wanting in the sanctity of an oath, but were made by one who was not present, and was not liable to cross-examination. For that reason they were excluded, notwithstanding the opinion under oath of scientific men, that they were books of authority . . . .
>
> But it is contended that the common law rule has been changed by the Code law. Section 1936 of the Code of Civil Procedure makes "historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, . . . *prima facie* evidence of facts of general notoriety and interest," and the question arises, whether such books, which were not regarded before the adoption of the Codes as competent evidence, are not, by force of that provision of the Code, made competent. Doubtless the intention of that legislation was to extend the rule of evidence rather than to restrict it. But the extension is limited by the terms "facts of general notoriety and interest."
>
> What are "facts of general notoriety and interest?" We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause that, under the provisions of the Code, proof may be made by the production of books of standard authority. . . .
>
> Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences founded upon conclusions reached from certain and constant data by processes too intricate to be elucidated by witnesses when on examination . . . . Thus mortuary tables for estimating the probable duration of the life of a party at a given age, chronological tables, tables of weights, measures and currency, annuity tables, interest tables, and the like, are admissible to prove facts of general notoriety and interest in connection with such subjects as may be involved in the trial of a cause. . . .
>
> But medicine is not considered as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that, what is considered a sound induction last year may be considered an unsound one this year, and the very book which evidences the induction, if it does not become obsolete may be altered in mate-

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> rial features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects . . . . "[I]f such treatises were to be held admissible, the question at issue might be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories." [8]

"Science," then, in the sense of Section 1936 of the Code of Civil Procedure means "exact science." Medicine is not such a science. Therefore, medical texts are not within the statutory designation of "books of science." Furthermore, medical facts are not "facts of general notoriety and interest" in the sense of Section 1936. For these two reasons Section 1936 is inapplicable to medical literature and to the literature of other "inexact" sciences. Such literature, therefore, remains inadmissible hearsay, as it was at common law. It is thus improper to read a medical text as substantive evidence; [9] to have a witness quote from the text on direct examination; [10] or to read the text in the course of arguing to the jury.[11] However, to some extent—which is more or less uncertain—the treatise may be used upon cross-examination.[12]

Learned Treatises—Rule 63(31)

Rule 63(31) makes admissible a "published treatise, periodical or pamphlet on a subject of history, *science or art*" (emphasis added) which treatise is "a reliable authority." Undoubtedly the Commissioners on Uniform State Laws intend to repudiate the notion that "science" means only "exact science" and they intend to include medicine and comparable disciplines under the head of "science or art."[13] Yet their choice of language is not adequate for their purpose. "Science or art" is the phrasing used in the California statute and in the Iowa statute on which the California enactment is based. Both jurisdictions have held that this phrasing does not embrace medicine.[14] Therefore, this phrasing does not clearly include medicine and like disciplines within the scope of the rule. This is especially so if the new rule is to be adopted in this State. Hence, we suggest that Rule 63(31) be amended to insert the words "medicine or other" immediately before the word "science."

Is Rule 63(31), as thus amended, a desirable exception? In support of an affirmative answer the following arguments may be advanced: (1) If proponent's objective is to give the jury doctor-author X's views as substantive evidence (so that the jury may reason: since X said it; it's true) the proponent will in most cases need this exception.

[8] *Id.* at 15-16, 6 Pac. at 870-72.
[9] *Ibid.*
[10] Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904); Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091 (1891).
[11] People v. Wheeler, 60 Cal. 581 (1882).
[12] Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 209 P.2d 98 (1949); 6 WIGMORE, EVIDENCE § 1700; Notes, 46 IOWA L. REV. 463 (1961), 23 SO. CAL. L. REV. 403 (1950), 29 U. CINC. L. REV. 255 (1960); Comment, 2 U.C.L.A. L. REV. 252 (1955).
[13] Rule 63(31) is based on the Model Code Rule of which it is substantially a copy. Morgan says of the Model Code Rule that it "has long been advocated by Mr. Wigmore." 18 A.L.I. PROCEEDINGS 195 (1941). The rule advocated by Wigmore would, of course, include medical texts. See 6 WIGMORE, EVIDENCE §§ 1691-1692 and his reference in § 1693 n.3 to the "California heresy" of the *Gallagher* case, note 7, p. 563, *supra*.
[14] 6 WIGMORE, EVIDENCE § 1693 n.3.

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The alternative, calling X as a witness, will be in most cases either impossible or inordinately inconvenient and expensive. There is, therefore, a necessity here in the sense that such necessity is an element of other recognized exceptions to the hearsay rule.[15] (2) Moreover, there is a special trustworthiness in this kind of hearsay arising from the scientific nature of the work. Whatever elements of bias or partisanship there may be in a given work, these elements are apt to be in relation to scientific theory. This kind of slanting should no more discredit a book than it discredits a specialist witness who espouses a particular scientific school of thought.[16] (3) Today (without the exception) we freely allow the expert to testify though (if he is *really* qualified) his opinion will practically always be compounded in part of his book learning.[17] If the book background is thus indirectly brought before the jury, why not allow it directly? Consider, for example, the extent to which the Freudian psychiatrist testifying as an expert will of necessity rely on Freud's works. If we accept, as we do, the witness' opinion based on such works, why not the books themselves?

In our opinion there is sufficient force in these considerations to justify the new rule dispensing with cross-examination of an author who is found to be a "reliable authority" on "a subject of history, medicine or other science or art."

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[15] Wigmore states that:

> [T]here are certain matters upon which the conclusions of two or three leaders in the scientific world are always preeminently desirable; and it is highly unsatisfactory that, except in the region where they happen to live, the opinions of world-famous investigators should have no standing of their own. Whether such persons are legally unavailable, or whether it is merely a question of relative expense, the principle of Necessity is equally satisfied; and we should be permitted to avail ourselves of their testimony in the printed form in which it is most convenient. [6 WIGMORE, EVIDENCE § 1691 at 5.]

[16] Wigmore's opinion on this matter is that,

> (a) There is no need of assuming a higher degree of sincerity for learned writers as a class than for other persons; but we may at least say that in the usual instance their state of mind fulfils the ordinary requirement for the Hearsay exceptions, namely, that the declarant should have 'no motive to misrepresent.' They may have a bias in favor of a theory, but it is a bias in favor of the truth as they see it; it is not a bias in favor of a lawsuit or of an individual. Their statement is made with no view to a litigation or to the interests of a litigable affair. When an expert employed by an electric company using the alternating or the single current writes an essay to show that the alternating current is or is not more dangerous to human life than a single current, the probability of his bias is plain; but this is the exceptional case, and such an essay could be excluded, just as any Hearsay statement would be if such a powerful counter-motive were shown to exist.
>
> (b) The writer of a learned treatise publishes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of method and of accuracy of results. The motive, in other words, is precisely the same in character and is more certain in its influence than that which is accepted as sufficient in some of the other Hearsay exceptions, namely, the unwelcome probability of a detection and exposure of errors.
>
> (c) Finally, the probabilities of accuracy, such as they are, at least are greater than those which accompany the testimony of so many expert witnesses on the stand. The abuses of expert testimony, arising from the fact that such witnesses are too often in effect paid to take a partisan view and are practically untrustworthy, are too well-known to repeat. It must be conceded that those who write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants.
>
> It may be concluded, then, that there is in these cases a sufficient circumstantial probability of trustworthiness. The Court in each instance should in its discretion exclude writings which for one reason or another do not seem to be sufficiently worthy of trust. [6 WIGMORE, EVIDENCE § 1692 at 6.]

[17] MCCORMICK, EVIDENCE § 296.

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If it be objected that the jury will be confused by technical terms and concepts, the answer is that proponent's self-interest may be trusted to prompt him to place an expert on the stand for whatever exposition is necessary under the circumstances. If it be objected that text extracts may be distorted by lifting them out of context, the answer is that opponent's self-interest may be trusted to prompt him to expose the distortion.[18] If it be objected that under the new rule the trial may degenerate into a "battle of books" the answer is that under Rule 45 the trial judge possesses a discretion adequate to guard against this danger.[19]

Conclusion

In summation, Rule 63(31), amended as proposed above, is desirable [20] and is recommended for approval.[21]

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[18] Wigmore states that:

> (3) Another objection sometimes raised is the danger of *confusing the jury* by technical passages without oral comment and simplification. A number of answers to this will suggest themselves; it is enough to point out that, so far as it is an appreciable danger, the counsel may be trusted to protect themselves, where necessary, against this danger by calling also an expert to take the stand.
>
> (4) Another objection, once made, is that the treatises *may be used unfairly,* by taking passages which are explained away or contradicted in other books or in other parts of the book. Here, again, so far as the possibility is appreciable, the opposing counsel may be trusted to protect his client's interests, exactly as he does, by bringing to the stand one expert to oppose another, and with much less difficulty and expense. [6 WIGMORE, EVIDENCE § 1690 at 4.]

[19] Professor Morgan's statement in 18 A.L.I. PROCEEDINGS 195 (1941): "[T]he danger that has been suggested to us is that there will be a battle of the books if you do adopt this Rule. The answer to that is, of course, the answer Judge Hand made—the control of the trial judge."

The objection to the "battle of books" was long ago made by Baron Alderson, though with a different figure of speech. "We must," he said, "have the evidence of individuals, not their written opinions. We should be *inundated* with books if we were to hold otherwise." Queen v. Crouch, 1 Cox's Cr. Cases 94 (1844), quoted in People v. Wheeler, 60 Cal. 581, 586 (1882).

[20] One desirable feature is stated as follows by the Commissioners on Uniform State Laws in the Comment to Rule 63(31):

> The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This exception will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose.

On this point consider the references in note 12, p. 565, *supra.*

[21] The provisions of Uniform Rule 63(30) could be regarded as broad enough to include scientific treatises. If Uniform Rule 63(31) is approved, it is of no importance that there is this possible overlap. If it is disapproved, it may be advisable to qualify Rule 63(30) to exclude its possible application to scientific treatises.

The N. J. Committee approved Rule 63(31). N. J. COMMITTEE REPORT 165-68. The N. J. Commission, though, recommended against its adoption. N. J. COMMISSION REPORT 67. The Utah Committee broadened the subdivision to include published maps or charts, conditioned the admissibility of evidence under the subdivision upon compliance with Rule 64 and recommended approval of the subdivision as so revised. UTAH FINAL DRAFT 42-43.

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RULE 64—DISCRETION OF JUDGE UNDER SUBDIVISIONS (15), (16), (17), (18) AND (19) OF RULE 63 TO EXCLUDE EVIDENCE

The theory of this rule is that, as to writings offered under Uniform Rule 63(15), (16), (17), (18) and (19), the opponent should be guarded against surprise at the trial by receiving pretrial notice and opportunity to investigate the validity and accuracy of the writings.

As stated in the comment on Model Code Rule 519, from which Uniform Rule 64 is derived: "The Rule accords with the spirit of modern legislation governing discovery."[1]

Our previous recommendation that subdivisions (15) through (19) of Rule 63 be approved is, of course, by necessary implication a recommendation that Rule 64 also be approved.[2]

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[1] MODEL CODE Rule 519 Comment.

[2] For references to Uniform Rule 64, see discussion in text on Rule 63(15), Rule 63(16), Rule 63(18) and Rule 63(19).

The N. J. Committee approved Rule 64 without change. N. J. COMMITTEE REPORT 168. The N. J. Commission added subdivisions (2), (3), (21), (22) and (29) to the subdivisions listed in Rule 64. N. J. COMMISSION REPORT 67-68. The Utah Committee added subdivisions (4)(c) and (31) to the list. UTAH FINAL DRAFT 43.

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RULE 65—CREDIBILITY OF DECLARANT

Rule 65 provides as follows:

> Rule 65. Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to Rule 63, is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

Rule 65 deals with impeaching a declarant whose declaration has been received under any of the exceptions—subdivisions (1) through (31)—to the hearsay rule (Rule 63). The first sentence of Rule 65 covers impeachment by evidence of declarant's inconsistent statement or conduct and provides for important differences between impeaching a declarant and impeaching a witness. On the other hand, the second sentence equates impeachment of a declarant with impeachment of a witness as to impeaching evidence other than evidence of inconsistent statement or conduct.

The first sentence declares that evidence of an inconsistent *"statement or other conduct"* is admissible though opportunity is wanting "to deny or explain such inconsistent *statement*." (Emphasis added.) If the immateriality of the absence of such opportunity is to be specified as to the inconsistent statement, it would be well to specify such immateriality also as to the inconsistent conduct. The "though" clause—"though he had no opportunity to deny or explain such inconsistent statement"—seems to be intended to explain rather than to impose any limitations or conditions. As such, this clause would be improved by making the explanation complete. Therefore, it is recommended that the first sentence be amended by adding at the end the words "or other conduct."

Impeaching a Witness as Opposed to Impeaching a Declarant

If a person testifies as a witness at the hearing and if one of the parties proposes to prove statements uttered by the witness on another occasion inconsistent with his testimony or proposes to prove inconsistent conduct, it is, of course, possible to give the witness an "opportunity to deny or explain" (to use the language of Rule 65) such inconsistent statement or conduct. Assuming the witness remains available throughout the hearing, he can be given such opportunity at some point prior to the conclusion of the hearing. Conceivably, the actual affording of such opportunity could be left up to the party supported by the witness. The party seeking to impeach could be permitted to adduce his inconsistent-statement evidence without making any inquiries of the witness. The other party could then decide whether to *recall* the witness and give him an opportunity to deny or explain. Un-

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der this scheme, the party supported by the witness would, of course, run the risk that the witness may become unavailable for recall, for example, because of death or disappearance.

Actually, however, the law is otherwise. The impeaching party must afford the witness the opportunity in question. This, he must do, either by examining the witness when first produced or upon recall *by him*.[1] It follows, of course, that if the impeaching party delays such examination counting upon recalling the witness, he bears the risk that the witness will become unavailable for such recall.[2] Professor McCormick summarizes the reasons of policy supporting the rule imposing these requirements upon the impeaching party as follows:

> The purposes of the requirement are (1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness may make the extrinsic proof unnecessary, and (3) to give the witness, in fairness to him, a chance to explain the discrepancy.[3]

Thus far we have been thinking of evidence of inconsistent statements of a *witness*. Now, what is the situation with respect to evidence of inconsistent statements or conduct of a *hearsay declarant?* To what extent, if any, should opportunity by the declarant to deny or explain be a condition precedent to proof of the declarant's inconsistent statement or conduct? We shall consider this question with reference to each of the following exceptions to the hearsay rule.

Depositions and Former Testimony

A statement made by a deponent in his deposition or made by a witness on a former occasion is hearsay under Rule 63 when offered to prove the truth of the matter stated. If such a statement is admitted, under Rule 65 it is "a statement received in evidence under an exception to Rule 63," and Rule 65 then becomes operative as to impeaching the deponent or former witness. So far as such impeachment is concerned, the factors involved seem to be the same whether the declarant be deponent or former witness. Therefore, depositions and former testimony are treated together, for what is applicable in the one situation should be applicable *mutatis mutandis* in the other.[4]

The three following situations illustrate the problem.

(1) At the preliminary hearing of a criminal charge W testifies for the prosecution. At this time defendant is aware that X claims to have heard W make statements contrary to W's testimony. Nevertheless defendant propounds no questions to W respecting the alleged statements to X. W dies. At the trial the prosecution reads the transcript of W's testimony into evidence. Defendant offers X to testify to W's inconsistent statements.

(2) Same as (1), except defendant is *unaware* of X's claim at the time of the preliminary hearing.

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[1] CAL. CODE CIV. PROC. § 2052; MCCORMICK, EVIDENCE § 37; 3 WIGMORE, EVIDENCE §§ 1025-1029. Under Uniform Rule 22(a) and (b), whether such examination shall be required is in the discretion of the court.
[2] MCCORMICK, EVIDENCE § 37; 3 WIGMORE, EVIDENCE §§ 1027, 1030.
[3] MCCORMICK, EVIDENCE § 37 at 67-68.
[4] See notes 6, 7 and 8, p. 572, *infra*.

(3) At the preliminary hearing of a criminal charge W testifies for the prosecution. Defendant does not cross-examine. W dies. At the trial the prosecution reads the transcript of W's testimony into evidence. Defendant offers X to testify to statements made by W *after* the preliminary hearing and inconsistent with his previous testimony at the preliminary hearing.

Considering these cases in inverse order, we note that presently the impeaching evidence would be admitted in California in Case (3). Our authority is *People* v. *Collup,*[5] in which the testimony of a prosecution witness at the preliminary hearing was read at the trial, the witness being unavailable. It was held to be error to exclude evidence of an inconsistent statement made by the witness *after* the preliminary. The court spoke as follows:

> It is undoubtedly the general rule that: "A witness may also be impeached by evidence that he had made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them." (Code Civ. Proc., § 2052.) However, we do not believe that the foundation requirement is necessary where it is impossible to comply with it due to no fault of the party urging the impeachment. In the instant case the prosecution was enabled to read the transcript of Nelson's testimony given at the preliminary hearing on the basis of a showing . . . [that] the witness was out of the state. . . . The impeaching evidence consisted of statements made by the witness *after* she had testified at the preliminary hearing and hence could not have been used at the preliminary hearing. . . . To prevent the surprise of the party offering the witness, that is, to give him data from which his witness may refute or explain the impeachment, and to present the complete picture of credibility of the witness by preserving the opportunity to explain or refute, and the danger of false testimony by the impeacher are valid reasons for the rule [requiring that a foundation be laid]. With reference to surprise, the prosecution should bear that burden when they take advantage of the unavailability of the witness as a basis for introducing the testimony at a former hearing. Insofar as the reasons for the rule consist of the endeavor to get all of the pertinent evidence before the court and to further test the credibility of the impeachment, the lack of the foundation cannot be said to impair the value of the impeaching testimony to the point where it should be rejected when it is impossible to lay the foundation.
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> * * *
>
> The modern tendency is to relax rigid rules of evidence—to escape from a slavish adherence to them with the accompanying hardship, injustice and prevention of a full disclosure of all pertinent circumstances to the trier of fact. Dean Hale, of the School of Law of the University of Southern California, aptly states:

[5] 27 Cal.2d 829, 167 P.2d 714 (1946).

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> "However, it doubtless is possible to follow this rule, calling for foundation, too slavishly. Cases arise in which the laying of the foundation is impossible or impracticable—for example, where a deposition is taken and the conflicting statements are made thereafter, or where the declarant of admissable hearsay has told conflicting stories." (10 So. Cal. L.Rev. 136.) We conclude therefore that no predicate was necessary for the impeaching evidence in the instant case.[6]

In Case (2), also, the evidence would be admitted. In *People* v. *Greenwell*[7] the principal evidence against defendant was the transcript of one Rowley's testimony given at the preliminary. Defendant had omitted to examine Rowley as to inconsistent statements. Rowley was outside the state at the time of the trial. Defendant offered evidence of Rowley's statements inconsistent with his testimony at the preliminary hearing contending that at the time of the preliminary hearing "he had no knowledge as to what testimony the witness Rowley would give against him, nor any information regarding any person by whom he might produce evidence that would impeach certain or any of the material testimony that was given by the said Rowley."[8] Defendant's offer of the impeaching evidence was rejected for want of the foundation prescribed by Code of Civil Procedure Section 2052. On appeal, defendant's conviction was affirmed. Defendant's position was said to be "legally untenable" despite "the possible disadvantage which, in the circumstances, defendant may have suffered in the matter." The untenability of defendant's position was said to result from the circumstance that "in like situations, many judicial decisions adhere strictly to the rule that is so definitely announced by the language of the statute." Thus under the unqualified rule of this case and the authorities therein referred to the foundation requirement of Code of Civil Procedure Section 2052 is to be enforced irrespective of defendant's knowledge at the time of the preliminary. If defendant possessed knowledge, there is no hardship in such enforcement. But even if knowledge were wanting, the requirement is still to be enforced despite admitted hardship.

Greenwell, if still good law, would, of course, require exclusion of the evidence in our Case (2). However, *Collup* overrules *Greenwell* (and like authorities) insofar as they hold "that the testimony of a witness given at a former trial, and read at the instant trial, because of the nonavailability of the witness cannot be impeached by contradictory

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[6] *Id.* at 836-38, 167 P.2d at 717-19. Dictum to the contrary, in People v. Compton, 132 Cal. 484, 64 Pac. 849 (1901), is overruled.

A comparable situation involving impeachment of a deponent is the following: Action of P. v. D. P takes W's deposition. W makes a certain statement in P's favor. W dies. Thereafter D learns from X that X claims to have heard W make a statement *after* the deposition was taken inconsistent with W's statement in the deposition. At the trial P reads the deposition. D offers X to testify to W's inconsistent statement.

There would seem to be no significant difference between the situation of the first statement made in a deposition (as in the hypothetical case just stated) and the situation where the first statement was made by a witness at a preliminary hearing or former trial as in the *Collup* case. People v. Collup, therefore, is authority for the admission of the evidence of the second and inconsistent statement in our hypothetical case.

[7] 20 Cal. App.2d 266, 66 P.2d 674 (1937).

[8] *Id.* at 267, 66 P.2d at 674.

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statements . . . made prior thereto but *where the impeacher clearly shows that he had no knowledge of such contradictory statements.* . . .''[9] (emphasis added.)

Thus, under *Collup,* if the impeacher had no knowledge of the *prior* statement (as in our Case (2) and as in *Greenwell*) he is excused from laying the foundation. It follows, of course, that *Collup* is authority for admitting the evidence in our Case (2).[10]

In Case (1) the evidence would probably be excluded. In this case the impeacher had knowledge of the prior statement at the time of the preliminary hearing. The rule of the pre-*Collup* cases was an unqualified rule excluding the impeaching evidence, the foundation not having been laid at the time of the former testimony. To be sure, this rule is qualified by *Collup* and admissibility is decreed when the terms of the qualification are met. *But* the qualification is that ''the impeacher clearly shows that he had no knowledge of [the prior] contradictory statements.'' It seems, then, that the older cases are *not* overruled insofar as they hold that the knowledgeable impeacher must lay the foundation. In our Case (1), the impeacher possessed the requisite knowledge. For want of the foundation, his impeaching evidence is now therefore inadmissible.[11]

Under Rule 65 the evidence would be admissible in *all* of the three cases stated. If our analysis is sound, Rule 65 thus accords with prevailing law as to Cases (3) and (2). However, Rule 65 is contrary to prevailing law in Case (1). In this case, which view is preferable?

Basically, Case (1) poses the question: What is the just solution when the would-be impeacher who once had the chance to lay the foundation refrained from so doing then and now finds it impossible to do so? Should he or his opponent bear the consequence of the supervening impossibility?

It may be helpful to inquire who bears the consequence when comparable events occur at the trial. Thus let us suppose the action of *P* v. *D*. P calls W who testifies favorably to P. D does not cross-examine with reference to any inconsistent statements of W. Later P rests. In defense D plans to call X to testify to W's inconsistent statement to X. D therefore asks leave to recall W for further cross-examination. Thereupon D is informed that W is now dead. Under current law D is

[9] 27 Cal.2d at 839, 167 P.2d at 719 (1946).

[10] A comparable situation with reference to impeaching a deponent is as follows: Action of P v. D. P takes W's deposition. W makes a certain statement in P's favor. D does not cross-examine. W dies. Thereafter D learns for the first time that X claims to have heard W make statements *prior* to the deposition inconsistent with the statements made in the deposition. At the trial P reads the deposition. D offers X to testify to the inconsistent statement.

There would seem to be no significant difference between the situation of a statement made at the preliminary hearing (as in Case (2) in the text) and made in a deposition (as in our present hypothetical case). If D's ignorance excuses the foundation in the one case, it is, *a fortiori,* a valid excuse in the other.

[11] A comparable situation with respect to impeaching a deponent is as follows: Action of P v. D. P takes W's deposition. W makes a certain statement in P's favor. D is present and is aware that X claims to have heard W make a contrary statement. D, however, propounds no questions to W respecting the inconsistent statement. Later, W dies. Still later and at the trial P reads the deposition. D offers X to testify to W's inconsistent statement. This would appear to be analogous to Case (1) stated in the text, and presumably, under current California law, D's offer should be rejected.

Let us suppose, all other facts being the same, that the deposition had been taken upon written interrogatories and D had not been present. Should D's offer of X then be received? Professor McCormick argues as follows that it should be: "It seems . . . that in the case of a deposition taken upon written interrogatories when the cross-questions must be propounded before the answers to the direct can usually be known, the foundation should not be required." McCORMICK, EVIDENCE § 37 at 69.

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now foreclosed from having X testify to W's inconsistency and, by analogy, this, of course, supports the current view excluding the evidence in Case (1).[12] However, under Uniform Rule 22 whether D in our at-the-trial situation should be foreclosed from showing W's inconsistency is discretionary with the court. This suggests a possible solution in our Case (1).

Returning then to Case (1), we have these choices: (a) A rule making the evidence of W's inconsistency unqualifiedly inadmissible (the present law); (b) A rule making the evidence unqualifiedly admissible (Rule 65); (c) A rule of discretion. This last is the "middle path" advocated by Wigmore.[13] It is the type of rule (*i.e.* rule of discretion) which Uniform Rule 22 states respecting the foundation as a feature of impeaching a *witness*. Is it not, therefore, a wise solution when the problem is impeaching a *declarant* in the situation of our Case (1)? In our opinion the answer is "Yes" and we propose, therefore, amendment of Rule 65 by adding the following at the end of the first sentence:

> unless the judge finds that the party seeking to discredit the declarant is responsible for the want of such opportunity and, in the exercise of discretion, decides that the evidence should be excluded.[14]

Other Hearsay Exceptions—Declarant Unavailable

Leaving deponents and former witnesses and thinking now of other hearsay declarants whose declarations are admissible under exceptions requiring unavailability of the declarant, we must realize that there is simply no possibility either of having previously given or of presently giving declarants of the latter type any *formal* opportunity to deny or admit or explain alleged inconsistencies. The declarant is neither deponent, former witness nor present witness. Not being and never having been a witness or deponent in making his statement against the would-be impeacher, the declarant simply cannot have been given and cannot now be given the type of notice and opportunity to deny or explain that a witness or deponent can receive.

Who, then, should suffer the consequence of this impossibility to lay a foundation? The courts are generally agreed that the party relying on the hearsay declaration should suffer the consequence and they therefore allow the impeacher to prove the inconsistent statement.[15] Remembering that by hypothesis the statement of the hearsay declar-

[12] See note 2, p. 570, *supra*.

[13] 3 WIGMORE, EVIDENCE § 1031.

[14] If it is desired to construct a nondiscretionary rule of mandatory exclusion, the following amendment would suffice for this purpose: "unless the judge finds that the party seeking to discredit the declarant is responsible for the want of such opportunity."

It is to be noted that in our Case (1) we postulate the clearcut proposition that at the time of the preliminary hearing "defendant is aware that X claims to have heard W make statements contrary to W's testimony." What, however, if X has been more or less vague or is a more or less disreputable character and a prospective witness of such quality that D does not know at the time of the preliminary whether he will eventually chance calling X? Is there not such a possibility for variables here that a rule of discretion is a better instrument for achieving just results than an inflexible rule of exclusion?

[15] Professor McCormick states that: "[T]he courts are generally agreed that inconsistent statements of the makers of dying declarations and declarations against interest . . . may be proven to impeach, despite the want of a foundation." MCCORMICK, EVIDENCE § 37 at 69. See also 3 WIGMORE, EVIDENCE § 1033.

California cases to the effect that "dying declarations may be impeached by contradictory statements of the deceased without laying a foundation" are collected in People v. Collup, 27 Cal.2d 829, 837, 167 P.2d 714, 718 (1946).

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ant has not been subjected to cross-examination, we must realize how harsh it would be to deprive the would-be impeacher at one and the same time both of cross-examination and impeachment by inconsistency-evidence.

The impact of Rule 65 in the situation just reviewed is merely to continue in force the rule presently operative.[16]

Other Hearsay Exceptions—Declarant Available

Let us suppose the personal injury action of *A* v. *B*. Although X is available, A proves X's spontaneous statement under Rule 63(4)(b) (*"res gestae"*). B now offers to prove X's inconsistent statement. Under Rule 65 the offer should be accepted. We have (in the language of Rule 65) "a statement received in evidence under an exception to Rule 63" (X's *"res gestae"* statement). We have "evidence of a statement by declarant . . . inconsistent" with the statement received as stated above. Under Rule 65 the evidence of the inconsistent statement is admissible, it being immaterial that declarant up to this point has had no opportunity to deny or explain. It is at once apparent, however, that, though declarant has had no opportunity to deny or explain as of the time of the offer of the inconsistent statement, it is nevertheless possible to afford him such opportunity thereafter.[17] Whether this shall be done is up to the party who elected in the first place to use the hearsay declaration in lieu of in-court testimony.

It seems entirely reasonable that the party electing to use the hearsay of an *available* declarant should have the burden of calling him to deny or explain alleged inconsistencies.[18] This may be the law today. (We have found no cases in point.) At any rate, it seems clear that this would be the law if Rule 65 were adopted.

Conclusion

Rule 65, amended in the two respects mentioned above, is recommended for approval.[19]

[16] As to evidence admitted under new Uniform Rules exceptions, such as Rule 63(4)(c), Rule 65 would, of course, become operative in new areas.

[17] This, of course, assumes the *"res gestae"* declarant is available. If perchance he is unavailable, the need for a rule like Rule 65 is, of course, imperative. See 3 WIGMORE, EVIDENCE § 1033 n. 5.

[18] The problem could arise also under other exceptions not requiring unavailability such as Rule 63(12) and Rule 63(4)(a).

[19] It may be worth observing that under Rule 65 evidence of the declarant's inconsistent statement is admissible "for the purpose of discrediting the declarant," not as substantive evidence. Suppose an action by P against D for goods and services allegedly furnished D upon request. Defense: The goods and services were supplied to D's brother, he being solely liable therefor. D proves as a declaration against the interest of the brother the statement of the brother (now deceased), "I contracted with P for those goods and services." P proves the brother's statement made on a later occasion, "D contracted with P for those goods and services." The brother's first statement would be substantive evidence in D's behalf, but the brother's second statement would not be substantive evidence in P's behalf. That is, the second statement could be regarded as cancelling the first but not as affirmative evidence of the facts asserted.

Compare in this respect the new view of Uniform Rule 63(1), making the out-of-court inconsistent statement of a *witness* substantive evidence.

The N. J. Committee and the Utah Committee both approved this rule as drafted. N. J. COMMITTEE REPORT 168-71; UTAH FINAL DRAFT 44. The N. J. Commission added "or competence" after "credibility" in the second sentence of the rule. N. J. COMMISSION REPORT 68.

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RULE 66—MULTIPLE HEARSAY

Rule 66 provides as follows:

> Rule 66. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

This rule deals with double hearsay or hearsay upon hearsay.

Is Double Hearsay Admissible Under Present Law?

Since *single* hearsay is admissible, so far as the hearsay rule is concerned, when it falls within *one* exception to the hearsay rule, it would seem to be an axiomatic proposition that *double* hearsay is likewise admissible when it falls within *two* exceptions. Yet the occasions for testing this apparent axiom have been few. Let us see why this has been so.

If A *testifies* B said so and so, and if this is accepted as proof of so and so, it is necessary to believe that (1) B made the statement, and (2) B's statement is true. Here, however, there is no hearsay problem as to item (1). A has asserted this as a witness on direct examination and subject, therefore, to cross-examination. If, however, X is the witness and X testifies A said B said so and so, and if this is accepted as proof of so and so, we are then relying upon an out-of-court assertion (A's) to establish the proposition (item (1) above) that B made the statement. This we cannot do unless we can find and apply an exception covering A's hearsay assertion that B made such a statement. The exceptions to the hearsay rule are so limited that there has been little opportunity for applying an exception to a hearsay statement asserting that another statement was made. The result is that our axiom, that two exceptions make double hearsay admissible, remains largely a theoretical proposition untested in practice.[1]

In one small area, however, the proposition has been tested in practice to a limited extent. This area concerns hospital records and the business entries exception. Professor McCormick summarizes this development as follows:

> Under standard hospital practice a trained attendant enters upon the record a "Personal History" identifying the patient and giving an account as recited by the patient or those accompanying him, of the present illness or injury and of the events and symptoms leading up to the present condition. This information, of

[1] Occasionally a case may be found in which double hearsay has been assumed, without discussion or analysis, to be admissible. For example, in People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946), the court assumed the admissibility of former testimony (given at the preliminary hearing) to prove an extra judicial admission by the defendant. See also pp. 527, 539, 549-550 *supra*.

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course, is sought for its bearing upon the diagnosis and treatment of the patient's injury or disease. In considering the admissibility of the recorded "history," two questions need to be clearly distinguished. First, is the record when duly authenticated and when it purports to embody the statement of the patient (or of some other named person) receivable as evidence that the statement was actually made by that person? When the accompanying proof shows that the taking and recording of statements such as the one offered is in the regular course of hospital practice and in the regular course of the business of the attendant who took and recorded it, the business records exception seems to support the admissibility of the record as evidence that the purported narrator actually made the statement. This result is subject to the qualification that the matters asserted in the statement must fall within the broad range of facts which under hospital practice are considered relevant to the diagnosis or treatment of the patient's condition. The second question is this: Having established the making of the statement by the patient (or other person) by proving the making of the record in regular course, is such statement receivable as evidence of the truth of the facts stated? It seems clear that such use of the statement cannot be supported under the business records exception to the hearsay rule, since the patient or other person accompanying him did not make the statement in the course of a business duty or routine. However, it may still be receivable to prove the facts stated, if it can qualify under any other exception to the rule against hearsay. Of these, the most frequently available would be the exception for the admissions of a party-opponent, as when the patient is plaintiff and his statements are sought to be used against him by the defendant. Other possibilities are the exceptions for spontaneous exclamations, dying declarations and declarations against interest.[2]

This analysis validates the axiom we tentatively advanced at the outset. Under this approach the evidence would probably be admissible in the following case. Charge: Murder of X. Defense: X committed suicide. Defendant's offer of proof: a police officer to testify he took A to the morgue to identify a body; upon viewing the body A became hysterical and cried, "It's X! He told me he was going to kill himself." Here we have (a) A's hearsay assertion that X made X's statement, and (b) X's hearsay statement declaring his suicidal intent. Statement (a), however, is probably covered by the excited utterance exception (*res gestae*) and statement (b) is certainly covered by the declaration of present mental condition exception.[3] Under these *two* exceptions, the *double* hearsay could therefore be admitted.

Is Rule 66 Necessary?

The 31 subdivisions of Rule 63 (the hearsay rule) set up 31 exceptions to that rule. Nothing appears to us in the statement of these exceptions to preclude the possibility of applying two of them to a case of double hearsay. Why, then, should we have a rule like Rule 66

[2] McCormick, Evidence § 290 at 611.
[3] McBaine § 1052.

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explicitly asserting that this can be done? Even though the rule may not be necessary, and even though the result it states could be achieved without it, the explicit statement may be useful in avoiding misunderstanding and in emphasizing the potential for application to multiple hearsay possessed by the 31 exceptions. Therefore, Rule 66 is not undesirable on the basis that it is superfluous. On the contrary, Rule 66 is wise as a measure of precaution against misconstruction and misunderstanding, especially in view of the uncertain state of the present law.

Some Double Hearsay Problems Under the Uniform Rules

Just as single hearsay is inadmissible under Rule 63 unless it comes under one of the 31 subdivisions of Rule 63, double hearsay is likewise inadmissible unless such double hearsay falls within the subdivisions of Rule 63. The difference, of course, is that for single hearsay only one exception must be found and applied, while for double hearsay two exceptions must be found and applied, or the same exception must be applied twice.

Thus, if W is offered to testify that A said B said so and so and the purpose of the offer is to prove so and so, we may have the following possible situations:

1. Neither A's statement (that B said so and so) nor B's statement (so and so) comes under any exception. Result: Offer rejected.

2. A's statement comes under an exception. B's does not. Result: Offer rejected.

   Example: Insurance fraud case. *Issue:* Did X lie in application for policy about ever having had TB. *Evidence:* W to testify to A's dying declaration that B told A that X once had TB.

3. A's statement does not come under an exception. B's statement does. Result: Offer rejected.

   Example: The action is against B for negligent injury. *Evidence:* W to testify that several months after the accident A said B told A at the time of the accident B was to blame for the accident. (B's statement is an admission; A's statement is under no exception.)

4. A's statement comes under one exception. B's statement comes under a different exception. Result: Offer accepted.

   Example: Charge: Murder of B. *Defense:* B committed suicide. *Evidence:* W (a police officer) to testify he took A to the morgue to identify B's body. Upon being shown the body A became hysterical and said B had told A that B intended to commit suicide. (B's statement admissible under Rule 63(12)(a); A's statement admissible under Rule 63(4)(b).)

5. A's and B's statements both come under the *same* exception. Result: Offer accepted.

   Example: A and B are dying room mates in a hospital. B, while dying (and knowing it), makes a statement to A. Later A, while dying (and knowing it), repeats B's statement to W.

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Triple Hearsay—and Beyond

Cases of triple hearsay could conceivably arise. For example, W testifies A said B told A that C said so and so. Logically, this should be admitted if, for example, C made his statement to B as a dying declaration; B so made his statement to A; A so made his statement to W.

Nothing in Rule 63(5), the dying declarations exception, precludes this triple application of the exception. Yet, Rule 66 deals only with double hearsay stating that double hearsay is not inadmissible as such if two exceptions apply. Would this be construed to mean that triple hearsay is inadmissible even though three exceptions or, as in our case, the same exception thrice applicable, are available? *Possibly* so and therefore Rule 66 *possibly* should be amended to read as follows (omitted matter in strikeout type, new matter in italics):

> A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes ~~a statement made~~ *one or more statements* by ~~another~~ *an additional* declarant *or declarants* and is offered to prove the truth of the included statement *or statements* if such included statement ~~itself~~ meets *or such included statements meet* the requirements of an exception *or exceptions.*

However, this amendment is not recommended. The area in which the provisions added by amendment could be expected to operate would be small. The results provided by the amendment could be reached without such amendment for Rule 66 need not necessarily be construed as forbidding admission of triple hearsay if covered by the requisite number of exceptions. It is the part of wisdom to provide specifically, as Rule 66 does, only for double hearsay, trusting the courts to handle the rare case of triple, or multiple hearsay without specific legislative guidance.

Conclusion

Rule 66 is recommended for approval.

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COMPETENCY OF HEARSAY DECLARANT

It must be considered to what extent, if any, the rules that disqualify certain persons as *witnesses* are applicable also to disqualify hearsay *declarants*. For example, does the rule that precludes an insane person from testifying at a trial operate by analogy to exclude the dying declaration of an insane person?

The Rules of Disqualification

The following are the California rules of disqualification that are to be considered:

1. Persons of "unsound mind" cannot be witnesses.[1]

2. Children under ten who are incapable of receiving just impressions and relating them truly cannot be witnesses.[2]

3. In civil cases a wife cannot be examined for or against her husband unless he consents nor can a husband testify for or against his wife unless she consents, except in certain situations.[3]

4. In criminal cases a wife is an incompetent witness for or against her husband unless both consent and a husband is an incompetent witness for or against his wife unless both consent, except in certain situations.[4]

5. The Dead Man Statute.[5]

The rule requiring a witness to possess direct knowledge[6] and the opinion rule are not considered at this time. Hence we do not discuss whether a party's admission must be based on firsthand knowledge, whether a declaration against the interest of a declarant must be so based or whether a dying declaration stating declarant's "conclusion" is inadmissible. The bearing of the knowledge and opinion rules upon various hearsay exceptions is discussed in the portion of this study dealing with those exceptions. Considered here is the applicability of the five rules stated above to hearsay declarants.

There is no over-all categorical answer to the question under investigation because, as Professor McCormick states:

> The application of the standards of competency of witnesses to declarants whose statements are offered in evidence under the various hearsay exceptions has never been worked out comprehensively by the courts.[7]

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[1] CAL. CODE CIV. PROC. § 1880(1).
[2] *Id.* § 1880(2).
[3] *Id.* § 1881 (1).
[4] CAL. PEN. CODE § 1322.
[5] CAL. CODE CIV. PROC. § 1880(3).
[6] *Id.* § 1845.
[7] MCCORMICK, EVIDENCE § 240 at 505.

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What little law there is can best be summarized by considering the problem *seriatim* with reference to each of the several exceptions to the hearsay rule.

Dying Declarations

Infancy and Insanity. Wigmore states that "In general, for testimonial qualifications, the rules to be applied [to dying declarants] are no more and no less than the ordinary one . . . for the qualifications of other witnesses." Therefore "if the declarant would have been disqualified to take the stand, by reason of infancy [or] insanity . . . his extrajudicial [dying declaration] must also be inadmissible."[8] Dicta in two California cases are in accord.[9]

Spouse Rule. Penal Code Section 1322 provides in part as follows: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one [is a party], except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person . . . of the other . . . . " Dying declarations are admissible only in homicide cases. Furthermore, only the victim's declarations are covered by the exception. Thus, it follows that we have the question of applying the spouse rule to the declarant of a dying declaration only when one spouse is charged with homicide of the other and the dying declaration of the other spouse is offered. Such a case is a "criminal action," for it is "a crime committed by one against the person . . . of the other."[10] Had the crime been attempted murder and had the attacked spouse survived, he or she would have been a competent witness under the exception in Section 1322. It would seem, therefore, that where the charge is homicide, this should be regarded as a case where the declarant, if alive, would have been a competent witness and the dying declaration should be received either for or against defendant insofar as the controlling factor is the notion that the rules for witnesses apply to declarants.

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

Depositions and Former Testimony

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

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

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[8] 5 WIGMORE, EVIDENCE § 1445.
[9] People v. Sanchez, 24 Cal. 17 (1864); People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064 (1913).
[10] CAL. PEN. CODE § 1322.

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Comment. In general competency rules apply to former witnesses and deponents,[11] and the competency of the former witness or deponent is judged as of the time that the former testimony was given or the deposition was taken.[12] In this case since W was sane at the time the former testimony was given, the transcript thereof is admissible.[13] Undoubtedly the same result would follow in the case of a deponent who was sane at the time his deposition was taken but who is insane at the time the deposition is offered. Section 2016(e) of the Code of Civil Procedure, however, is confusingly phrased.[14]

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

Comment. Again competency rules in general apply to deponents and again competency is usually judged as of the time of the deposition.[15] Section 2016(e) is confusingly phrased on this matter also.[16]

Case 3. Action of *People* v. *D* upon a charge of forgery. The people call D's wife. She testifies without objection. D also testifies. Now D is charged with having committed perjury in the first case. In the perjury trial the People call D's wife. D's objection on the ground of Section 1322 of the Penal Code is sustained. The People then offer the transcript of the wife's testimony in the forgery case. If there is no objection by D, the transcript is admissible. If, however, D had objected to the transcript on the ground of Penal Code Section 1322, the transcript would probably have been inadmissible.

Comment. Authority for the suggested rulings is the opinion of the Supreme Court denying a hearing in *People* v. *Chadwick*.[17] In that case D did not object to his wife's *testimony* at the first trial or to the *transcript* of such testimony at the second trial. (He did, however, object to the proposed testimony of the wife at the second trial.) In affirming D's conviction, the District Court of Appeal did not use the rationale of waiver of objection to the transcript by failure to object. Rather the court stated and apparently rested its decision upon the following broad generalization:

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[11] 2 WIGMORE, EVIDENCE § 479.

[12] *Id.* § 483.

[13] People v. Crandall, 43 Cal. App.2d 238, 110 P.2d 682 (1941).

[14] Under Code of Civil Procedure Section 2016(d)(3)(iii), the inability of deponent to testify at the trial because of "sickness" or "infirmity" is one of the occasions wherein use of his deposition at the trial is authorized.

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

[15] 2 WIGMORE, EVIDENCE §§ 479, 483.

[16] If Section 2016(e) of the Code of Civil Procedure is to be taken literally, D's objection must be overruled. Since W is now sane, no reason "would require the exclusion of the evidence if the witness were then [*i.e.*, at the trial] present and testifying." Again literal construction producing this absurd result is unlikely.

[17] 4 Cal. App. 63, 87 Pac. 384 (1906).

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> The provisions of the code (Code Civ. Proc., sec. 1881 [1]; Pen. Code, sec. 1322) prohibiting a husband or a wife from being examined as a witness for or against the other, except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them. The code merely makes either spouse incompetent as a *witness* in an action or proceeding against the other, but does not render their statements elsewhere given privileged against being shown by competent testimony.[18]

This generalization is in marked contrast to Wigmore's proposition to the effect that hearsay declarations by the wife or husband, such as would ordinarily be receivable under some exception to the hearsay rule, should be excluded when offered against the other spouse.[19] Furthermore, the generalization appears to be disapproved by the following statement of the California Supreme Court in the opinion of that court denying a hearing:

> If the decision of the district court of appeal was intended to declare, as the defendant insists that it does, that when, upon the trial of a case, the wife of the defendant has testified against him without objection by him, her testimony then given may, in all cases, be read against him, over his objection, upon another trial of that or any other charge against him, we do not approve of that portion of it. No such question was necessarily involved in the case. The affirmance of the judgment, so far as the reading of such testimony is concerned, was justified by the fact that upon the trial of the forgery charge the defendant made no objection to the testimony of Norine Schneider against him, and that upon the trial of the perjury case, resulting in the judgment appealed from, he did not object to the reading of the testimony given by her upon the other trial.[20]

Nevertheless at least one writer[21] and two subsequent California cases seemingly overlook the Supreme Court's opinion and suggest that the generalization made by the District Court of Appeal is the law of this State.[22] If this view is accepted, the spouse rule is inapplicable to former testimony and to excited utterances (*res gestae*). This view and the opposing view of Wigmore will be referred to again.

It is worth noting that under the Wigmore view the spouse rule *does* apply to hearsay declarations, and the time when the disqualification is operative or inoperative is the time when the hearsay declaration is *offered*, not the time when *made*.[23] It follows that under this view a man could suppress the hearsay declaration of a woman, otherwise admissible against him, by marrying her, unless, of course, the case is one of the exceptional cases stated in Code of Civil Procedure Section 1881

[18] *Id.* at 72, 87 Pac. at 388.
[19] 8 WIGMORE, EVIDENCE § 2232.
[20] People v. Chadwick, 4 Cal. App. 63, 75, 87 Pac. 384, 389 (1906).
[21] Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 394 (1931).
[22] People v. Peak, 66 Cal. App.2d 894, 153 P.2d 464 (1944); First Nat. Bank v. DeMoulin, 56 Cal. App. 313, 205 Pac. 92 (1922).
[23] 8 WIGMORE, EVIDENCE § 2237(3); MCCORMICK, EVIDENCE § 240.

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(1) or Penal Code Section 1322. Finally, it is worth noting that in the case of former testimony most objections that could have been made when the testimony was first given may be withheld at that point and be successfully advanced for the first time when evidence of the testimony is offered at the second trial.[24] Under the Supreme Court's opinion in the *Chadwick* case this, of course, is true of the Penal Code Section 1322 objection.

Case 4. A sues B for a money judgment for goods and services allegedly supplied by A to B. A testifies in support of his claim and is cross-examined by B. Mistrial. Before the action is reached for retrial A dies and his administrator is substituted as the party plaintiff; B also dies and his administrator, D, is substituted as the party defendant. Upon the retrial plaintiff offers a transcript of A's testimony. D objects on the ground of the Dead Man Statute.[25] Query as to the ruling.

Comment. The California cases are in conflict. *Rose* v. *So. Trust Co.*[26] involved a claim against an estate upon a contract for certain services rendered the decedent. Previously the decedent had sued the claimant concerning a transaction related to the claim. The Supreme Court held that the testimony of the claimant given at the trial of the previous case and the deposition of the claimant taken in the previous case were inadmissible under the Dead Man Statute even though the former testimony of the decedent was admitted. The court relied in part upon *Mitchell* v. *Haggenmeyer*,[27] which involved a similar situation. In the *Mitchell* case, the Dead Man Statute was enacted after the deposition of the claimant was taken but before the trial of the claimant's action against the estate. The Supreme Court held the deposition inadmissible under the Dead Man Statute even though the testimony in the deposition was competent when given.[28] Under these cases, D's objection in Case 4 would be sustained, for the disqualification created by the Dead Man Statute is judged as of the time the former testimony or deposition is offered.

In *Kay* v. *Laventhal*,[29] however, a district court of appeal held that the plaintiff, in an action against an estate, could introduce his own deposition that had been taken during the decedent's lifetime. No

[24] McCormick, Evidence § 236.
[25] Cal. Code Civ. Proc. § 1880(3).
[26] 178 Cal. 580, 174 Pac. 28 (1918).
[27] 51 Cal. 108 (1875).
[28] If the deposition of a claimant against an estate is taken by a defendant executor or administrator, the disqualification of the Dead Man Statute is waived, for a party must make his objections to the competency of a deponent at the time of the taking of his deposition. McClenahan v. Keyes, 188 Cal. 574, 206 Pac. 454 (1922). Hence, in the *Mitchell* case, the deposition of the claimant would have been admissible had the Dead Man Statute been in existence at the time the deposition was taken, for the taking of the deposition would have been a waiver of the statute. Since the statute was not in existence, the executor could not waive it by taking the claimant's deposition.
In Moul v. McVey, 49 Cal. App.2d 101, 121 P.2d 83 (1942), the court held that a defendant executor waived the disqualification of the Dead Man Statute by introducing a transcript of the plaintiff's former testimony. In Evans v. Gibson, 220 Cal. 476, 31 P.2d 389 (1934) and Sweet v. Markwart, 158 Cal. App.2d 700, 323 P.2d 192 (1958), the opinions indicate the plaintiff may avoid his own disqualification by introducing the decedent's deposition or former testimony. The *Rose* case, note 26 *supra*, is contrary to these indications in the *Evans* and *Sweet* cases, for it held the plaintiff's former testimony and deposition incompetent even though the plaintiff also introduced the decedent's former testimony.
[29] 78 Cal. App. 293, 248 Pac. 555 (1926).

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authority was cited. The Supreme Court denied a hearing. Again, in *McKee* v. *Lynch*[30] a district court of appeal held that a plaintiff's deposition which was taken during the decedent's life was admissible at the trial of the action against the decedent's estate. The court pointed out that the contrary authorities were discussed in the petition for a hearing in the *Laventhal* case but the Supreme Court refused to review the decision. The Supreme Court declined to hear the *McKee* case, too. Under these cases, D's objections in Case 4 would be overruled, for the disqualification created by the Dead Man Statute is judged as of the time the former testimony or deposition was given.[31]

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

Summary. (1) The infancy-insanity disqualification applies to deponents and former witnesses, the qualification being judged as of the time the deposition is taken or the former testimony is given.

(2) The spouse rule probably applies, the qualification being judged as of the time the deposition or the former testimony is *offered*.

(3) The Dead Man Statute applies and, if the Supreme Court's denials of petitions for hearing are regarded as the last expression by that court, the qualification is judged as of the time the deposition is taken or the former testimony is given.

Declarations Against Interest

No case or other authority has been found discussing the present problem in connection with this exception. The elements of the exception themselves probably embrace at least the maturity-sanity compe-

[30] 40 Cal. App.2d 216, 104 P.2d 675 (1940).

[31] A deposition taken during the lifetime of the decedent was again held admissible against the decedent's estate in Hays v. Clarke, 175 Cal. App.2d 565, 346 P.2d 448 (1959) and in Corso v. Security-First Nat'l. Bank, 171 Cal. App.2d 816, 342 P.2d 56 (1959). Both cases relied on the *Kay*, note 29 *supra*, and *McKee*, note 30 *supra*, cases. Peculiarly, in neither case did the court discuss Section 2016 of the Code of Civil Procedure. Since January 1, 1958, Section 2016 has provided the statutory authority for admitting depositions in civil actions. Unlike the former law under which the *Kay* and *McKee* cases were decided—which permitted either party to use any party's deposition for any purpose (former Code of Civ. Proc. § 2022)—Section 2016 permits a party's deposition to be introduced on his own behalf only if the party-deponent is physically unable to testify or if the court finds that "such exceptional circumstances exist as to make it desirable, in the interest of justice," to use the deposition. In both cases, however, the deponent—the plaintiff—was neither dead, absent nor incapacitated, and the court did not indicate that "such exceptional circumstances" existed as to make it desirable to use the deposition "in the interest of justice." Moreover, in neither case did the court discuss subdivision (e) of Section 2016, which provides that "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason that would require the exclusion of the evidence if the witness were then present and testifying." In fact, in the *Hays* case, the court held that the party-deponent's direct testimony was properly stricken by the trial court under the provisions of the Dead Man Statute. Whether or not the enactment of Section 2016 has restored the rule of the *Rose* case will not be known until the Supreme Court chooses to review the matter.

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tency requisites. That is, a child too young to testify is too young to speak consciously against his interest. So, too, of an incompetent too mentally defective to testify. Thus the proponent of a declaration against interest probably must show that his declarant possessed minimal maturity-sanity competence to testify in order to show the declaration was against interest. The comments concerning Cases 3 and 4, *supra,* are germane to the question of the spouse rule and the Dead Man Statute disqualification of those making declarations against interest, assuming the problem could conceivably arise—a doubtful assumption in itself.

Excited Utterances (Res Gestae)

Infancy. Wigmore's position is that the disqualification for infancy does not and should not exclude a child's excited utterance that is otherwise admissible. His reasoning is that the principle of the excited utterance exception "obviates the usual sources of untrustworthiness in children's testimony" and "furthermore the orthodox rules for children's testimony are not in themselves meritorious." [32] Professor McCormick concedes that "it is held that evidence of spontaneous declarations of infants is admissible despite the incompetency of the child as a witness." [33] However, he doubts the wisdom of so holding because, he says, "as to the qualification of mental capacity as applied to young children . . . in its modern form of a mere requirement that the witness must only possess such minimum capacity to observe, remember and narrate the facts as will enable him to give some aid to the trier, it would seem sensible to apply that standard to the out-of-court declarant." [34] Neither author cites any California case on the point and none has been found.

Insanity. Wigmore states that the "disqualification of insanity should probably be treated for the present purpose like that of infancy," [35] and cites *Wilson* v. *State,*[36] a Texas case, for this view. Professor McCormick also cites the *Wilson* case as indicating the current rule. However, he questions this rule on the same basis on which he questions the infancy rule.[37]

Spouse Rule. Wigmore's position is that *hearsay declarations* by the wife or husband, such as would ordinarily be receivable under some exception to the hearsay rule, should be excluded when offered against the other spouse,[38] the qualification of the declarant spouse being judged as of the time the declaration is offered in evidence rather than as of the time the declaration was made.[39]

Professor McCormick states the rule to be that an excited declaration is admissible even when "made by the husband or wife of the accused in a criminal case." [40] He cites, however, only one Texas case and makes no reference to Wigmore's view or to the authorities cited by Wigmore supporting that view.

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[32] 6 WIGMORE, EVIDENCE § 1751(1).
[33] MCCORMICK, EVIDENCE § 272, p. 582.
[34] *Id.* § 240 at 505.
[35] 6 WIGMORE, EVIDENCE § 1751(4) n. 6.
[36] 49 Tex. Cr. 50, 90 S.W. 312 (1905).
[37] MCCORMICK, EVIDENCE § 272 n. 5. See also *id.* § 240.
[38] 8 WIGMORE, EVIDENCE § 2232.
[39] *Id.* § 2237(3).
[40] MCCORMICK, EVIDENCE § 272 at 582.

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

Dead Man Statute. Suppose P sues X's administrator for damages for alleged injuries allegedly inflicted upon P by X's alleged negligence. P offers evidence of his own excited utterance made immediately after the accident. D objects on the basis of the Dead Man Statute. Query as to what the ruling would be. In view of the rationale of the Dead Man Statute (fear of perjury motivated by interest) it seems that D's objection should be overruled on the basis that P's excitement and the resulting spontaneity of his statement override the interest factor.[41]

Admissions

Infancy and Insanity. Wigmore's position on this matter is as follows:

> A primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistent other utterances . . . . It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party's present claim that gives them logical force.[42]
>
> * * *
>
> On the same principle, the admissions of an *infant* party would be receivable. Theoretically, the admissions of a *lunatic* party would stand upon the same footing, although the weight to be given them might be "nil."[43]

Professor McCormick's position is as follows:

> In so far as outmoded testimonial restrictions still survive, such as disqualification for conviction of crime, marital disqualification, and the test of ability to understand the obligation of an oath as applied to small children, it seems that these requirements should not in general be extended to hearsay declarants nor in particular to admissions. But as to the qualification of mental capacity as applied to young children and insane persons, in its modern form of a mere requirement that the witness must only possess such minimum capacity to observe, remember and narrate the facts as will enable him to give some aid to the trier, it would seem sensible to apply that standard to the out-of-court declarant and the party making admissions. If it does not appear that this minimum capacity was wanting, then the immaturity or insanity of the declarant would only affect the credibility of the admission or other declaration. And so of intoxication, hysteria and similar temporary derangements. If the party making the admission, or other declarant, was not shown to be incapable of making any rational statement, his intoxication or other derangement would be considered only as affecting the credibility of the statement.[44]

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[41] See by analogy 6 WIGMORE, EVIDENCE § 1751(3) and discussion in text relating to Case 4 *supra.*

[42] 4 WIGMORE, EVIDENCE § 1053 at 12.

[43] *Id.* at 14.

[44] MCCORMICK, EVIDENCE § 240 at 505-06.

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Professor McCormick's position seems preferable to Wigmore's. An admission is substantive evidence, whether made in or out of court. If the admitter, when making his out-of-court statement, is too young or so insane that he could not have been heard in court at that time, then his out-of-court statement should be excluded. This appears to be the rule when the admission is in the form of a confession by defendant in a criminal case.[45] It should be the rule with reference to *all* admissions.

Spouse Rule. Usually a third person's out-of-court statement is hearsay as to a party and is *not* admissible against the party as his admission. This is equally true if the party is a husband and the out-of-court declarant is his wife. It follows that there are few situations in which the wife's out-of-court statement could be regarded as the husband's admission, and there is little occasion, therefore, to consider whether the wife-against-husband disqualification applies to out-of-court declarations constituting admissions.[46] A few such situations, however, do arise under Code of Civil Procedure Section 1870, subdivisions (5) and (6), which provide as follows:

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

What if the declarant in such cases is wife of the party? It would seem that the Section 1870 rules should override the spouse rule.[47] Under our decisions it seems clear that this is the case insofar as the joint interest principle of Section 1870(5) is concerned.[48] However, it is possibly not the case insofar as the agency principle of that section is concerned.[49]

A superficially similar problem is presented by Section 1870(3) which is as follows:

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

What if the "act or declaration of another" referred to in this subdivision is the wife of the party? Here, it is sufficiently clear that the evidence is admissible,[50] because, as Wigmore says:

> [T]he statements are receivable, as would be those of any other person, . . . [for they] are not offered as hers . . . [but] as his by assent and adoption.[51]

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[45] People v. Isby, 30 Cal.2d 879, 186 P.2d 405 (1947).
[46] 8 WIGMORE, EVIDENCE § 2232.
[47] *Id.* § 2232(1).
[48] Wilcox v. Berry, 32 Cal.2d 189, 195 P.2d 414 (1948).
[49] Ayres v. Wright, 103 Cal. App. 610, 284 Pac. 1077 (1930).
[50] People v. Leary, 28 Cal.2d 740, 172 P.2d 41 (1946).
[51] 8 WIGMORE, EVIDENCE § 2232(2).

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

Declarations of Physical and Mental Condition

Presumably maturity-sanity requisites are applicable here. Query as to the Spouse Rule and Dead Man Rule.[52]

Pedigree Declarations

Presumably maturity-sanity requisites apply. Query as to others.[53]

Uniform Rules

The Uniform Rules preserve the maturity-sanity requirements in the following terms:

> Rule 17. A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.

Both the Dead Man Statute and the spouse rule are abolished by Rule 7; however, the privilege for confidential communications between spouses is retained by Rule 28.

Conclusion

It would seem that the minimal requisites to qualify a witness under Rule 17 should be imposed also to qualify hearsay declarants. This could be accomplished by amending subdivisions (4), (5), (6), (7), (8), (10), (12), (23), (24) and (25) of Rule 63 so that each would require "the judge to find that at the time of making the statement the declarant possessed the capacities requisite to qualify as a witness under Rule 17."

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[52] See discussion under Cases 3 and 4 *supra*.
[53] *Ibid.*

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THE INCORPORATION OF REVISED RULES OF EVIDENCE 62-66 IN THE CALIFORNIA CODES

In the preceding portions of this study, consideration has been given to the desirability of adopting the Uniform Rules of Evidence as the law of evidence in California. The Law Revision Commission having tentatively recommended revision of the Uniform Rules (the Uniform Rules as revised by the Commission are referred to herein as the "Revised Rules"), it behooves us to consider the changes in the existing statutory law that may be needed if the Revised Rules are enacted as law in California. We propose in this portion of the study to explore the problems incident to, and to make recommendations concerning, the incorporation in the California Codes of the Revised Rules.

General Policies to be Followed in the Incorporation of the Revised Rules in the California Law

Location of the Revised Rules in the Code

Part IV of the Code of Civil Procedure is the principal source of statutory rules of evidence applicable to civil, criminal and probate proceedings.[1] It seems, therefore, that any large-scale revision of the law of evidence belongs in Part IV, and it is recommended that the Revised Rules be incorporated in that part.

General Comparison of Present Statutory Hearsay Law and Uniform Rules 62-66

Uniform Rules 62-66 purport to provide a complete system governing the admission and exclusion of hearsay evidence. The format of these Rules is: (a) Definitional provisions—Rule 62 and Rule 63, introductory paragraph; (b) Statement of general rule that hearsay is inadmissible—Rule 63, introductory paragraph; (c) Statement of 31 exceptions to the general rule—Rule 63, subdivisions (1)-(31).

Although we have today in California numerous code provisions respecting hearsay, these provisions are not organized in any structure comparable to the orderly format of Uniform Rules 62-66. Thus, although we have a multiplicity of statutory exceptions to the hearsay rule, we do not have any statutory definition of hearsay evidence, nor any statutory statement of the general rule. Moreover the statutory exceptions are not stated as such, nor are they collected together in

[1] Section 1 of the Code of Civil Procedure provides: "This act shall be known as The Code of Civil Procedure of California, and is divided into four parts, as follows:
Part I. Of Courts of Justice.
II. Of Civil Actions.
III. Of Special Proceedings of a Civil Nature.
IV. Of Evidence."
Section 1102 of the Penal Code provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code."
Section 1230 of the Probate Code provides in part as follows: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions."

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any one place, nor are they inconsiderable in number. In consequence, our present mass of legislative hearsay law can scarcely be called a system. It is in fact so disorganized and so disorderly that, taken as a whole, it is entirely unsystematic.

Nevertheless, we shall now attempt a general description of our present hearsay code provisions and a comparison, in general terms, of such provisions with Uniform Rule 63.

Practically all of our hearsay statutes consist of exceptions to the hearsay rule. For descriptive purposes we may call them "general" and "special" exceptions. In this context a general exception means a principle of general application, like the principle of dying declarations or declarations against interest. A special exception means a narrow *ad hoc* exception in the nature of a rule of thumb directed only to a specially limited situation.

To illustrate, Code of Civil Procedure Section 1870(4) provides in part as follows:

> [E]vidence may be given upon a trial of . . . [t]he act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person . . . .

Under the classification we have in mind this is a "general" exception.

On the other hand Agricultural Code Section 920 provides as follows:

> Any sample taken by an enforcement officer in accordance with rules and regulations promulgated under the provisions of this article for the taking of official samples shall be prima facie evidence, in any court in this State, of the true condition of the entire lot from which the sample was taken. A written report issued by the State Seed Laboratory showing the analysis of any such sample shall be prima facie evidence, in any court in this State, of the true analysis of the entire lot from which the sample was taken.

This we regard as a "special" exception.

Analogues of the general exceptions are found in the subdivisions of Uniform Rule 63 and in subdivisions (1) to (31) of Revised Rule 63. For example, the pedigree exception above quoted is roughly analogous to subdivisions (23)-(26) of Rule 63. On the other hand, since Uniform Rule 63 and subdivisions (1) to (31) of Revised Rule 63 for the most part fashion the exceptions in general terms and since the statutory special exceptions deal with minutiae, we find in the subdivisions of Rule 63 no counterparts of the special exceptions (except, of course, to the extent that a special exception is a minute application of a general principle stated in a subdivision).

General Program for Adjusting the Present Hearsay Code Provisions to the Adoption of Revised Rules 62-66

Of course, the proposed adoption of Revised Rules 62-66 must be accompanied by appropriate recommendations concerning adjustments in the present statutes. Ideally and logically, since the rules are a total system, the appropriate adjustment would be a total repeal of all

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statutes now dealing with hearsay. It is believed, however, that as the study progresses, this ideal will appear to be impossible to accomplish.

The program proposed herein is therefore something less than the ideal which the demands of abstract logic and considerations of symmetry require.

Speaking generally the program is as follows:

1. Repeal specifically all of the present code provisions which create general hearsay exceptions that are either inconsistent with or substantially coextensive with the Revised Rule 63 counterparts of such provisions.

2. Leave intact the remainder of our present statutory hearsay law.

We now turn to the analysis and discussion of the code provisions which we submit in support of this program.

The Four Groups of Statutes

Subdivisions (1) to (31) of Revised Rule 63 are exceptions to the hearsay rule whereby certain evidence is declared to be admissible notwithstanding such evidence is hearsay. Virtually all of our statutory law relating to hearsay likewise declares the admissibility of hearsay evidence and, like subdivisions (1) to (31) of Revised Rule 63, these statutes therefore operate as exceptions to the hearsay rule.

Comparing our statutory exceptions with the exceptions stated in subdivisions (1) to (31) of Revised Rule 63, we find that the statutory exceptions fall into the following four groups:

1. Those which are more restrictive than the exceptions provided in subdivisions (1) to (31) of Revised Rule 63.

Illustration: Code of Civil Procedure Section 1870(4) provides in part as follows:

> [E]vidence may be given upon a trial of the following facts: . . . in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death . . . .

On the other hand, Revised Rule 63(5) makes dying declarations admissible in civil as well as criminal actions and does not limit the subject matter of the declaration to the cause of the declarant's death.

2. Those which are substantially coextensive with the exceptions provided in subdivisions (1) to (31) of Revised Rule 63.

Illustration: Code of Civil Procedure Sections 1953e-1953h (the Uniform Business Records as Evidence Act) is coextensive with Revised Rule 63 (13).

3. Those which are more liberal than the exceptions provided in subdivisions (1) to (31) of Revised Rule 63.

Illustration: Code of Civil Procedure Section 1849 provides in part as follows:

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

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Under this section the declaration is admissible irrespective of the availability of the declarant. Per contra, under Revised Rule 63(10), such declaration is admissible only if the declarant is unavailable as a witness.

Further illustration: Penal Code Section 1107 provides that in a prosecution for forging the note of a corporation, the fact of incorporation may be proved by reputation. But Revised Rule 63(28) permits reputation evidence only to establish a person's character or trait of character.

4. Those which are minute applications of a principle stated in subdivisions (1) to (31) of Revised Rule 63.

Illustration: Revised Rule 63(17) makes admissible a writing purporting to be a copy of an official record or of an entry therein. Business and Professions Code Section 8923 provides for admissibility of copies of records and papers in the office of the Yacht and Ship Brokers Commissioner. The latter is, of course, a miniscule application of the principle of the former.

It is believed that practically all of our statutory hearsay law falls within the above four classifications. There is, however, a small residuum which is not included. Thus, we have a few special statutes which operate in this fashion: they forbid the application of a principle stated in a Revised Rule 63 subdivision to a particular situation.

Illustration: Under Vehicle Code Section 20013, a person's accident report is not admissible against him. This forbids the application to this particular situation of the admissions principle stated in Revised Rule 63(7).

Such legislation is, so to speak, an exception to an exception stated in a Revised Rule 63 subdivision.

Each of these groups of our present hearsay statutes presents special problems of adjustment in connection with incorporating Revised Rules 62-66 into the California codes. We shall now explore these problems with reference to each group and, then, we shall attempt to formulate appropriate recommendations.

Groups One and Two (General Statutory Exceptions More Restrictive Than or Coextensive With Subdivisions (1) to (31) of Revised Rule 63). The problems here are not acute. It seems self-evident that, to the extent that our present statutory statements of the traditional hearsay exceptions are more restrictive than their Revised Rule 63 counterparts, such statutes should be repealed. For example, in proposing Revised Rule 63(5), covering the dying declaration exception, we would certainly propose repeal of that portion of Code of Civil Procedure Section 1870 which states this exception in more restrictive form than subdivision (5) of Revised Rule 63.

The only problem we find in this area grows out of a few statutes currently in force which operate to forbid the application of a traditional hearsay exception to a particular situation, as Vehicle Code Section 20013 mentioned above. This, however, does not (we think) require any special adjustment. Presently, this Vehicle Code section operates as an exception to the general admissions principle stated in Code of

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Civil Procedure Section 1870(2) ("evidence may be given . . . of . . . the . . . declaration . . . of a party, as evidence against such party"). The substitution of the Revised Rule 63 admissions principle—*i.e.,* the substitution of subdivision (7) of Revised Rule 63—for Code of Civil Procedure Section 1870(2) would not (we think) be interpreted as intended to affect the Vehicle Code section.

As to group two: again it seems self-evident that in proposing something coextensive with a present code section or sections we should recommend repeal of such section or sections.

Group Three (Statutory Exceptions More Liberal Than Subdivisions (1) to (31) of Revised Rule 63). Above we have partially illustrated this type of statute. We now proceed to develop the illustrations more fully. Penal Code Section 315 provides in part:

> [I]n all prosecutions for keeping or resorting to [a house of ill-fame] . . . common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it.

As pointed out above Penal Code Section 1107 provides in part:

> Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company . . . the incorporation of such . . . company . . . may be proved by general reputation . . . .

These, it seems, are two instances of reputation evidence which would now be admissible but which would be inadmissible under subdivisions (1) to (31) of Revised Rule 63. Reputation evidence is hearsay under Revised Rule 63 and the exceptions to Revised Rule 63 relating to reputation—subdivisions (26)-(28)—do not cover the two kinds of reputation specified in the two sections of the Penal Code.

Probate Code Section 372 provides that subject to certain conditions the court may "as evidence of the execution" of a contested will "admit proof of the handwriting . . . of any of the subscribing witnesses." Such proof seems to involve a hearsay statement by the subscribing witness (namely, that he saw the will executed).[2] We find nothing in the subdivisions (1) to (31) of Revised Rule 63 which would make such evidence admissible.

Another illustration is Code of Civil Procedure Section 1870(5), which provides in part as follows:

> [E]vidence may be given . . . of the following facts: . . . After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. *The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party* . . . . [Emphasis added.]

We note the following concerning the second sentence. Uniform Rule 63(10), as originally drafted, would have made admissible against a

[2] See 5 WIGMORE, EVIDENCE § 1505 *et seq.*

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party the declaration of a person jointly interested with the party provided such declaration was against the interest of the declarant (as usually it would be). Such declaration would be admissible even though the declarant is available. That is, Uniform Rule 63(10) in its original form would have covered most of the ground embraced by Code of Civil Procedure Section 1870(5), second sentence. Revised Rule 63(10), however, requires the unavailability of the declarant and does not cover, as Section 1870(5) now does, declarations of an available declarant.

Other instances are as follows: Civil Code Section 224m (written statement by person relinquishing child for adoption constitutes prima facie evidence of facts recited); Section 1263 (declaration of homestead prima facie evidence of facts stated); Section 2924 (certain recitals in deed prima facie evidence of facts recited).

The foregoing constitutes a partial collection of present statutory exceptions which are more liberal than the subdivisions (1) to (31) of Revised Rule 63.[3] These exceptions, it seems, admit that which Revised Rule 63 would exclude altogether.

This seems to raise the following questions for decision:

1. Should these code provisions be repealed or continued in operation?

2. If they should be continued, how should this be accomplished?

A categorical answer cannot be given to the first question. As a general rule, it is recommended that the decision be to continue the provisions in force. We perceive no reason to *narrow* the present scope of admissible hearsay. Nonetheless, in certain instances the statement of a narrower rule of admissibility in the URE and the Revised Rules constitutes a conscious rejection of a form of evidence deemed untrustworthy. In these instances, of course, it is necessary to repeal the existing statutory statement of the unsound rule. In most cases, though, we think present law should be preserved to the extent that it makes admissible what the rules would make altogether inadmissible.

Turning then to the second question—how to continue present law in force—the answer is (we think) to amend Rule 63 by adding thereto a new subdivision to be numbered (32) and to read as follows:

> (32) Hearsay evidence declared to be admissible by any other law of this State.[4]

Group Four (Statutory Exceptions Which Are Minute Applications of Rule 63 Principles). The provisions which fall under this head are narrow provisions making admissible certain copies of certain documents and records. Such provisions are simply small applications of the large principle stated in Revised Rule 63(17). It may be thought, therefore, that to leave these statutes in the books would make the codes needlessly prolix and untidy. It is our belief, however, that specific repeal of these provisions would be an intricate operation which would not

[3] See *infra* for a complete collection.

[4] The Utah Committee added a similar subdivision to its revision of the Uniform Rules which reads as follows:

"(32) *Statutory Exceptions to the Hearsay Rule Not Repealed.* All statements which are admissible under the provisions of the statutes of this state;" UTAH FINAL DRAFT 43.

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be worth the man-hours it would require to produce repeal and to make the adjustments incident to such repeal. We advise, therefore, against any attempt to effect specific repeal of the provisions in question.

If such provisions are not to be repealed specifically, what then? Our idea is to incorporate in the Revised Rules an amendment whereby such provisions are identified in terms of general reference and whereby in such terms it is provided for continuing the provisions in force. For this purpose we suggest adding Revised Rule 66.1 as follows:

> Rule 66.1. Nothing in Rules 62 to 66, inclusive, shall be construed to repeal by implication any other provision of law relating to hearsay evidence.

In evaluating this proposal it should be remembered that Revised Rule 66.1 would have no effect on those *general* code provisions which are coextensive or substantially coextensive with subdivisions (1) to (31) of Revised Rule 63, since under our proposed program such provisions would be specifically repealed. The sole purpose and proposed effect of Revised Rule 66.1 is to clarify the status of the numerous *special* code provisions which are consistent with or more liberal than subdivisions (1) to (31) of Revised Rule 63. As pointed out above, in our opinion these are too numerous and too much enmeshed with the various acts of which they are a part to make specific repeal a feasible venture. Moreover, it seems unwise to have the status of all such provisions in doubt. The only course remaining is, we think, to declare the continued vitality of these provisions. The purpose and intent of proposed Revised Rule 66.1 is to make such declaration.

Statutes to be Revised, Retained or Repealed

In this part we propose (1) to indicate all of the California legislation touching hearsay which our research has disclosed, and (2) to indicate how such legislation would be affected by the proposals set forth above.

All of the codes have been examined and also Deering's General Laws.

We shall first give the relevant provisions of the Code of Civil Procedure, next those of the Civil, Penal and Probate Codes, and thereafter those of other codes in the alphabetical order of such other codes.

Code of Civil Procedure

Section 17 provides in part:

> The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context: . . . 7. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories . . . .

Revised Rule 62(5) provides " 'State' includes each of the United States and the District of Columbia." Revised Rule 63(15) refers to

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"state or territory of the United States" and Revised Rule 63(19) refers to "state or nation."

It is recommended that subdivision (5) of Revised Rule 62 be omitted, as not needed in view of the provisions of Code of Civil Procedure Section 17(7). Although the latter defines "state" to include both the District of Columbia and the territories, this would not change the scope of Revised Rule 63(15), which expressly includes territories. Nor would it change what we suspect to be the intent of Revised Rule 63(19), namely that it is intended to apply to territorial records.

Section 273 provides:

> The report of the official reporter, or official reporter pro tempore of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings.

No repeal of Section 273; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 1846 provides:

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

No repeal of Section 1846. Possibly a witness's statements made at a hearing upon *private* or *ex parte* examination of the witness would not fall within the Revised Rule 63 definition of hearsay. Therefore, Section 1846 had better remain as a protection against such private or ex parte examination.

Section 1848 provides:

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

No repeal of Section 1848; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 1849 provides:

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

Repeal Section 1849. If a predecessor in interest is unavailable as a witness, his declarations against interest in regard to his title are admissible under Revised Rule 63(10). If the declarant is available as a witness, he may be called and asked about the subject matter of the declaration; and if he testifies inconsistently, the prior statement may then be shown under Revised Rule 63(1)(a) to prove the truth

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of its contents. Hence, Section 1849 has significance only if the declarant is unavailable and the statement cannot be classified as a declaration against interest.

The hearsay exception stated in this section—and the similar rule relating to the statements of joint owners, joint obligors and other persons with joint interests which is stated in Section 1870(5) of the Code of Civil Procedure—was apparently omitted from the Uniform Rules by design and not by inadvertence.

The Uniform Law Commissioners explain that subdivisions (7) through (9) of Rule 63—relating to admissions, adoptive admissions and vicarious admissions—''adopt the policy of Model Code Rules 506, 507 and 508.''[5] The American Law Institute explanation for omitting the hearsay exception for statements of predecessors and persons with joint interests is as follows:

> The common law rules covering the first three situations [declarations of joint obligors or joint obligees, declarations of joint tenants, and declarations of predecessors in interest] do not expressly require that the declaration be against the interest of the declarant. In the cases dealing with declarations of joint obligors and joint obligees, and joint tenants, the admitted declarations are always against such interest. In cases dealing with declarations of a predecessor in interest, the English courts admit only those affecting the quantity or quality of the declarant's interest, and all the admitted declarations are against interest. The American cases admit also declarations which affect only the declarant's power to convey. In all but two or three stray instances, the admitted declarations were against interest. There is no reason why a hearsay declaration . . . which is self serving or which has no indicium of verity should be received against the party merely because he happens to be in the relation of joint obligor, or joint owner, or predecessor in interest with the declarant. The application of the common law rules has resulted in absurd distinctions, particularly in bankruptcy actions and actions for wrongful death and on policies of insurance. This Rule, therefore, rejects the statement of the common law to this extent, and takes care of these declarations under Rule 509 [declarations against interest]. In so doing, it is contrary to only two or three decisions, none of which carefully considered the problem.[6]

The foregoing argument assumes the availability of the declarant, for under the Model Code all hearsay evidence was admissible if the declarant was unavailable. Although the Commissioners on Uniform State Laws rejected the Model Code's principle that hearsay from unavailable declarants should be admissible, they apparently accepted the reasons stated for omitting this common law exception to the hearsay rule. These reasons are as germane to our present problem as they were to the Model Code. Thus, to the extent that Section 1849 is significant, it states an unsound rule and should be repealed.

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[5] Comment, URE 63(7).
[6] Model Code pp. 252-53.

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Section 1850 provides:

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

Repeal Section 1850; this section, it seems, is the nineteenth century version of the so-called *res gestae* doctrine. It should be regarded as superseded by Revised Rule 63(4) and should be repealed.

Section 1851 provides:

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

Repeal Section 1851; it is superseded by Revised Rule 63(9)(c) and (21.1).

Section 1852 provides:

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

Repeal Section 1852; it is superseded by pedigree rules, Revised Rule 63(23)-(27).

Section 1853 provides:

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

Repeal Section 1853; it is superseded by Revised Rule 63(10).

Section 1854 provides:

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

No repeal of Section 1854. To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule. Under proposed Revised Rule 63(32) and Revised Rule 66.1, Section 1854 would be continued in operation.

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Section 1855a provides:

> When, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; (b) any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of title to real estate, whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstracts and notes, or either, taken from such records in the preparation and upkeeping of its, or his, plant in the ordinary course of its business, the same may, without further proof, be admitted in evidence for the purpose aforesaid. No proof of the loss of the original document or instrument shall be required other than the fact that the same is not known to the party desiring to prove its contents to be in existence; provided, nevertheless, that any party so desiring to use said evidence shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.

No repeal of Section 1855a; it remains in effect under Revised Rule 63(32) and Revised Rule 66.1. The destruction or loss of a document excuses nonproduction of the document as proof of its terms and lays a foundation for secondary evidence under both Code of Civil Procedure Section 1855 and Uniform Rule 70. If, however, such secondary evidence is hearsay, *e.g.*, a certificate or an affidavit (*cf. viva voce* testimony of a witness who testifies from present memory as to the terms of the document), we must find some exception to the hearsay rule to make it admissible. When the hearsay is in the form of a purported certificate, *i.e.*, a certified copy by the custodian of the public document, the evidence (though hearsay) is admissible under Revised Rule 63(17) and its Code of Civil Procedure counterparts. Section 1855a, however, deals with a special and different kind of hearsay, viz, the abstracts therein specified. These abstracts would not be made admissible by Revised Rule 63(17). Possibly they would be admissible under Revised Rule 63(13). In any event it seems wise to leave Section 1855a intact in order to be sure that the method of proof therein provided for continues in force.

Section 1870 provides in part:

> In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: . . .
>
> 2. The act, declaration, or omission of a party, as evidence against such party;

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

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;

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

7. The act, declaration, or omission forming part of a transaction, as explained in Section 1850;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter; . . .

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary; . . .

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree . . . .

Repeal *Section 1870(2);* it is superseded by Revised Rule 63(7). Note: Revised Rule 63(7) refers only to "statement." On the other hand Section 1870(2) refers to "act, declaration or omission." However, under Revised Rule 62(1) "statement" includes assertive acts or conduct. Under Revised Rule 63 only statements are hearsay. Thus nonassertive acts or omissions are admissible as nonhearsay. Thus Revised Rule 62(1) plus Revised Rule 63 plus Revised Rule 63(7) would cover the area of "act, declaration or omission" of a party now embraced by Section 1870(2).

Repeal *Section 1870(3);* it is superseded by Revised Rule 63(8)(b).

Repeal *Section 1870(4).* Clause one is superseded by Revised Rule 63(23); clause two is superseded by Revised Rule 63(10); clause three is superseded by Revised Rule 63(5).

Repeal *Section 1870(5).* The first sentence is superseded by Revised Rules 63(8)(a) and (9)(a). The second sentence should be repealed for the reason stated in connection with Section 1849; *supra.*

Repeal *Section 1870(6);* it is superseded by Revised Rule 63(9)(b).

Repeal *Section 1870(7);* it is superseded by Revised Rule 63(4)(b).

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Repeal *Section 1870(8);* it is superseded by Revised Rule 63(3) and (3.1).

Repeal *Section 1870(11);* it is superseded by Revised Rule 63(27).

Repeal *Section 1870(13);* it is superseded by Revised Rule 63(26), (26.1) and (27).

Section 1893 provides:

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

Repeal second clause of Section 1893; it is superseded by Revised Rule 63(17). Section 1888 defines "public writings" as:

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

Section 1894 divides public writings into four classes: "1. Laws; 2. Judicial records; 3. Other official documents; 4. Public records, kept in this State, of private writings." All other writings are private writings.[7]

Under these sections it has been repeatedly held that all writings by public officers in the course of their duties are not necessarily "public writings".[8] A record in a public office is a "public writing" only if it is itself an act or record of an act of a public officer.[9] In *Coldwell* v. *Board of Public Works,*[10] the Supreme Court held that "a large number of incompleted and unapproved maps, plans, estimates, studies, reports, and memoranda relating more or less directly to the Hetch Hetchy project, some of which [were] prepared or [were] in the course of preparation by the City Engineer's assistants, some of which [had] been left there by employees of previous administrations but none of which [had] been finally approved by the City Engineer or filed with the Board of Public Works or made a part of any public or official transaction"[11] were not public writings within the meaning of Section 1888 of the Code of Civil Procedure. The *Coldwell* case involved a citizen's attempt to secure by mandamus the right to view and make copies of certain documents and data in the City Engineer's office of the City of San Francisco. The petitioner relied on Section 1892 of the Code of Civil Procedure which gives all citizens the right to inspect and make copies of "public writings." The Supreme Court, however, held that this material did not constitute public writings until it received "some official approval." Until such time the documents could not "be considered the act or the record of an act of the City Engineer or the Board of Public Works."[12] Nonetheless, the court granted the peti-

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[7] CAL. CODE CIV. PROC. § 1889.
[8] Coldwell v. Board of Public Works, 187 Cal. 510, 202 Pac. 879 (1921); Pruett v. Burr, 118 Cal. App.2d 188, 257 P.2d 690 (1953).
[9] Mushet v. Department of Public Service, 35 Cal. App. 630, 170 Pac. 642 (1917).
[10] 187 Cal. 510, 202 Pac. 647 (1921).
[11] *Id.* at 513, 202 Pac. at 880.
[12] *Id.* at 519, 202 Pac. at 882.

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tioner the right to inspect the document upon the authority of Political Code Section 1032 (now Government Code Section 1227). This section states "the public records and other matters in the office of any officer" are open to the inspection of any citizen of the State. The Supreme Court held that, although the City Engineer's records were not public writings, they were "other matters" in the office of the City Engineer and, therefore, were open to inspection.

The second clause of Section 1893 provides that a copy of a "public writing," properly certified, is admissible as evidence with like effect as the original writing. Its narrow provisions are fully superseded by Revised Rule 63(17) which provides that a properly authenticated copy of any "writing in the custody of a public officer" is admissible to prove the content of the writing.

Section 1901 provides:

> A copy of a public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such writing.

Repeal Section 1901; it is superseded by Revised Rule 63(17).

Section 1905 provides:

> A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister State may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

Repeal Section 1905; it is superseded by Revised Rule 63(13), (15) and (17).

Sections 1906 and 1907 provide:

> 1906. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country.
>
> 1907. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:
>
> 1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

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2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

Repeal Sections 1906 and 1907; they are superseded by Revised Rule 63(13), (15) and (17).

Section 1918 provides:

Other official documents may be proved, as follows:

1. Acts of the executive of this state, by the records of the state department of the state; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the Legislature or congress, or either house thereof.

2. The proceedings of the Legislature of this state, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a county or municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such county or corporation.

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

7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and the copy is duly certified by the officer having the legal custody of the original, provided, that in any foreign country which is composed of or divided into sovereign and/or independent states or other political subdivisions, the certificate of the country or sovereign herein mentioned may be executed by either the chief executive or

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the head of the state department of the state, or other political subdivision of such foreign country in which said documents are lodged or kept, under the seal of such state or other political subdivision; and provided, further, that the signature of the sovereign of a foreign country or the signature of the chief executive or of the head of the state department of a state or political subdivision of a foreign country must be authenticated by the certificate of the minister or ambassador or a consul, vice consul or consular agent of the United States in such foreign country.

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof.

Repeal Section 1918; it is superseded by Revised Rules 63(13), (15) and (17) and Rule 68.

Section 1919 provides:

A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

Repeal Section 1919; it is superseded by Revised Rule 63(13), (15), (17) and (19).

Sections 1919a-1919b set up an elaborate system for proof by certified copy of the contents of church records.

No repeal of Sections 1919a-1919b; they continue in effect under Revised Rule 63(32) and Revised Rule 66.1. Revised Rule 63(17) does not seem to apply because church records are not "official" records and Revised Rule 63(17) applies to proof by certified copy only of official records. Sections 1919a and 1919b give us a means of proof not supplied by the Revised Rules and these sections should be retained.

Section 1920 provides:

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

Repeal Section 1920; it is superseded by Revised Rule 63(13) and (15).

Section 1920a provides:

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

Repeal Section 1920a. A "photographic copy" described in Section 1920a would, under Revised Rule 63(17) and Uniform Rule 1(13), be "a writing purporting to be a copy of an official record." Uniform Rule 1(13) and Revised Rule 63(17) therefore make such photographic copy admissible.

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Section 1920b provides:

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

No repeal of Section 1920b; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1. This section is much broader than Revised Rule 63(17), which covers certified *photographic* copies (*see above* under Section 1920a) but only such copies of *official* records. Section 1920b, however, extends to certified photographic copies of *any* record, document or paper. Section 1920b is a highly desirable provision, not incorporated in any of the provisions of the Uniform Rules or Revised Rules. It should be retained intact.

Section 1921 provides:

> A transcript from the record or docket of a justice of the peace of a sister State, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

Repeal Section 1921; it is superseded by Revised Rule 63(17).

Section 1925 provides:

> A certificate of purchase, or of location, of any lands in this State, issued or made in pursuance of any law of the United States, or of this State, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

No repeal of Section 1925; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

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Section 1926 provides:

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

Repeal Section 1926; it is superseded by Revised Rule 63(15).

Section 1927 provides:

> Whenever any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be prima facie evidence of the date of such location.

No repeal of Section 1926; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 1927.5 provides:

> Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as prima facie evidence in all the courts of this State with like force and effect as the originals and without proving the execution of such originals.

No repeal of Section 1926.5; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 1928 provides:

> A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.

No repeal of Section 1928; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

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

No repeal of Sections 1928.1-1928.4; these sections continue in effect under Revised Rule 63(32) and Revised Rule 66.1.

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Section 1936 provides:

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

Repeal Section 1936; it is superseded by Revised Rule 63(31).

Section 1946 provides:

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

Repeal Section 1946. Section 1946(1) is superseded by Revised Rule 63(10); Section 1946(2) is superseded by Revised Rule 63(13); Section 1946(3) is superseded by Revised Rule 63 and various specific exceptions that will continue under Revised Rule 63(32) and Revised Rule 66.1.

Section 1947 provides:

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

Repeal Section 1947; it is superseded by Revised Rule 63(13).

Section 1948 provides:

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

No repeal of Section 1948; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 1951 provides:

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

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conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

No repeal of Section 1951; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Sections 1953e-1953h. (Uniform Business Records as Evidence Act.)

Repeal Sections 1953e-1953h; these sections are superseded by Revised Rule 63(13).

Sections 2009-2015. (Use of affidavits.)

No repeal of Sections 2009-2015; these sections continue in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 2047 provides:

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

Repeal the second sentence of Section 2047; it is superseded by Revised Rule 63(1)(c).

Civil Code

Section 166	(Inventory prima facie evidence)
Section 224m	(Written statement relinquishing child reciting maker entitled to sole custody prima facie evidence of sole custody)
Section 226	(Statement of person in connection with adoption proceedings that person is entitled to custody of child prima facie evidence of fact)
Section 1183.5	(Certain recitals in military certificate or jurat prima facie evidence of truth thereof)
Section 1189	(Out-of-state certificate of acknowledgement prima facie evidence of facts stated in certificate)
Section 1190.1	(Certificate of acknowledgement by corporation prima facie evidence that instrument was act of corporation pursuant to by-laws)
Section 1207	(Certified copy of record of defectively executed instrument admissible)

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Section 1263	(Declaration of homestead prima facie evidence of facts stated)
Section 1810.2	(Certain record notation of mailing and date prima facie evidence of such mailing)
Section 2471	(Certain certified copies of entries by clerk and certain affidavits by printer presumptive evidence of facts stated)
Section 2924	(Certain recitals in deed prima facie evidence of facts recited)

No repeal of any of above provisions of the Civil Code. All continue in effect under Revised Rule 63(32) and Revised Rule 66.1.

Penal Code

Section 269b	(Recorded certificate of marriage or certified copy "proves the marriage" for purposes of prosecution for adultery)

No repeal of Section 269b; it is continued in operation by Revised Rule 63(32) and Revised Rule 66.1.

Section 315	(In prosecution for keeping house of ill-fame, character of house and inmates provable by reputation)

No repeal of Section 315; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 476a	(Notice of protest admissible as proof of presentation, nonpayment and protest)

No repeal of Section 476a; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 686 provides:

> In a criminal action the defendant is entitled:
> 1. To a speedy and public trial.
> 2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.
> 3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or can not with due diligence be found within the state; and except also that

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> in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who can not, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted.

Subdivision 3 of Section 686 now sets forth three exceptions to the right of 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 revised Rule 63(3) and (3.1) 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 should be revised by eliminating the specific exceptions for these situations and by substituting for them a general cross reference to admissible hearsay. The present statement of the conditions under which a deposition may be admitted should also be deleted, and in lieu of the deleted language there should be substituted language that accurately provides for the admission of depositions under Penal Code Sections 882, 1345 and 1362.

Section 939.6 provides:

> In the investigation of a charge, the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before the grand jury, furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in subdivision 3 of Section 686. The grand jury shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Repeal Section 939.6. Under Uniform Rule 2, the Uniform Rules seem to apply to grand jury investigations. Since this seems to be so and since Section 939.6 may be more restrictive than the Uniform Rules on the question of what is "legal evidence," it seems desirable to repeal the section.

Section 969(b) (Judicial and penitentiary records to establish prior conviction)

No repeal of Section 969(b); it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 1107 (In prosecution for forging note of corporation, incorporation provable by reputation)

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No repeal of Section 1107; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 1192.4 (Withdrawn plea of guilty may not be received in evidence)

No repeal of Section 1192.4 This section qualifies the admissions principle as stated in subdivision (7) of Revised Rule 63. However, no adjustment of the rule seems necessary. (See text *supra,* at pp. 593-94.)

Sections 1334.2–1334.3 (Certificate prima facie evidence under Uniform Act to secure the attendance of witnesses from without the state in criminal cases)

No repeal of Sections 1334.2–1334.3; these sections continue in effect under Revised Rule 63(32) and Revised Rule 66.1.

Section 4852.1 (Records admissible in application for restoration of rights)

No repeal of Section 4852.1; it continues in effect under Revised Rule 63(32) and Revised Rule 66.1.

Probate Code

Sections 329 and 372 (Proof of execution of will by establishing signature of subscribing witness)

No repeal of Sections 329 and 372; these sections continue in force under Revised Rule 63(32) and Revised Rule 66.1. See discussion in text, *supra* at p. 594.

Sections 351 and 374 (Certain former testimony admissible)

No repeal of Sections 351 and 374; these sections continue in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 545 (Certain entries in register of actions prima facie evidence)

No repeal of Section 545; it continues in operation under Revised Rule 63(32) and Revised Rule 66.1.

Section 712 (Claim presented by notary, certificate prima facie evidence of presentation and date)

No repeal of Section 712; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 853 (Decree directing executor or administrator to execute conveyance prima facie evidence of correctness of proceedings and authority to make conveyance)

No repeal of Section 853; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 1174 (Judgment establishing death prima facie evidence of death)

No repeal of Section 1174; it continues in operation under Revised Rule 63(32) and Revised Rule 66.1.

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Section 1192 (Decree determining identity of heir prima facie evidence of fact determined)

No repeal of Section 1192; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 1233 (Affidavits admissible in uncontested probate proceedings)

No repeal of Section 1233; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 1435.7 (Certain medical certificate prima facie evidence of facts stated therein)

Section 1461 (Certain affidavits prima facie evidence of facts stated therein)

Sections 1653–1654, 1662.5, and 1664 (Certain certificates prima facie evidence)

No repeal of any of foregoing. All continue in operation by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Agricultural Code

Section 160.97 (Proof of failure to file report creates presumption of no damage)

Section 438 (Certain records, reports, audits, certificates, findings, prima facie evidence)

Section 746.4 (Certain certificates prima facie evidence)

Section 751 (Like Section 746.4, *supra*)

Section 768 (Like Section 746.4, *supra*)

Section 772 (Like Section 746.4, *supra*)

Section 782 (Like Section 746.4, *supra*)

Section 892.5 (Certificates as to grade, quality and condition of barley prima facie evidence of truth)

Section 893 (Like Section 746.4, *supra*)

Section 920 (Written analysis of state Seed Laboratory prima facie evidence of true analysis)

Section 1040 (Like Section 746.4, *supra*)

Section 1272 (Like Section 746.4, *supra*)

No repeal of any of foregoing sections of Agricultural Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Business and Professions Code

Section 162 (Certificate of custodian of records of Department of Professional and Vocational Standards prima facie evidence of certain facts)

Section 1001 (Like Section 4809, *infra*)

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Section 2376	(Clerk's record of suspension or revocation of certificate to practice medicine prima facie evidence)
Section 4809	(Register of Board of Examiners in Veterinary Medicine prima facie evidence of matters contained therein)
Section 4881	(Like Section 2376, *supra*)
Section 6766	(Certificate of registration presumptive evidence of fact)
Section 8532	(Like Section 8923, *infra*)
Section 8923	(Certified copies of records in office of Yacht and Ship Brokers Commission admissible to same extent as original records)
Section 10078	(Like Section 8923, *supra*)
Section 14271	(Trade-mark registration prima facie evidence of ownership)
Section 20768	(Motor fuel pump license tag evidence of payment of license fee)

No repeal of any of foregoing sections of Business and Professions Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Corporations Code

Section 832	(Original or copy of by-laws or minutes prima facie evidence of adoption of by-laws, holding of meetings and action taken)
Section 833	(Corporate seals as prima facie evidence of execution)
Section 3904	(Certificate annexed to corporate conveyance prima facie evidence of facts authorizing conveyance)
Section 6500	(Copy of designation of process agent sufficient evidence of appointment)
Section 6503	(Certificate of Secretary of State of receipt of process prima facie evidence of such receipt)
Section 6600	(Copy of articles of foreign corporation prima facie evidence of incorporation)
Section 15011	("An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.")

No repeal of any of foregoing sections of Corporations Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

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Education Code

Section 12913	(Record of conviction admissible)
Sections 23258 and 23260	(Deed to Regents of University of California prima facie evidence of certain facts)
Section 16958	(Copy of resolution declaring need for student transportation district admissible)

No repeal of any of foregoing provisions of Education Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Financial Code

Section 252	(Papers executed by Superintendent of Banks admissible)
Section 255	(Reports by Superintendent of Banks prima facie evidence of facts stated in such reports)
Section 3010	(Certificate by Superintendent of Banks prima facie evidence of certain facts)
Section 9303	(Verified copies of minutes presumptive evidence of holding and action of meeting)
Section 9616	(Commissioner's written statement of his determination of assets prima facie evidence of correctness of determination)

No repeal of any of foregoing sections of Financial Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Government Code

Section 23211	(Verified petition prima facie evidence of facts stated)
Section 23326	(Like Section 23211, *supra*)
Section 25172	(Sheriff's return upon subpoena prima facie evidence)
Section 26662	(Return of sheriff on process or notices prima facie evidence of facts stated in return)
Section 27335	(Certified copy of record prima facie evidence of original stamp)
Section 38009	(Certain affidavit prima facie evidence of facts stated)
Section 39341	(Deed of street superintendent prima facie evidence of facts recited)
Section 40807	(Record with certificate prima facie evidence of contents, passage and publication of ordinance)
Section 50113	(Certain certified copies prima facie evidence of original)
Section 50433	(Proof of publication of notice by affidavit)

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Section 50443	(Resolution prima facie evidence of facts stated)
Section 53874	(Deed prima facie evidence)

No repeal of any of foregoing sections of Government Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Health and Safety Code

Section 10577	(Birth, death, marriage record prima facie evidence of facts stated)
Section 14840	(Certificate prima facie evidence of facts stated)
Section 24207	(Copy of resolution declaring need for air pollution control district, admissible)
Section 26339	(Certificate of Chief of Division of Laboratories and Chief of Bureau of Food and Drug Inspections prima facie evidence of facts therein stated)
Section 26563	(Like Section 26339, *supra*)

No repeal of any of foregoing sections of Health and Safety Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Insurance Code

Section 38	(Like Section 11022, *infra*)
Section 772	(Certain written statement prima facie evidence of certain facts)
Section 1740	(Certificate of Commissioner certifying facts found after hearing prima facie evidence of facts)
Section 1819	(Like Section 1740, *supra*)
Section 11014	(Commissioner's certificate prima facie evidence of existence of society)
Section 11022	(Affidavit of mailing prima facie evidence of mailing)
Section 11028	(Like Section 11022, *supra*)
Section 11030	(Printed copies of constitution of society prima facie evidence of legal adoption thereof)
Section 11139	(Commissioner's report prima facie evidence of facts stated)

No repeal of any of foregoing sections of Insurance Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

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Labor Code

Section 1304	(Failure to produce permit or certificate prima facie evidence of illegal employment)
Section 1813	(Failure to file report prima facie evidence of no emergency)
Section 1851	(Like Section 1813, *supra*)
Section 6507	(Admissibility of safety orders)

No repeal of any of foregoing provisions of Labor Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Public Resources Code

Section 2311	(Certificate of surveyor prima facie evidence)
Section 2318	(Notice and affidavit prima facie evidence of certain facts)
Section 2320	(Like Section 2318, *supra*)
Section 2322	(Record of location of mining claim admissible)
Section 2323	(Copy of record admissible)
Section 2606	(Grubstake contracts and prospecting agreements prima facie evidence)
Section 3234	(Classified records)
Section 3428	(Record of assessment prima facie evidence)
Section 5559	(Like Section 2318, *supra*)

No repeal of any of foregoing sections of Public Resources Code. All (save Section 3234) continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1. Section 3234 would continue effective in same way as Vehicle Code Section 20013. See text, *supra* at pp. 593-94.

Public Utilities Code

Section 1901	(Copies of documents and orders evidence in like manner as originals)
Section 14358	(Copy of order of exclusion prima facie evidence of exclusion)
Section 15531	(Great register sufficient evidence)
Section 17510	(Like Section 14358, *supra*)
Section 27258	(Like Section 14358, *supra*)

No repeal of any of foregoing provisions of Public Utilities Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Revenue and Taxation Code

Section 1842	(Statement of secretary of board prima facie evidence of certain facts)

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Section 1870	(Copy of order prima facie evidence of regularity of proceedings)
Section 2634	(Like Section 2862, *infra*)
Section 2862	(Roll showing unpaid taxes prima facie evidence of assessment and other matters)
Section 3004	(Like Section 2862, *supra*)
Section 3517	(Deed prima facie evidence of certain facts)
Section 3520	(Deed prima facie evidence)
Section 4376	(Abstract list showing unpaid taxes prima facie evidence of certain facts)
Section 6714	(Like Section 10075, *infra*)
Section 7981	(Copy of return prima facie evidence of certain facts)
Section 10075	(Certificate of State Board of Equalization prima facie evidence of certain facts)
Section 11473	(Like Section 10075, *supra*)
Section 12682	(Controller's certificate prima facie evidence of certain facts)
Section 12834	(Controller's lists prima facie evidence of certain facts contained therein)
Section 15576	(Appraiser's report prima facie evidence of value of gift)
Section 16122	(Controller's certificate prima facie evidence of imposition of tax)
Section 18600	(Certificate of Franchise Tax Board prima facie evidence of assessment)
Section 18647	(Certificate of Franchise Tax Board presumptive evidence of certain facts)
Section 18834	(Certificate of Franchise Tax Board prima facie evidence of certain facts)
Section 19403	(Like Section 18834, *supra*)
Section 23302	(Certificate of Secretary of State prima facie evidence of suspension or forfeiture)
Section 25669	(Certificate of Franchise Tax Board prima facie evidence of certain facts)
Section 25761b	(Findings of Franchise Tax Board presumptive evidence of certain facts)
Section 26252	(Like Section 25669, *supra*)
Section 30303	(Certificate of State Board of Equalization prima facie evidence of certain facts)

No repeal of any of foregoing sections of Revenue and Taxation Code. All continue in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

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Streets and Highways Code

Section 6614	(Bond prima facie evidence)
Sections 6768 and 6790	(Certificate prima facie evidence)
Section 10423	(Deed of tax collector prima facie evidence of matters it recites)
Section 22178	(Like Section 10423)

No repeal of any of the foregoing sections of the Streets and Highways Code. All continue in operation by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Unemployment Insurance Code

Section 1854	(Certificate prima facie evidence of certain facts)

No repeal of Section 1854; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Vehicle Code

Section 20013	(Accident report not admissible)

No repeal of Section 20013. See text, *supra* at pp. 593-94.

Section 40806	(On plea of guilty court may consider police report, giving defendant notice and opportunity to be heard)

No repeal of Section 40806; it continues in force under Revised Rule 63(32) and Revised Rule 66.1.

Section 40832	(Revocation or suspension of license by department not admissible in any civil action)

No repeal of Section 40832. See text, *supra* at pp. 593-94.

Sections 40833 and 16005	(Departmental action not evidence on issue of negligence)

No repeal of Sections 40833 and 16005. See text, *supra* at pp. 593-94.

Section 41103	(Proof of notice by certificate or affidavit)

No repeal of Section 41103; it continues in force by virtue of Revised Rule 63(32) and Revised Rule 66.1.

Welfare and Institutions Code

Section 5355	(Evidence of bad repute in proceedings to commit drug addict)
Section 6738	(Certificate prima facie evidence of sanity)

No repeal of Sections 5355 and 6738; these sections continue in force under Revised Rule 63(32) and Revised Rule 66.1.

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MJN 2309

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

proposing an

Evidence Code

January 1965

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

MJN 2310

MJN 2311

STATE OF CALIFORNIA EDMUND G. BROWN, Governor

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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.

To assist the Commission in the formulation of this recommendation, 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 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 recent legislation and court rules 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 in 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 Uniform Rules of Evidence, now published in Volume 6 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES, were published in pamphlet form between August 1962 and June 1964:

Article I. General Provisions (April 1964)
Article II. Judicial Notice (April 1964)
Burden of Producing Evidence, Burden of Proof, and Presumptions (Replacing Article III) (June 1964)
Article IV. Witnesses (March 1964)
Article V. Privileges (February 1964)
Article VI. Extrinsic Policies Affecting Admissibility (March 1964)
Article VII. Expert and Other Opinion Testimony (March 1964)
Article VIII. Hearsay Evidence (August 1962)
Article IX. Authentication and Content of Writings (January 1964)

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The nine pamphlets containing the tentative recommendations were widely distributed. Copies were sent to all organizations, officials, lawyers, judges, and law professors who had indicated that they would review and comment on the tentative recommendations. Numerous persons and organizations reviewed the tentative recommendations and furnished the Commission with suggested revisions, many of which are reflected in the proposed Evidence Code. Representatives of several organizations attended the Commission meetings at which the proposed code was considered.

The Commission also retained Professor Ronan E. Degnan (of the School of Law, University of California at Berkeley) to analyze and report on the statutory law contained in Part IV of the Code of Civil Procedure. His report enabled the Commission to integrate those portions of the Code of Civil Procedure relating to evidence with the substance of the revised tentative recommendations into a single, comprehensive Evidence Code.

In September 1964, a preliminary draft of the proposed Evidence Code was published as Preprint Senate Bill No. 1. Copies of the preprinted bill were distributed to interested persons and organizations and were made available to members of the bench and bar at the annual meeting of the State Bar in Santa Monica in October 1964.

While the Commission was reviewing and revising the preprinted bill prior to the 1965 legislative session, many of the groups that had commented on the tentative recommendations continued to provide the Commission with valuable suggestions concerning both the form and content of the proposed Evidence Code. Numerous other persons and organizations also reviewed the preprinted bill and many of their suggestions are incorporated in the proposed code.

Thus, although this recommendation is the responsibility of the Law Revision Commission, it reflects the contributions of many persons throughout the State whose efforts have contributed materially to the quality of the final product. The Commission's indebtedness to many of these persons is recorded in the list of acknowledgments that follows.

Respectfully submitted,

JOHN R. MCDONOUGH, JR.
Chairman

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ACKNOWLEDGMENTS

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, Clark L. Bradley, Leonard J. Dieden, George G. Grover, Roy A. Gustafson, Bert W. Levit, Charles H. Matthews, Stanford C. Shaw, Vaino H. Spencer, Samuel D. Thurman, and Pearce Young.

Professor James H. Chadbourn (of the Harvard Law School) and Professor Ronan E. Degnan (of the School of Law, University of California at Berkeley), 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.

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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.

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Beverly Hills Bar Association
Colusa County Bar Association
Compton Judicial District Bar Ass'n
Hollywood Bar Association
Lassen County Bar Association
Long Beach Bar Association
Marin County Bar Association
Merced County Bar Association
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* See the introductory note to this table.

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OUTLINE OF PROPOSED LEGISLATION

EVIDENCE CODE

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Sec.
1. Short title.
2. Common law rule construing code abrogated.
3. Constitutionality.
4. Construction of code.
5. Effect of headings.
6. References to statutes.
7. "Division," "chapter," "article," "section," "subdivision," and "paragraph."
8. Construction of tenses.
9. Construction of genders.
10. Construction of singular and plural.
11. "Shall" and "may."
12. Code effective January 1, 1967.

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105. "Action."
110. "Burden of producing evidence."
115. "Burden of proof."
120. "Civil action."
125. "Conduct."
130. "Criminal action."
135. "Declarant."
140. "Evidence."
145. "The hearing."
150. "Hearsay evidence."
160. "Law."
165. "Oath."
170. "Perceive."
175. "Person."
180. "Personal property."
185. "Property."
190. "Proof."
195. "Public employee."
200. "Public entity."
205. "Real property."
210. "Relevant evidence."
220. "State."
225. "Statement."
230. "Statute."
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240. "Unavailable as a witness."
245. "Verbal."
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CHAPTER 2. PROVINCE OF COURT AND JURY

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311. Determination of foreign law.
312. Jury as trier of fact.

CHAPTER 3. ORDER OF PROOF

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320. Power of court to regulate order of proof.

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351. Admissibility of relevant evidence.
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353. Effect of erroneous admission of evidence.
354. Effect of erroneous exclusion of evidence.
355. Limited admissibility.
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401. "Proffered evidence."
402. Procedure for determining foundational and other preliminary facts.
403. Determination of foundational and other preliminary facts where relevancy, personal knowledge, or authenticity is disputed.
404. Determination of whether proffered evidence is incriminatory.
405. Determination of foundational and other preliminary facts in other cases.
406. Evidence affecting weight or credibility.

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411. Direct evidence of one witness sufficient.
412. Party having power to produce better evidence.
413. Party's failure to explain or deny evidence.

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450. Judicial notice may be taken only as authorized by law.
451. Matters which must be judicially noticed.
452. Matters which may be judicially noticed.
453. Compulsory judicial notice upon request.
454. Information that may be used in taking judicial notice.
455. Opportunity to present information to court.
456. Noting for record denial of request to take judicial notice.
457. Instructing jury on matter judicially noticed.
458. Judicial notice by trial court in subsequent proceedings.
459. Judicial notice by reviewing court.

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501. Burden of proof in criminal action generally.
502. Instructions on burden of proof.

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521. Claim that person did not exercise care.
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638. Ownership of property by person who exercises acts of ownership.
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EXISTING CODES: AMENDMENTS, ADDITIONS, AND REPEALS

BUSINESS AND PROFESSIONS CODE

Section 2904 (Repealed)
Section 5012 (Amended)
Section 25009 (Amended)

CIVIL CODE

Section 53 (Amended)
Section 164.5 (Added)
Section 193 (Repealed)
Section 194 (Repealed)
Section 195 (Repealed)
Section 3544 (Added)
Section 3545 (Added)
Section 3546 (Added)
Section 3547 (Added)
Section 3548 (Added)

CODE OF CIVIL PROCEDURE

Section 1 (Amended)
Section 117g (Amended)
Section 125 (Amended)
Section 153 (Amended)
Section 433 (Amended)
Section 631.7 (Added)
Section 1256.2 (Repealed)
Section 1747 (Amended)
Title of Part IV (Amended)
Section 1823 (Repealed)
Section 1824 (Repealed)
Section 1825 (Repealed)
Section 1826 (Repealed)
Section 1827 (Repealed)
Section 1828 (Repealed)
Section 1829 (Repealed)
Section 1830 (Repealed)
Section 1831 (Repealed)
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Section 1839 (Repealed)
Section 1844 (Repealed)
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Section 1846 (Repealed)
Section 1847 (Repealed)
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Section 1849 (Repealed)
Section 1850 (Repealed)
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Section 1883 (Repealed)
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Section 1885 (Repealed)
Section 1893 (Amended)
Section 1901 (Repealed)
Section 1903 (Repealed)
Section 1905 (Repealed)
Section 1906 (Repealed)
Section 1907 (Repealed)
Section 1908.5 (Added)
Section 1918 (Repealed)
Section 1919 (Repealed)
Section 1919a (Repealed)
Section 1919b (Repealed)
Section 1920 (Repealed)
Section 1920a (Repealed)
Section 1920b (Repealed)
Section 1921 (Repealed)
Section 1922 (Repealed)
Section 1923 (Repealed)
Section 1924 (Repealed)
Section 1925 (Repealed)
Section 1926 (Repealed)
Section 1927 (Repealed)
Section 1927.5 (Repealed)
Section 1928 (Repealed)

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CODE OF CIVIL PROCEDURE—Continued

Sections 1928.1-1928.4 (Repealed)
- Section 1928.1 (Repealed)
- Section 1928.2 (Repealed)
- Section 1928.3 (Repealed)
- Section 1928.4 (Repealed)

Section 1936 (Repealed)
Section 1936.1 (Repealed)
Section 1937 (Repealed)
Section 1938 (Repealed)
Section 1939 (Repealed)
Section 1940 (Repealed)
Section 1941 (Repealed)
Section 1942 (Repealed)
Section 1943 (Repealed)
Section 1944 (Repealed)
Section 1945 (Repealed)
Section 1946 (Repealed)
Section 1947 (Repealed)
Section 1948 (Repealed)
Section 1951 (Repealed)

Sections 1953e-1953h (Repealed)
- Section 1953e (Repealed)
- Section 1953f (Repealed)
- Section 1953f.5 (Repealed)
- Section 1953g (Repealed)
- Section 1953h (Repealed)

Sections 1953i-1953*l* (Repealed)
- Section 1953i (Repealed)
- Section 1953j (Repealed)
- Section 1953k (Repealed)
- Section 1953*l* (Repealed)

Section 1954 (Repealed)

Sections 1957-1963 (Repealed)
- Section 1957 (Repealed)
- Section 1958 (Repealed)
- Section 1959 (Repealed)
- Section 1960 (Repealed)
- Section 1961 (Repealed)
- Section 1962 (Repealed)
- Section 1963 (Repealed)

Section 1967 (Repealed)
Section 1968 (Repealed)
Section 1973 (Repealed)
Section 1974 (Amended)
Section 1978 (Repealed)

Sections 1980.1-1980.7 (Repealed)
- Section 1980.1 (Repealed)
- Section 1980.2 (Repealed)
- Section 1980.3 (Repealed)
- Section 1980.4 (Repealed)
- Section 1980.5 (Repealed)
- Section 1980.6 (Repealed)
- Section 1980.7 (Repealed)

Sections 1981-1983 (Repealed)
- Section 1981 (Repealed)
- Section 1982 (Repealed)
- Section 1983 (Repealed)

Section 1998 (Repealed)
Section 1998.1 (Repealed)
Section 1998.2 (Repealed)
Section 1998.3 (Repealed)
Section 1998.4 (Repealed)
Section 1998.5 (Repealed)
Section 2009 (Amended)
Section 2016 (Amended)

Sections 2042-2056 (Repealed)
- Section 2042 (Repealed)
- Section 2043 (Repealed)
- Section 2044 (Repealed)
- Section 2045 (Repealed)
- Section 2046 (Repealed)
- Section 2047 (Repealed)
- Section 2048 (Repealed)
- Section 2049 (Repealed)
- Section 2050 (Repealed)
- Section 2051 (Repealed)
- Section 2052 (Repealed)
- Section 2053 (Repealed)
- Section 2054 (Repealed)
- Section 2055 (Repealed)
- Section 2056 (Repealed)

Section 2061 (Repealed)
Section 2065 (Repealed)
Section 2066 (Repealed)
Section 2078 (Repealed)
Section 2079 (Repealed)

Sections 2101-2103 (Repealed)
- Section 2101 (Repealed)
- Section 2102 (Repealed)
- Section 2103 (Repealed)

CORPORATIONS CODE

Section 6602 (Amended)
Section 25310 (Amended)

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GOVERNMENT CODE

Section 11513 (Amended)
Section 19580 (Amended)

HEALTH AND SAFETY CODE

Section 3197 (Amended)

PENAL CODE

Section 270e (Amended)
Section 686 (Amended)
Section 688 (Amended)
Section 939.6 (Amended)
Section 961 (Amended)
Section 963 (Amended)
Section 1120 (Amended)
Section 1322 (Repealed)
Section 1323 (Repealed)
Section 1323.5 (Repealed)
Section 1345 (Amended)
Section 1362 (Amended)

PUBLIC UTILITIES CODE

Section 306 (Amended)

OPERATIVE DATE OF AMENDMENTS, ADDITIONS, AND REPEALS

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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. Iso-

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lated 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

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—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 similar 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

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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 reasonable 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.

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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.

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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.* 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 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

* 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.

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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. *Cross-References* are also included to facilitate the use of this recommendation. The references contained in these *Cross-References* are for convenience only; the inclusion or omission of a particular reference in no way reflects the Commission's intent in regard to the recommendation. References that are pertinent to all or nearly all of the sections in a division appear in the *Cross-References* at the head of the division instead of under each section. Both sectional and divisional *Cross-References* should be consulted to obtain a list of important references that pertain to a particular section. Where an existing code section is mentioned in the *Cross-References,* the portion of the proposed legislation containing amendments, additions, and repeals of existing statutes should be consulted to determine whether the section referred to is amended by the proposed legislation.

A summary of each division of the code and a discussion of its effect on existing law appear 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 defined 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 405 makes a significant change, however: It provides that the judge's rulings on the admissibility of confessions, dying declarations, and spontaneous statements are final, *i.e.,* the jury does not redetermine the question of admissibility after the judge has ruled.

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 re-

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quested 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 when judicial notice is to 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; Presumptions and Inferences. Division 5 deals with the burden of proof, the burden of producing evidence, and presumptions and inferences. 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 dead man statute is not continued; instead, a hearsay exception (Section 1261) is created to equalize the position of the estate with that of the claimant. 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 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 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

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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 inconsistent 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.

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PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to establish an Evidence Code, thereby consolidating and revising the law relating to evidence; amending various sections of the Business and Professions Code, Civil Code, Code of Civil Procedure, Corporations Code, Government Code, Health and Safety Code, Penal Code, and Public Utilities Code to make them consistent therewith; adding Sections 164.5, 3544, 3545, 3546, 3547, and 3548 to the Civil Code; adding Sections 631.7 and 1908.5 to the Code of Civil Procedure; and repealing legislation inconsistent therewith.

The people of the State of California do enact as follows:

SECTION 1. The Evidence Code is enacted, to read:

EVIDENCE CODE

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

§ 1. Short title

1. This code shall be known as the Evidence Code.

Comment. This section is similar to comparable sections in recently enacted California codes. *E.g.*, VEHICLE CODE § 1. See also CODE CIV. PROC. §§ 1, 19.

§ 2. Common law rule construing code abrogated

2. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. This code establishes the law of this State respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

Comment. This section is substantially the same as Section 4 of the Code of Civil Procedure.

CROSS-REFERENCES

Similar provisions:
- Civil Code § 4
- Code of Civil Procedure § 4
- Penal Code § 4

§ 3. Constitutionality

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

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Comment. Section 3 is the same as Section 1108 of the Commercial Code. See also, *e.g.*, VEHICLE CODE § 5. This general "severability" provision permits the repeal of comparable provisions applicable to specific sections formerly compiled in the Code of Civil Procedure that are now compiled in the Evidence Code and makes it unnecessary to include similar provisions in future amendments to this code. See CODE CIV. PROC. § 1928.4 (superseded by the Evidence Code).

CROSS-REFERENCES

Definition:
Person, see § 175

§ 4. Construction of code

4. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 6.

§ 5. Effect of headings

5. Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

Comment. Similar provisions appear in all the existing California codes except the Civil Code, the Commercial Code, and the Code of Civil Procedure. *E.g.*, VEHICLE CODE § 7.

§ 6. References to statutes

6. Whenever any reference is made to any portion of this code or of any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 10.

CROSS-REFERENCES

Definition:
Statute, see § 230

§ 7. "Division," "chapter," "article," "section," "subdivision," and "paragraph"

7. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Chapter" means a chapter of the division in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

(f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

Comment. Somewhat similar provisions appear in various California codes. *E.g.*, VEHICLE CODE § 11. See also CODE CIV. PROC. § 17(8).

§ 8. Construction of tenses

8. The present tense includes the past and future tenses; and the future, the present.

Comment. This is a standard provision in various California codes. *E.g.,* VEHICLE CODE § 12. See also CODE CIV. PROC. § 17.

§ 9. Construction of genders

9. The masculine gender includes the feminine and neuter.

Comment. This is a standard provision in various California codes. *E.g.,* VEHICLE CODE § 13. See also CODE CIV. PROC. § 17.

§ 10. Construction of singular and plural

10. The singular number includes the plural; and the plural, the singular.

Comment. This is a standard provision in various California codes. *E.g.,* VEHICLE CODE § 14. See also CODE CIV. PROC. § 17.

§ 11. "Shall" and "may"

11. "Shall" is mandatory and "may" is permissive.

Comment. This is a standard provision in various California codes. *E.g.,* VEHICLE CODE § 15.

§ 12. Code effective January 1, 1967

12. This code shall become operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date and also further proceedings in actions pending on that date. The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.

Comment. The delayed operative date provides time for California judges and attorneys to become familiar with the code before it goes into effect. Section 12 makes it clear that the Evidence Code governs all proceedings after December 31, 1966. Thus, if the trial court makes a ruling on the admission of evidence prior to January 1, 1967, such ruling is not affected by the enactment of the Evidence Code; if an appeal is taken from the ruling, Section 12 requires the appellate court to apply the law applicable at the time the ruling was made. On the other hand, any ruling made by the trial court on the admission of evidence after December 31, 1966, is governed by the Evidence Code, even if the trial of the particular action was commenced prior to that date.

CROSS-REFERENCES

Definition:
  Action, see § 105
Privileges, scope of application of, see §§ 901, 910, 920

DIVISION 2. WORDS AND PHRASES DEFINED

Comment. Division 2 contains definitions of general application only. Words and phrases that have special significance only to a particular division or article are defined in the division or article in which the defined term is used. For example, Sections 900-905 define terms that are used only in Division 8 (Privileges), and Sections 950-953 define terms that are used in the article relating to the lawyer-client privilege. Some additional sections of general application that are of a definitional nature include Sections 7-11 in Division 1.

CROSS-REFERENCES

Construction of code generally:
- Gender, see § 9
- Plural number, see § 10
- Singular number, see § 10
- Tense, see § 8

Other definitions of general application:
- Article, see § 7
- Authentication of a writing, see § 1400
- Chapter, see § 7
- Cross-examination, see § 761
- Direct examination, see § 760
- Division, see § 7
- Inference, see § 600
- Leading question, see § 764
- May, see § 11
- Paragraph, see § 7
- Presumption, see § 600
- Presumption affecting the burden of producing evidence, see § 603
- Presumption affecting the burden of proof, see § 605
- Redirect examination, see § 762
- Recross-examination, see § 763
- Section, see § 7
- Shall, see § 11
- Subdivision, see § 7

§ 100. Application of definitions

100. Unless the provision or context otherwise requires, these definitions govern the construction of this code.

Comment. Section 100 is a standard provision found in the definitional portion of recently enacted California codes. See, *e.g.,* VEHICLE CODE § 100.

§ 105. "Action"

105. "Action" includes a civil action and a criminal action.

Comment. Defining the word "action" to include both a civil action or proceeding and a criminal action or proceeding eliminates the necessity of repeating "civil action and criminal action" in numerous code sections.

CROSS-REFERENCES

Definitions:
- Civil action, see § 120
- Criminal action, see § 130

§ 110. "Burden of producing evidence"

110. "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

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Comment. The phrases defined in Sections 110 and 115 provide a convenient means for distinguishing between the burden of *proving a fact* and the burden of *going forward* with the evidence. They recognize a distinction that is well established in California. WITKIN, CALIFORNIA EVIDENCE §§ 53-60 (1958). The practical effect of the distinction is discussed in the *Comments* to Division 5 (commencing with Section 500), especially in the *Comments* to Sections 500 and 550.

The second paragraph of Section 115 makes it clear that "burden of proof" refers to the burden of proving the fact in question by a preponderance of the evidence unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, or decisional law. See the definition of "law" in EVIDENCE CODE § 160.

CROSS-REFERENCES

Assignment of burden of producing evidence, see § 550
Definition:
Evidence, see § 140
Presumptions affecting burden of producing evidence, see §§ 603, 604, 607, 630

§ 115. "Burden of proof"

115. "Burden of proof" means the obligation of a party to meet the requirement of a rule of law that he raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

Comment. See the *Comment* to Section 110.

CROSS-REFERENCES

Assignment of burden of proof, see §§ 500–522
Definitions:
Law, see § 160
Proof, see § 190
Presumptions affecting burden of proof, see §§ 605–607, 660

§ 120. "Civil action"

120. "Civil action" includes all actions and proceedings other than a criminal action.

Comment. Defining "civil action" to include civil proceedings eliminates the necessity of repeating "civil action or proceeding" in numerous code sections, and, together with the definition of "criminal action" in Section 130, it assures the applicability of the Evidence Code to all actions and proceedings. See EVIDENCE CODE § 300.

CROSS-REFERENCES

Definition:
Criminal action, see § 130

§ 125. "Conduct"

125. "Conduct" includes all active and passive behavior, both verbal and nonverbal.

Comment. This broad definition of "conduct" is self-explanatory.

CROSS-REFERENCES

Definition:
Verbal, see § 245

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§ 130. "Criminal action"

130. "Criminal action" includes criminal proceedings.

Comment. See the *Comment* to Section 120.

§ 135. "Declarant"

135. "Declarant" is a person who makes a statement.

Comment. Ordinarily, the word "declarant" is used in the Evidence Code to refer to a person who makes a hearsay statement as distinguished from the witness who testifies to the content of the statement. See EVIDENCE CODE § 1200 and the *Comment* thereto.

CROSS-REFERENCES

Definition:
Statement, see § 225

§ 140. "Evidence"

140. "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Comment. "Evidence" is defined broadly to include the testimony of witnesses, tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof. The definition includes anything offered in evidence whether or not it is technically inadmissible and whether or not it is received. For example, Division 10 (commencing with Section 1200) uses "evidence" to refer to hearsay which may be excluded as inadmissible but which may be admitted if no proper objection is made. Thus, when inadmissible hearsay or opinion testimony is admitted without objection, this definition makes it clear that it constitutes evidence that may be considered by the trier of fact.

Section 140 is a better statement of existing law than Code of Civil Procedure Section 1823, which is superseded by Section 140. Although Section 1823 by its terms restricts "judicial evidence" to that "sanctioned by law," the general principle is well established that matter which is technically inadmissible under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if it is offered and received in evidence without proper objection or motion to strike. *E.g., People v. Alexander,* 212 Cal. App.2d 84, 98, 27 Cal. Rptr. 720, 727 (1963) ("illustrations of this principle are numerous and cover a wide range of evidentiary topics such as incompetent hearsay, secondary evidence violating the best evidence rule, inadmissible opinions, lack of foundation, incompetent, privileged or unqualified witnesses, and violations of the parol evidence rule"). See WITKIN, CALIFORNIA EVIDENCE §§ 723-724 (1958).

Under this definition, a presumption is not evidence. See also EVIDENCE CODE § 600 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Proof, see § 190
Writing, see § 250

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Judicial notice as substitute for evidence, see § 457
Jury view:
  Civil case, see Code of Civil Procedure § 610
  Criminal case, see Penal Code § 1119
Presumption not evidence, see § 600

§ 145. "The hearing"

145. "The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.

Comment. "The hearing" is defined to mean the hearing at which the particular question under the Evidence Code arises and, unless a particular provision or its context otherwise indicates, not some earlier or later hearing. This definition is much broader than would be a reference to the trial itself; the definition includes, for example, preliminary hearings and post-trial proceedings.

§ 150. "Hearsay evidence"

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

Comment. Because of its special significance to Division 10, the substantive definition of "hearsay evidence" is contained in Section 1200. See the *Comment* to Section 1200.

§ 160. "Law"

160. "Law" includes constitutional, statutory, and decisional law.

Comment. This definition makes it clear that a reference to "law" includes the law established by judicial decisions as well as by constitutional and statutory provisions.

§ 165. "Oath"

165. "Oath" includes affirmation.

Comment. Similar definitions are found in other California codes. *E.g.*, VEHICLE CODE § 16.

§ 170. "Perceive"

170. "Perceive" means to acquire knowledge through one's senses.

Comment. This definition is self-explanatory.

§ 175. "Person"

175. "Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, or public entity.

Comment. This broad definition is similar to definitions found in other codes. *E.g.*, GOVT. CODE § 17; VEHICLE CODE § 470. See also CODE CIV. PROC. § 17.

CROSS-REFERENCES

Definition:
  Public entity, see § 200

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§ 180. "Personal property"

180. "Personal property" includes money, goods, chattels, things in action, and evidences of debt.

Comment. This definition is the same as the definition of "personal property" in Section 17(3) of the Code of Civil Procedure.

CROSS-REFERENCES

"Real property" defined, see § 205

§ 185. "Property"

185. "Property" includes both real and personal property.

Comment. This definition is the same as the definition of "property" in Section 17(1) of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
Personal property, see § 180
Real property, see § 205

§ 190. "Proof"

190. "Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Comment. This definition is more accurate than the definition of "proof" in Code of Civil Procedure Section 1824, which is superseded by Section 190. The disjunctive reference to "the trier of fact or the court" is needed because, even when the jury is the trier of fact, the court is required to determine preliminary questions of fact on the basis of proof.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Trier of fact, see § 235

§ 195. "Public employee"

195. "Public employee" means an officer, agent, or employee of a public entity.

Comment. This definition specifically includes public officers and agents, thereby eliminating any distinction between employees and officers and making it unnecessary to repeat the phrase "officer, agent, or employee" in numerous code sections.

CROSS-REFERENCES

Definition:
Public entity, see § 200

§ 200. "Public entity"

200. "Public entity" includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

Comment. The broad definition of "public entity" includes every form of public authority, both foreign and domestic. Occasionally, "public entity" is used in the Evidence Code with limiting language to

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refer specifically to entities within this State or the United States. *E.g.*, EVIDENCE CODE § 452(b). *Cf.* EVIDENCE CODE § 452(f).

CROSS-REFERENCES

Definition:
State, see § 220

§ 205. "Real property"

205. "Real property" includes lands, tenements, and hereditaments.

Comment. This definition is substantially the same as the definition of "real property" in Section 17(2) of the Code of Civil Procedure.

CROSS-REFERENCES

"Personal property" defined, see § 180

§ 210. "Relevant evidence"

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

Comment. This definition restates existing law. *E.g.*, *Larson v. Solbakken,* 221 Cal. App.2d 410, 419, 34 Cal. Rptr. 450, 455 (1963); *People v. Lint,* 182 Cal. App.2d 402, 415, 6 Cal. Rptr. 95, 102-103 (1960). Thus, under Section 210, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred. This retains existing law as found in subdivisions 1 and 15 of Code of Civil Procedure Section 1870, which are superseded by the Evidence Code. In addition, Section 210 makes it clear that evidence relating to the credibility of witnesses and hearsay declarants is "relevant evidence." This restates existing law. See CODE CIV. PROC. §§ 1868, 1870(16) (credibility of witnesses), which are superseded by the Evidence Code, and *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 339-340, 569-575 (1964) (credibility of hearsay declarants).

CROSS-REFERENCES

Definitions:
Action, see § 105
Declarant, see § 135
Evidence, see § 140
Proof, see § 190

§ 220. "State"

220. "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States.

Comment. This definition is more precise than the comparable definition found in Section 17(7) of the Code of Civil Procedure. For example, Section 220 makes it clear that "state" includes Puerto Rico,

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even though Puerto Rico is now a "commonwealth" rather than a "territory."

§ 225. "Statement"

225. "Statement" means (a) a verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for a verbal expression.

Comment. The significance of this definition is explained in the *Comment* to Evidence Code Section 1200.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Verbal, see § 245

§ 230. "Statute"

230. "Statute" includes a provision of the Constitution.

Comment. In the Evidence Code, "statute" includes a constitutional provision. Thus, for example, when a particular section is subject to any exceptions "otherwise provided by statute," exceptions provided by the Constitution also are applicable.

§ 235. "Trier of fact"

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

Comment. "Trier of fact" is defined to include not only the jury but also the court when it is trying an issue of fact without a jury. The definition is not exclusive; a referee, court commissioner, or other officer conducting proceedings governed by the Evidence Code may be a trier of fact. See EVIDENCE CODE § 300.

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 240. "Unavailable as a witness"

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;

(2) Disqualified from testifying to the matter;

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;

(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement

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or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

Comment. Usually, the phrase "unavailable as a witness" is used in the Evidence Code to state the condition that must be met whenever the admissibility of hearsay evidence is dependent upon the declarant's present unavailability to testify. See, *e.g.*, EVIDENCE CODE §§ 1241, 1251, 1291, 1292, 1310, 1311, 1323. See also CODE CIV. PROC. § 2016(c)(3) and PENAL CODE §§ 1345 and 1362, relating to depositions.

"Unavailable as a witness" includes, in addition to cases where the declarant is physically unavailable (*i.e.*, dead, insane, or beyond the reach of the court's process), situations in which the declarant is legally unavailable (*i.e.*, prevented from testifying by a claim of privilege or disqualified from testifying). Of course, if the declaration made out of court is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege does not make the declaration admissible. The exceptions to the hearsay rule that are set forth in Division 10 (commencing with Section 1200) of the Evidence Code do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law—such as privilege—which makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule. Accordingly, the hearsay exceptions permit the introduction of evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or is not inadmissible for some other reason.

Section 240 substitutes a uniform standard for the varying standards of unavailability provided by the superseded Code of Civil Procedure sections providing hearsay exceptions. *E.g.*, CODE CIV. PROC. § 1870 (4), (8). The conditions constituting unavailability under these superseded sections vary from exception to exception without apparent reason. Under some of these sections, the evidence is admissible if the declarant is dead; under others, the evidence is admissible if the declarant is dead or insane; under still others, the evidence is admissible if the declarant is absent from the jurisdiction. Despite the express language of these superseded sections, Section 240 may, to a considerable extent, restate existing law. *Compare People v. Spriggs*, 60 Cal.2d 868, 875, 36 Cal. Rptr. 841, 845, 389 P.2d 377, 381 (1964) (generally consistent with Section 240), *with* the older cases, some but not all of which are inconsistent with the *Spriggs* case and with Section 240. See the cases cited in *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 411 note 7 (1964).

CROSS-REFERENCES

Definitions:
- Declarant, see § 135
- Hearing, see § 145
- Statement, see § 225

Disqualification of witness, see §§ 700–701
Privileges, see §§ 900–1073

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§ 245. "Verbal"

245. "Verbal" includes both oral and written words.

Comment. The word "verbal" is defined to avoid the necessity of repeating "oral or written" in various sections of the code.

CROSS-REFERENCES

Definition:
Writing, see § 250

§ 250. "Writing"

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

Comment. "Writing" is defined very broadly to include all forms of tangible expression, including pictures and sound recordings.

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DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

§ 300. Applicability of code

300. Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a district court of appeal, superior court, municipal court, or justice court, including proceedings conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.

Comment. Section 300 makes the Evidence Code applicable to all proceedings conducted by California courts except those court proceedings to which it is made inapplicable by statute. The provisions of the code do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them.

Various code sections—in the Evidence Code as well as in other codes—make the provisions of the Evidence Code applicable to a certain extent in proceedings other than court proceedings. *E.g.,* GOVT. CODE § 11513 (a finding in a proceeding conducted under the Administrative Procedure Act may not be based on hearsay evidence unless the evidence would be admissible over objection in a civil action); PENAL CODE § 939.6 (a grand jury, in investigating a charge, may receive only evidence admissible over objection in a criminal action); EVIDENCE CODE § 910 (provisions of the Evidence Code relating to privileges are applicable in all proceedings of every kind in which testimony can be compelled to be given); and EVIDENCE CODE § 1566 (Sections 1560–1565 are applicable in nonjudicial proceedings).

Section 300 does not affect any other statute relaxing rules of evidence for specified purposes. See, *e.g.,* CODE CIV. PROC. § 117g (judge of small claims court may make informal investigation either in or out of court), § 1768 (hearing of conciliation proceeding to be conducted informally), § 2016(b) (inadmissibility of testimony at trial is not ground for objection to testimony sought from a deponent, provided that such testimony is reasonably calculated to lead to the discovery of admissible evidence); PENAL CODE § 1203 (judge must consider probation officer's investigative report on question of probation); WELF. & INST. CODE § 706 (juvenile court must consider probation officer's social study in determining disposition to be made of ward or dependent child).

CROSS-REFERENCES

Criminal action, applicability of rules of evidence, see Penal Code § 1102
Definitions:
  Action, see § 105
  Statute, see § 230
Grand jury proceedings, applicability of rules of evidence, see Penal Code § 939.6
See also the statutes cited in the *Comment*

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CHAPTER 2. PROVINCE OF COURT AND JURY

§ 310. Questions of law for court

310. All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4.

Comment. Section 310 restates the substance of and supersedes the first sentence of Section 2102 of the Code of Civil Procedure.

CROSS-REFERENCES

Comment on evidence, see Constitution, Art. I, § 13; Art. VI, § 19; Penal Code § 1127
Criminal action, questions for court and jury, see Penal Code §§ 1124-1127
Definitions:
  Evidence, see § 140
  Law, see § 160
  Statute, see § 230
  Writing, see § 250
Issue of law, trial by court, see Code of Civil Procedure § 591
Judicial notice, see §§ 450-459
Office of judge in construing statute or instrument, see Code of Civil Procedure § 1858
Preliminary determinations on admissibility of evidence, see §§ 400-406

§ 311. Determination of foreign law

311. (a) Determination of the law of a foreign nation or a public entity in a foreign nation is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).

(b) If such law is applicable and the court is unable to determine it, the court may, as the ends of justice require, either:

(1) Apply the law of this State if the court can do so consistently with the Constitution of the United States and the Constitution of this State; or

(2) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

Comment. Section 311 restates the substance of and supersedes the last paragraph of Section 1875 of the Code of Civil Procedure.

The court may be unable to determine the foreign law because the parties have not provided the court with sufficient information to make such determination. If it appears that the parties may be able to obtain such information, the court may, of course, grant the parties additional time within which to obtain such information and make it available to the court. But when all sources of information as to the foreign law are exhausted and the court is unable to determine the foreign law, Section 311 provides the rule that governs the disposition of the case.

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CROSS-REFERENCES

Definitions:
  Action, see § 105
  Law, see § 160
  Public entity, see § 200
  State, see § 220
Judicial notice of foreign law, see § 452

§ 312. Jury as trier of fact

312. Except as otherwise provided by law, where the trial is by jury:

(a) All questions of fact are to be decided by the jury.

(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

Comment. Section 312 restates the substance of and supersedes Section 2101 and the first sentence of Section 2061 of the Code of Civil Procedure. The rule stated in Section 312 is subject to such exceptions as are otherwise provided by statutory or decisional law. See, *e.g.*, EVIDENCE CODE §§ 310, 311, 457.

CROSS-REFERENCES

Actual fraud a question of fact, see Civil Code § 1574
Blood tests, conclusive effect, see §§ 892, 895, 896
Comment on evidence, see Constitution, Art. I, § 13; Art. VI, § 19; Penal Code § 1127
Criminal action, questions for jury, see Penal Code §§ 1125-1127
Definitions:
  Declarant, see § 135
  Evidence, see § 140
  Law, see § 160
Instructions to jury on questions of fact, see Code of Civil Procedure § 608; Penal Code § 1127
Issues of fact, by whom tried, see Code of Civil Procedure § 592
Judicially noticed facts binding on jury, see § 457
Jurors as judges of credibility of witnesses, see Constitution, Art. VI, § 19; Penal Code § 1127
Jury to determine law and fact in libel prosecutions, see Constitution, Art. I, § 9; Penal Code §§ 251, 1125
Trial by jury, see Constitution, Art. I, § 7

CHAPTER 3. ORDER OF PROOF

§ 320. Power of court to regulate order of proof

320. Except as otherwise provided by law, the court in its discretion shall regulate the order of proof.

Comment. Section 320 restates the substance of and supersedes the first sentence of Section 2042 of the Code of Civil Procedure. Under Section 320, as under existing law, the trial judge has wide discretion to determine the order of proof. See CALIFORNIA CIVIL PROCEDURE DURING TRIAL, Parrish, *Order of Proof*, 205 (Cal. Cont. Ed. Bar 1960). Of course, the order of proof ordinarily should be as prescribed in Code of Civil Procedure Section 607 or 631.7 (added in this recommendation) or in Penal Code Sections 1093 and 1094.

Directions of the trial judge which control the order of proof should be distinguished from those which actually exclude evidence. Obviously, it is not permissible, through repeated directions of the order of proof, to prevent a party from presenting relevant evidence on a disputed fact. *Foster v. Keating*, 120 Cal. App.2d 435, 261 P.2d 529 (1953); CALIFORNIA CIVIL PROCEDURE DURING TRIAL, Parrish, *Order*

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of Proof, 205, 210 (Cal. Cont. Ed. Bar 1960). See also *Murry v. Manley,* 170 Cal. App.2d 364, 338 P.2d 976 (1959).

CROSS-REFERENCES

Definition:
  Law, see § 160
Order of proof:
  Civil jury case, see Code of Civil Procedure § 607
  Civil nonjury case, see Code of Civil Procedure § 631.7
  Criminal action, see Penal Code §§ 1093, 1094
  Facts preliminary to admission of evidence, see § 403(b)

CHAPTER 4. ADMITTING AND EXCLUDING EVIDENCE

Article 1. General Provisions

§ 350. Only relevant evidence admissible

350. No evidence is admissible except relevant evidence.

Comment. Section 350 restates and supersedes that portion of Code of Civil Procedure Section 1868 requiring the exclusion of irrelevant evidence.

CROSS-REFERENCES

Definitions:
  Evidence, see § 140
  Relevant evidence, see § 210
Determination of relevancy, see § 403

§ 351. Admissibility of relevant evidence

351. Except as otherwise provided by statute, all relevant evidence is admissible.

Comment. Section 351 abolishes all limitations on the admissibility of relevant evidence except those that are based on a statute, including a constitutional provision. See EVIDENCE CODE § 230. The Evidence Code contains a number of provisions that exclude relevant evidence either for reasons of public policy or because the evidence is too unreliable to be presented to the trier of fact. See, *e.g.,* EVIDENCE CODE § 352 (cumulative, unduly prejudicial, etc. evidence), §§ 900–1073 (privileges), §§ 1100–1156 (extrinsic policies), § 1200 (hearsay). Other codes also contain provisions that may in some cases result in the exclusion of relevant evidence. See, *e.g.,* CIVIL CODE §§ 79.06, 79.09, 227; CODE CIV. PROC. § 1747; EDUC. CODE § 14026; FIN. CODE § 8754; FISH & GAME CODE § 7923; GOVT. CODE §§ 15619, 18573, 18934, 18952, 20134, 31532; HEALTH & SAF. CODE §§ 211.5, 410; INS. CODE §§ 735, 855, 10381.5; LABOR CODE § 6319; PENAL CODE §§ 290, 938.1, 3046, 3107, 11105; PUB. RES. CODE § 3234; REV. & TAX. CODE §§ 16563, 19282–19289; UNEMPL. INS. CODE §§ 1094, 2111, 2714; VEHICLE CODE §§ 1808, 16005, 20012–20015, 40803, 40804, 40832, 40833; WATER CODE § 12516; WELF. & INST. CODE §§ 118, 827.

CROSS-REFERENCES

Authentication of writings, see §§ 1400-1421
Credibility of witness, see §§ 770, 780-791
Definitions:
  Relevant evidence, see § 210
  Statute, see § 230
Determination of relevancy, see § 403

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Evidence excluded because of:
  Best evidence rule, see §§ 1500-1510
  Cumulative or prejudicial effect, see § 352
  Extrinsic policies, see §§ 1100-1156
  Hearsay rule, see §§ 1200-1341
  Privileges, see §§ 900-1073
Judge as witness, see § 703
Juror as witness, see § 704
See also the statutes cited in the *Comment*

§ 352. Discretion of court to exclude evidence

352. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Comment. Section 352 expresses a rule recognized by statute and in several California decisions. CODE CIV. PROC. §§ 1868, 2044 (superseded by the Evidence Code); *Adkins v. Brett*, 184 Cal. 252, 258, 193 Pac. 251, 254 (1920) ("the matter [of excluding prejudicial evidence] is largely one of discretion on the part of the trial judge"); *Moody v. Peirano*, 4 Cal. App. 411, 418, 88 Pac. 380, 382 (1906) ("a wide discretion is left to the trial judge in determining whether [evidence of a collateral nature] is admissible or not").

CROSS-REFERENCES

Control of interrogation of witnesses, see § 765
Criminal action, excluding evidence, see Penal Code § 1044
Definition:
  Evidence, see § 140
Expert witnesses, limiting number to be called, see § 723

§ 353. Effect of erroneous admission of evidence

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

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

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

Comment. Subdivision (a) of Section 353 codifies the well-settled California rule that a failure to make a timely objection to, or motion to exclude or to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See WITKIN, CALIFORNIA EVIDENCE §§ 700-702 (1958). Subdivision (a) also codifies the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. WITKIN, CALIFORNIA EVIDENCE §§ 703-709 (1958).

Subdivision (b) reiterates the requirement of Section 4½ of Article VI of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial.

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Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson*, 61 Cal.2d ___, 39 Cal. Rptr. 1, 393 P.2d 161 (1964).

CROSS-REFERENCES

Definition:
 Evidence, see § 140
Disallowing claim of privilege as reversible error, see § 918
Formal finding of preliminary facts unnecessary, see § 402
Miscarriage of justice, see Constitution, Art. VI, § 4½

§ 354. Effect of erroneous exclusion of evidence

354. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

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

(b) The rulings of the court made compliance with subdivision (a) futile; or

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

Comment. Section 354, like Section 353, reiterates the requirement of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial. CAL. CONST., Art. VI, § 4½.

The provisions of Section 354 that require an offer of proof or other disclosure of the evidence improperly excluded reflect existing law. See WITKIN, CALIFORNIA EVIDENCE § 713 (1958). The exceptions to this requirement that are stated in Section 354 also reflect existing law. Thus, an offer of proof is unnecessary where the judge has limited the issues so that an offer to prove matters related to excluded issues would be futile. *Lawless v. Calaway,* 24 Cal.2d 81, 91, 147 P.2d 604, 609 (1944). An offer of proof is also unnecessary when an objection is improperly sustained to a question on cross-examination. *Tossman v. Newman,* 37 Cal.2d 522, 525-526, 233 P.2d 1, 3 (1951) ("no offer of proof is necessary in order to obtain a review of rulings on cross-examination"); *People v. Jones,* 160 Cal. 358, 117 Pac. 176 (1911).

CROSS-REFERENCES

Definitions:
 Cross-examination, see §§ 761, 772, 773
 Evidence, see § 140
Formal finding of preliminary facts unnecessary, see § 402
Miscarriage of justice, see Constitution, Art. VI, § 4½

§ 355. Limited admissibility

355. When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

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Comment. Section 355 codifies existing law which requires the court to instruct the jury as to the limited purpose for which evidence may be considered when such evidence is admissible for one purpose and inadmissible for another. See *Adkins v. Brett,* 184 Cal. 252, 193 Pac. 251 (1920).

Under Section 352, as under existing law, the judge is permitted to exclude such evidence if he deems it so prejudicial that a limiting instruction would not protect a party adequately and the matter in question can be proved sufficiently by other evidence. See discussion in *Adkins v. Brett,* 184 Cal. 252, 258, 193 Pac. 251, 254 (1920) ; *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612, 639-640 (1964).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Exclusion of unduly prejudicial evidence, see § 352

§ 356. Entire act, declaration, conversation, or writing may be brought out to elucidate part offered

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

Comment. Section 356 restates the substance of and supersedes Section 1854 of the Code of Civil Procedure.

CROSS-REFERENCES

Circumstances under which instrument was made, see Civil Code § 1647; Code of Civil Procedure § 1860
Definition:
Writing, see § 250
Exclusion of cumulative or unduly prejudicial evidence, see § 352

Article 2. Preliminary Determinations on Admissibility of Evidence

§ 400. "Preliminary fact"

400. As used in this article, "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.

Comment. "Preliminary fact" is defined to distinguish those facts upon which the admissibility of evidence depends from those facts sought to be proved by that evidence.

CROSS-REFERENCES

Definition:
Evidence, see § 140

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§ 401. "Proffered evidence"

401. As used in this article, "proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.

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

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Preliminary fact, see § 400

§ 402. Procedure for determining foundational and other preliminary facts

402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

Comment. Under Section 310, the court must decide preliminary questions of fact upon which the admissibility of evidence depends. Section 402 prescribes certain procedures that must be observed by the court when making such preliminary determinations.

Subdivision (a). Subdivision (a) requires the judge to observe the procedures specified in Article 2 (commencing with Section 400) when he is determining disputed factual questions preliminary to the admission or exclusion of evidence. The provisions of Article 2 are designed to distinguish clearly between (1) those situations where the judge must be persuaded of the existence of the preliminary fact upon which admissibility depends and (2) those situations where the judge must admit the proffered evidence merely upon the introduction of evidence sufficient to sustain a finding of the preliminary fact. Under the Evidence Code, as under existing law, the judge determines some preliminary fact questions on the basis of all of the evidence presented to him by both parties, resolving any conflicts in that evidence. EVIDENCE CODE § 405. See, *e.g.*, *People v. Glab*, 13 Cal. App.2d 528, 57 P.2d 588 (1936) (judge considered conflicting evidence and decided that a proposed witness was not married to the defendant and, therefore, was competent to testify). See also *Fairbank v. Hughson*, 58 Cal. 314 (1881) (error to permit jury to determine whether witness was an expert). On the other hand, the judge does not always resolve conflicts in the evidence submitted on preliminary fact questions; in some

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cases, the proffered evidence must be admitted if there is evidence sufficient to sustain a finding of the preliminary fact. EVIDENCE CODE § 403. See, *e.g., Reed v. Clark,* 47 Cal. 194, 200 (1873); *Verzan v. McGregor,* 23 Cal. 339 (1863).

Subdivision (b). Subdivision (b) requires the judge to determine the admissibility of a confession or admission of a criminal defendant out of the presence and hearing of the jury. Under existing law, whether the preliminary hearing is held out of the presence of the jury is left to the judge's discretion. *People v. Gonzales,* 24 Cal.2d 870, 151 P.2d 251 (1944); *People v. Nelson,* 90 Cal. App. 27, 31, 265 Pac. 366, 367 (1928). The existing procedure permits the jury to hear evidence that may be extremely prejudicial. For example, in *People v. Black,* 73 Cal. App. 13, 238 Pac. 374 (1925), the alleged coercion consisted of threats to send the defendants to New Mexico to be prosecuted for murder. Subdivision (b) prevents this kind of prejudice. Nothing in subdivision (b) precludes a defendant from presenting to the jury evidence attacking the credibility of a confession that is admitted (EVIDENCE CODE § 406), and such evidence may include some of the same matters presented to the judge during the preliminary hearing.

Subdivision (c). Subdivision (c) codifies existing law. *Wilcox v. Berry,* 32 Cal.2d 189, 195 P.2d 414 (1948) (where evidence is properly received, the ground of the court's ruling is immaterial); *City & County of San Francisco v. Western Air Lines, Inc.,* 204 Cal. App.2d 105, 22 Cal. Rptr. 216 (1962) (where evidence is excluded, the ruling will be upheld if any ground exists for the exclusion).

CROSS-REFERENCES

Definitions:
- Criminal action, see § 130
- Evidence, see § 140
- Preliminary fact, see § 400
- Statute, see § 230

Determination of admissibility of evidence for court, see § 310
Exclusion of cumulative or unduly prejudicial evidence, see § 352

§ 403. Determination of foundational and other preliminary facts where relevancy, personal knowledge, or authenticity is disputed

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

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

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

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

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evi-

dence of the preliminary fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court:

(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

Comment. As indicated in the *Comment* to Section 402, the judge does not determine in all instances whether a preliminary fact exists or does not exist. At times, the judge must admit the proffered evidence if there is evidence sufficient to sustain a finding of the preliminary fact, and the jury must finally decide whether the preliminary fact exists. See, *e.g., Verzan v. McGregor,* 23 Cal. 339 (1863). Section 403 covers those situations in which the judge is required to admit the proffered evidence upon the introduction of evidence sufficient to sustain a finding of the preliminary fact.

Subdivision (a)

Some writers have attempted to distinguish the kinds of questions to be decided under the standard prescribed in Section 403 from the kinds of questions to be decided under the standard described in Section 405 on the ground that the former questions involve the *relevancy* of the proffered evidence while the latter questions involve the *competency* of evidence that is relevant. Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence,* 40 Harv. L. Rev. 392 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact,* 43 Harv. L. Rev. 165 (1929). It is difficult, however, to distinguish all preliminary fact questions upon this principle. And eminent legal authorities sometimes differ over whether a particular preliminary fact question is one of relevancy or competency. For example, Wigmore classifies admissions with questions of relevancy (4 Wigmore, Evidence 1 (3d ed. 1940)) while Morgan classifies admissions with questions of competency to be decided under the standard prescribed in Section 405 (Morgan, Basic Problems of Evidence 244 (1957)).

To eliminate uncertainties of classification, subdivision (a) lists the kinds of preliminary fact questions that are to be determined under the standard prescribed in Section 403. And to eliminate any uncertainties that are not resolved by this listing, various Evidence Code sections state specifically that admissibility depends on "evidence sufficient to sustain a finding" of certain facts. See, *e.g.,* Evidence Code §§ 1222, 1223, 1400.

The preliminary fact questions listed in subdivision (a), or identified elsewhere as matters to be determined under the Section 403 standard, are not finally decided by the judge because they have been traditionally regarded as jury questions. The questions involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the jury's function to determine the effect and value of the evidence addressed to it. Evidence Code § 312. Hence,

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the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question. The "question of admissibility . . . merges imperceptibly into the weight of the evidence, if admitted." *Di Carlo v. United States,* 6 F.2d 364, 367 (2d Cir. 1925). If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.

For example, if the question of *A*'s title to land is in issue, *A* may seek to prove his title by a deed from former owner *O*. Section 1401 requires that the deed be authenticated, and the judge, under Section 403, must rule on the question of authentication. If *A* introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the rule were otherwise and the judge, on the basis of the adverse party's evidence, were permitted to decide that the deed was spurious and not admissible, the judge would be resolving the basic factual issue in the case and *A* would be deprived of a jury finding on the issue, even though he is entitled to a jury decision and even though he has introduced evidence sufficient to warrant a jury finding in his favor.

Illustrative of the preliminary fact questions that should be decided under Section 403 are the following:

Section 350—Relevancy. Under existing law, as under Section 403, if the relevancy of proffered evidence depends on the existence of some preliminary fact, the evidence is admissible if there is evidence sufficient to warrant a jury finding of the preliminary fact. *Reed v. Clark,* 47 Cal. 194, 200 (1873). Thus, for example, if *P* sues *D* upon an alleged agreement, evidence of negotiations with *A* is inadmissible because irrelevant unless *A* is shown to be *D*'s agent; but the evidence of the negotiations with *A* is admissible if there is evidence sufficient to sustain a finding of the agency. *Brown v. Spencer,* 163 Cal. 589, 126 Pac. 493 (1912). The same rule is applicable when a person is charged with criminal responsibility for the acts of another because they are conspirators. See discussion in *People v. Steccone,* 36 Cal.2d 234, 238, 223 P.2d 17, 19 (1950).

Section 702—Requirement of personal knowledge. Evidence sufficient to sustain a finding of a witness' personal knowledge seems to be sufficient under the existing California practice. See, *e.g., People v. Avery,* 35 Cal.2d 487, 492, 218 P.2d 527, 530 (1950) ("Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under section 1845 of the Code of Civil Procedure."); *People v. McCarthy,* 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910). See also *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 711–713 (1964).

Section 788—Conviction of a crime when offered to attack credibility. In this situation, the preliminary fact issue to be decided under Section 403 is whether the witness is actually the person who was convicted. This involves the relevancy of the evidence (since, obviously, the conviction of another does not affect the witness' credibility) and should be a question to be resolved by the jury. The judge should not

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be able to decide finally that it was the witness who was convicted and, thus, to prevent a contest on that issue before the jury. The existing law is uncertain in this regard; however, it seems likely that any evidence sufficient to identify the witness as the person convicted is sufficient to warrant admission of the conviction. See *People v. Theodore,* 121 Cal. App.2d 17, 28, 262 P.2d 630, 637 (1953) (relying on presumption of identity of person from identity of name). Section 403 does not affect the special procedural rule provided in Section 788 that requires the proponent of the evidence to make the preliminary showing out of the presence and hearing of the jury. See EVIDENCE CODE § 788 and the *Comment* thereto.

Section 800—Requirement that lay opinion be based on personal perception. The requirement specified in Section 800 is merely a specific application of the personal knowledge requirement in Section 702. See the discussion of Section 702 in this *Comment, supra.*

Sections 1200–1341—Identity of hearsay declarant. For most hearsay evidence, admissibility depends upon two preliminary determinations: (1) Did the declarant actually make the statement as claimed by the proponent of the evidence? (2) Does the statement meet certain standards of trustworthiness required by some exception to the hearsay rule?

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

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

The admissibility of some hearsay declarations is dependent solely upon the determination that a particular declarant made the statement. Some of these exceptions to the hearsay rule—such as inconsistent statements of trial witnesses and admissions—are mentioned specifically below. Since the only preliminary fact to be determined in regard to these declarations involves the relevancy of the evidence, they should be admitted upon the introduction of evidence sufficient to sustain a finding of the preliminary fact.

When the admissibility of hearsay depends both upon a determination that a particular declarant made the statement and upon a determination that the requisite standards of a hearsay exception have been met, the former determination is to be made upon evidence sufficient to sustain a finding of the preliminary fact. Paragraph (4) is included in subdivision (a) to make this clear.

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Section 1220—Admissions of a party. The only preliminary fact that is subject to dispute is the identity of the declarant. Under Section 403(a)(4), an admission is admissible upon the introduction of evidence sufficient to sustain a finding that the party made the statement. Existing law appears to be in accord. *Eastman v. Means,* 75 Cal. App. 537, 242 Pac. 1089 (1925).

An admission is not admissible in a criminal case unless it was given voluntarily. The voluntariness of an admission by a criminal defendant is determined under Section 405, not Section 403.

Sections 1221, 1222—Authorized and adoptive admissions. Under existing law, both authorized admissions (by an agent of a party) and adoptive admissions are admitted upon the introduction of evidence sufficient to sustain a finding of the foundational fact. *Sample v. Round Mountain Citrus Farm Co.,* 29 Cal. App. 547, 156 Pac. 983 (1916) (authorized admission); *Southers v. Savage,* 191 Cal. App.2d 100, 12 Cal. Rptr. 470 (1961) (adoptive admission).

Section 1223—Admission of co-conspirator. The admission of a co-conspirator is another form of an authorized admission. Hence, the proffered evidence is admissible upon the introduction of evidence sufficient to sustain a finding of the conspiracy. Existing law is in accord. *People v. Robinson,* 43 Cal.2d 132, 137, 271 P.2d 865, 868 (1954).

Sections 1224–1227—Admission of third person whose liability, breach of duty, or right is in issue. The only preliminary fact subject to dispute is the identity of the declarant; and the preliminary showing required in regard to this class of admissions is the same as if the declarant were being sued directly. Any evidence of the making of the statement by the claimed declarant is sufficient to warrant its admission. Existing law is in accord. See *Langley v. Zurich General Acc. & Liab. Ins. Co.,* 219 Cal. 101, 25 P.2d 418 (1933). Although Sections 1226 and 1227 are new to California law, the same principles should be applicable.

Sections 1235, 1236—Previous statements of witnesses. Prior inconsistent statements and prior consistent statements made before bias or other improper motive arose are dealt with in Sections 1235 and 1236. In each case, the evidence is relevant and probative if the witnesses to the statements are credible. The credibility of the witnesses testifying to these statements should be decided finally by the jury. Moreover, the only preliminary fact subject to dispute insofar as alleged inconsistent statements are concerned is the identity of the declarant. Hence, evidence is admitted under these sections upon the introduction of evidence sufficient to sustain a finding of the preliminary fact. The existing practice seems to be consistent with Section 403. See *Schneider v. Market Street Ry.,* 134 Cal. 482, 492, 66 Pac. 734, 738 (1901) ("Whether the [prior inconsistent] statements made to Glassman and Hubbell were made by Meley, or by some other man, was a question for the jury. Both witnesses testified that they were made by him."); *People v. Neely,* 163 Cal. App.2d 289, 312, 329 P.2d 357, 371 (1958) (two prior consistent statements held admissible because the "jury could properly infer . . . the motive to fabricate did arise after the making of the two statements").

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Sections 1400–1402—Authentication of writings. Under existing law, an otherwise competent writing is admissible upon the introduction of evidence sufficient to sustain a finding of the authenticity of the writing. *Verzan v. McGregor,* 23 Cal. 339 (1863). Section 403(a)(3) retains this existing law.

Sections 1410–1421—Means of authenticating writings. Sections 1410 through 1421 merely state several ways in which the requirements of Sections 1400 through 1402 may be met. Hence, to the extent that Sections 1410 through 1421 specify facts that may be shown to authenticate writings, the same principles apply: In each case, the judge must decide whether the evidence offered is sufficient to sustain a finding of the authenticity of the proffered writing and admit the writing if there is such evidence. Care should be exercised, however, to distinguish those cases where the disputed preliminary fact is the authenticity of an exemplar with which the proffered writing is to be compared (EVIDENCE CODE §§ 1417-1419) or the qualification of a witness to give an opinion concerning the authenticity of a writing (EVIDENCE CODE §§ 1416, 1418); the judge is required to determine such questions under the the provisions of Section 405.

Subdivision (b)

Subdivision (b) restates the apparent meaning of Section 1834 of the Code of Civil Procedure. Under this subdivision, the judge may receive evidence that is conditionally admissible under Section 403, subject to the presentation of evidence of the preliminary fact later in the course of the trial. See *Brea v. McGlashan,* 3 Cal. App.2d 454, 465, 39 P.2d 877, 882 (1934).

Subdivision (c)

Subdivision (c) relates to the instructions to be given the jury when evidence is admitted whose admissibility depends on the existence of a preliminary fact determined under Section 403. When such evidence is admitted, the jury is required to make the ultimate determination of the existence of the preliminary fact. Unless the jury is persuaded that the preliminary fact exists, it is not permitted to consider the evidence.

For example, if *P* offers evidence of his negotiations with *A* in his contract action against *D,* the judge must admit the evidence if there is other evidence sufficient to sustain a finding that *A* was *D*'s agent. If the jury is not persuaded that *A* was in fact *D*'s agent, then it is not permitted to consider the evidence of the negotiations with *A* in determining *D*'s liability.

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

At times, however, it is not quite so clear that conditionally admissible evidence should be disregarded unless the preliminary fact is

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

CROSS-REFERENCES

Definitions:
- Burden of producing evidence, see § 110
- Conduct, see § 125
- Evidence, see § 140
- Preliminary fact, see § 400
- Proffered evidence, see § 401
- Statement, see § 225
- Writing, see § 250

See also the statutes cited in the *Comment*

§ 404. Determination of whether proffered evidence is incriminatory

404. Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Comment. Section 404 provides a special procedure to be followed by the judge when an objection is made in reliance upon the privilege against self-incrimination. Under Section 404, the objecting party has the burden of showing that the testimony sought might incriminate him. However, the party is not required to produce evidence as such. In addition to considering evidence, the judge must consider the matters disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors. See *Cohen v. Superior Court*, 173 Cal. App.2d 61, 70, 343 P.2d 286, 291 (1959). Nonetheless, the burden is on the objector to present to the judge information of this sort sufficient to indicate that the proffered evidence might incriminate him. If he presents information of this sort, Section 404 requires the judge to sustain the claim of privilege unless it clearly appears that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Section 404 is consistent with existing law: The party claiming the privilege "has the burden of showing that the testimony which was being required might be used in a prosecution to help establish his

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guilt''; the court may require testimony to be given only if it clearly appears to the court that the claim of privilege is mistaken and that any answer "*'cannot possibly'*" have a tendency to incriminate the witness. *Cohen v. Superior Court,* 173 Cal. App.2d 61, 68, 70-72, 343 P.2d 286, 290, 291-292 (1959) (italics in original).

CROSS-REFERENCES

Definition:
 Proffered evidence, see § 401
Privilege against self-incrimination, see § 940

§ 405. Determination of foundational and other preliminary facts in other cases

405. With respect to preliminary fact determinations not governed by Section 403 or 404:

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

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

Comment. Section 405 requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations covered by Sections 403 and 404. Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion.

Under Section 405, the judge first indicates to the parties who has the burden of proof and the burden of producing evidence on the disputed issue as implied by the rule of law under which the question arises. For example, Section 1200 indicates that the burden of proof is usually on the proponent of the evidence to show that the proffered evidence is within a hearsay exception. Thus, if the disputed preliminary fact is whether the proffered statement was spontaneous, as required by Section 1240, the proponent would have the burden of persuading the judge as to the spontaneity of the statement. On the other hand, the privilege rules usually place the burden of proof on the objecting party to show that a privilege is applicable. Thus, if the disputed preliminary fact is whether a person is married to a party and, hence, whether their confidential communications are privileged under Section 980, the burden of proof is on the party asserting the privilege to persuade the judge of the existence of the marriage.

After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is per-

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suaded by the party with the burden of proof, he finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by such finding.

Section 405 is generally consistent with existing law. CODE CIV. PROC. § 2102 ("All questions of law, including the admissibility of testimony, [and] the facts preliminary to such admission, . . . are to be decided by the Court") (superseded by EVIDENCE CODE § 310).

Examples of preliminary fact issues to be decided under Section 405

Illustrative of the preliminary fact questions that should be decided under Section 405 are the following:

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

Section 720—Qualifications of an expert witness. Under Section 720, as under existing law, the proponent must persuade the judge that his expert is qualified, and it is error for the judge to submit the qualifications of the expert to the jury. *Fairbank v. Hughson,* 58 Cal. 314 (1881); *Eble v. Peluso,* 80 Cal. App.2d 154, 181 P.2d 680 (1947).

Section 788—Conviction of a crime when offered to attack credibility. If the disputed preliminary fact is whether a pardon or some similar relief has been granted to a witness convicted of a crime, the judge's determination is made under Section 405. *Cf. Comment* to Section 403.

Section 870—Opinion evidence on sanity. Whether a witness is sufficiently acquainted with a person whose sanity is in question to be qualified to express an opinion on the matter involves, in effect, the expertise of the witness on that limited subject. The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this *Comment, supra.* Under existing law, too, determination of whether a witness is an "intimate acquaintance" is a question addressed to the court. *Estate of Budan,* 156 Cal. 230, 104 Pac. 442 (1909).

Sections 900–1073—Privileges. Under this code, as under existing law, the party claiming a privilege has the burden of proof on the preliminary facts. *San Diego Professional Ass'n v. Superior Court,* 58 Cal.2d 194, 199, 23 Cal. Rptr. 384, 387, 373 P.2d 448, 451 (1962) ("The burden of establishing that a particular matter is privileged is on the party asserting that privilege."); *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 117, 354 P.2d 637, 645 (1960). The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary to show that an

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exception to the privilege is applicable. *But see Abbott v. Superior Court,* 78 Cal. App.2d 19, 21, 177 P.2d 317, 318 (1947) (suggesting that a prima facie showing by the proponent is sufficient where the issue is whether a communication between attorney and client was made in contemplation of crime).

Sections 1152, 1154—Admissions made during compromise negotiations. With respect to admissions made during compromise negotiations, the disputed preliminary fact to be decided by the judge is whether the admission occurred during compromise negotiations or at some other time. This code places the burden on the objecting party to satisfy the judge that the admission occurred during such negotiations.

Sections 1200–1341—Hearsay evidence. When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration—was the statement actually made by the person alleged to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence—*e.g.,* was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under this code, questions relating to the authenticity of the proffered declaration are decided under Section 403. See the *Comment* to Section 403. But other preliminary fact questions are decided under Section 405.

For example, the court must decide whether a statement offered as a dying declaration was made under a sense of impending death, and the proponent of the evidence has the burden of proof on this issue. *People v. Keelin,* 136 Cal. App.2d 860, 873, 289 P.2d 520, 528 (1955); *People v. Pollock,* 31 Cal. App.2d 747, 753-754, 89 P.2d 128, 131 (1939). Under this code, the proponent of a hearsay declaration has the burden of proof on the unavailability of the declarant as a witness under Section 1291 or 1310; but the party objecting to the evidence has the burden of proving that the unavailability of the declarant was procured by the proponent in order to prevent the declarant from testifying. See EVIDENCE CODE § 240.

Section 1416—Opinion evidence on handwriting. Whether a witness is sufficiently acquainted with the handwriting of a person to give an opinion on whether a questioned writing is in that person's handwriting involves, in effect, the expertise of the witness on the limited subject of the supposed writer's handwriting. The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this *Comment, supra.*

Sections 1417–1419—Comparison of writing with exemplar. Under Sections 1417 through 1419, as under existing law, the judge must be satisfied that a writing is genuine before he may admit it for comparison with other writings whose authenticity is in dispute. *People v. Creegan,* 121 Cal. 554, 53 Pac. 1082 (1898); *Marshall v. Hancock,* 80 Cal. 82, 22 Pac. 61 (1889).

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Sections 1500-1510—Best evidence rule. Under Section 405, as under existing law, the trial judge is required to determine the preliminary fact necessary to warrant reception of secondary evidence of a writing, and the burden of proof on the issue is on the proponent of the secondary evidence. *Cotton v. Hudson,* 42 Cal. App.2d 812, 110 P.2d 70 (1941).

Sections 1550, 1551—Photographic copy of writing. Sections 1550 and 1551 are special exceptions to the best evidence rule; hence, Section 405 governs the determination of any disputed preliminary fact under these sections just as it governs the determination of disputed preliminary facts under Sections 1500 through 1510. See the discussion of Sections 1500-1510 in this *Comment, supra.*

Confessions, dying declarations, and spontaneous statements

Section 405 is generally consistent with existing law. It will, however, substantially change the law relating to confessions, dying declarations, and spontaneous statements. Under existing law, the judge considers all of the evidence and decides whether evidence of this sort is admissible, as indicated in Section 405. But if he decides the proffered evidence is admissible, he submits the preliminary question to the jury for a final determination whether the confession was voluntary, whether the dying declaration was made in realization of impending doom, or whether the spontaneous statement was in fact spontaneous; and the jury is instructed to disregard the statement if it does not believe that the condition of admissibility has been satisfied. *People v. Baldwin,* 42 Cal.2d 858, 866–867, 270 P.2d 1028, 1033–1034 (1954) (confession—see the court's instruction, *id.* at 866, 270 P.2d at 1033); *People v. Gonzales,* 24 Cal.2d 870, 876–877, 151 P.2d 251, 254 (1944) (confession); *People v. Singh,* 182 Cal. 457, 476, 188 Pac. 987, 995 (1920) (dying declaration); *People v. Keelin,* 136 Cal. App.2d 860, 871, 289 P.2d 520, 527 (1955) (spontaneous declaration).

Under Section 405, the judge's rulings on these questions are final; the jury does not have an opportunity to redetermine the issue.

Section 405 will have no effect on the admissibility of confessions where the uncontradicted evidence shows that the confession was not voluntary. Under existing law, as under the Evidence Code, such a confession may not be admitted for consideration by the jury. *People v. Trout,* 54 Cal.2d 576, 6 Cal. Rptr. 759, 354 P.2d 231 (1960); *People v. Jones,* 24 Cal.2d 601, 150 P.2d 801 (1944). Section 405 will also have no effect on the admissibility of confessions in those instances where, despite a conflict in the evidence, the court is persuaded that the confession was not voluntary; for, under existing law (as under the Evidence Code), "if the court concludes that the confession was not free and voluntary it . . . is in duty bound to withhold it from the jury's consideration." *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944).

Hence, Section 405 changes the law relating to confessions only where there is a substantial conflict in the evidence over voluntariness and the court is not persuaded that the confession was involuntary. Under existing law, a court that is in doubt may "pass the buck" concerning such a confession to the jury when there is a difficult factual question to resolve; for "if there is evidence that the confession was free and

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voluntary, it is within the court's discretion to permit it to be read to the jury, and to submit to the jury for its determination the question whether under all the circumstances the confession was made freely and voluntarily." *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944). Under the Evidence Code, however, the court is required to withhold a confession from the jury unless the court is persuaded that the confession was made freely and voluntarily. The court has no "discretion" to avoid difficult decisions by shifting the responsibility to the jury. If the court is in doubt, if the prosecution has not persuaded it of the voluntary nature of the confession, Section 405 requires the court to exclude the confession. Thus, Section 405 makes the procedure for determining the admissibility of a confession the same as the procedure for determining the admissibility of physical evidence claimed to have been seized in violation of constitutional guarantees. See *People v. Gorg,* 45 Cal.2d 776, 291 P.2d 469 (1955); *People v. Chavez,* 208 Cal. App.2d 248, 24 Cal. Rptr. 895 (1962).

The existing law is based on the belief that a jury, in determining the defendant's guilt or innocence, can and will refuse to consider a confession that it has determined was involuntary even though it believes that the confession is true. Section 405, on the other hand, proceeds upon the belief that it is unrealistic to expect a jury to perform such a feat. Corroborating facts stated in a confession cannot but assist the jury in resolving other conflicts in the evidence. The question of voluntariness will inevitably become merged with the question of guilt and the truth of the confession; and, as a result of this merger, the admitted confession will inevitably be considered on the issue of guilt. The defendant will receive a greater degree of protection if the court is deprived of the power to shift its fact-determining responsibility to the jury and is required to exclude a confession whenever it is not persuaded that the confession was voluntary.

The foregoing discussion has focused on confessions because the case law is well developed there. But the "second crack" doctrine is equally unsatisfactory when applied to dying declarations and spontaneous statements. Hence, Section 405 requires the court to rule finally on the admissibility of these statements as well.

Of course, Section 405 does not prevent the presentation of any evidence to the jury that is relevant to the reliability of the hearsay statement. See EVIDENCE CODE § 406. Thus, a party may present evidence of the circumstances under which a confession, dying declaration, or spontaneous statement was made where such evidence is relevant to the credibility of the statement, even though such evidence may duplicate to some degree the evidence presented to the court on the issue of admissibility. But the jury's sole concern is the truth or falsity of the facts stated, not the admissibility of the statement.

CROSS-REFERENCES

Definitions:
- Action, see § 105
- Burden of producing evidence, see § 110
- Burden of proof, see § 115
- Evidence, see § 140
- Law, see § 160
- Preliminary fact, see § 400
- Proffered evidence, see § 401

Requiring disclosure of information claimed to be privileged, see § 915

See also the statutes cited in the *Comment*

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§ 406. Evidence affecting weight or credibility

406. This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

Comment. Other sections in this article provide that the judge determines whether proffered evidence is admissible, *i.e.*, whether it may be considered by the trier of fact. Section 406 simply makes it clear that the judge's decision on a question of admissibility does not preclude the parties from introducing before the trier of fact evidence relevant to weight and credibility.

CROSS-REFERENCES

Definitions:
- Evidence, see § 140
- Trier of fact, see § 235

CHAPTER 5. WEIGHT OF EVIDENCE GENERALLY

§ 410. "Direct evidence"

410. As used in this chapter, "direct evidence" means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Comment. Section 410 restates the substance of and supersedes Section 1831 of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
- Evidence, see § 140
- Inference, see § 600
- Presumption, see § 600
- Proof, see § 190

§ 411. Direct evidence of one witness sufficient

411. Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.

Comment. Section 411 restates the substance of and supersedes Section 1844 of the Code of Civil Procedure. The phrase "except where additional evidence is required by statute" has been substituted for the phrase "except perjury and treason" in Section 1844 because the "perjury and treason" exception to Section 1844 is too limited: Corroboration is required by Section 20 of Article I of the California Constitution (treason) and by Penal Code Sections 653f (solicitation to commit felonies), 1103a (perjury), 1108 (abortion and prostitution cases), 1110 (obtaining property by oral false pretenses), and 1111 (testimony of accomplices); in addition, Civil Code Section 130 provides that divorces cannot be granted on the uncorroborated testimony of the parties.

CROSS-REFERENCES

Corroboration, when required:
- Abortion, see Penal Code § 1108
- Accomplice testimony, see Penal Code § 1111
- Divorce, see Civil Code § 130
- False pretenses, see Penal Code § 1110
- Lost or destroyed will, see Probate Code §§ 74, 350

Nuncupative will, see Probate Code § 54
Perjury, see Penal Code § 1103a
Prostitution, procuring female under 18 for, see Penal Code § 1108
Soliciting commission of certain crimes, see Penal Code § 653f
Treason, see Constitution, Art. I, § 20; Penal Code § 1103

Definitions:
Direct evidence, see § 410
Evidence, see § 140
Proof, see § 190
Statute, see § 230

§ 412. Party having power to produce better evidence

412. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

Comment. Section 412 restates the substance of and supersedes subdivisions 6 and 7 of Section 2061 of the Code of Civil Procedure.

Section 413, taken together with Section 412, restates in substance the meaning that has been given to the presumptions appearing in subdivisions 5 and 6 of Code of Civil Procedure Section 1963.

Evidence Code Section 913 provides that "no presumption shall arise because of the exercise of [a] privilege, and the trier of fact may not draw any inference therefrom," and the trial judge is required to give such an instruction if he is requested to do so. However, there is no inconsistency between Section 913 and Sections 412 and 413. Section 913 deals only with the inferences that may be drawn from the exercise of a privilege; it does not purport to deal with the inferences that may be drawn from the evidence in the case. Sections 412 and 413, on the other hand, deal with the inferences to be drawn from the evidence in the case; and the fact that a privilege has been relied on is irrelevant to the application of these sections. *Cf. People v. Adamson,* 27 Cal.2d 478, 165 P.2d 3 (1946).

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 413. Party's failure to explain or deny evidence

413. In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his wilful suppression of evidence relating thereto, if such be the case.

Comment. See the *Comment* to Section 412.

CROSS-REFERENCES

Comment on defendant's failure to explain or deny case against him, see Constitution, Art. I, § 13; Penal Code § 1127

Definitions:
Evidence, see § 140
Inference, see § 600
Trier of fact, see § 235

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DIVISION 4. JUDICIAL NOTICE

Comment. The statutory scheme in Division 4 is based on Article 2 (Rules 9-12) of the Uniform Rules of Evidence. The court is required to take judicial notice of the matters listed in Section 451. It may take judicial notice of the matters listed in Section 452 even when not requested to do so; it is required to notice them, however, if a party requests it and satisfies the requirements of Section 453.

There is some overlap between the matters listed in the mandatory notice provisions of Section 451 and the matters listed in the permissive-unless-a-request-is-made provisions of Section 452. Thus, when a matter falls within Section 451, judicial notice is mandatory even though the matter would otherwise fall within Section 452. The introductory clause of Section 452 makes this clear. For example, public statutory law is required to be noticed under subdivision (a) of Section 451 even though it would also be included under official acts of the legislative department under subdivision (c) of Section 452. Certain regulations are required to be noticed under subdivision (b) of Section 451 even though they might also be included under subdivisions (b) and (c) of Section 452. And indisputable matters of universal knowledge are required to be noticed under subdivision (f) of Section 451 even though such matters might be included under subdivisions (g) and (h) of Section 452.

There is also some overlap between the various categories listed in Section 452. However, this overlap will cause no difficulty because all of the matters listed in Section 452 are treated alike.

§ 450. Judicial notice may be taken only as authorized by law

450. Judicial notice may not be taken of any matter unless authorized or required by law.

Comment. Section 450 provides that judicial notice may not be taken of any matter unless authorized or required by law. See EVIDENCE CODE § 160, defining "law." Sections 451 and 452 state a number of matters which must or may be judicially noticed. Judicial notice of other matters is authorized or required by other statutes or by decisional law. *E.g.*, CIVIL CODE § 53; CORP. CODE § 6602. In this respect, the Evidence Code is consistent with existing law, for the principal judicial notice provision found in existing law—Code of Civil Procedure Section 1875 (superseded by this division of the Evidence Code)—does not limit judicial notice to those matters specified by statute. Judicial notice has been taken of various matters not so specified, principally of those matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and sim-

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ilar materials is inherent in the requirement that it take judicial notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. *Cf. People v. Sterling Refining Co.*, 86 Cal. App. 558, 564, 261 Pac. 1080, 1083 (1927) (statutory authority to notice "public and private acts" of legislature held to authorize examination of legislative history of certain acts). See also *Perez v. Sharp,* 32 Cal.2d 711, 198 P.2d 17 (1948) (texts and authorities used by court in opinions determining constitutionality of statute prohibiting interracial marriages). Section 450 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining the rules of law that it is required to notice. Nor will Section 450 broaden or limit the extent to which a court may take judicial notice of any other matter not specified in Section 451 or 452.

CROSS-REFERENCES

Blood tests, conclusive effect of, see § 895
Definition:
 Law, see § 160
Judicial notice of:
 Administrative regulations of California state agencies, see Government Code §§ 11383, 11384
 Another proceeding pending between same parties on same cause, see Code of Civil Procedure § 433
 California Administrative Code and Administrative Register, contents of, see Government Code §§ 11383, 11384
 Cities, organization and existence of, see Government Code § 34330.
 City and city and county charters, see Constitution, Art. XI, § 8.
 County charters, see Constitution, Art. XI, § 7½
 Federal Register, certain material published in, see United States Code, Title 44, § 307
 Foreign corporations, judicial notice of official acts concerning, see Corporations Code § 6602
 Ordinances, judicial notice of in criminal actions, see Penal Code § 963
 Recorded instruments containing restrictive racial covenants and the like, see Civil Code § 53
 State Personnel Board rules and amendments, see Government Code § 18576
See also the *Cross-References* under Section 453

§ 451. Matters which must be judicially noticed

451. Judicial notice shall be taken of:

(a) The decisional, constitutional, and public statutory law of the United States and of every state of the United States and of the provisions of any charter described in Section 7½ or 8 of Article XI of the California Constitution.

(b) Any matter made a subject of judicial notice by Section 11383, 11384, or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.

(c) Rules of practice and procedure for the courts of this State adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

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(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

Comment. Judicial notice of the matters specified in Section 451 is *mandatory,* whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by this section.

Section 451 includes matters both of law and of fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations, and rules. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign nations and certain regulations and ordinances) are included under Section 452, rather than under Section 451, primarily because of the difficulty of ascertaining such matters. Subdivision (e) of Section 451 requires the court to judicially notice "the true signification of all English words and phrases and of all legal expressions." These are facts that must be judicially noticed in order to conduct meaningful proceedings. Similarly, subdivision (f) of Section 451 covers "universally known" facts.

Listed below are the matters that must be judicially noticed under Section 451.

California and federal law. The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (a). This requirement states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875 (superseded by the Evidence Code).

Law of sister states. The decisional, constitutional, and public statutory law in force in sister states must be judicially noticed under subdivision (a). California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section 451 requires notice of relevant decisions of *all* sister-state courts. If this be an extension of existing law, it is a desirable one, for the intermediate-appellate courts of sister states are as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On the necessity for a request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On

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whether judicial notice is mandatory, see *In re Bartges*, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in *Estate of Moore*, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935). Section 451 requires such notice to be taken without a request being made.

Law of territories and possessions of the United States. The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States must be judicially noticed under subdivision (a). See the broad definition of "state" in EVIDENCE CODE § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

Charter provisions of California cities and counties. Judicial notice must be taken under subdivision (a) of the provisions of charters adopted pursuant to Section 7½ or 8 of Article XI of the California Constitution. Notice of these provisions is mandatory under the State Constitution. CAL. CONST., Art. XI, § 7½ (county charter), § 8 (charter of city or city and county).

Regulations of California and federal agencies. Judicial notice must be taken under subdivision (b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing law as found in Government Code Sections 11383 and 11384. Under subdivision (b), judicial notice must also be taken of the rules of the State Personnel Board. This, too, is existing law under Government Code Section 18576.

Subdivision (b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although Section 307 of Title 44 of the United States Code provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this *requires* notice by state courts. See *Broadway Fed. etc. Loan Ass'n v. Howard*, 133 Cal. App.2d 382, 386 note 4, 285 P.2d 61, 64 note 4 (1955) (referring to 44 U.S.C.A. §§ 301-314). *Compare* Note, 59 HARV. L. REV. 1137, 1141 (1946) (doubt expressed that notice is required), *with* Knowlton, *Judicial Notice*, 10 RUTGERS L. REV. 501, 504 (1956) ("it would seem that this provision is binding upon the state courts"). *Livermore v. Beal*, 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. *E.g.*, *Pacific Solvents Co. v. Superior Court*, 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948) (orders and regulations); *People v. Mason*, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (presidential and executive proclamations) (disapproved on other grounds in *People v. Friend*, 50

Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); *Downer v. Grizzly Livestock & Land Co.,* 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (rules and regulations). Section 451 makes the California law clear.

Rules of court. Judicial notice of the California Rules of Court is required under subdivision (c). These rules, adopted by the Judicial Council, are as binding on the parties as procedural statutes. *Cantillon v. Superior Court,* 150 Cal. App.2d 184, 309 P.2d 890 (1957). See *Albermont Petroleum, Ltd. v. Cunningham,* 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Likewise, the rules of pleading, practice, and procedure promulgated by the United States Supreme Court are required to be judicially noticed under subdivision (d).

The rules of the California and federal courts which are required to be judicially noticed under subdivisions (c) and (d) are, or should be, familiar to the court or easily discoverable from materials readily available to the court. However, this may not be true of the court rules of sister states or other jurisdictions nor, for example, of the rules of the various United States Courts of Appeals or local rules of a particular superior court. See *Albermont Petroleum, Ltd. v. Cunningham,* 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Judicial notice of these rules is permitted under subdivision (e) of Section 452 but is not required unless there is compliance with the provisions of Section 453.

Words, phrases, and legal expressions. Subdivision (e) requires the court to take judicial notice of "the true signification of all English words and phrases and of all legal expressions." This restates the same matter covered in subdivision 1 of Code of Civil Procedure Section 1875. Under existing law, however, it is not clear that judicial notice of these matters is mandatory.

"Universally known" facts. Subdivision (f) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. *Cf. People v. Tossetti,* 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (f) should be contrasted with subdivisions (g) and (h) of Section 452, which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Subdivisions (g) and (h) permit notice of facts and propositions that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. The facts must fulfill the requirements of subdivision (f) of Section 451 or subdivision (g) or (h) of Section 452. If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under this division, he may not "notice" it.

It is clear under existing law that the court may judicially notice the matters specified in subdivision (f); it is doubtful, however, that the court *must* notice them. See *Varcoe v. Lee,* 180 Cal. 338, 347, 181 Pac. 223, 227 (1919) (dictum). Since subdivision (f) covers universally

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known facts, the parties ordinarily will expect the court to take judicial notice of them; the court should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

CROSS-REFERENCES

Definition:
State, see § 220

§ 452. Matters which may be judicially noticed

452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) Resolutions and private acts of the Congress of the United States and of the legislature of any state of the United States.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(f) The law of foreign nations and public entities in foreign nations.

(g) Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Specific facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Comment. Section 452 includes matters both of law and of fact. The court *may* take judicial notice of these matters, even when not requested to do so; it is *required* to notice them if a party requests it and satisfies the requirements of Section 453.

The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. However, if a party requests it and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. See EVIDENCE CODE § 453. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations.

Although Section 452 extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing

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law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court. Under Section 453, this burden falls upon the party requesting that judicial notice be taken. In addition, the parties are entitled under Section 455 to a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that may be judicially noticed under Section 452 (and must be noticed if the conditions specified in Section 453 are met).

Resolutions and private acts. Subdivision (a) provides for judicial notice of resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Penal Code Section 963 is mandatory, whereas judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

Although no case in point has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. *Ellis v. Eastman,* 32 Cal. 447 (1867).

Regulations, ordinances, and similar legislative enactments. Subdivision (b) provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States or of any state, territory, or possession of the United States, including public entities therein. See the broad definition of "public entity" in EVIDENCE CODE § 200. The words "regulations and legislative enactments" include such matters as "ordinances" and other similar legislative enactments. Not all public entities legislate by ordinance.

This subdivision changes existing law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. *People v. Cowles,* 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956); *People v. Crittenden,* 93 Cal. App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. *Thompson v. Guyer-Hays,* 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); *County of Los Angeles v. Bartlett,* 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); *Becerra v. Hochberg,* 193 Cal.

App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Judicial notice of certain regulations of California and federal agencies is mandatory under subdivision (b) of Section 451. Subdivision (b) of Section 452 provides for judicial notice of California and federal regulations that are not included under subdivision (b) of Section 451 and, also, for judicial notice of regulations of other states and territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 CAL. JUR.2d *Evidence* § 24. Although no case in point has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

Official acts of the legislative, executive, and judicial departments. Subdivision (c) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. Subdivision (c) states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, the California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission. See WITKIN, CALIFORNIA EVIDENCE § 49 (1958), and 1963 Supplement thereto.

Court records and rules of court. Subdivisions (d) and (e) provide for judicial notice of the court records and rules of court of (1) any court of this State or (2) any court of record of the United States or of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. So far as court records are concerned, subdivision (d) states existing law. *Flores v. Arroyo,* 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of subdivision (c) of Section 452 are broad enough to include court records, specific mention of these records in subdivision (d) is desirable in order to eliminate any uncertainty in the law on this point. See the *Flores* case, *supra.*

Subdivision (e) may change existing law so far as judicial notice of rules of court is concerned, but the provision is consistent with the modern philosophy of judicial notice as indicated by the holding in *Flores v. Arroyo, supra.* To the extent that subdivision (e) overlaps with subdivisions (c) and (d) of Section 451, notice is, of course, mandatory under Section 451.

Law of foreign nations. Subdivision (f) provides for judicial notice of the law of foreign nations and public entities in foreign nations. See the broad definition of "public entity" in EVIDENCE CODE § 200. Subdivision (f) should be read in connection with Sections 311, 453, and 454. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California

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Law Revision Commission. CODE CIV. PROC. § 1875. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries* at I-1 (1957).

Subdivision (f) refers to "the law" of foreign nations and public entities in foreign nations. This makes all law, in whatever form, subject to judicial notice.

Matters of "common knowledge" and verifiable facts. Subdivision (g) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This subdivision states existing case law. *Varcoe v. Lee,* 180 Cal. 338, 181 Pac. 223 (1919); 18 CAL. JUR.2d *Evidence* § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and determining the tenor of the matter to be noticed.

Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world." To the extent that subdivisions (g) and (h) overlap subdivision (f) of Section 451, notice is, of course, mandatory under Section 451.

The matters covered by subdivisions (g) and (h) are included in Section 452, rather than Section 451, because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice of these matters is to be mandatory. See EVIDENCE CODE § 453 and the *Comment* thereto.

Under existing law, courts take judicial notice of the matters that are included under subdivisions (g) and (h), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

CROSS-REFERENCES

Definitions:
  Public entity, see § 200
  State, see § 220
Judicial notice of certain matters required, see § 451
See also the *Cross-References* under Section 453

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§ 453. Compulsory judicial notice upon request

453. Judicial notice shall be taken of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Comment. Section 453 provides that the court must take judicial notice of any matter specified in Section 452 if a party requests that such notice be taken, furnishes the court with sufficient information to enable it to take judicial notice of the matter, and gives each adverse party sufficient notice of the request to prepare to meet it.

Section 453 is intended as a safeguard and not as a rigid limitation on the court's power to take judicial notice. The section does not affect the discretionary power of the court to take judicial notice under Section 452 where the party requesting that judicial notice be taken fails to give the requisite notice to each adverse party or fails to furnish sufficient information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. Hence, when he considers it appropriate, the judge may take judicial notice under Section 452 and may consult and use any source of pertinent information, whether or not furnished by the parties. However, where the matter noticed under Section 452 is one that is of substantial consequence to the action—even though the court may take judicial notice under Section 452 when the requirements of Section 453 have not been satisfied—the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. See EVIDENCE CODE § 455 and the *Comment* thereto.

The "notice" requirement. The party requesting the court to judicially notice a matter under Section 453 must give each adverse party sufficient notice, through the pleadings or otherwise, to enable him to prepare to meet the request. In cases where the notice given does not satisfy this requirement, the court may decline to take judicial notice. A somewhat similar notice to the adverse parties is required under subdivision 4 of Section 1875 of the Code of Civil Procedure when a request for judicial notice of the law of a foreign country is made. Section 453 broadens this existing requirement to cover all matters specified in Section 452.

The notice requirement is an important one since judicial notice is binding on the jury under Section 457. Accordingly, the adverse parties should be given ample notice so that they will have an opportunity to prepare to oppose the taking of judicial notice and to obtain information relevant to the tenor of the matter to be noticed.

Since Section 452 relates to a wide variety of facts and law, the notice requirement should be administered with flexibility in order to insure that the policy behind the judicial notice rules is properly implemented. In many cases, it will be reasonable to expect the notice to be given at or before the time of the pretrial conference. In other cases, matters of fact or law of which the court should take judicial

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notice may come up at the trial. Section 453 merely requires reasonable notice, and the reasonableness of the notice given will depend upon the circumstances of the particular case.

The "sufficient information" requirement. Under Section 453, the court is not required to resort to any sources of information not provided by the parties. If the party requesting that judicial notice be taken under Section 453 fails to provide the court with "sufficient information," the judge may decline to take judicial notice. For example, if the party requests the court to take judicial notice of the specific gravity of gold, the party requesting that notice be taken must furnish the judge with definitive information as to the specific gravity of gold. The judge is not required to undertake the necessary research to determine the fact, though, of course, he is not precluded from doing such research if he so desires.

Section 453 does not define "sufficient information"; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. The court justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems.

Burden on party requesting that judicial notice be taken. Where a request is made to take judicial notice under Section 453, the court may decline to take judicial notice unless the party requesting that notice be taken persuades the judge that the matter is one that properly may be noticed under Section 452 and also persuades the judge as to the tenor of the matter to be noticed. The degree of the judge's persuasion regarding a particular matter is determined by the subdivision of Section 452 which authorizes judicial notice of the matter. For example, if the matter is claimed to be a fact of common knowledge under paragraph (g) of Section 452, the party must persuade the judge that the fact is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, *i.e.,* that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under paragraph (b) of Section 452, the party must persuade the judge that a valid ordinance exists and also as to its tenor; but the judge need not believe that no reasonable person could conclude otherwise.

Without regard to the evidence supplied by the party requesting that judicial notice be taken, the judge's determination to take judicial notice of a matter specified in Section 452 will be upheld on appeal if the matter was properly noticed. The reviewing court may resort to any information, whether or not available at the trial, in order to sustain the proper taking of judicial notice. See EVIDENCE CODE § 459. On the other hand, even though a party requested that judicial notice be taken under Section 453 and gave notice to each adverse party in compliance with subdivision (a) of Section 453, the decision of the judge not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to

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the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter.

CROSS-REFERENCES

Accusatory pleading not required to state matters judicially noticed, see Penal Code § 961
Pleading ordinance:
Civil action, see Code of Civil Procedure § 459
Criminal action, see Penal Code § 963

§ 454. Information that may be used in taking judicial notice

454. In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

(a) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(b) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

Comment. Since one of the purposes of judicial notice is to simplify the process of proofmaking, the judge should be given considerable latitude in deciding what sources are trustworthy. This section permits the court to use any source of pertinent information, including the advice of persons learned in the subject matter. It probably restates existing law as found in Section 1875 of the Code of Civil Procedure. See *Estate of McNamara,* 181 Cal. 82, 89-91, 183 Pac. 552, 555 (1919); *Rogers v. Cady,* 104 Cal. 288, 290, 38 Pac. 81 (1894) (dictum); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article II. Judicial Notice),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 850-851 (1964).

CROSS-REFERENCES

Exclusion of cumulative or unduly prejudicial evidence, see § 352
Privileges, see §§ 900-1073

§ 455. Opportunity to present information to court

455. With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action:

(a) If the court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Comment. Section 455 provides procedural safeguards designed to afford the parties reasonable opportunity to be heard both as to the propriety of taking judicial notice of a matter and as to the tenor of the matter to be noticed.

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Subdivision (a). This subdivision guarantees to the parties a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. In a jury case, the subdivision provides the parties with an opportunity to present their information to the judge before a jury instruction based on a matter judicially noticed is given. Where the matter subject to judicial notice relates to a cause tried by the court, the subdivision guarantees the parties an opportunity to dispute the taking of judicial notice of the matter before the cause is submitted for decision. If the judge does not discover that a matter should be judicially noticed until after the cause is submitted for decision, he may, of course, order the cause to be reopened for the purpose of permitting the parties to provide him with information concerning the matter.

Subdivision (a) is limited in its application to those matters specified in subdivision (f) of Section 451 or in Section 452 that are of substantial consequence to the determination of the action, for it would not be practicable to make the subdivision applicable to the other matters listed in Section 451 or to matters that are of inconsequential significance.

What constitutes a "reasonable opportunity" to "present . . . information" will depend upon the complexity of the matter and its importance to the case. For example, in a case where there is no dispute as to the existence and validity of a city ordinance, no formal hearing would be necessary to determine the propriety of taking judicial notice of the ordinance and of its tenor. But, where there is a complex question as to the tenor of foreign law applicable to the case, the granting of a hearing under subdivision (a) would be mandatory. The New York courts have so construed their judicial notice statute, saying that an opportunity for a litigant to know what the deciding tribunal is considering and to be heard with respect to both law and fact is guaranteed by due process of law. *Arams v. Arams,* 182 Misc. 328, 182 Misc. 336, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

Subdivision (b). If the court resorts to sources of information not previously known to the parties, this subdivision requires that such information and its source be made a part of the record when it relates to taking judicial notice of a matter specified in subdivision (f) of Section 451 or in Section 452 that is of substantial consequence to the determination of the action. This requirement is based on a somewhat similar requirement found in Code of Civil Procedure Section 1875 regarding the law of a foreign nation. Making the information and its source a part of the record assures its availability for examination by the parties and by a reviewing court. In addition, subdivision (b) requires the court to give the parties a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken.

CROSS-REFERENCES

Definition:
Action, see § 105

§ 456. Noting for record denial of request to take judicial notice

456. If the court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.

Comment. Section 456 requires the judge to advise the parties and indicate for the record at the earliest practicable time any denial of a request to take judicial notice of a matter. The requirement is imposed in order to provide the parties with an adequate opportunity to submit evidence on any matter as to which judicial notice was anticipated but not taken. No comparable requirement is found in existing law. Compare EVIDENCE CODE § 455 and the *Comment* thereto.

§ 457. Instructing jury on matter judicially noticed

457. If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the court may, and upon request shall, instruct the jury to accept as a fact the matter so noticed.

Comment. Section 457 makes matters judicially noticed binding on the jury and thereby eliminates any possibility of presenting to the jury evidence disputing the fact as noticed by the court. The section is limited to instruction on a matter that would otherwise have been for determination by the jury; instruction of juries on matters of law is not a matter of evidence and is covered by the general provisions of law governing instruction of juries. The section states the substance of the existing law as found in Code of Civil Procedure Section 2102. See *People v. Mayes,* 113 Cal. 618, 625-626, 45 Pac. 860, 862 (1896); *Gallegos v. Union-Tribune Publishing Co.,* 195 Cal. App.2d 791, 797-798, 16 Cal. Rptr. 185, 189-190 (1961).

§ 458. Judicial notice by trial court in subsequent proceedings

458. The failure or refusal of the trial court to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division.

Comment. This section provides that the failure or even the refusal of the court to take judicial notice of a matter at the trial does not bar the trial judge, or another trial judge, from taking judicial notice of that matter in a subsequent proceeding, such as a hearing on a motion for new trial or the like. Although no California case in point has been found, it seems safe to assume that the trial judge has the power to take judicial notice of a matter in subsequent proceedings, since the appellate court can properly take judicial notice of any matter that the trial court could properly notice. See *People v. Tossetti,* 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

CROSS-REFERENCES

Definition:
Action, see § 105

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§ 459. Judicial notice by reviewing court

459. (a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Comment. Section 459 sets forth a separate set of rules for the taking of judicial notice by a reviewing court.

Subdivision (a). Subdivision (a) requires that a reviewing court take judicial notice of any matter that the trial court properly noticed or was obliged to notice. This means that the matters specified in Section 451 must be judicially noticed by the reviewing court even though the trial court failed to take judicial notice of such matters. A matter specified in Section 452 also must be judicially noticed by the reviewing court if such matter was properly noticed by the trial court in the exercise of its discretion or an appropriate request was made at the trial level and the party making the request satisfied the conditions specified in Section 453. However, if the trial court erred, the reviewing court is not bound by the tenor of the notice taken by the trial court.

Having taken judicial notice of such a matter, the reviewing court may or may not apply it in the particular case on appeal. The effect to be given to matters judicially noticed on appeal, where the question has not been raised below, depends on factors that are not evidentiary in character and are not mentioned in this code. For example, the appellate court is required to notice the matters of law mentioned in Section 451, but it may hold that an error which the appellant has "invited" is not reversible error or that points not urged in the trial court may not be advanced on appeal, and refuse, therefore, to apply the law to the pending case. These principles do not mean that the appellate court does not take judicial notice of the applicable law;

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they merely mean that, for reasons of policy governing appellate review, the appellate court may refuse to apply the law to the case before it.

In addition to requiring the reviewing court to judicially notice those matters which the trial court properly noticed or was required to notice, the subdivision also provides authority for the reviewing court to exercise the same discretionary power to take judicial notice as is possessed by the trial court.

Subdivision (b). The reviewing court may consult any source of pertinent information for the purpose of determining the propriety of taking judicial notice or the tenor of the matter to be noticed. This includes, of course, the power to consult such sources for the purpose of sustaining or reversing the taking of judicial notice by the trial court. As to the rights of the parties when the reviewing court consults such materials, see subdivision (d) and the *Comment* thereto.

Subdivision (c). This subdivision provides the parties with the same procedural protection when judicial notice is taken by the reviewing court as is provided by Section 455(a).

Subdivision (d). This subdivision assures the parties the same procedural safeguard at the appellate level that they have in the trial court: If the appellate court resorts to sources of information not included in the record in the action or proceeding, or not received in open court at the appellate level, either to sustain the tenor of the notice taken by the trial court or to notice a matter in a tenor different from that noticed by the trial court, the parties must be given a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken. See EVIDENCE CODE § 455(b) and the *Comment* thereto.

CROSS-REFERENCES

Definition:
Action, see § 105

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DIVISION 5. BURDEN OF PROOF; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS AND INFERENCES

CHAPTER 1. BURDEN OF PROOF

Article 1. General

§ 500. Party who has the burden of proof

500. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

Comment. As used in Section 500, the burden of proof means the obligation of a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or nonexistence of a fact. See EVIDENCE CODE §§ 115, 190. If this requisite degree of conviction is not achieved as to the existence of a particular fact, the trier of fact must assume that the fact does not exist. MORGAN, BASIC PROBLEMS OF EVIDENCE 19 (1957); 9 WIGMORE, EVIDENCE § 2485 (3d ed. 1940). Usually, the burden of proof requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence—a degree of proof usually described as proof by a preponderance of the evidence. EVIDENCE CODE § 115; WITKIN, CALIFORNIA EVIDENCE § 59 (1958). However, in some instances, the burden of proof requires a party to produce a substantially greater degree of belief in the mind of the trier of fact concerning the existence of the fact—a burden usually described by stating that the party must introduce clear and convincing proof (WITKIN, CALIFORNIA EVIDENCE § 60 (1958)) or, with respect to the prosecution in a criminal case, proof beyond a reasonable doubt (PENAL CODE § 1096).

The defendant in a criminal case sometimes has the burden of proof in regard to a fact essential to negate his guilt. However, in such cases, he usually is not required to persuade the trier of fact as to the existence of such fact; he is merely required to raise a reasonable doubt in the mind of the trier of fact as to his guilt. EVIDENCE CODE § 501; *People v. Bushton,* 80 Cal. 160, 22 Pac. 127 (1889). If the defendant produces no evidence concerning the fact, there is no issue on the matter to be decided by the jury; hence, the jury may be instructed that the nonexistence of the fact must be assumed. See, *e.g., People v. Harmon,* 89 Cal. App.2d 55, 58, 200 P.2d 32, 34 (1948) (prosecution for narcotics possession; jury instructed "that the burden of proof is upon the defendant that he possessed a written prescription and that in the absence of such evidence it must be assumed that he had no such prescription"). See also *People v. Boo Doo Hong,* 122 Cal. 606, 607, 55 Pac. 402, 403 (1898).

Section 1981 of the Code of Civil Procedure (superseded by Evidence Code Section 500) provides that the party holding the affirmative of the issue must produce the evidence to prove it and that the burden of proof lies on the party who would be defeated if no evidence were given on either side. This section has been criticized as establishing a meaningless standard:

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> The "affirmative of the issue" lacks any substantial objective meaning, and the allocation of the burden actually requires the application of several rules of practice and policy, not entirely consistent and not wholly reliable. [WITKIN, CALIFORNIA EVIDENCE § 56 at 72-73 (1958).]
>
> That the burden is on the party having the affirmative [or] that a party is not required to prove a negative . . . is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form. Thus a plaintiff's exercise of ordinary care equals absence of contributory negligence, in the minority of jurisdictions which place this element in plaintiff's case. In any event, the proposition seems simply not to be so. [Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 11 (1959).]

"The basic rule, which covers most situations, is that whatever facts a party must affirmatively plead he also has the burden of proving." WITKIN, CALIFORNIA EVIDENCE § 56 at 73 (1958). Section 500 follows this basic rule. However, Section 500 is broader, applying to issues not necessarily raised in the pleadings.

Under Section 500, the burden of proof as to a particular fact is normally on the party to whose case the fact is essential. "[W]hen a party seeks relief the burden is upon him to prove his case, and he cannot depend wholly upon the failure of the defendant to prove his defenses." *Cal. Employment Comm'n v. Malm,* 59 Cal. App.2d 322, 323, 138 P.2d 744, 745 (1943). And, "as a general rule, the burden is on the defendant to prove new matter alleged as a defense . . . , even though it requires the proof of a negative." *Wilson v. California Cent. R.R.,* 94 Cal. 166, 172, 29 Pac. 861, 864 (1892).

Section 500 does not attempt to indicate what facts may be essential to a particular party's claim for relief or defense. The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence.

The general rule allocating the burden of proof applies "except as otherwise provided by law." The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. In determining the incidence of the burden of proof, "the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." 9 WIGMORE, EVIDENCE § 2486 at 275 (3d ed. 1940).

Under existing California law, certain matters have been called "presumptions" even though they do not fall within the definition contained in Code of Civil Procedure Section 1959 (superseded by Evidence Code Section 600). Both Section 1959 and Evidence Code Section 600 define a presumption to be an assumption or conclusion of fact

that the law requires to be drawn from the proof or establishment of some other fact. Despite the statutory definition, subdivisions 1 and 4 of Code of Civil Procedure Section 1963 (superseded by Sections 520 and 521 of the Evidence Code) provide presumptions that a person is innocent of crime or wrong and that a person exercises ordinary care for his own concerns. Similarly, some cases refer to a presumption of sanity. It is apparent that these so-called presumptions do not arise from the establishment or proof of a fact in the action. In fact, they are not presumptions at all but are preliminary allocations of the burden of proof in regard to the particular issue. This preliminary allocation of the burden of proof may be satisfied in particular cases by proof of a fact giving rise to a presumption that does affect the burden of proof. For example, the initial burden of proving negligence may be satisfied in a particular case by proof that undamaged goods were delivered to a bailee and that such goods were lost or damaged while in the bailee's possession. Upon such proof, the bailee would have the burden of proof as to his lack of negligence. *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 205 P.2d 1037 (1949). *Cf.* COM. CODE § 7403.

Because the assumptions referred to above do not meet the definition of a presumption contained in Section 600, they are not continued in this code as presumptions. Instead, they appear in the next article in several sections allocating the burden of proof on specific issues. See Article 2 (Sections 520-522).

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Law, see § 160
Proof of guilt beyond reasonable doubt, see § 501; Penal Code § 1096

§ 501. Burden of proof in criminal action generally

501. Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096.

Comment. A statute assigning the burden of proof may require the party to whom the burden is assigned to raise a reasonable doubt in the mind of the trier of fact or to persuade the trier of fact by a preponderance of evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. See EVIDENCE CODE § 115.

Sections 520–522 (which assign the burden of proof on specific issues) may, at times, assign the burden of proof to the defendant in a criminal action. Elsewhere in the codes are other sections that either specifically allocate the burden of proof to the defendant in a criminal action or have been construed to allocate the burden of proof to the defense. For example, Health and Safety Code Section 11721 provides specifically that, in a prosecution for the use of narcotics, it is the burden of the defense to show that the narcotics were administered by or under the direction of a person licensed to prescribe and administer narcotics. Health and Safety Code Section 11500, on the other hand, prohibits the possession of narcotics but provides an exception for narcotics possessed pursuant to a prescription. The courts have construed this section to place the burden of proof on the defense to show that the exception applies and that the narcotics were possessed pursuant to a pre-

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scription. *People v. Marschalk*, 206 Cal. App.2d 346, 23 Cal. Rptr. 743 (1962); *People v. Bill*, 140 Cal. App. 389, 392-394, 35 P.2d 645, 647-648 (1934).

Section 501 is intended to make it clear that the statutory allocations of the burden of proof appearing in this chapter and elsewhere in the codes are subject to Penal Code Section 1096, which requires that a criminal defendant be proved guilty beyond a reasonable doubt, *i.e.*, that the statutory allocations do not (except on the issue of insanity) require the defendant to persuade the trier of fact of his innocence. Under Evidence Code Section 522, as under existing law, the defendant must prove his insanity by a preponderance of the evidence. *People v. Daugherty*, 40 Cal.2d 876, 256 P.2d 911 (1953). However, where a statute allocates the burden of proof to the defendant on any other issue relating to the defendant's guilt, the defendant's burden, as under existing law, is merely to raise a reasonable doubt as to his guilt. *People v. Bushton*, 80 Cal. 160, 22 Pac. 127 (1889). Section 501 also makes it clear that, when a statute assigns the burden of proof to the prosecution in a criminal action, the prosecution must discharge that burden by proof beyond a reasonable doubt.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Criminal action, see § 130
Statute, see § 230
Proof of guilt beyond reasonable doubt, see Penal Code § 1096

§ 502. Instructions on burden of proof

502. The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Comment. Section 502 supersedes subdivision 5 of Code of Civil Procedure Section 2061.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Proof, see § 190

Article 2. Burden of Proof on Specific Issues

§ 520. Claim that person guilty of crime or wrongdoing

520. The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

Comment. Section 520 restates the substance of and supersedes subdivision 1 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Person, see § 175
Proof of guilt beyond reasonable doubt, see § 501; Penal Code § 1096

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§ 521. Claim that person did not exercise care

521. The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

Comment. Section 521 supersedes the presumption in subdivision 4 of Code of Civil Procedure Section 1963. Under existing law, the presumption is considered "evidence"; while under the Evidence Code, it is not. See EVIDENCE CODE § 600 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Person, see § 175

§ 522. Claim that person is or was insane

522. The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

Comment. Section 522 codifies an allocation of the burden of proof that is frequently referred to in the cases as a presumption. See, *e.g.*, *People v. Daugherty,* 40 Cal.2d 876, 899, 256 P.2d 911, 925-926 (1953).

CROSS-REFERENCES

Definition:
Burden of proof, see § 115

CHAPTER 2. BURDEN OF PRODUCING EVIDENCE

§ 550. Party who has the burden of producing evidence

550. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof. Thereafter, the burden of producing evidence as to a particular fact is on the party who would suffer a finding against him on that fact in the absence of further evidence.

Comment. Section 550 deals with the allocation of the burden of producing evidence. At the outset of the case, this burden will coincide with the burden of proof. 9 WIGMORE, EVIDENCE § 2487 at 279 (3d ed. 1940). However, during the course of the trial, the burden may shift from one party to another, irrespective of the incidence of the burden of proof. For example, if the party with the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party, whether or not the presumption is one that affects the burden of proof. In addition, a party may introduce evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence, in which case the burden of producing evidence would shift to the opposing party to produce some evidence. These principles are in accord with well-settled California law. See discussion in WITKIN, CALIFORNIA EVIDENCE §§ 53-56 (1958). See also 9 WIGMORE, EVIDENCE § 2487 (3d ed. 1940).

CROSS-REFERENCES

Definitions:
Burden of producing evidence, see § 110
Burden of proof, see § 115
Evidence, see § 140

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CHAPTER 3. PRESUMPTIONS AND INFERENCES

Article 1. General

§ 600. Presumption and inference defined

600. (a) Subject to Section 607, a presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

(b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

Comment. Except for the limitation at the beginning of the section, the definition of a presumption in Section 600 is substantially the same as that contained in Code of Civil Procedure Section 1959: "A presumption is a deduction which the law expressly directs to be made from particular facts." Section 600 was derived from Rule 13 of the Uniform Rules of Evidence and supersedes Code of Civil Procedure Section 1959.

The reference to Section 607 appears in this section because, under the Evidence Code, a rebuttable presumption cannot require the jury to find a fact essential to the guilt of a defendant in a criminal case; it can merely authorize such a finding. See EVIDENCE CODE § 607 and the *Comment* thereto.

The second sentence of subdivision (a) may be unnecessary in light of the definition of "evidence" in Section 140—"testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Presumptions, then, are not "evidence" but are conclusions that the law requires to be drawn (in the absence of a sufficient contrary showing) when some other fact is proved or otherwise established in the action.

Nonetheless, the second sentence has been added here to repudiate specifically the rule of *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931). That case held that a presumption is evidence that must be weighed against conflicting evidence; and in *Scott v. Burke,* 39 Cal.2d 388, 247 P.2d 313 (1952), the Supreme Court held that conflicting presumptions must be weighed against each other. These decisions require the jury to perform an intellectually impossible task. The jury is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and to determine which "evidence" is of greater probative force. Or else, the jury is required to accept the fact that the law requires two opposing conclusions and to determine which required conclusion is of greater probative force.

Moreover, the doctrine that a presumption is evidence imposes upon the party with the burden of proof a much higher burden of proof than is warranted. For example, if a party with the burden of proof has a presumption invoked against him and if the presumption remains in the case as evidence even though the jury believes that he has produced a preponderance of the evidence, the effect is that he must produce some additional but unascertainable quantum of proof in order to dispel the effect of the presumption. See *Scott v. Burke,* 39 Cal.2d 388, 405-406,

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247 P.2d 313, 323-324 (1952) (dissenting opinion). The doctrine that a presumption is evidence gives no guidance to the jury or to the parties as to the amount of this additional proof. The most that should be expected of a party in a civil case is that he prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence). The most that should be expected of the prosecution in a criminal case is that it establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.

To avoid the confusion engendered by the doctrine that a presumption is evidence, this code describes "evidence" as the matters presented in judicial proceedings and uses presumptions solely as devices to aid in determining the facts from the evidence presented.

The definition of "inference" in subdivision (b) restates in substance the definition contained in Code of Civil Procedure Sections 1958 and 1960. Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence.

CROSS-REFERENCES

Definitions:
- Action, see § 105
- Evidence, see § 140
- Law, see § 160

Effect of presumption establishing element of crime, see § 607
Prima facie evidence, see § 602
See also the *Cross-References* under Sections 601, 602, 630, 660

§ 601. Classification of presumptions

601. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

Comment. Under existing law, some presumptions are conclusive. The court or jury is required to find the existence of the presumed fact regardless of the strength of the opposing evidence. The conclusive presumptions are specified in Section 1962 of the Code of Civil Procedure (superseded by Article 2 (Sections 620-624) of this chapter).

Under existing law, too, all presumptions that are not conclusive are rebuttable presumptions. CODE CIV. PROC. § 1961 (superseded by EVIDENCE CODE § 601). However, the existing statutes make no attempt to classify the rebuttable presumptions.

For several decades, courts and legal scholars have wrangled over the purpose and function of presumptions. The view espoused by Professors Thayer (THAYER, PRELIMINARY TREATISE ON EVIDENCE 313-352 (1898)) and Wigmore (9 WIGMORE, EVIDENCE §§ 2485-2491 (3d ed. 1940)), accepted by most courts (see Morgan, *Presumptions*, 10 RUTGERS L. REV. 512, 516 (1956)), and adopted by the American Law Institute's Model Code of Evidence, is that a presumption is a preliminary assumption of fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. In Professor Thayer's view, a presumption

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merely reflects the judicial determination that the same conclusionary fact exists so frequently when the preliminary fact exists that, once the preliminary fact is established, proof of the conclusionary fact may be dispensed with unless there is actually some contrary evidence:

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. [THAYER, PRELIMINARY TREATISE ON EVIDENCE 326 (1898).]

Professors Morgan and McCormick argue that a presumption should shift the burden of proof to the adverse party. MORGAN, SOME PROBLEMS OF PROOF 81 (1956); MCCORMICK, EVIDENCE § 317 at 671-672 (1954). They believe that presumptions are created for reasons of policy and argue that, if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium, and, *a fortiori*, it should be of sufficient weight to require a finding if the trier of fact does not believe the contrary evidence.

The classification of presumptions in the Evidence Code is based on a third view suggested by Professor Bohlen in 1920. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920). Underlying the presumptions provisions of the Evidence Code is the conclusion that the Thayer view is correct as to some presumptions, but that the Morgan view is right as to others. The fact is that presumptions are created for a variety of reasons, and no single theory or rationale of presumptions can deal adequately with all of them. Hence, the Evidence Code classifies all rebuttable presumptions as either (1) presumptions affecting the burden of producing evidence (essentially Thayer presumptions), or (2) presumptions affecting the burden of proof (essentially Morgan presumptions).

Sections 603 and 605 set forth the criteria by which the two classes of rebuttable presumptions may be distinguished, and Sections 604, 606, and 607 prescribe their effect. Articles 3 and 4 (Sections 630-667) classify many presumptions found in California law; but many other presumptions, both statutory and common law, must await classification by the courts in accordance with the criteria contained in Sections 603 and 605.

The classification scheme contained in the Evidence Code follows a distinction that appears in the California cases. Thus, for example, the courts have at times held that presumptions do not affect the burden of proof. *Estate of Eakle,* 33 Cal. App.2d 379, 91 P.2d 954 (1939) (presumption of undue influence); *Valentine v. Provident Mut. Life Ins. Co.,* 12 Cal. App.2d 616, 55 P.2d 1243 (1936) (presumption of death from seven years' absence). And at other times the courts have held that certain presumptions do affect the burden of proof. *Estate of Nickson,* 187 Cal. 603, 203 Pac. 106 (1921) ("clear and convincing

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proof'' required to overcome presumption of community property); *Estate of Walker*, 180 Cal. 478, 181 Pac. 792 (1919) (''clear and satisfactory proof'' required to overcome presumption of legitimacy). The cases have not, however, explicitly recognized the distinction, nor have they applied it consistently. *Compare Estate of Eakle, supra* (presumption of undue influence does not affect burden of proof), *with Estate of Witt,* 198 Cal. 407, 245 Pac. 197 (1926) (presumption of undue influence must be overcome with ''the clearest and most satisfactory evidence''). The Evidence Code clarifies the law relating to presumptions by identifying the distinguishing factors, and it provides a measure of certainty by classifying a number of specific presumptions.

CROSS-REFERENCES.

Conclusive presumptions, see §§ 620–624
Definition:
  Presumption, see § 600
Presumptions affecting the burden of producing evidence, see §§ 603, 604, 607, 630–645
Presumptions affecting the burden of proof, see §§ 605–607, 660–667
Prima facie evidence, see § 602

§ 602. Statute making one fact prima facie evidence of another fact

602. A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

Comment. Section 602 indicates the construction to be given to the large number of statutes scattered through the codes that state that one fact or group of facts is prima facie evidence of another fact. See, *e.g.,* AGRIC. CODE § 18, COM. CODE § 1202, REV. & TAX. CODE § 6714. In some instances, these statutes have been enacted for reasons of public policy that require them to be treated as presumptions affecting the burden of proof. See *People v. Schwartz,* 31 Cal.2d 59, 63, 187 P.2d 12, 14 (1947); *People v. Mahoney,* 13 Cal.2d 729, 732-733, 91 P.2d 1029, 1030-1031 (1939). It seems likely, however, that in many instances such statutes are not intended to affect the burden of proof but only the burden of producing evidence. Section 602 provides that these statutes are to be regarded as rebuttable presumptions. Hence, unless some specific language applicable to the particular statute in question indicates whether it affects the burden of proof or only the burden of producing evidence, the courts will be required to classify these statutes as presumptions affecting the burden of proof or the burden of producing evidence in accordance with the criteria set forth in Sections 603 and 605.

CROSS-REFERENCES

Copies of Spanish title papers as prima facie evidence, see § 1605
Deed pursuant to court process as prima facie evidence, see § 1603
Definitions:
  Rebuttable presumption, see § 601
  Statute, see § 230
Official certificate of purchase as prima facie evidence, see § 1604
Official record as prima facie evidence, see § 1600
Patent for mineral lands as prima facie evidence, see § 1602
See also the *Cross-References* under Sections 630, 660

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§ 603. Presumption affecting the burden of producing evidence defined

603. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

Comment. Sections 603 and 605 set forth the criteria for determining whether a particular presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. Many presumptions are classified in Articles 3 and 4 (Sections 630-667) of this chapter. In the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof by applying the standards contained in Sections 603 and 605.

Section 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases. *Cf.* BOHLEN, STUDIES IN THE LAW OF TORTS 644 (1926). Typical of such presumptions are the presumption that a mailed letter was received (Section 641) and presumptions relating to the authenticity of documents (Sections 643-645).

The presumptions described in Section 603 are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact.

CROSS-REFERENCES

Definitions:
- Action, see § 105
- Burden of producing evidence, see § 110
- Presumption, see § 600

Presumptions affecting the burden of producing evidence, see §§ 630–645
See also the *Cross-References* under Section 630

§ 604. Effect of presumption affecting burden of producing evidence

604. Subject to Section 607, the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall

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determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

Comment. Section 604 describes the manner in which a presumption affecting the burden of producing evidence operates. Such a presumption is merely a preliminary assumption in the absence of contrary evidence, *i.e.*, evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. For example, if a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions. If there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge should instruct the jury concerning the presumption. If the basic fact from which the presumption arises is established (by the pleadings, by stipulation, by judicial notice, etc.) so that the existence of the basic fact is not a question of fact for the jury, the jury should be instructed that the presumed fact is also established. If the basic fact is a question of fact for the jury, the judge should charge the jury that, if it finds the basic fact, the jury must also find the presumed fact. MORGAN, BASIC PROBLEMS OF EVIDENCE 36-38 (1957).

If the prosecution in a criminal action relies on a presumption affecting the burden of producing evidence to establish an element of the crime with which the defendant is charged and if there is no evidence as to the nonexistence of the presumed fact, the jury should be instructed that it is permitted to find the presumed fact but is not required to do so. See EVIDENCE CODE § 607 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
- Burden of producing evidence, see § 110
- Evidence, see § 140
- Inference, see § 600
- Presumption, see § 600
- Trier of fact, see § 235

Effect of presumption that establishes element of crime, see § 607

§ 605. Presumption affecting the burden of proof defined

605. A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the

stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

Comment. Section 605 describes a presumption affecting the burden of proof. Such presumptions are established in order to carry out or to effectuate some public policy other than or in addition to the policy of facilitating the trial of actions.

Frequently, presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence. For example, the presumption of death from seven years' absence (Section 667) exists in part to facilitate the disposition of actions by supplying a rule of thumb to govern certain cases in which there is likely to be no direct evidence of the presumed fact. But the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy (perhaps 30 or 40 years) that underlies the presumption indicates that it should be a presumption affecting the burden of proof.

Frequently, too, a presumption affecting the burden of proof will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on the probability that most marriages are valid. However, an underlying logical inference is not essential. In fact, the lack of an underlying inference is a strong indication that the presumption affects the burden of proof. Only the needs of public policy can justify the direction of a particular assumption that is not warranted by the application of probability and common experience to the known facts. Thus, the total lack of any inference underlying the presumption of the negligence of an employer that arises from his failure to secure the payment of workmen's compensation (LABOR CODE § 3708) is a clear indication that the presumption is based on public policy and affects the burden of proof. Similarly, the fact that the presumption of death from seven years' absence may conflict directly with the logical inference that life continues for its normal expectancy is an indication that the presumption is based on public policy and, hence, affects the burden of proof.

CROSS-REFERENCES

Definitions:
- Action, see § 105
- Burden of proof, see § 115
- Presumption, see § 600

Presumptions affecting the burden of proof, see §§ 660–667

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§ 606. Effect of presumption affecting burden of proof

606. Subject to Section 607, the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

Comment. Section 606 describes the manner in which a presumption affecting the burden of proof operates. In the ordinary case, the party against whom it is invoked will have the burden of proving the nonexistence of the presumed fact by a preponderance of the evidence. Certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof. When such a presumption is relied on, the party against whom the presumption operates will have a heavier burden of proof and will be required to persuade the trier of fact of the nonexistence of the presumed fact by proof " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " *Sheehan v. Sullivan,* 126 Cal. 189, 193, 58 Pac. 543, 544 (1899).

If the party against whom the presumption operates already has the same burden of proof as to the nonexistence of the presumed fact that is assigned by the presumption, the presumption can have no effect on the case and no instruction in regard to the presumption should be given. See *Speck v. Sarver,* 20 Cal.2d 585, 590, 128 P.2d 16, 19 (1942) (dissenting opinion by Traynor, J.); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof,* 47 HARV. L. REV. 59, 69 (1933). If the evidence is not sufficient to sustain a finding of the nonexistence of the presumed fact, the judge's instructions will be the same as if the presumption were merely a presumption affecting the burden of producing evidence. See the *Comment* to Section 604. If there is evidence of the nonexistence of the presumed fact, the judge should instruct the jury on the manner in which the presumption affects the factfinding process. If the basic fact from which the presumption arises is so established that the existence of the basic fact is not a question of fact for the jury (as, for example, by the pleadings, by judicial notice, or by stipulation of the parties), the judge should instruct the jury that the existence of the presumed fact is to be assumed until the jury is persuaded to the contrary by the requisite degree of proof (proof by a preponderance of the evidence, clear and convincing proof, etc.). See MCCORMICK, EVIDENCE § 317 at 672 (1954). If the basic fact is a question of fact for the jury, the judge should instruct the jury that, if it finds the basic fact, it must also find the presumed fact unless persuaded of the nonexistence of the presumed fact by the requisite degree of proof. MORGAN, BASIC PROBLEMS OF EVIDENCE 38 (1957).

In a criminal case, a presumption affecting the burden of proof may be relied upon by the prosecution *to establish an element of the crime* with which the defendant is charged. But, in such a case, the effect of the presumption on the factfinding process and the nature of the instructions differ substantially from those described in Section 606 and this *Comment.* See EVIDENCE CODE § 607 and the *Comment* thereto. On other issues, a presumption affecting the burden of proof will have the same effect in a criminal case as it does in a civil case, and the instructions will be the same.

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CROSS-REFERENCES

Definition:
Burden of proof, see § 115
Effect of presumption that establishes element of crime, see § 607

§ 607. Effect of presumption that establishes an element of a crime

607. When a rebuttable presumption operates in a criminal action to establish an element of the crime with which the defendant is charged, neither the burden of producing evidence nor the burden of proof is imposed upon the defendant; but, if the trier of fact finds that the facts that give rise to the presumption have been proved beyond a reasonable doubt, the trier of fact may but is not required to find that the presumed fact has also been proved beyond a reasonable doubt.

Comment. Under Section 607, rebuttable presumptions apply somewhat differently when invoked to establish a fact essential to the guilt of a criminal defendant than they do when invoked to establish some other fact.

If a presumption affecting the burden of producing evidence is invoked to establish a fact essential to a defendant's guilt, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears from the case (see EVIDENCE CODE § 604) and the jury should be given no instruction on the effect of the presumption. If there is no contrary evidence, however, the judge should instruct the jury that, if it finds that the facts giving rise to the presumption have been proved beyond a reasonable doubt, it is *permitted* to find that the presumed fact has been proved beyond a reasonable doubt.

If a presumption affecting the burden of proof is invoked to establish a fact essential to a defendant's guilt, whether or not there is contrary evidence, the judge should instruct the jury that, if it finds that the facts giving rise to the presumption have been proved beyond a reasonable doubt, it is permitted—but not required—to find that the presumed fact has also been proved beyond a reasonable doubt.

Thus, under the Evidence Code, a rebuttable presumption cannot place either the burden of producing evidence or the burden of proof on the defendant concerning a fact constituting an element of the crime with which he is charged. Those burdens may be placed on a defendant only by statutes so providing. *Cf.* Sections 500, 501, and 550 and the *Comments* thereto. See also the comment on affirmative defenses in MODEL PENAL CODE, TENTATIVE DRAFT No. 4 at 110-112 (1955).

Effect on existing law. Section 607 changes existing California law and practice in two respects. However, because of the confusion engendered by conflicting instructions that are now given in criminal cases, it is uncertain whether the change will have any practical significance in the trial of criminal cases.

First, Section 607 may change the California law by providing that a presumption cannot *require* a jury in a criminal case to find a fact constituting an element of the crime charged. Whether or not Section 607 changes the law in this respect, it will modify existing practice, for juries have been instructed that they are bound to find in accordance with applicable presumptions.

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Code of Civil Procedure Section 1959 defines a presumption as "a deduction which the law expressly directs to be made from particular facts." Code of Civil Procedure Section 1961 provides that the jury "are bound to find according to the presumption" if it is not "controverted by other evidence." Although "the rules of evidence in civil actions are also applicable to criminal actions" as a general rule (PENAL CODE § 1102; on presumptions, *cf. People v. Hewlett,* 108 Cal. App.2d 358, 239 P.2d 150 (1951)), the applicability of these sections to criminal cases cannot be regarded as settled, for there appears to be no appellate decision in which the propriety of instructing a jury in a criminal case in their terms has been considered. Nevertheless, there are cases in which juries have been instructed on presumptions in the terms of *California Jury Instructions, Criminal* (2d ed. 1958) Numbers 25 and 40, both of which, after reciting the statutory definition, state: "Unless declared by law to be conclusive, it [a presumption] may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption." See, *e.g., People v. Masters,* 219 Cal. App.2d 672, 33 Cal. Rptr. 383 (1963); *People v. Porter,* 217 Cal. App.2d 824, 31 Cal. Rptr. 841 (1963); *People v. Perez,* 128 Cal. App.2d 750, 276 P.2d 72 (1954); *People v. Candiotto,* 128 Cal. App.2d 347, 275 P.2d 500 (1954) (opinions indicate, without discussion, that the quoted instruction was given).

Under Section 607, it is clear that a presumption which operates to establish the guilt of a criminal defendant is not a "deduction which the law expressly directs to be made"; it is only a conclusion that the trier of fact is *permitted*—but is not required—to draw. Hence, a jury cannot be instructed that, unless a presumption is controverted, "the jury is bound to find in accordance with the presumption." Instead, the judge should instruct the jury that it is permitted, but is not required, to find in accordance with the presumption. An instruction similar to Instruction Number 25 contained in *California Jury Instructions, Criminal* (2d ed. 1958) may be given only if the statute defining the crime explicitly places the burden of proof on the defendant or provides that the fact in question creates an exception to the defined crime. See, *e.g., People v. Harmon,* 89 Cal. App.2d 55, 58, 200 P.2d 32, 34 (1948) (crime defined as possession of narcotics *except* upon prescription; instruction approved stating "that the burden of proof is upon the defendant that he possessed a written prescription and that in the absence of such evidence it must be assumed that he had no such prescription"). See also *People v. Boo Doo Hong,* 122 Cal. 606, 607, 55 Pac. 402, 403 (1898). *Cf. Comments* to Sections 500 and 501.

Second, Section 607 will change the California law by providing that neither the burden of proof nor the burden of producing evidence is placed on a criminal defendant by a presumption. The California courts have held that a presumption that operates to establish a fact essential to the guilt of a criminal defendant " 'places upon the defendant the burden of producing such evidence thereon as will . . . create a reasonable doubt in the minds of the jury as to' " the existence of the presumed fact. *People v. Martina,* 140 Cal. App.2d 17, 25, 294 P.2d 1015, 1019 (1956). See also *People v. Hardy,* 33 Cal.2d

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52, 64, 198 P.2d 865, 872 (1948) ("the defendant . . . is . . . required . . . only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury"); *People v. Scott,* 24 Cal.2d 774, 783, 151 P.2d 517, 521 (1944) ("he [the defendant] must . . . go forward with evidence to the extent of raising a reasonable doubt that he tampered with the identification marks [of a firearm in violation of Penal Code Section 12091]"); *People v. Agnew,* 16 Cal.2d 655, 666, 107 P.2d 601, 606 (1940) ("the burden thus placed upon the defendant [by a common law presumption] could be met by evidence which produced in their [the jury's] minds a reasonable doubt . . ."). And, under existing law, an instruction stating that the defendant has such a burden may be given. *People v. Martina,* 140 Cal. App.2d 17, 294 P.2d 1015 (1956). Thus, under existing law, a presumption has been held to place upon the defendant a burden similar to that which he has under a statute specifically placing the burden of proof upon him. *People v. Agnew,* 16 Cal.2d 655, 107 P.2d 601 (1940); *People v. Bushton,* 80 Cal. 160, 22 Pac. 127 (1889).

However, under existing law, a criminal defendant is entitled to an instruction in every case that he "is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal . . . ." PENAL CODE § 1096. In presumptions cases, juries have been instructed that a presumption relied on by the prosecution does "not relieve the prosecution of the burden of proving every element of the offense charged . . . ." *People v. Hewlett,* 108 Cal. App.2d 358, 373, 239 P.2d 150, 159 (1951). *California Jury Instructions, Criminal* (2d ed. 1958) Number 51, which relates to the defendant's right to refuse to testify, refers to the prosecution's "burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt" and goes on to say that "the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." Thus, where a crime is defined to include certain specified elements and a presumption is relied on to prove one of the elements, juries have been given instructions that both require the prosecution to prove the crucial element beyond a reasonable doubt and require the defendant to raise a reasonable doubt on the question.

Under Section 607, it is clear that neither the burden of producing evidence nor the burden of proof—even to the extent of raising a reasonable doubt—is placed on a criminal defendant by a presumption. It is also clear that an instruction that so states—such as the instruction approved in *People v. Martina,* 140 Cal. App.2d 17, 294 P.2d 1015 (1956)—is improper. But it is uncertain whether this change will have much practical significance in the trial of criminal cases. Section 607 merely precludes the giving of an instruction that conflicts with other required instructions and, therefore, avoids the present confusion concerning the proper allocation of the burden of proof. It seems likely that the practical effect of these instructions has been to require the jury to weigh the effect of a presumption in determining whether the prosecution has proved each element of the crime beyond a reason-

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able doubt. Thus, as a practical matter, a presumption may be considered much the same as other evidence in the case is considered. There is language in some cases indicating that this is the actual function of a presumption. For example, in *People v. Hardy*, 33 Cal.2d 52, 64, 198 P.2d 865, 872 (1948), the court said that "the rule [relating to the defendant's burden] is the same whether the People rely on testimonial evidence or on presumptions, except where the presumption is conclusive." See also *People v. Hewlett,* 108 Cal. App.2d 358, 373, 239 P.2d 150, 159 (1951) ("it seems quite clear that any of the disputable presumptions set forth by law . . . may be considered by the jury in weighing the presumption of innocence and in determining whether the prosecution has sustained the burden of showing that the defendant is guilty . . . beyond a reasonable doubt").

Section 607 provides specifically that a presumption is a matter that *may* be relied on by the trier of fact, and in so providing it achieves directly a result that now is probably achieved in practice as a result of the contradictory instructions that are given.

Policy underlying Section 607. The treatment of presumptions and the burden of proof in this code is similar to that proposed in the Model Penal Code. Like Section 607, the presumptions contained in the Model Penal Code permit a jury finding of the presumed fact but do not require such a finding. MODEL PENAL CODE § 1.12(5) (Proposed Official Draft 1962). However, under the Model Penal Code, the prosecution is relieved of producing any evidence as to a matter that is made an affirmative defense. MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962). "Unless there is evidence supporting the defense, there is no issue on the point to be submitted to the jury." MODEL PENAL CODE, TENTATIVE DRAFT No. 4 at 110 (1955). The prosecution is required to prove beyond a reasonable doubt a fact that is made an affirmative defense only when "the defendant shows enough to justify such doubt upon the issue." *Ibid.* Similarly, under Evidence Code Section 501, the defendant may be foreclosed from obtaining a jury decision as to the existence of a particular fact when there is no evidence thereof if the existence of that fact is made an affirmative defense either by a statute specifically assigning to the defendant the burden of proof as to the existence of the fact or by a statute describing the existence of the fact as an exception to the defined crime. Section 607 thus does not preclude the Legislature from placing the burden of proof on a criminal defendant. It merely forbids the Legislature from using a presumption for that purpose. The burden of proof on the essential elements of a crime must remain on the prosecution; it cannot be shifted to the defendant by presumptions. If the defendant is to be given the burden of proof, the statute defining the crime must clearly indicate that a defense, not an element of the crime, is involved.

The Commission recognizes that in some instances, as a practical matter, it will be difficult or virtually impossible for the prosecution to produce evidence of an essential element of an offense. That is especially so when the element involves proof of a negative fact (*e.g.,* a possessor of narcotics did not have a doctor's prescription therefor) or a fact solely or peculiarly within the defendant's knowledge (*e.g.,* that he defaced the identification marks on a pistol or revolver). Nonetheless, it is and has been the prosecution's burden on all of the evidence

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to persuade the trier of fact beyond a reasonable doubt of the defendant's guilt of the offense charged. The Commission's purpose has been to reconcile these two policies so that an undue burden of producing evidence is not imposed on the prosecution while, at the same time, maintaining and not relaxing its burden of persuasion; it is believed that Section 607 accomplishes this purpose.

CROSS-REFERENCES

Definitions:
Burden of producing evidence, see § 110
Burden of proof, see § 115
Criminal action, see § 130
Reasonable doubt, see Penal Code § 1096
Rebuttable presumption, see § 601
Trier of fact, see § 235

Article 2. Conclusive Presumptions

§ 620. Conclusive presumptions

620. The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.

Comment. This article supersedes and continues in effect without substantive change the provisions of subdivisions 2, 3, 4, and 5 of Section 1962 of the Code of Civil Procedure. Other statutes not listed in this article also provide conclusive presumptions. See, *e.g.*, CIVIL CODE § 3440. There may also be a few nonstatutory conclusive presumptions. See WITKIN, CALIFORNIA EVIDENCE § 63 (1958).

Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law. Hence, the Commission has not recommended any substantive revision of the conclusive presumptions contained in this article.

CROSS-REFERENCES

Definitions:
Law, see § 160
Presumption, see § 600

§ 621. Legitimacy

621. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate.

Comment. Section 621 restates and supersedes subdivision 5 of Code of Civil Procedure Section 1962.

CROSS-REFERENCES

Definition:
Law, see § 140
Rebuttable presumption of legitimacy, see § 661

§ 622. Facts recited in written instrument

622. The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

Comment. Section 622 restates and supersedes subdivision 2 of Code of Civil Procedure Section 1962.

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§ 623. Estoppel by own statement or conduct

623. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Comment. Section 623 restates and supersedes subdivision 3 of Code of Civil Procedure Section 1962.

CROSS-REFERENCES

Definitions:
- Conduct, see § 125
- Statement, see § 225

§ 624. Estoppel of tenant to deny title of landlord

624. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

Comment. Section 624 restates and supersedes subdivision 4 of Code of Civil Procedure Section 1962.

Article 3. Presumptions Affecting the Burden of Producing Evidence

§ 630. Presumptions affecting the burden of producing evidence

630. The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 603, are presumptions affecting the burden of producing evidence.

Comment. Article 3 sets forth a list of presumptions, recognized in existing law, that are classified here as presumptions affecting the burden of producing evidence. The list is not exhaustive. Other presumptions affecting the burden of producing evidence may be found in other codes. Others will be found in the common law. Specific statutes will classify some of these, but some must await classification by the courts. The list here, however, will eliminate any uncertainty as to the proper classification for the presumptions in this article.

CROSS-REFERENCES

Acknowledged writings and official writings presumed genuine, see §§ 1450-1454
Copy of official writing as prima facie evidence, see § 1530
Definitions:
- Law, see § 160
- Presumption, see § 600

Effect of presumption affecting burden of producing evidence, see § 604
Official record of writing as prima facie evidence, see § 1532
Prima facie evidence, see § 602

§ 631. Money delivered by one to another

631. Money delivered by one to another is presumed to have been due to the latter.

Comment. Section 631 restates and supersedes the presumption in subdivision 7 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

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§ 632. Thing delivered by one to another

632. A thing delivered by one to another is presumed to have belonged to the latter.

Comment. Section 632 restates and supersedes the presumption in subdivision 8 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 633. Obligation delivered up to the debtor

633. An obligation delivered up to the debtor is presumed to have been paid.

Comment. Section 633 restates and supersedes the presumption in subdivision 9 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 634. Person in possession of order on himself

634. A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.

Comment. Section 634 restates and supersedes the presumption found in subdivision 13 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
Person, see § 175

§ 635. Obligation possessed by creditor

635. An obligation possessed by the creditor is presumed not to have been paid.

Comment. The presumption in Section 635 is a common law presumption recognized in the California cases. *E.g., Light v. Stevens,* 159 Cal. 288, 113 Pac. 659 (1911).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 636. Payment of earlier rent or installments

636. The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

Comment. Section 636 restates and supersedes the presumption in subdivision 10 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

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§ 637. Ownership of things possessed

637. The things which a person possesses are presumed to be owned by him.

Comment. Section 637 restates and supersedes the presumption found in subdivision 11 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
Person, see § 175

§ 638. Ownership of property by person who exercises acts of ownership

638. A person who exercises acts of ownership over property is presumed to be the owner of it.

Comment. Section 638 restates and supersedes the presumption found in subdivision 12 of Code of Civil Procedure Section 1963. Subdivision 12 of Code of Civil Procedure Section 1963 provides that a presumption of ownership arises from common reputation of ownership. This is inaccurate, however, for common reputation is not admissible to prove private title to property. *Berniaud v. Beecher,* 76 Cal. 394, 18 Pac. 598 (1888); *Simons v. Inyo Cerro Gordo Co.,* 48 Cal. App. 524, 192 Pac. 144 (1920).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definitions:
Person, see § 175
Property, see § 185

§ 639. Judgment correctly determines rights of parties

639. A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.

Comment. Section 639 restates and supersedes the presumption found in subdivision 17 of Code of Civil Procedure Section 1963. The presumption involved here is that the judgment correctly determines that one party owes another money, or that the parties are divorced, or their marriage has been annulled, or any similar rights of the parties. The presumption does not apply to the facts underlying the judgment. For example, a judgment of annulment is presumed to determine correctly that the marriage is void. *Clark v. City of Los Angeles,* 187 Cal. App.2d 792, 9 Cal. Rptr. 913 (1960). However, the judgment may not be used to establish presumptively that one of the parties was guilty of fraud as against some third party who is not bound by the judgment.

In a few cases, a judgment may be used as evidence of the facts necessarily determined by the judgment. See, *e.g.,* EVIDENCE CODE §§ 1300-1302. But, even in those cases, the judgments do not presumptively establish the facts determined; they are merely evidence.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Judgment as hearsay evidence, see §§ 1300–1302

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§ 640. Writing truly dated

640. A writing is presumed to have been truly dated.

Comment. Section 640 restates and supersedes the presumption in subdivision 23 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
Writing, see § 250

§ 641. Letter received in ordinary course of mail

641. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

Comment. Section 641 restates and supersedes the presumption in subdivision 24 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 642. Conveyance by person having duty to convey real property

642. A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest.

Comment. Section 642 restates and supersedes the presumption in subdivision 37 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definitions:
Person, see § 175
Real property, see § 205

§ 643. Authenticity of ancient document

643. A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

(a) Is at least 30 years old;

(b) Is in such condition as to create no suspicion concerning its authenticity;

(c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and

(d) Has been generally acted upon as authentic by persons having an interest in the matter.

Comment. Section 643 restates and supersedes the presumption found in subdivision 34 of Code of Civil Procedure Section 1963. Although the statement of the ancient documents rule in Section 1963 requires the document to have been acted upon as if genuine before the presumption applies, some recent cases have not insisted upon this requirement. *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). The requirement that the document be acted upon as genuine is, in substance, a requirement of the possession of property

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by those persons who would be entitled to such possession under the document if it were genuine. See 7 WIGMORE, EVIDENCE §§ 2141, 2146 (3d ed. 1940); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 101, 135-137 (1964). Giving the ancient documents rule a presumptive effect—*i.e., requiring* a finding of the authenticity of an ancient document—seems justified when it is a dispositive instrument and the persons interested in the matter have acted upon the instrument for a period of at least 30 years as if it were genuine. Evidence which is not of this strength may be sufficient in particular cases to warrant an inference of genuineness and thus justify the admission of the document into evidence, but the presumption should be confined to those cases where the evidence of genuineness is not likely to be disputed. See 7 WIGMORE, EVIDENCE § 2146 (3d ed. 1940). Accordingly, Section 643 limits the presumptive application of the ancient documents rule to dispositive instruments.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definitions:
  Person, see § 175
  Personal property, see § 180
  Real property, see § 205
  Writing, see § 250

§ 644. Book purporting to be published by public authority

644. A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

Comment. Section 644 restates and supersedes the presumption in subdivision 35 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 645. Book purporting to contain reports of cases

645. A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases.

Comment. Section 645 restates and supersedes the presumption found in subdivision 36 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
  State, see § 220

Article 4. Presumptions Affecting the Burden of Proof

§ 660. Presumptions affecting the burden of proof

660. The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting the burden of proof.

MJN 2419

Comment. In some cases it may be difficult to determine whether a particular presumption is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. To avoid uncertainty, it is desirable to classify as many presumptions as possible. Article 4 (§§ 660-667), therefore, lists several presumptions that are to be regarded as presumptions affecting the burden of proof. The list is not exclusive. Other statutory and common law presumptions that affect the burden of proof must await classification by the courts.

CROSS-REFERENCES

Definition:
  Law, see § 160
Effect of presumption affecting the burden of proof, see § 606
Hospital records, affidavit attached to copy presumed true, see § 1562
Privileged communications, presumption of confidentiality, see § 917

§ 661. Legitimacy

661. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof.

Comment. Section 661 restates and supersedes the presumption found in Sections 193, 194, and 195 of the Civil Code and subdivision 31 of Code of Civil Procedure Section 1963 as these sections have been interpreted by the courts.

Civil Code Section 194 provides a presumption of legitimacy for children born within ten months after the dissolution of a marriage. The courts have said that the ten-month period referred to is actually 300 days. *Estate of McNamara,* 181 Cal. 82, 183 Pac. 552 (1919). Hence, the more accurate time period has been substituted for the ten-month period referred to in Section 194.

As under existing law, the presumption may be overcome only by clear and convincing proof. *Kusior v. Silver,* 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

Of course, this presumption can be applied only when the conclusive presumption of legitimacy stated in Section 621 is inapplicable. *Kusior v. Silver,* 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

CROSS-REFERENCES

Blood tests to determine paternity, see §§ 890-897
Classification and effect of presumption, see §§ 606, 660
Conclusive presumption of legitimacy, see § 621
Definitions:
  Civil action, see § 120
  Criminal action, see § 130
  Proof, see § 190

§ 662. Owner of legal title to property is owner of beneficial title

662. The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

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Comment. Section 662 codifies a common law presumption recognized in the California cases. The presumption may be overcome only by clear and convincing proof. *Olson v. Olson,* 4 Cal.2d 434, 437, 49 P.2d 827, 828 (1935); *Rench v. McMullen,* 82 Cal. App.2d 872, 187 P.2d 111 (1947).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660
Definitions:
Proof, see § 190
Property, see § 185

§ 663. Ceremonial marriage

663. A ceremonial marriage is presumed to be valid.

Comment. Section 663 codifies a common law presumption recognized in the California cases. *Estate of Hughson,* 173 Cal. 448, 160 Pac. 548 (1916); *Wilcox v. Wilcox,* 171 Cal. 770, 155 Pac. 95 (1916); *Freeman S.S. Co. v. Pillsbury,* 172 F.2d 321 (9th Cir. 1949).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

§ 664. Official duty regularly performed

664. It is presumed that official duty has been regularly performed.

Comment. Section 664 restates and supersedes subdivision 15 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

§ 665. Arrest without warrant

665. An arrest without a warrant is presumed to be unlawful.

Comment. Section 665 codifies a common law presumption recognized in the California cases. *People v. Agnew,* 16 Cal.2d 655, 107 P.2d 601 (1940). Under this presumption, if a person arrests another without the color of legality provided by a warrant, the person making the arrest must prove the circumstances that justified the arrest without a warrant. *Badillo v. Superior Court,* 46 Cal.2d 269, 294 P.2d 23 (1956); *Dragna v. White,* 45 Cal.2d 469, 471, 289 P.2d 428, 430 (1955) ("Upon proof of [arrest without process] the burden is on the defendants to prove justification for the arrest.").

Of course, this presumption is applicable only when the legality of an arrest is in issue, as, for example, in false arrest cases or in cases where evidence is offered that was seized in a search incident to an arrest. In these situations, the presumption has no effect other than to require that the party relying on the legality of an arrest prove its legality. Under Section 600, the presumption is not evidence of the illegality of an arrest, and it would be improper to so argue.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

§ 666. Judicial action lawful exercise of jurisdiction

666. Any court of this State or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

Comment. Section 666 restates and supersedes the presumption in subdivision 16 of Code of Civil Procedure Section 1963. Under existing law, the presumption applies only to courts of general jurisdiction; the presumption has been held inapplicable to a superior court in California when acting in a special or limited jurisdiction. *Estate of Sharon,* 179 Cal. 447, 177 Pac. 283 (1918). The presumption also has been held inapplicable to courts of inferior jurisdiction. *Santos v. Dondero,* 11 Cal. App.2d 720, 54 P.2d 764 (1936). There is no reason to perpetuate this distinction insofar as the courts of California and of the United States are concerned. California's municipal and justice courts are served by able and conscientious judges and are no more likely to act beyond their jurisdiction than are the superior courts. Moreover, there is no reason to suppose that a superior court or a federal court is less respectful of its jurisdiction when acting in a limited capacity (for example, as a juvenile court) than it is when acting in any other capacity. Section 666, therefore, applies to any court or judge of any court of California or of the United States. So far as other states are concerned, the distinction is still applicable, and the presumption applies only to courts of general jurisdiction.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660
Definition:
State, see § 220

§ 667. Death of person not heard from in seven years

667. A person not heard from in seven years is presumed to be dead.

Comment. Section 667 restates and supersedes the presumption in subdivision 26 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

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DIVISION 6. WITNESSES

CROSS-REFERENCES

Accomplice as witness, see Penal Code § 1111
Attendance of witnesses, compelled by subpoena, see Code of Civil Procedure § 1985 *et seq.;* Penal Code § 1326 *et seq.*
Co-defendant in criminal action, discharge to testify, see Penal Code §§ 1099-1101
Convicts as witnesses, see Penal Code § 2603
Crimes:
  Falsifying, destroying, or concealing evidence, see Penal Code §§ 132-138
  Perjury and subornation thereof, see Penal Code §§ 118-129
Expert and other opinion testimony, see §§ 800-897
Number of witnesses to prove fact, see § 411
Preliminary determinations on admissibility of evidence, see §§ 400-406
Prisoners as witnesses, see Code of Civil Procedure §§ 1995-1997; Penal Code §§ 1567, 2620-2623
Privileges, see §§ 900-1073

CHAPTER 1. COMPETENCY

§ 700. General rule as to competency

700. Except as otherwise provided by statute, every person is qualified to be a witness and no person is disqualified to testify to any matter.

Comment. Section 700 makes it clear that all grounds for disqualification of witnesses must be based on statute. There can be no nonstatutory grounds for disqualification. The section is similar to and supersedes Section 1879 of the Code of Civil Procedure, which provides that "all persons . . . who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses."

Just as Code of Civil Procedure Section 1879 is limited by various statutory restrictions on the competency of witnesses, the broad rule stated in Section 700 is also substantially qualified by statutory restrictions appearing in the Evidence Code and in other California codes. See, *e.g.*, EVIDENCE CODE § 701 (mental or physical capacity to be a witness), § 702 (requirement of personal knowledge), § 703 (judge as a witness), § 704 (juror as a witness), §§ 900-1073 (privileges), § 1150 (continuing existing law limiting use of juror's evidence concerning jury misconduct); VEHICLE CODE § 40804 (speed trap evidence).

CROSS-REFERENCES

Criminal action, competency of witnesses, see Penal Code § 1321
Defendant in criminal case, privilege not to be called as a witness and not to testify, see § 930; Constitution, Art. I, § 13
Definition:
  Statute, see § 230
Judge as witness, see § 703
Juror as witness, see §§ 704, 1150; Penal Code § 1120
Mental or physical incapacity to be witness, see § 701
Personal knowledge requirement, see § 702
Religious qualifications, see Constitution, Art. I, § 4
Speed trap, competency of witness, see Vehicle Code § 40804
Spouse, privilege not to be called as witness and not to testify, see §§ 970-973

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§ 701. Disqualification of witness

701. A person is disqualified to be a witness if he is:

(a) Incapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or

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

Comment. Under existing law, the competency of a person to be a witness is a question to be determined by the court and depends upon his capacity to understand the oath and to perceive, recollect, and communicate that which he is offered to relate. "Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact." *People v. McCaughan,* 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957).

Under the Evidence Code, too, the competency of a person to be a witness is a question to be determined by the court. See EVIDENCE CODE § 405 and the *Comment* thereto. However, Section 701 requires the court to determine only the prospective witness' capacity to communicate and his understanding of the duty to tell the truth. The missing qualifications—the capacity to perceive and to recollect—are determined in a different manner. Because a witness, qualified under Section 701, must have personal knowledge of the facts to which he testifies (Section 702), he must, of course, have the capacity to perceive and to recollect those facts. But the court may exclude the testimony of a witness for lack of personal knowledge only if no jury could reasonably find that he has such knowledge. See EVIDENCE CODE § 403 and the *Comment* thereto. Thus, the Evidence Code has made a person's capacity to perceive and to recollect a condition for the admission of his testimony concerning a particular matter instead of a condition for his competency to be a witness. And, under the Evidence Code, if there is evidence that the witness has those capacities, the determination whether he in fact perceived and does recollect is left to the trier of fact. See EVIDENCE CODE §§ 403 and 702 and the *Comments* thereto.

Although Section 701 modifies the existing law with respect to determining the competency of witnesses, it seems unlikely that the change will have much practical significance. Theoretically, Section 701 may permit children and persons suffering from mental impairment to testify in some instances where they are now disqualified from testifying; in practice, however, the California courts have permitted children of very tender years and persons with mental impairment to testify. See WITKIN, CALIFORNIA EVIDENCE §§ 389, 390 (1958). See also *Bradburn v. Peacock,* 135 Cal. App.2d 161, 164-165, 286 P.2d 972, 974 (1955) (reversible error to preclude a child from testifying without conducting a *voir dire* examination to determine his competency: "We cannot say that *no* child of 3 years and 3 months is capable of receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that *no* child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5." (Emphasis in original.)); *People*

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v. McCaughan, 49 Cal.2d 409, 317 P.2d 974 (1957) (indicating that committed mental patients may be competent witnesses). For further discussion, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 709-710 (1964).

CROSS-REFERENCES

Criminal actions, competency of witnesses, see Penal Code § 1321
Determination of whether witness disqualified, see § 405
See also the *Cross-References* under Section 700

§ 702. Personal knowledge of witness

702. (a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

Comment. Section 702 states the general requirement that a witness must have personal knowledge of the facts to which he testifies. "Personal knowledge" means a present recollection of an impression derived from the exercise of the witness' own senses. 2 WIGMORE, EVIDENCE § 657 at 762 (3d ed. 1940). *Cf.* EVIDENCE CODE § 170, defining "perceive." Section 702 restates the substance of and supersedes Code of Civil Procedure Section 1845.

Except to the extent that experts may give opinion testimony not based on personal knowledge (see EVIDENCE CODE § 801), the requirement of Section 702 is applicable to all witnesses, whether expert or not. Certain additional qualifications that an expert witness must possess are set forth in Article 1 (commencing with Section 720) of Chapter 3.

Under existing law, as under Section 702, an objection must be made to the testimony of a witness who does not have personal knowledge; but, if there is no reasonable opportunity to object before the testimony is given, a motion to strike is appropriate after lack of knowledge has been shown. *Fildew v. Shattuck & Nimmo Warehouse Co.*, 39 Cal. App. 42, 46, 177 Pac. 866, 867 (1918) (objection to question properly sustained when foundational showing of personal knowledge was not made); *Sneed v. Marysville Gas & Elec. Co.*, 149 Cal. 704, 709, 87 Pac. 376, 378 (1906) (error to overrule motion to strike testimony after lack of knowledge shown on cross-examination); *Parker v. Smith*, 4 Cal. 105 (1854) (testimony properly stricken by court when lack of knowledge shown on cross-examination).

If a timely objection is made that a witness lacks personal knowledge, the court may not receive his testimony subject to the condition that evidence of personal knowledge be supplied later in the trial. Section 702 thus limits the ordinary power of the court with respect to the order of proof. See EVIDENCE CODE § 403(b). See also EVIDENCE CODE § 320.

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CROSS-REFERENCES

Definition:
Evidence, see § 140
Determination of whether witness has personal knowledge, see § 403
Opinion testimony as to sanity, see § 870
Opinion testimony generally, see §§ 800-805
Past memory recorded, see §§ 1237, 1238
Refreshing memory, see § 771

§ 703. Judge as witness

703. (a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, which shall be deemed a motion for mistrial, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

Comment. Under existing law, a judge may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). *But see People v. Connors,* 77 Cal. App. 438, 450-457, 246 Pac. 1072, 1076-1079 (1926) (dictum) (abuse of discretion for the presiding judge to testify to important and necessary facts).

Section 703, however, precludes the judge from testifying if a party objects. Before the judge may be called to testify in a civil or criminal action, he must disclose to the parties out of the presence and hearing of the jury the information he has concerning the case. After such disclosure, if no party objects, the judge is permitted—but not required—to testify.

Section 703 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally. For these and other reasons, Section 703 is preferable to Code of Civil Procedure Section 1883.

CROSS-REFERENCES

Definition:
Action, see § 105

§ 704. Juror as witness

704. (a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the

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court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, which shall be deemed a motion for mistrial, the court shall declare a mistrial and order the action assigned for trial before another jury.

(c) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.

Comment. Under existing law, a juror may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). Section 704, on the other hand, prevents a juror from testifying before the jury if any party objects.

A juror-witness is in an anomalous position. He manifestly cannot weigh his own testimony impartially. A party affected adversely by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror—and perhaps his fellow jurors as well. And, if he does not attack the juror's testimony, the other jurors may give his testimony undue weight. For these and other reasons, Section 704 forbids jurors to testify over the objection of any party.

Before a juror may be called to testify before the jury in a civil or criminal action, he is required to disclose to the parties out of the presence and hearing of the remaining jurors the information he has concerning the case. After such disclosure, if no party objects, the juror is required to testify. If a party objects, the objection is deemed a motion for mistrial and the judge is required to declare a mistrial and order the action assigned for trial before another jury.

Section 704 is concerned only with the problem of a juror who is called to testify before the jury. Section 704 does not deal with *voir dire* examinations of jurors, with testimony of jurors in post-verdict proceedings (such as on motions for new trial), or with the testimony of jurors on any other matter that is to be decided by the court. *Cf.* EVIDENCE CODE § 1150 and the *Comment* thereto.

CROSS-REFERENCES

Criminal action, duty of juror to disclose knowledge, see Penal Code § 1120
Definition:
Action, see § 105
Misconduct by jury, evidence of, see § 1150; Code of Civil Procedure § 657

CHAPTER 2. OATH AND CONFRONTATION

§ 710. Oath required

710. Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by Chapter 3 (commencing with Section 2093) of Title 6 of Part IV of the Code of Civil Procedure.

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Comment. Sections 710 and 711 restate the substance of and supersede Section 1846 of the Code of Civil Procedure.

CROSS-REFERENCES

Oath required of interpreter or translator, see § 751

§ 711. Confrontation

711. At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

Comment. See the *Comment* to Section 710.

CROSS-REFERENCES

Defendant in criminal case, right to confront adverse witnesses, see Penal Code § 686
Definition:
Action, see § 105
Examination of witnesses, see §§ 760-778

CHAPTER 3. EXPERT WITNESSES

Article 1. Expert Witnesses Generally

§ 720. Qualification as an expert witness

720. (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

Comment. This section states existing law as declared in subdivision 9 (last clause) of Code of Civil Procedure Section 1870, which is superseded by Sections 720 and 801.

The judge must be satisfied that the proposed witness is an expert. *People v. Haeussler,* 41 Cal.2d 252, 260 P.2d 8 (1953); *Pfingsten v. Westenhaver,* 39 Cal.2d 12, 244 P.2d 395 (1952); *Bossert v. Southern Pac. Co.,* 172 Cal. 504, 157 Pac. 597 (1916); *People v. Pacific Gas & Elec. Co.,* 27 Cal. App.2d 725, 81 P.2d 584 (1938).

Against the objection of a party, the special qualifications of the proposed witness must be shown as a prerequisite to his testimony as an expert. With the consent of the parties, the judge may receive a witness' testimony conditionally, subject to the necessary foundation being supplied later in the trial. See EVIDENCE CODE § 320. Unless the foundation is subsequently supplied, however, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion.

The judge's determination that a witness qualifies as an expert witness is binding on the trier of fact, but the trier of fact may consider the witness' qualifications as an expert in determining the weight to be given his testimony. *Pfingsten v. Westenhaver,* 39 Cal.2d 12, 244 P.2d 395 (1952); *Howland v. Oakland Consol. St. Ry.,* 110 Cal. 513, 42 Pac. 983 (1895); *Estate of Johnson,* 100 Cal. App.2d 73, 223

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P.2d 105 (1950). See EVIDENCE CODE §§ 405 and 406 and the *Comments* thereto.

CROSS-REFERENCES

Blood test experts, qualifications, see § 893
Court may limit number of experts, see § 723
Cross-examination concerning qualifications, see § 721
Definition:
  Evidence, see § 140
Determination of whether witness is an expert, see § 405
Handwriting, opinion as to, see § 1416
Interpreters, see §§ 750-754
Opinion testimony generally, see §§ 801-805
Sanity, opinion as to, see § 870
Translators, see §§ 750-754
Writing, authenticity of, see § 1418

§ 721. Cross-examination of expert witness

721. (a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the matter upon which his opinion is based and the reasons for his opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or

(2) Such publication has been admitted in evidence.

Comment. Under Section 721, a witness who testifies as an expert may, of course, be cross-examined to the same extent as any other witness. See Chapter 5 (commencing with Section 760). But, under subdivision (a) of Section 721, as under existing law, the expert witness is also subject to a somewhat broader cross-examination: "Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based (Code Civ. Proc., § 1872), and which he took into consideration; and he may be 'subjected to the most rigid cross examination' concerning his qualifications, and his opinion and its sources [citation omitted]." *Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal. App.2d 222, 230, 344 P.2d 428, 433 (1959). The cross-examination rule stated in subdivision (a) is based in part on the last clause of Code of Civil Procedure Section 1872.

Subdivision (b) clarifies a matter concerning which there is considerable confusion in the California decisions. It is at least clear under existing law that an expert witness may be cross-examined in regard to those books on which he relied in forming or arriving at his opinion. *Lewis v. Johnson*, 12 Cal.2d 558, 86 P.2d 99 (1939); *People v. Hooper*, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). Dicta in some decisions indicate that the cross-examiner is strictly limited to the books relied on by the expert witness. See, *e.g.*, *Baily v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104 (1904). Other cases, however, suggest that an expert witness

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may be cross-examined in regard to any book of the same character as the books on which he relied in forming his opinion. *Griffith v. Los Angeles Pac. Co.*, 14 Cal. App. 145, 111 Pac. 107 (1910). See *Salgo v. Leland Stanford etc. Bd. Trustees*, 154 Cal. App.2d 560, 317 P.2d 170 (1957); *Gluckstein v. Lipsett*, 93 Cal. App.2d 391, 209 P.2d 98 (1949) (reviewing California authorities). (Possibly, the cross-examiner is restricted under this view to the use of such books as "are not in harmony with the testimony of the witness." *Griffith v. Los Angeles Pac. Co., supra.*) Language in several earlier cases indicated that the cross-examiner could use books to test the competency of an expert witness, whether or not the expert relied on books in forming his opinion. *Fisher v. Southern Pac. R.R.*, 89 Cal. 399, 26 Pac. 894 (1891); *People v. Hooper*, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). More recent decisions indicate, however, that the opinion of an expert witness must be based either generally or specifically on books before the expert can be cross-examined concerning them. *Lewis v. Johnson*, 12 Cal.2d 558, 86 P.2d 99 (1939); *Salgo v. Leland Stanford etc. Bd. Trustees*, 154 Cal. App.2d 560, 317 P.2d 170 (1957); *Gluckstein v. Lipsett*, 93 Cal. App.2d 391, 209 P.2d 98 (1949). The conflicting California cases are gathered in Annot., 60 A.L.R.2d 77 (1958).

If an expert witness has relied on a particular publication in forming his opinion, it is necessary to permit cross-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him even though not specifically relied on by him in forming his opinion. An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing upon the credibility of his testimony. However, a rule permitting cross-examination on technical treatises not considered by the expert witness would permit the cross-examiner to utilize this opportunity not for its ostensible purpose—to test the expert's opinion—but to bring before the trier of fact the opinions of absentee authors without the safeguard of cross-examination. Although the court would be required upon request to caution the jury that the statements read are not to be considered evidence of the truth of the propositions stated, there is a danger that at least some jurors might rely on the author's statements for this purpose. Yet, the statements in the text might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable to the case before the court, or might be unreliable for some other reason that could be revealed if the author were subject to cross-examination. Therefore, subdivision (b) does not permit cross-examination of an expert witness on scientific, technical, or professional works not referred to, considered, or relied on by him.

If a particular publication has already been admitted in evidence, however, the reason for subdivision (b)—to prevent inadmissible evidence from being brought before the jury—is inapplicable. Hence, the subdivision permits an expert witness to be examined concerning such a publication without regard to whether he referred to, considered,

or relied on it in forming his opinion. *Cf. Laird v. T. W. Mather, Inc.*, 51 Cal.2d 210, 331 P.2d 617 (1958).

The rule stated in subdivision (b) thus provides a fair and workable solution to this conflict of competing interests with respect to the permissible use of scientific, technical, or professional publications by the cross-examiner.

CROSS-REFERENCES

Commercial, scientific, and similar publications as hearsay evidence, see §§ 1340, 1341
Cross-examination generally, see §§ 760-778
Definition:
  Cross-examination, see § 761
Instruction on expert opinion testimony, see Penal Code § 1127b
Opinion testimony generally, see §§ 801-805

§ 722. Credibility of expert witness

722. (a) The fact of the appointment of an expert witness by the court may be revealed to the trier of fact.

(b) The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony.

Comment. Subdivision (a) of Section 722 codifies a rule recognized in the California decisions. *People v. Cornell*, 203 Cal. 144, 263 Pac. 216 (1928); *People v. Strong*, 114 Cal. App. 522, 300 Pac. 84 (1931).

Subdivision (b) of Section 722 restates the substance of Section 1256.2 of the Code of Civil Procedure. Section 1256.2, however, applies only in condemnation cases, while Section 722 is not so limited. It is uncertain whether the California law in other fields of litigation is as stated in Section 722. At least one California case has held that an expert could be asked whether he was being compensated but that he could not be asked the amount of the compensation. *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513 (1910). However, the decision may have been based on the discretionary right of the trial judge to curtail collateral inquiry.

In any event, the rule enunciated in Section 722 is a desirable rule. The tendency of some experts to become advocates for the party employing them has been recognized. 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 485-486 (1962). The jury can better appraise the extent to which bias may have influenced an expert's opinion if it is informed of the amount of his fee—and, hence, the extent of his possible feeling of obligation to the party calling him.

CROSS-REFERENCES

Credibility of witnesses generally, see §§ 780, 785-791
Definition:
  Trier of fact, see § 235

§ 723. Limit on number of expert witnesses

723. The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.

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Comment. Section 723 restates the substance of and supersedes the last sentence of Section 1871 of the Code of Civil Procedure.

CROSS-REFERENCES

Cumulative evidence, exclusion, see § 352
Definition:
Action, see § 105

Article 2. Appointment of Expert Witness by Court

§ 730. Appointment of expert by court

730. When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or may be required. The court may fix the compensation for such services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at such amount as seems reasonable to the court.

Comment. Section 730 restates the substance of and supersedes the first paragraph of Section 1871 of the Code of Civil Procedure.

CROSS-REFERENCES

Appointment of blood test experts, see §§ 890-897
Appointment of expert may be revealed to trier of fact, see § 722
Appointment of interpreter or translator, see §§ 750-754
Criminal cases:
Appointment of alienists to determine sanity, see Penal Code § 1027
Skilled persons as witnesses to prove forgery, see Penal Code § 1107
Definitions:
Action, see § 105
Evidence, see § 140
Opinion testimony by expert, see §§ 801-805
Qualification of expert, see § 720

§ 731. Payment of court-appointed expert

731. (a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court.

(b) In any county in which the procedure prescribed in this subdivision has been authorized by the board of supervisors, the compensation fixed under Section 730 for medical experts in civil actions in such county shall be a charge against and paid out of the treasury of such county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

Comment. Section 731 restates the substance of and supersedes the second paragraph of Section 1871 of the Code of Civil Procedure.

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CROSS-REFERENCES

Compensation of:
- Alienists appointed in criminal action, see Penal Code § 1027
- Blood test experts, see §§ 894, 896
- Interpreters and translators, see §§ 752-754

Definitions:
- Civil action, see § 120
- Criminal action, see § 130

§ 732. Calling and examining court-appointed expert

732. Any expert appointed by the court under Section 730 may be called and examined by the court or by any party to the action. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced.

Comment. Section 732 restates the substance of and supersedes the fourth paragraph of Section 1871 of the Code of Civil Procedure. Section 732 refers to Section 775, which is based on language originally contained in Section 1871. Section 775 permits each party to the action to object to questions asked and evidence adduced and, also, to cross-examine any person called by the court as a witness to the same extent as if such person were called as a witness by an adverse party.

CROSS-REFERENCES

Appointment by court, disclosure of, see § 722
Cross-examination of expert witnesses generally, see § 721
Definitions:
- Action, see § 105
- Cross-examination, see § 761
- Evidence, see § 140

Examination of alienists appointed in criminal action, see Penal Code § 1027
Examination of witnesses generally, see §§ 760-778
Opinion testimony by expert, see §§ 801-805

§ 733. Right to produce other expert evidence

733. Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action.

Comment. Section 733 restates the substance of and supersedes the third paragraph of Section 1871 of the Code of Civil Procedure.

CROSS-REFERENCES

Court may limit number of expert witnesses, see § 723
Definitions:
- Action, see § 105
- Evidence, see § 140

Similar provision:
- Blood test experts, see § 897

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CHAPTER 4. INTERPRETERS AND TRANSLATORS

§ 750. Rules relating to witnesses apply to interpreters and translators

750. A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses.

Comment. Section 750 codifies existing law. *E.g., People v. Lem Deo,* 132 Cal. 199, 201, 64 Pac. 265, 266 (1901) (interpreter); *People v. Bardin,* 148 Cal. App.2d 776, 307 P.2d 384 (1957) (translator).

CROSS-REFERENCES

Credibility of witnesses, see §§ 722, 780, 785-791
Cross-examination of expert witnesses, see § 721
Definitions:
  Action, see § 105
  Law, see § 160
Examination of witnesses generally, see §§ 760-778
Qualification as expert witness, see § 720
Qualification as interpreter, see Code of Civil Procedure § 264
See also the *Cross-References* under Section 700

§ 751. Oath required of interpreters and translators

751. (a) An interpreter shall take an oath that he will make a true interpretation to the witness in a language that the witness understands and that he will make a true interpretation of the witness' answers to questions to counsel, court, or jury, in the English language, with his best skill and judgment.

(b) A translator shall take an oath that he will make a true translation in the English language of any writing he is to decipher or translate.

Comment. Section 751 is based on language presently contained in subdivision (c) of Section 1885 of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
  Oath, see § 165
  Writing, see § 250

§ 752. Interpreters for witnesses

752. (a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he can understand and who can understand him shall be sworn to interpret for him.

(b) The interpreter may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

Comment. Section 752 restates the substance of and supersedes Section 1884 of the Code of Civil Procedure. It is drawn broadly enough to authorize the use of an interpreter for a person whose inability to be understood directly stems from physical disability as well as from lack of understanding of the English language. See discussion in *People v. Walker,* 69 Cal. App. 475, 231 Pac. 572 (1924). Under Section 752, as under existing law, whether an interpreter should be

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appointed is largely within the discretion of the trial judge. *People v. Holtzclaw,* 76 Cal. App. 168, 243 Pac. 894 (1926).

Subdivision (b) of Section 752 substitutes for the detailed language in Code of Civil Procedure Section 1884 a reference to the general authority of a court to appoint expert witnesses, since interpreters are treated as expert witnesses and subject to the same rules of competency and examination as are experts generally. The existing procedure provided by Code of Civil Procedure Section 1884 does not insure that an interpreter who is required to testify will be paid reasonable compensation for his services. Section 752 corrects this deficiency in the existing law.

CROSS-REFERENCES

Appointment of expert witness by court, see §§ 730-733
Interpreter for deaf person in certain actions, see § 754
Interpreter subject to rules applicable to witnesses, see § 750
Interpreter's oath, see § 751
See also the *Cross-References* under Section 750

§ 753. Translators of writings

753. (a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

(b) The translator may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

Comment. Section 753 restates the substance of and supersedes Section 1863 of the Code of Civil Procedure, but the language of Section 753 is new. The same principles that require the appointment of an interpreter for a witness who is incapable of expressing himself so as to be understood directly apply with equal force to documentary evidence. See EVIDENCE CODE § 752 and the *Comment* thereto.

CROSS-REFERENCES

Appointment of expert witness by court, see §§ 730-733
Definitions:
  Evidence, see § 140
  Writing, see § 250
Translator subject to rules applicable to witnesses, see § 750
Translator's oath, see § 751
See also the *Cross-References* under Section 750

§ 754. Interpreters for deaf in criminal and commitment cases

754. (a) As used in this section, "deaf person" means a person with a hearing loss so great as to prevent his understanding language spoken in a normal tone.

(b) In any criminal action where the defendant is a deaf person, all of the proceedings of the trial shall be interpreted to him in a language that he understands by a qualified interpreter appointed by the court.

(c) In any action where the mental condition of a deaf person is being considered and where such person may be committed to a mental institution, all of the court proceedings pertaining to him shall be interpreted to him in a language

that he understands by a qualified interpreter appointed by the court.

(d) Interpreters appointed under this section shall be paid for their services a reasonable sum to be determined by the court, which shall be a charge against the county in which such action is pending and shall be paid out of the treasury of such county on order of the court.

Comment. Section 754 restates the substance of and supersedes Section 1885 of the Code of Civil Procedure. Subdivision (c) of Section 1885 is not continued in Section 754 but is restated in substance in Section 751.

The phrase "with or without a hearing aid" has been deleted from the definition of "deaf person" as unnecessary. The court's inquiry should be directed towards the ability of the person to hear; the court should not be concerned with the means by which he might be enabled to hear.

CROSS-REFERENCES

Definitions:
Action, see § 105
Criminal action, see § 130
See also the *Cross-References* under Sections 750 and 752

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions

§ 760. "Direct examination"

760. "Direct examination" is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.

Comment. Section 760 restates the substance of and supersedes the first clause of Code of Civil Procedure Section 2045 and the last clause of Code of Civil Procedure Section 2048. Under Section 760, an examination of a witness called by another party is direct examination if the examination relates to a matter that is not within the scope of the previous examination of the witness.

CROSS-REFERENCES

Examination of:
Adverse party, see § 776
Alienist appointed to determine sanity, see Penal Code § 1027
Blood test expert, see § 893
Hearsay declarant, see § 1203
Person upon whose statement expert bases opinion, see § 804
Witness called by court, see § 775
Leading questions on direct examination, see § 767
Opinion testimony, giving supporting matter on direct examination, see § 802
Order of examination, see § 772

§ 761. "Cross-examination"

761. "Cross-examination" is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.

Comment. Section 761 restates the substance of and supersedes the definition of "cross-examination" found in Section 2045 of the Code of Civil Procedure. In accordance with existing law, it limits cross-exam-

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ination of a witness to the scope of the witness' direct examination. See generally WITKIN, CALIFORNIA EVIDENCE §§ 622-638 (1958).

Section 761, together with Section 773, retains the cross-examination rule now applicable to a defendant in a criminal action who testifies as a witness in that action. See *People v. McCarthy,* 88 Cal. App.2d 883, 200 P.2d 69 (1948). See also *People v. Arrighini,* 122 Cal. 121, 54 Pac. 591 (1898); *People v. O'Brien,* 66 Cal. 602, 6 Pac. 695 (1885); WITKIN, CALIFORNIA EVIDENCE § 629 (1958). See also EVIDENCE CODE § 772(d).

CROSS-REFERENCES

Definition:
Direct examination, see § 760
Order of examination, see § 772
Scope of cross-examination, see § 773
See also the *Cross-References* under Sections 760 and 773

§ 762. "Redirect examination"

762. "Redirect examination" is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.

Comment. "Redirect examination" and "recross-examination" are not defined in existing statutes, but the terms are recognized in practice. See WITKIN, CALIFORNIA EVIDENCE §§ 697, 698 (1958). The scope of redirect and recross-examination is limited by Section 774.

The definition of "redirect examination" embraces not only the examination immediately following cross-examination of the witness but also any subsequent re-examination of the witness by the direct examiner.

CROSS-REFERENCES

Definition:
Cross-examination, see § 761
Leading questions on redirect examination, see § 767
Order of examination, see § 772
Re-examination generally, see § 774

§ 763. "Recross-examination"

763. "Recross-examination" is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.

Comment. See the *Comment* to Section 762. The definition of "recross-examination" embraces not only the examination immediately following the first redirect examination of the witness but also any subsequent re-examination of the witness by a cross-examiner.

CROSS-REFERENCES

Definition:
Redirect examination, see § 762
Leading questions on recross-examination, see § 767
Order of examination, see § 772
Re-examination generally, see § 774

§ 764. "Leading question"

764. A "leading question" is a question that suggests to the witness the answer that the examining party desires.

Comment. Section 764 restates the substance of and supersedes the first sentence of Section 2046 of the Code of Civil Procedure. For

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restrictions on the use of leading questions in the examination of a witness, see EVIDENCE CODE § 767 and the *Comment* thereto.

CROSS-REFERENCES

Leading questions, when permitted, see § 767

Article 2. Examination of Witnesses

§ 765. Court to control mode of interrogation

765. The court shall exercise reasonable control over the mode of interrogation of a witness so as (a) to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and (b) to protect the witness from undue harassment or embarrassment.

Comment. Section 765 restates the substance of and supersedes Section 2044 of the Code of Civil Procedure. As to the latitude permitted the judge in controlling the examination of witnesses under existing law, which is continued in effect by Section 765, see *Commercial Union Assur. Co. v. Pacific Gas & Elec. Co.,* 220 Cal. 515, 31 P.2d 793 (1934). See also *People v. Davis,* 6 Cal. App. 229, 91 Pac. 810 (1907).

CROSS-REFERENCES

Criminal action, control of proceedings by judge, see Penal Code § 1044

§ 766. Responsive answers

766. A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

Comment. Section 766 restates the substance of and supersedes Section 2056 of the Code of Civil Procedure.

§ 767. Leading questions

767. Except under special circumstances where the interests of justice otherwise require:

(a) A leading question may not be asked of a witness on direct or redirect examination.

(b) A leading question may be asked of a witness on cross-examination or recross-examination.

Comment. Subdivision (a) restates the substance of and supersedes the last sentence of Section 2046 of the Code of Civil Procedure. Subdivision (b) is based on and supersedes a phrase that appears in Code of Civil Procedure Section 2048.

CROSS-REFERENCES

Cross-examination by party whose interest is not adverse to party calling witness, see § 773

Definitions:
- Cross-examination, see § 761
- Direct examination, see § 760
- Leading question, see § 764
- Recross-examination, see § 763
- Redirect examination, see § 762

See also the *Cross-References* under Section 760

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§ 768. Writings

768. (a) In examining a witness concerning a writing, including a statement made by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to show, read, or disclose to him any part of the writing.

(b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

Comment. Section 768 deals with a subject now covered in Sections 2052 and 2054 of the Code of Civil Procedure. Under the existing sections, a party need not disclose to a witness any information concerning a prior inconsistent *oral* statement of the witness before asking him questions about the statement. *People v. Kidd,* 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961); *People v. Campos,* 10 Cal. App.2d 310, 317, 52 P.2d 251, 254 (1935). However, if a witness' prior inconsistent statements are in *writing* or, as in the case of former oral testimony, have been reduced to writing, "they must be shown to the witness before any question is put to him concerning them." CODE CIV. PROC. § 2052 (superseded by EVIDENCE CODE § 768); *Umemoto v. McDonald,* 6 Cal.2d 587, 592, 58 P.2d 1274, 1276 (1936).

Section 768 eliminates the distinction made in existing law between oral and written statements and permits a witness to be asked questions concerning a prior inconsistent statement, whether written or oral, even though no disclosure is made to him concerning the prior statement. (Whether a foundational showing is required before other evidence of the prior statement may be admitted is not covered in Section 768; the prerequisites for the admission of such evidence are set forth in Section 770.) The disclosure of inconsistent written statements that is required under existing law limits the effectiveness of cross-examination by removing the element of surprise. The forewarning gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement. The existing rule is based on an English common law rule that has been abandoned in England for 100 years. See MCCORMICK, EVIDENCE § 28 at 53 (1954).

With respect to other types of writings (such as those that are not made by the witness himself or, even though made by him, are not inconsistent statements used for impeachment purposes), there apparently is no requirement that they be shown to a witness before he can be examined concerning them. Section 2054 of the Code of Civil Procedure requires only that the adverse party be given an opportunity to inspect any writing that is *actually shown* to a witness before the witness can be examined concerning the writing. See *People v. Briggs,* 58 Cal.2d 385, 413, 24 Cal. Rptr. 417, 435, 374 P.2d 257, 275 (1962); *People v. Keyes,* 103 Cal. App. 624, 284 Pac. 1096 (1930) (hearing denied); *People v. De Angelli,* 34 Cal. App. 716, 168 Pac. 699 (1917). Section 768 clarifies whatever doubt may exist in this regard by declaring that such a writing need not be shown to the witness before he can be examined concerning it. Of course, the best evidence rule may in some cases preclude eliciting testimony concerning the content of a writing. See EVIDENCE CODE § 1500 and the *Comment* thereto.

Subdivision (b) of Section 768 preserves the right of the adverse party to inspect a writing that is *actually shown* to a witness before

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the witness can be examined concerning it. As indicated above, this preserves the existing requirement declared in Code of Civil Procedure Section 2054. However, the right of inspection has been extended to all parties to the action.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
  Action, see § 105
  Hearing, see § 145
  Statement, see § 225
  Writing, see § 250
Disclosing information concerning inconsistent statement, see § 769
Evidence of inconsistent statement, when permitted, see § 770
Inconsistent statement as hearsay evidence, see § 1235

§ 769. Inconsistent statement or conduct

769. In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.

Comment. Section 769 is consistent with the existing California law regarding the examination of a witness concerning prior inconsistent *oral* statements. *People v. Kidd,* 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961). Insofar as this section also relates to inconsistent statements of a witness that are in writing (see the definitions of "statement" and "conduct" in EVIDENCE CODE §§ 225 and 125, respectively), see the *Comment* to Section 768.

CROSS-REFERENCES

Definitions:
  Conduct, see § 125
  Hearing, see § 145
  Statement, see § 225
Evidence of inconsistent statement, when permitted, see § 770
See also the *Cross-References* under Section 770

§ 770. Evidence of inconsistent statement of witness

770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

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

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

Comment. Under Section 2052 of the Code of Civil Procedure, extrinsic evidence of a witness' inconsistent statement may be admitted only if the witness was given the opportunity, while testifying, to explain or deny the contradictory statement. Permitting a witness to explain or deny an alleged inconsistent statement is desirable, but there is no compelling reason to provide the opportunity for explanation *before* the inconsistent statement is introduced in evidence. Accordingly, unless the interests of justice otherwise require, Section 770 permits the judge to exclude evidence of an inconsistent statement only if the witness during his examination was not given an opportunity to explain or deny the statement *and* he has been unconditionally ex-

cused and is not subject to being recalled as a witness. Among other things, Section 770 will permit more effective cross-examination and impeachment of several collusive witnesses, since there need be no disclosure of prior inconsistency before all such witnesses have been examined.

Where the interests of justice require it, the court may permit extrinsic evidence of an inconsistent statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement. An absolute rule forbidding introduction of such evidence where the specified conditions are not met may cause hardship in some cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer available to testify. For the foundational requirements for the admission of a hearsay declarant's inconsistent statement, see EVIDENCE CODE § 1202 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
  Action, see § 105
  Evidence, see § 140
  Hearing, see § 145
  Statement, see § 225
Disclosure not required when examining witness, see §§ 768, 769
Hearsay exception for inconsistent statement, see § 1235
Inconsistent statement of hearsay declarant, see § 1202

§ 771. Refreshing recollection with a writing

771. If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the request of an adverse party, who may, if he chooses, inspect the writing, cross-examine the witness concerning it, and read it to the jury.

Comment. Section 771 grants to an adverse party the right to inspect any writing used to refresh a witness' recollection, whether the writing is used by the witness while testifying or prior thereto. The right of inspection granted by Section 771 may be broader than the similar right of inspection granted by Section 2047 of the Code of Civil Procedure, for Section 2047 has been interpreted by the courts to grant a right of inspection of only those writings used by the witness while he is testifying. *People v. Gallardo,* 41 Cal.2d 57, 257 P.2d 29 (1953); *People v. Grayson,* 172 Cal. App.2d 372, 341 P.2d 820 (1959); *Smith v. Smith,* 135 Cal. App.2d 100, 286 P.2d 1009 (1955). In a criminal case, however, the defendant can compel the prosecution to produce any written statement of a prosecution witness relating to matters covered in the witness' testimony. *People v. Estrada,* 54 Cal.2d 713, 7 Cal. Rptr. 897, 355 P.2d 641 (1960). The extent to which the public policy reflected in criminal discovery practice overrides the restrictive interpretation of Code of Civil Procedure Section 2047 is not clear. See WITKIN, CALIFORNIA EVIDENCE § 602 (Supp. 1963). In any event, Section 771 follows the lead of the criminal cases, such as *People v. Silberstein,* 159 Cal. App.2d Supp. 848, 323 P.2d 591 (1958) (defendant entitled to inspect police report used by police officer to refresh his recollection *before* testifying), and grants a right of inspection without

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regard to when the writing is used to refresh recollection. If a witness' testimony depends upon the use of a writing to refresh his recollection, the adverse party's right to inspect the writing should not be made to depend upon the happenstance of when the writing is used.

CROSS-REFERENCES

Cross-examination, see § 773
Definitions:
 Cross-examination, see § 761
 Writing, see § 250
Inspection of writing shown to witness, see § 768
Past memory recorded, see § 1237
Prior identification, see § 1238

§ 772. Order of examination

772. (a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) Subject to subdivision (d), a party may, in the discretion of the court, during his cross-examination, redirect examination, or recross-examination of a witness, examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not be examined under direct examination by another party.

Comment. Subdivision (a) codifies existing but nonstatutory California law. See WITKIN, CALIFORNIA EVIDENCE § 576 at 631 (1958).

Subdivision (b) is based on and supersedes the second sentence of Section 2045 of the Code of Civil Procedure. The language of the existing section has been expanded, however, to require completion of each phase of examination of the witness, not merely the direct examination.

Under subdivision (c), as under existing law, a party examining a witness under cross-examination, redirect examination, or recross-examination may go beyond the scope of the initial direct examination if the court permits. See CODE CIV. PROC. §§ 2048 (last clause), 2050; WITKIN, CALIFORNIA EVIDENCE §§ 627, 697 (1958). Under the definition in Section 760, such an extended examination is direct examination. *Cf.* CODE CIV. PROC. § 2048 ("such examination is to be subject to the same rules as a direct examination").

Subdivision (d) states an exception for the defendant-witness in a criminal action that reflects existing law. See WITKIN, CALIFORNIA EVIDENCE § 629 at 676 (1958).

CROSS-REFERENCES

Control of mode of interrogation, see § 765
Cross-examination, see § 773
Definitions:
 Criminal action, see § 130
 Cross-examination, see § 761
 Direct examination, see § 760
 Recross-examination, see § 763
 Redirect examination, see § 762

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Expert witness, cross-examination of, see § 721
Expert witness, examination of, see §§ 801-805
Recall of witnesses, see § 778
Re-examination, see § 774
See also the *Cross-References* under Section 760

§ 773. Cross-examination

773. (a) A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.

(b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the same rules that are applicable to the direct examination.

Comment. Subdivision (a) restates the substance of Sections 2045 (part) and 2048 of the Code of Civil Procedure and Section 1323 of the Penal Code.

Subdivision (b) is based on the holding in *Atchison, T. & S.F. Ry. v. Southern Pac. Co.,* 13 Cal. App.2d 505, 57 P.2d 575 (1936). That case held that a party not adverse to the direct examiner of a witness did not have the right to cross-examine the witness. Under subdivision (a), such a party would have the right to cross-examine the witness upon any matter within the scope of the direct examination, but he would be prohibited by Section 767 from asking leading questions during such examination. If the witness testifies on direct examination to matters that are, in fact, antagonistic to a party's position, he may be permitted to cross-examine with leading questions even though from a technical point of view the interest of the cross-examiner is not adverse to that of the direct examiner. *Cf. McCarthy v. Mobile Cranes, Inc.,* 199 Cal. App.2d 500, 18 Cal. Rptr. 750 (1962).

CROSS-REFERENCES

Control of mode of interrogation, see § 765
Definitions:
  Action, see § 105
  Cross-examination, see § 761
  Direct examination, see § 760
Expert witness, cross-examination of, see § 721
Expert witness, examination of, see §§ 801-805
Leading questions on direct and cross-examination, see § 767
Offer of proof unnecessary on cross-examination, see § 354
Part of transaction covered, admissibility of whole, see § 356
Witness called by court, cross-examination of, see §§ 732, 775
See also the *Cross-References* under Section 760

§ 774. Re-examination

774. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion.

Comment. Section 774 is based on and supersedes the first and third sentences of Section 2050 of the Code of Civil Procedure. The nature of a re-examination is to be determined in accordance with the definitions in Sections 760-763.

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CROSS-REFERENCES

Definition:
Action, see § 105
Phases of examination, see § 772
Recall of witness, see § 778

§ 775. Court may call witnesses

775. The court on its own motion may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.

Comment. The power of the judge to call *expert* witnesses is well recognized by statutory and case law in California. CODE CIV. PROC. § 1871 (recodified as Section 723 and Article 2 (commencing with Section 730) of Chapter 3); PENAL CODE § 1027; *Citizens State Bank v. Castro,* 105 Cal. App. 284, 287 Pac. 559 (1930). See also CODE CIV. PROC. §§ 1884 and 1885 (interpreters), continued in substance by Chapter 4 (commencing with Section 750).

The power of the judge to call other witnesses is also recognized by case law. *Travis v. Southern Pac. Co.,* 210 Cal. App.2d 410, 425, 26 Cal. Rptr. 700, 707-708 (1962) ("[W]e have been cited to no case, nor has our independent research disclosed any case, dealing with a civil action in which a witness has been called to the stand by the court, over objection of a party. However, we can see no difference in this respect between a civil and a criminal case. In both, the endeavor of the court and the parties should be to get at the truth of the matter in contest. Fundamentally, there is no reason why the court in the interests of justice should not call to the stand anyone who appears to have relevant, competent and material information.").

CROSS-REFERENCES

Definitions:
Action, see § 105
Cross-examination, see § 761
Evidence, see § 140
Examination of expert called by court, see § 732
Leading questions, see § 767
Objections to evidence, see § 353
Order of examination, see § 772

§ 776. Examination of adverse party or witness

776. (a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness. The party calling such witness is not bound by his testimony, and the testimony of such witness may be rebutted by the party calling him for such examination by other evidence.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

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(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

Comment. Section 776 restates the substance of Code of Civil Procedure Section 2055 as it has been interpreted by the courts. See WITKIN, CALIFORNIA EVIDENCE §§ 607-613 (1958), and pertinent cases cited and discussed therein.

Subdivision (a). Subdivision (a) restates the provisions of Section 2055 that permit a party to call and examine as if under cross-examination an adverse party and certain adverse witnesses. However, Section 776 substitutes the phrase "or a person identified with such a party" for the confusing enumeration of persons listed in the first sentence of Section 2055. This phrase is defined in subdivision (d) of Section 776 to include all of the persons presently named in Section 2055. See the *Comment* to subdivision (d), *infra.*

Subdivision (b). Subdivision (b) is based in part on similar provisions contained in Code of Civil Procedure Section 2055. Unlike Section 2055, however, this subdivision is drafted in recognition of the problems involved in multiple party litigation. Thus, the introductory portion of subdivision (b) states the general rule that a witness examined under this section may be cross-examined by all other parties to the action in such order as the court directs. For example, a party whose interest in the action is identical with that of the party who called the witness for examination under this section has a right to cross-examine the witness fully because he, too, has the right to call the witness for examination under this section. Similarly, a party whose interest in the action is adverse to the party who calls the witness for examination under this section has the right to cross-examine the witness fully unless he is identified with the witness as described in paragraphs (1) and (2) of this subdivision. Paragraphs (1) and (2) restrict the nature of the cross-examination permitted of a witness by a party with whom the witness is identified and by parties whose

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interest in the action is not adverse to the party with whom the witness is identified. These parties are limited to examination of the witness as if under redirect examination. In essence, this means that leading questions cannot be asked of the witness by these parties. See EVIDENCE CODE § 767. Although the examination must proceed as if it were a redirect examination, under Section 761 it is in fact a cross-examination and limited to the scope of the direct. See also EVIDENCE CODE §§ 760, 773.

Subdivision (c). Subdivision (c) codifies a principle that has been recognized in the California cases even though not explicitly stated in Code of Civil Procedure Section 2055. See *Gates v. Pendleton,* 71 Cal. App. 752, 236 Pac. 365 (1925); *Goehring v. Rogers,* 67 Cal. App. 260, 227 Pac. 689 (1924).

Subdivision (d). Subdivision (d) lists the classes of persons who are "identified with a party" as that phrase and variations of it are used in subdivisions (a) and (b) of Section 776. The persons named in paragraphs (1) and (2) are those described in the first sentence of Code of Civil Procedure Section 2055 as being subject to examination pursuant to the section because of a particular relationship to a party. See the definitions of "person," "public employee," and "public entity" in EVIDENCE CODE §§ 175, 195, and 200, respectively. In addition, paragraph (3) of this subdivision describes persons who were in any of the requisite relationships at the time of the act or omission giving rise to the cause of action. This states existing case law. *Scott v. Del Monte Properties, Inc.,* 140 Cal. App.2d 756, 295 P.2d 947 (1956); *Wells v. Lloyd,* 35 Cal. App.2d 6, 94 P.2d 373 (1939). Similarly, paragraph (4) extends this principle to include any person who obtained relevant knowledge as a result of such a relationship but who does not fit the precise descriptions contained in paragraphs (1) through (3). For example, a person whose employment by a party began after the cause of action arose and terminated prior to the time of his examination at the trial would be included in the description contained in paragraph (4) if he obtained relevant knowledge of the incident as a result of his employment. It is not clear whether this states existing law, for no California decision has been found that decides this question. The paragraph is necessary, however, to preclude a party from preventing examination of his employee pursuant to this section by the simple expedient of discharging the employee prior to trial and reinstating him afterwards. *Cf. Wells v. Lloyd,* 35 Cal. App.2d 6, 12, 94 P.2d 373, 376-377 (1939).

CROSS-REFERENCES

Cross-examination generally, see § 773
Definitions:
  Civil action, see § 120
  Cross-examination, see § 761
  Evidence, see § 140
  Person, see § 175
  Public employee, see § 195
  Public entity, see § 200
  Redirect examination, see § 762
Leading questions, see § 767
Offer of proof unnecessary on cross-examination, see § 354
Order of examination, see § 772
Re-examination generally, see § 774

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§ 777. Exclusion of witness

777. (a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.

(b) A party to the action cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

Comment. Section 777 is based on and supersedes Section 2043 of the Code of Civil Procedure. Under the existing law, the judge exercises broad discretion in regard to the exclusion of witnesses. *People v. Lariscy,* 14 Cal.2d 30, 92 P.2d 638 (1939); *People v. Garbutt,* 197 Cal. 200, 239 Pac. 1080 (1925). *Cf.* PENAL CODE § 867 (power of magistrate to exclude witnesses during preliminary examination). See also CODE CIV. PROC. § 125 (general discretionary power of the court to exclude witnesses).

Under the existing law, the judge may not exclude a party to an action. If the party is a corporation, an officer designated by its attorney is entitled to be present. Section 777 permits the right of presence to be exercised by an employee as well as an officer. Also, because there is little practical distinction between corporations and other artificial entities and organizations, Section 777 extends the right of presence to all artificial parties.

CROSS-REFERENCES

Defendant in criminal action, presence of, see Penal Code § 1043
Definitions:
Action, see § 105
Person, see § 175
Divorce or seduction cases, private hearing, see Code of Civil Procedure § 125
Magistrates authorized to exclude and separate witnesses, see Penal Code § 867

§ 778. Recall of witness

778. After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion.

Comment. Section 778 restates the substance of and supersedes the second and third sentences of Section 2050 of the Code of Civil Procedure.

CROSS-REFERENCES

Definition:
Action, see § 105
Re-examination of witness, see § 774

CHAPTER 6. CREDIBILITY OF WITNESSES

Article 1. Credibility Generally

§ 780. General rule as to credibility

780. Except as otherwise provided by law, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or dis-

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prove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

(d) The extent of his opportunity to perceive any matter about which he testifies.

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

Comment. Section 780 is a restatement of the existing California law as declared in several sections of the Code of Civil Procedure, all of which are superseded by this section and other sections in Article 2 (commencing with Section 785) of this chapter. See, *e.g.*, CODE CIV. PROC. §§ 1847, 2049, 2051, 2052, 2053.

Section 780 is a general catalog of those matters that have any tendency in reason to affect the credibility of a witness. So far as the admissibility of evidence relating to credibility is concerned, Section 780 is technically unnecessary because Section 351 declares that "all relevant evidence is admissible." However, this section makes it clear that matters that may not be "evidence" in a technical sense can affect the credibility of a witness, and it provides a convenient list of the most common factors that bear on the question of credibility. See *Davis v. Judson,* 159 Cal. 121, 128, 113 Pac. 147, 150 (1910); *La Jolla Casa de Manana v. Hopkins,* 98 Cal. App.2d 339, 346, 219 P.2d 871, 876 (1950). See generally WITKIN, CALIFORNIA EVIDENCE §§ 480-485 (1958). Limitations on the admissibility of evidence offered to attack or support the credibility of a witness are stated in Article 2 (commencing with Section 785).

There is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is "collateral". The so-called "collateral matter" limitation on attacking the credibility of a witness excludes evidence relevant to credibility unless such evidence is independently relevant to the issue being tried. It is based on the sensible notion that trials should be confined to settling those disputes between the parties upon which their rights in the litigation depend. Under existing law, this "collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, *e.g.*, *People v. Wells,* 33 Cal.2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.

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The effect of Section 780 (together with Section 351) is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352, the court has substantial discretion to exclude collateral evidence. The effect of Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

There is no limitation in the Evidence Code on the use of opinion evidence to prove the character of a witness for honesty, veracity, or the lack thereof. Hence, under Sections 780 and 1100, such evidence is admissible. This represents a change in the present law. See *People v. Methvin,* 53 Cal. 68 (1878). However, the opinion evidence that may be offered by those persons intimately familiar with the witness is likely to be of more probative value than the generally admissible evidence of reputation. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

CROSS-REFERENCES

Attacking and supporting credibility, limitations on, see §§ 785-791
Character evidence as affecting credibility, see §§ 786-790, 1100
Comment on credibility by court, see Constitution, Art. VI, § 19; Penal Code § 1127
Consistent statements, see §§ 791, 1236, 1238
Definitions:
  Action, see § 105
  Hearing, see § 145
  Law, see § 160
  Proof, see § 190
  Statement, see § 225
Exclusion of evidence of little probative value, see § 352
Expert witnesses, credibility of, see §§ 721, 722
Hearsay declarant, credibility of, see § 1202
Inconsistent statements, see §§ 768-770, 1235
Jurors as judges of credibility, see § 312; Constitution, Art. VI, § 19; Penal Code § 1127
Witnesses protected from undue harassment or embarrassment, see § 765

Article 2. Attacking or Supporting Credibility

§ 785. Parties may attack or support credibility

785. The credibility of a witness may be attacked or supported by any party, including the party calling him.

Comment. Section 785 eliminates the present restriction on attacking the credibility of one's own witness. Under the existing law, a party is precluded from attacking the credibility of his own witness unless he has been surprised and damaged by the witness' testimony. CODE CIV. PROC. §§ 2049, 2052 (superseded by EVIDENCE CODE §§ 768, 769, 770, 785); *People v. LeBeau,* 39 Cal.2d 146, 148, 245 P.2d 302, 303 (1952). In large part, the present law rests upon the theory that a party producing a witness is bound by his testimony. See discussion in *Smellie v. Southern Pac. Co.,* 212 Cal. 540, 555-556, 299 Pac. 529, 535 (1931). This theory has long been abandoned in several jurisdictions where the practical exigencies of litigation have been recognized. See MCCORMICK, EVIDENCE § 38 (1954). A party has no actual control over a person who witnesses an event and is required to testify to aid the trier of fact in its function of determining the truth. Hence, a party should not be "bound" by the testimony of a witness produced by him and should be permitted to attack the credibility of the witness without anachronistic limitations. Denial of the right to attack credibility may often work a hardship on a party where by necessity he

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must call a hostile witness. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure. In regard to attacking the credibility of a "necessary" witness, see generally *People v. McFarlane,* 134 Cal. 618, 66 Pac. 865 (1901); *Anthony v. Hobbie,* 85 Cal. App.2d 798, 803-804, 193 P.2d 748, 751 (1948); *First Nat'l Bank v. De Moulin,* 56 Cal. App. 313, 321, 205 Pac. 92, 96 (1922).

CROSS-REFERENCES

Evidence affecting credibility generally, see § 780
See also the *Cross-References* under Section 780

§ 786. Character evidence generally

786. Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness.

Comment. Section 786 limits evidence relating to the character of a witness to the character traits necessarily involved in a proper determination of credibility. Other character traits are not sufficiently probative of a witness' honesty or veracity to warrant their consideration on the issue of credibility.

Section 786 is substantially in accord with the present California law. CODE CIV. PROC. § 2051 (superseded by EVIDENCE CODE §§ 780, 785-788); *People v. Yslas,* 27 Cal. 630, 633 (1865).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Evidence of good character to support credibility, see § 790
Kinds of character evidence admissible to support or attack credibility, see §§ 787-789, 1100

§ 787. Specific instances of conduct

787. Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

Comment. Under Section 787, as under existing law, evidence of specific instances of a witness' conduct is inadmissible to prove a trait of his character for the purpose of attacking or supporting his credibility. See *Sharon v. Sharon,* 79 Cal. 633, 673-674, 22 Pac. 26, 38 (1889); CODE CIV. PROC. § 2051 (superseded by Section 787 and several other sections in Chapter 6). Section 787 is subject, however, to Section 788, which permits certain kinds of criminal convictions to be used for the purpose of attacking a witness' credibility.

CROSS-REFERENCES

Conviction of crime, when admissible to attack credibility, see § 788
Definitions:
Conduct, see § 125
Evidence, see § 140

§ 788. Conviction of witness for a crime

788. (a) Subject to subdivision (b), evidence of a witness' conviction of a felony is admissible for the purpose of attacking his credibility if the court, in proceedings held out of the presence and hearing of the jury, finds that:

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

(2) The witness has admitted his conviction of the crime or the party attacking the credibility of the witness has produced competent evidence of the conviction.

(b) Evidence of a witness' conviction of a felony is inadmissible for the purpose of attacking his credibility if:

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

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

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

(4) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in paragraph (2) or (3).

(5) A period of more than 10 years has elapsed since the date of his release from confinement, or the expiration of the period of his parole, probation, or sentence, whichever is the later date.

Comment. Under Section 787, evidence of specific instances of a witness' conduct is inadmissible for the purpose of attacking or supporting his credibility. Section 788 states an exception to this general rule where the evidence of the witness' misconduct consists of his conviction of a felony of a kind described in this section. A judgment of conviction that is offered to prove that the person adjudged guilty committed the crime is hearsay. See EVIDENCE CODE §§ 1200 and 1300 and the *Comments* thereto. But the hearsay objection to the evidence specified in Section 788 is overcome by the declaration in the section that such evidence "is admissible" when offered on the issue of credibility.

Subdivision (a). Under subdivision (a), as under existing law, only felony convictions may be used for impeachment purposes. See CODE CIV. PROC. § 2051. Criminal convictions are admitted for the purpose of showing that the witness, by the serious nature of his previous criminal conduct, has demonstrated such a lack of honesty or veracity that now he cannot be trusted to testify truthfully. See EVIDENCE CODE § 786; CODE CIV. PROC. § 2051; WITKIN, CALIFORNIA EVIDENCE § 651 (1958). Hence, subdivision (a) limits the convictions that may be shown for impeachment purposes to those felonies that necessarily indicate the witness' dishonesty or lack of veracity. Other convictions cannot be shown because they have little or no tendency to prove the witness is not trustworthy and because they frequently have an unduly prejudicial effect. To preclude any necessity for retrying the previous crime to determine whether the conviction is admissible under Section 788, the minimum elements essential to conviction must necessarily involve dishonesty or false statement, or the conviction cannot be shown. *Cf. In re Hallinan,* 43 Cal.2d 243, 272 P.2d 768 (1954).

Subdivision (a) modifies existing law, for under existing law any felony conviction may be used for impeachment purposes even though the crime involved has no bearing on the witness' honesty or veracity. See CODE CIV. PROC. § 2051. Section 788 substitutes for this undiscriminating treatment of felony convictions the requirement that the convictions be relevant to the purpose for which they are admitted, *i.e.*, that the convictions tend to prove the witness' dishonesty or lack of veracity.

"Dishonesty" as used in Section 788 means "any breach of honesty or trust, as lying, deceiving, cheating, stealing, or defrauding." MERRIAM-WEBSTER, NEW INTERNATIONAL DICTIONARY (3d ed. 1961). "[T]he measure of [the] meaning [of dishonesty] is . . . an infirmity of purpose so opprobrious or furtive as to be fairly characterized as dishonest in the common speech of men." Cardozo, C. J., in *World Exchange Bank v. Commercial Casualty Ins. Co.*, 255 N.Y. 1, 173 N.E. 902, 903 (1930). Thus, convictions of felonies involving fraud, deception, and lying may, of course, be shown under Section 788. *Cf. Hogg v. Real Estate Commissioner*, 54 Cal. App.2d 712, 129 P.2d 709 (1942). All forms of larceny may also be shown. *Cf. Brecheen v. Riley*, 187 Cal. 121, 200 Pac. 1042 (1921). Similarly, other crimes involving the wrongful deprivation of another of his property and furtive, stealthy crimes (such as burglary) may be shown.

On the other hand, such crimes as felony drunk driving, manslaughter, arson (except for fraudulent purposes), assault, and possession of a deadly weapon do not involve dishonesty or false statement and may not be shown under Section 788.

Under subdivision (a), evidence of the conviction of a witness for a crime is inadmissible unless the appropriate showing has first been made to the court in proceedings out of the presence and hearing of the jury. Thus, for the purpose of impeaching the credibility of a witness, a party may not ask the witness whether he has been convicted of a crime unless the party has first made the requisite showing to the court.

The procedure provided by subdivision (a) is necessary to avoid unfair imputations of crimes that either are inadmissible for impeachment or are nonexistent. In the hearing held out of the presence of the jury, the party seeking to impeach the witness may ask the witness whether he has been convicted of a crime that is admissible for impeachment purposes. If the witness denies any prior conviction, the party seeking to impeach is precluded from asking the witness any questions on the matter before the jury unless he can produce competent evidence of the conviction. Of course, if the witness admits a prior conviction of the proper kind, the witness may be asked concerning the conviction before the jury and his admission of the conviction can be shown if he then denies it. This is substantially in accord with existing law as declared in *People v. Perez*, 58 Cal.2d 229, 23 Cal. Rptr. 569, 373 P.2d 617 (1962).

The procedure specified in Section 788 is applicable to all witnesses; hence, it is applicable to a defendant in a criminal action if he chooses to testify as a witness. Of course, a criminal defendant who does not choose to testify is not subject to impeachment and his prior convictions are not admissible for such a purpose.

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Subdivision (b). Subdivision (b) is a logical extension of the policy expressed in Section 2051 of the Code of Civil Procedure that prohibits the use of a conviction to attack credibility if a pardon has been granted upon the basis of a certificate of rehabilitation. See also CODE CIV. PROC. § 2065. Section 2051 is too limited, however, because it does not exclude convictions in analogous situations.

Insofar as other convictions and pardons are concerned, the conviction is admissible to attack credibility, and the pardon—even though it may be based on the innocence of the defendant and his wrongful conviction for the crime—is admissible merely to mitigate the effect of the conviction. *People v. Hardwick,* 204 Cal. 582, 269 Pac. 427 (1928). Moreover, the certificate of rehabilitation referred to in Section 2051 is available only to felons who have been confined in a state prison or penal institution; it is not available to persons granted probation. PENAL CODE § 4852.01. Section 1203.4 of the Penal Code provides a procedure for setting aside the convictions of rehabilitated probationers. Yet, under Section 2051 of the Code of Civil Procedure, a conviction that has been set aside under Penal Code Section 1203.4 may be shown to attack the credibility of the defendant in a subsequent criminal prosecution. *People v. James,* 40 Cal. App.2d 740, 105 P.2d 947 (1940).

Subdivision (b) eliminates these anachronisms by prohibiting the use of a conviction to attack credibility if the person convicted has been determined to be either innocent or rehabilitated and a pardon has been granted or the conviction has been set aside by court order pursuant to the cited provisions of the Penal Code or he has been relieved of the penalties and disabilities of the conviction pursuant to a similar procedure provided by the laws of another jurisdiction.

Paragraph (5) of subdivision (b) is new to California law. The fact that a person may have committed a crime at some remote time is of little probative value in determining his present character. Therefore, paragraph (5) excludes evidence of remote convictions, for it is the witness' character at the time of the hearing that the trier of fact must determine.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Law, see § 160
Determination of whether pardon granted or the like, see § 405
Determination of whether witness was convicted, see § 403
Judgments as hearsay evidence, see §§ 1300-1302

§ 789. Religious belief

789. Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.

Comment. Section 789 codifies existing law as expressed in *People v. Copsey,* 71 Cal. 548, 12 Pac. 721 (1887), where the Supreme Court held that evidence relating to a witness' religious belief or lack thereof is incompetent on the issue of his credibility as a witness. See CAL. CONST., Art. I, § 4.

CROSS-REFERENCES

Definition:
Evidence, see § 140

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§ 790. Good character of witness

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

Comment. Section 790 restates without substantive change a rule that is well recognized by statutory and case law in California. CODE CIV. PROC. § 2053 (superseded by EVIDENCE CODE §§ 790, 1101); *People v. Bush,* 65 Cal. 129, 131, 3 Pac. 590, 591 (1884). Unless the credibility of a witness is put in issue by an attack impugning his character for honesty or veracity (see Section 786), evidence of the witness' good character admitted merely to support his credibility introduces collateral material that is unnecessary to a proper determination of any legitimate issue in the action. See *People v. Sweeney,* 55 Cal.2d 27, 38-39, 9 Cal. Rptr. 793, 799, 357 P.2d 1049, 1055 (1960).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Evidence admissible to support credibility, see § 780
Proof of character, see § 1100

§ 791. Prior consistent statement of witness

791. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

Comment. Section 791 sets forth the conditions for admitting a witness' prior consistent statements for the purpose of supporting his credibility as a witness. For a discussion of the effect to be given to the evidence admitted under this section, see EVIDENCE CODE § 1236 and the *Comment* thereto.

Subdivision (a). Subdivision (a) permits the introduction of a witness' prior consistent statement if evidence of an inconsistent statement of the witness has been admitted for the purpose of attacking his credibility and if the consistent statement was made *before* the alleged inconsistent statement.

Under existing California law, evidence of a prior consistent statement is admissible to rebut a charge of bias, interest, recent fabrication, or other improper motive. See the *Comment* to subdivision (b), *infra.* Existing law may preclude admission of a prior consistent statement to rehabilitate a witness where only a prior inconsistent statement has

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been admitted for the purpose of attacking his credibility. See *People v. Doyell,* 48 Cal. 85, 90-91 (1874). However, recent cases indicate that the offering of a prior inconsistent statement necessarily is an implied charge that the witness has fabricated his testimony since the time the inconsistent statement was made and justifies the admission of a consistent statement made prior to the alleged inconsistent statement. *People v. Bias,* 170 Cal. App.2d 502, 511-512, 339 P.2d 204, 210-211 (1959). Subdivision (a) makes it clear that evidence of a previous consistent statement is admissible under these circumstances to show that no such fabrication took place. Subdivision (a), thus, is no more than a logical extension of the general rule that evidence of a prior consistent statement is admissible to rehabilitate a witness following an express or implied charge of recent fabrication.

Subdivision (b). This subdivision codifies existing law. See *People v. Kynette,* 15 Cal.2d 731, 104 P.2d 794 (1940) (overruled on other grounds in *People v. Snyder,* 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958)). Of course, if the consistent statement was made *after* the time the improper motive is alleged to have arisen, the logical thrust of the evidence is lost and the statement is inadmissible. See *People v. Doetschman,* 69 Cal. App.2d 486, 159 P.2d 418 (1945).

CROSS-REFERENCES

Definitions:
- Evidence, see § 140
- Hearing, see § 145
- Statement, see § 225

Hearsay exception for:
- Consistent statement, see § 1236
- Inconsistent statement, see § 1235
- Prior identification, see § 1238

Inconsistent statements, see §§ 768-770

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

Comment. Two matters concerning the terminology used in this division should be noted: (1) The word "opinion" is used to include all opinions, inferences, conclusions, and other subjective statements made by a witness. (2) The word "matter" is used to encompass facts, data, and such matters as a witness' knowledge, experience, and other intangibles upon which an opinion may be based. Thus, every conceivable basis for an opinion is included within this term.

CROSS-REFERENCES

Competency of witnesses, see §§ 700-704
Control of mode of interrogation, see § 765
Credibility of witnesses, see §§ 780, 785-791
Examination of witnesses generally, see §§ 760-778
Exclusion of cumulative or unduly prejudicial evidence, see § 352
Expert witnesses generally, see §§ 720-754
Preliminary determinations on admissibility of evidence, see §§ 400-406

CHAPTER 1. EXPERT AND OTHER OPINION TESTIMONY

Article 1. Expert and Other Opinion Testimony Generally

§ 800. Opinion testimony by lay witness

800. If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

(a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of his testimony.

Comment. This section codifies existing law. A witness who is not testifying as an expert may testify in the form of an opinion only if the opinion is based on his own perception. *Stuart v. Dotts,* 89 Cal. App.2d 683, 201 P.2d 820 (1949). See discussion in *Manney v. Housing Authority,* 79 Cal. App.2d 453, 459-460, 180 P.2d 69, 73 (1947). And, in addition, the opinion must be "helpful to a clear understanding of his testimony." See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901, 931-935 (1964).

Section 800 does not make inadmissible an opinion that is admissible under existing law, even though the requirements of subdivisions (a) and (b) are not satisfied. Thus, the section does not affect the existing rule that a nonexpert witness may give his opinion as to the value of his property or the value of his own services. See WITKIN, CALIFORNIA EVIDENCE § 179 (1958). The words "such an opinion as is permitted by law" in Section 800 make this clear.

CROSS-REFERENCES

Definitions:
  Law, see § 160
  Perceive, see § 170
Handwriting, opinion as to, see § 1416
Sanity, opinion as to, see § 870

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§ 801. Opinion testimony by expert witness

801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Comment. Section 801 deals with opinion testimony of a witness testifying as an expert; it sets the standard for admissibility of such testimony.

Subdivision (a), which states *when* an expert may give his opinion upon a subject that is within the scope of his expertise, codifies the existing rule that expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training, and education. *People v. Cole,* 47 Cal.2d 99, 103, 301 P.2d 854, 856 (1956). For examples of the variety of subjects upon which expert testimony is admitted, see WITKIN, CALIFORNIA EVIDENCE §§ 190–195 (1958).

Subdivision (b) states a general rule in regard to the permissible bases upon which the opinion of an expert may be founded. The California courts have made it clear that the nature of the matter upon which an expert may base his opinion varies from case to case. In some fields of expert knowledge, an expert may rely on statements made by and information received from other persons; in some other fields of expert knowledge, an expert may not do so. For example, a physician may rely on statements made to him by the patient concerning the history of his condition. *People v. Wilson,* 25 Cal.2d 341, 153 P.2d 720 (1944). A physician may also rely on reports and opinions of other physicians. *Kelley v. Bailey,* 189 Cal. App.2d 728, 11 Cal. Rptr. 448 (1961); *Hope v. Arrowhead & Puritas Waters, Inc.,* 174 Cal. App.2d 222, 344 P.2d 428 (1959). An expert on the valuation of real or personal property, too, may rely on inquiries made of others, commercial reports, market quotations, and relevant sales known to the witness. *Betts v. Southern Cal. Fruit Exchange,* 144 Cal. 402, 77 Pac. 993 (1904); *Hammond Lumber Co. v. County of Los Angeles,* 104 Cal. App. 235, 285 Pac. 896 (1930); *Glantz v. Freedman,* 100 Cal. App. 611, 280 Pac. 704 (1929). On the other hand, an expert on automobile accidents may not rely on extrajudicial statements of others as a partial basis for an opinion as to the point of impact, whether or not the statements would be admissible evidence. *Hodges v. Severns,* 201 Cal. App.2d 99, 20 Cal. Rptr. 129 (1962); *Ribble v. Cook,* 111 Cal. App.2d 903, 245 P.2d 593 (1952). See also *Behr v. County of Santa Cruz,* 172 Cal. App.2d 697, 342 P.2d 987 (1959) (report of fire ranger as to cause of fire held inadmissible because it was based primarily upon statements made to him by other persons).

Likewise, under existing law, irrelevant or speculative matters are not a proper basis for an expert's opinion. See *Roscoe Moss Co. v. Jenkins,* 55 Cal. App.2d 369, 130 P.2d 477 (1942) (expert may not base opinion upon a comparison if the matters compared are not reasonably comparable); *People v. Luis,* 158 Cal. 185, 110 Pac. 580 (1910) (physician may not base opinion as to person's feeblemindedness merely upon the person's exterior appearance); *Long v. Cal.-Western States Life Ins. Co.,* 43 Cal.2d 871, 279 P.2d 43 (1955) (speculative or conjectural data); *Eisenmayer v. Leonardt,* 148 Cal. 596, 84 Pac. 43 (1906) (speculative or conjectural data). *Compare People v. Wochnick,* 98 Cal. App.2d 124, 219 P.2d 70 (1950) (expert may not give opinion as to the truth or falsity of certain statements on basis of lie detector test), *with People v. Jones,* 42 Cal.2d 219, 266 P.2d 38 (1954) (psychiatrist may consider an examination given under the influence of sodium pentothal —the so-called "truth serum"—in forming an opinion as to the mental state of the person examined).

The variation in the permissible bases of expert opinion is unavoidable in light of the wide variety of subjects upon which such opinion can be offered. In regard to some matters of expert opinion, an expert *must,* if he is going to give an opinion that will be helpful to the jury, rely on reports, statements, and other information that might not be admissible evidence. A physician in many instances cannot make a diagnosis without relying on the case history recited by the patient or on reports from various technicians or other physicians. Similarly, an appraiser must rely on reports of sales and other market data if he is to give an opinion that will be of value to the jury. In the usual case where a physician's or an appraiser's opinion is required, the adverse party also will have its expert who will be able to check the data relied upon by the adverse expert. On the other hand, a police officer can analyze skid marks, debris, and the condition of vehicles that have been involved in an accident without relying on the statements of bystanders; and it seems likely that the jury would be as able to evaluate the statements of others in the light of the physical facts, as interpreted by the officer, as would the officer himself. It is apparent that the extent to which an expert may base his opinion upon the statements of others is far from clear. It is at least clear, however, that it is permitted in a number of instances. See *Young v. Bates Valve Bag Corp.,* 52 Cal. App.2d 86, 96-97, 125 P.2d 840, 846 (1942), and cases therein cited. *Cf. People v. Alexander,* 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963).

It is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible; the subjects upon which expert opinion may be received are too numerous to make statutory prescription of applicable rules a feasible venture. It is possible, however, to formulate a general rule that specifies the minimum requisites that must be met in every case, leaving to the courts the task of determining particular detail within this general framework. This standard is expressed in subdivision (b) which states a general rule that is applicable whenever expert opinion is offered on a given subject.

Under subdivision (b), the matter upon which an expert's opinion is based must meet each of three separate but related tests. ***First,*** the mat-

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ter must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion is expressed. This requirement assures the expert's acquaintance with the facts of a particular case either by his personal perception or observation or by means of assuming facts not personally known to the witness. *Second,* and without regard to the means by which an expert familiarizes himself with the matter upon which his opinion is based, the matter relied upon by the expert in forming his opinion must be of a type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates. In large measure, this assures the reliability and trustworthiness of the information used by experts in forming their opinions. *Third,* an expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper basis for an opinion. For example, the statements of bystanders as to the cause of a fire may be considered reliable for some purposes by an investigator of the fire, particularly when coupled with physical evidence found at the scene, but the courts have determined this to be an improper basis for an opinion since the trier of fact is as capable as the expert of evaluating such statements in light of the physical facts as interpreted by the expert. *Behr v. County of Santa Cruz,* 172 Cal. App.2d 697, 342 P.2d 987 (1959).

The rule stated in subdivision (b) thus permits an expert to base his opinion upon reliable matter, *whether or not admissible,* of a type that may reasonably be used in forming an opinion upon the subject to which his expert testimony relates. In addition, it provides assurance that the courts and the Legislature are free to continue to develop specific rules regarding the proper bases for particular kinds of expert opinion in specific fields. See, *e.g.,* 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings* at A-1 (1961). Subdivision (b) thus provides a sensible standard of admissibility while, at the same time, it continues in effect the discretionary power of the courts to regulate abuses, thereby retaining in large measure the existing California law.

CROSS-REFERENCES

Blood test experts, see §§ 890-897
Definitions:
  Hearing, see § 145
  Law, see § 160
  Perceive, see § 170
  Trier of fact, see § 235
Expert witnesses, appointment by court, see §§ 730-733
Expert witnesses generally, see §§ 720-723
Interpreters, see §§ 750-754
Judicial notice, use of expert testimony, see § 454
Translators, see §§ 750-754
Writing, expert testimony concerning authenticity of, see § 1418

§ 802. Statement of basis of opinion

802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its

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discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

Comment. Section 802 restates the substance of and supersedes a portion of Section 1872 of the Code of Civil Procedure. Section 802, however, relates to all witnesses who testify in the form of opinion, while Section 1872 relates only to experts.

Although Section 802 (like its predecessor, Code of Civil Procedure Section 1872) provides that a witness *may* state the basis for his opinion on direct examination, it is clear that, in some cases, a witness is *required* to do so in order to show that his opinion is applicable to the action before the court. Under existing law, where a witness testifies in the form of opinion not based upon his personal observation, the assumed facts upon which his opinion is based must be stated in order to show that the witness has some basis for forming an intelligent opinion and to permit the trier of fact to determine the applicability of the opinion in light of the existence or nonexistence of such facts. *Eisenmayer v. Leonardt,* 148 Cal. 596, 84 Pac. 43 (1906); *Lemley v. Doak Gas Engine Co.,* 40 Cal. App. 146, 180 Pac. 671 (1919) (hearing denied). Evidence Code Section 802 will not affect the rule set forth in these cases, for it is based essentially on the requirement that all evidence must be shown to be applicable—or relevant—to the action. EVIDENCE CODE §§ 350, 403. But under Section 802, as under existing law, a witness testifying from his personal observation of the facts upon which his opinion is based need not be examined concerning such facts before testifying in the form of opinion; his personal observation is a sufficient basis upon which to found his opinion. *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm'n,* 29 Cal.2d 492, 175 P.2d 823 (1946); *Hart v. Olson,* 68 Cal. App.2d 657, 157 P.2d 385 (1945); *Lemley v. Doak Gas Engine Co., supra.* However, the court may require a witness to state the facts observed before stating his opinion. In this respect, Section 802 codifies the existing rule concerning lay witnesses and, although the existing law is unclear, probably states the existing rule as to expert witnesses. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901, 934 (lay witness), 939 (expert witness) (1964).

CROSS-REFERENCES

Definitions:
Direct examination, see § 760
Law, see § 160

§ 803. Opinion based on improper matter

803. The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

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Comment. Under Section 803, as under existing law, an opinion may be held inadmissible or may be stricken if it is based wholly or in substantial part upon improper considerations. Whether or not the opinion should be held inadmissible or stricken will depend in a particular case on the extent to which the improper considerations have influenced the opinion. "The question is addressed to the discretion of the trial court." *People v. Lipari,* 213 Cal. App.2d 485, 493, 28 Cal. Rptr. 808, 813-814 (1963). See discussion in *City of Gilroy v. Filice,* 221 Cal. App.2d 259, 271-272, 34 Cal. Rptr. 368, 375-376 (1963), and cases cited therein. If a witness' opinion is stricken because of reliance upon improper considerations, the second sentence of Section 803 assures the witness the opportunity to express his opinion after excluding from his consideration the matter determined to be improper.

CROSS-REFERENCES

Handwriting, basis of opinion as to, see §§ 1416, 1418, 1419
Matter upon which opinion may be based, see §§ 800, 801
Sanity, opinion as to, see § 870

§ 804. Opinion based on opinion or statement of another

804. (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

Comment. Section 804 is designed to provide protection to a party who is confronted with an expert witness who relies on the opinion or statement of some other person. (See the *Comment* to Section 801 for examples of opinions that may be based on the statements and opinions of others.) In such a situation, a party may find that cross-examination of the witness will not reveal the weakness in his opinion, for the crucial parts are based on the observations or opinions of someone else. Under existing law, if that other person is called as a witness, he is the witness of the party calling him and, therefore, that party may not subject him to cross-examination.

The existing law operates unfairly, for it unnecessarily restricts meaningful cross-examination. Hence, Section 804 permits a party to extend his cross-examination into the underlying bases of the opinion testimony introduced against him by calling the authors of opinions

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and statements relied on by adverse witnesses and examining them as if under cross-examination concerning the subject matter of their opinions and statements. See the *Comment* to EVIDENCE CODE § 1203.

CROSS-REFERENCES

Cross-examination of expert witness, see § 721
Definitions:
  Action, see § 105
  Statement, see § 225
Examination of witnesses, method and scope, see §§ 760-778
Similar provision:
  Hearsay declarant, examination as if under cross-examination, see § 1203

§ 805. Opinion on ultimate issue

805. Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

Comment. Although several older cases indicated that an opinion could not be received on an ultimate issue, more recent cases have repudiated this rule. Hence, this section is declarative of existing law. *People v. Wilson,* 25 Cal.2d 341, 349-350, 153 P.2d 720, 725 (1944); *Wells Truckways, Ltd. v. Cebrian,* 122 Cal. App.2d 666, 265 P.2d 557 (1954); *People v. King,* 104 Cal. App.2d 298, 231 P.2d 156 (1951).

CROSS-REFERENCES

Definition:
  Trier of fact, see § 235

Article 2. Opinion Testimony on Particular Subjects

§ 870. Opinion as to sanity

870. A witness may state his opinion as to the sanity of a person when:

(a) The witness is an intimate acquaintance of the person whose sanity is in question;

(b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or

(c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

Comment. Subdivisions (a) and (b) restate the substance of and supersede subdivision 10 of Section 1870 of the Code of Civil Procedure. Subdivision (c) merely makes it clear that a witness who meets the requirements of Section 800 or Section 801 is qualified to testify in the form of an opinion as to the sanity of a person. Section 870 does not disturb the present rule that permits a witness to testify to a person's rational or irrational appearance or conduct, even though the witness is not qualified under Section 870 to express an opinion on the person's sanity. See *Pfingst v. Goetting,* 96 Cal. App.2d 293, 215 P.2d 93 (1950).

CROSS-REFERENCES

Definition:
  Writing, see § 250
Opinion testimony generally, see §§ 800-805

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CHAPTER 2. BLOOD TESTS TO DETERMINE PATERNITY

§ 890. Short title

890. This chapter may be cited as the Uniform Act on Blood Tests to Determine Paternity.

Comment. Section 890 is identical with and supersedes Section 1980.1 of the Code of Civil Procedure.

§ 891. Interpretation

891. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Comment. Section 891 is identical with and supersedes Section 1980.2 of the Code of Civil Procedure.

§ 892. Order for blood tests in civil actions involving paternity

892. In a civil action in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, and shall upon motion of any party to the action made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

Comment. Section 892 restates the substance of and supersedes Section 1980.3 of the Code of Civil Procedure.

CROSS-REFERENCES

Appointment of expert witnesses generally, see §§ 730-733
Court order for blood test, see Code of Civil Procedure § 2032
Definition:
  Civil action, see § 120

§ 893. Tests made by experts

893. The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

Comment. Section 893 is identical with and supersedes Section 1980.4 of the Code of Civil Procedure.

CROSS-REFERENCES

Examination of expert witnesses, see §§ 721, 722, 801-805
Examination of witnesses generally, see §§ 760-778

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§ 894. Compensation of experts

894. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by the county, and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action.

Comment. Section 894 restates the substance of and supersedes all of Code of Civil Procedure Section 1980.5 except the last sentence, which is superseded by Evidence Code Section 897.

CROSS-REFERENCES

Definition:
Action, see § 105

§ 895. Determination of paternity

895. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.

Comment. Section 895 is identical with and supersedes Section 1980.6 of the Code of Civil Procedure.

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 896. Limitation on application in criminal matters

896. This chapter applies to criminal actions subject to the following limitations and provisions:

(a) An order for the tests shall be made only upon application of a party or on the court's initiative.

(b) The compensation of the experts shall be paid by the county under order of court.

(c) The court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 895; otherwise, the case shall be submitted for determination upon all the evidence.

Comment. Section 896 restates the substance of and supersedes Section 1980.7 of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
Criminal action, see § 130
Evidence, see § 140
Effect of expert testimony, instruction on, see Penal Code § 1127b

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§ 897. Right to produce other expert evidence

897. Nothing contained in this chapter shall be deemed or construed to prevent any party to any action from producing other expert evidence on the matter covered by this chapter; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action.

Comment. Section 897 supersedes the last sentence of Section 1980.5 of the Code of Civil Procedure. Insofar as Section 897 permits a party to produce other expert evidence, it makes no change in existing law. However, Section 897 permits a party to recover ordinary witness fees for expert witnesses called by him, whereas Section 1980.5 does not permit him to do so. In this respect, Section 897 is consistent with the general provision on recovery of witness fees for expert witnesses called by a party in a case where other experts are appointed by the court. See CODE CIV. PROC. § 1871 (third paragraph) (recodified as EVIDENCE CODE § 733).

CROSS-REFERENCES

Court may limit number of expert witnesses, see § 723
Definitions:
  Action, see § 105
  Evidence, see § 140
Similar provision:
  Court-appointed experts generally, see § 733

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Supreme Court of California
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Electronically FILED on 5/13/2020 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Lower Court Case Number: **B296639**

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5/13/2020

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/s/Frederic Cohen

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Cohen, Frederic (56755)

Last Name, First Name (PNum)

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