Time	Place
Nov. 19 - 7:00 p.m. - 10:00 p.m. Nov. 20 - 9:00 a.m. - 5:00 p.m. Nov. 21 - 9:00 a.m. - 12:00 p.m.	Law School - Boalt Hall University of California Berkeley

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Berkeley November 19-21, 1964

Bring the following materials to the meeting (in addition to other items listed on agenda):

(1) Printed pamphlet containing Uniform Rules of Evidence

(2) Printed pamphlets containing tentative recommendations and studies (there are 9 pamphlets)

(3) Preprint Senate Bill No. 1

(4) Revised Preprinted Senate Bill No. 1 (yellow pages)

AGENDA ITEMS

1. Approval of Minutes for October 1964 Meeting (to be sent)

2. Administrative Matters, if any

Report on interim hearings and similar matters

Introduction and authors of bills to effectuate our recommendations

Stanford lease

Annual Report - Memorandum 64-103 (enclosed)

3. Study No. 34(L) - Uniform Rules of Evidence--Review of Preprinted Bill and Final Approval for Printing:

Memorandum 64-101 (sent Nov. 13, 1964)

First Supplement to Memo 64-101 (enclosed)

Amendments and Repeals (Mr. Stanton)

4. Study No. 52(L) - Sovereign Immunity

Memorandum 64-102 (sent Nov. 4, 1964)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 19, 20, AND 21, 1964

Berkeley

A regular meeting of the California Law Revision Commission was held in Berkeley at the University of California Law School on November 19, 20, and 21, 1964.

Present: John R. McDonough, Jr., Chairman
Richard H. Keatinge, Vice Chairman
Joseph A. Ball
James R. Edwards
Sho Sato
Herman F. Selvin
Thomas E. Stanton, Jr.

Absent: Hon. James A. Cobey
Hon. Alfred H. Song
George H. Murphy, ex officio

Messrs. John H. DeMoully, Joseph B. Harvey, and Jon D. Smock of the Commission's staff were also present.

Also present were the following:

Robert F. Carlson, representing the Department of Public Works (November 20 only)
Robert Lynch, representing Office of County Counsel (L.A.) (November 20 and 21 only)
Warren P. Marsden, representing the Judicial Council (November 20 only)
Joseph Powers, representing the Association of District Attorneys
Gordon Ringer, representing the Office of the Attorney General
Felix Stumpf, Continuing Education of the Bar (November 20 only)

ADMINISTRATIVE MATTERS

Minutes of October 1964 Meeting. The summary of the Presentation by Mr. Ringer (attached to Minutes) was corrected by deleting the words "the jury alone" in the third line of the second paragraph of the discussion on Sections 210 and 402 and inserting the words "both the court and jury." As thus revised, the Minutes were approved.

Stanford lease. The Executive Secretary was authorized by the Commission to approve a lease with Stanford University covering the space occupied by the Commission for the period following December 31, 1964, but the amount of rent to be paid under such lease shall not exceed the amount contained in the revised budget for 1964-65 and in the proposed budget for 1965-66.

1965 Annual Report. The 1965 Annual Report was approved as set out in Memorandum 64-103. The staff indicated that some revisions will be made in the material set in type for the 1964 Annual Report and that the discussion under topic 2 on page 1 of Memorandum 64-103 has also been slightly revised in preparing this material for the printer.

Future meetings. Future meetings are scheduled as follows:

January 14-16 (three full days)	- Monterey
February 18-20	- San Francisco
March 18-20	- Los Angeles
April 11-13	- Lake Tahoe
May 13-15	- San Francisco

REVISED PREPRINT SENATE BILL NO. 1

The Commission considered Revised Preprint Senate Bill No. 1 and Memorandum 64-101 and the First Supplement to Memorandum 64-101. The following actions were taken:

Title

The opinion of the Legislative Counsel approving the legal adequacy of the title was noted.

Section 12

The word "operative" was substituted for "effective" in line 29 on page 16.

The Commission considered the comment of the State Bar Committee on Section 12 (item 1). The Commission discussed the suggestion that the old rules of evidence continue to apply to a "hearing" commenced prior to the operative date of the Evidence Code until the "hearing" is concluded even though it is concluded after December 31, 1966.

Considerable uncertainty was expressed as to the meaning of the word "hearing" as used in this context.

A suggestion was made but not adopted that the Evidence Code be made applicable in the discretion of the judge to cases pending on the operative date of the Evidence Code. This suggestion was not adopted, primarily because the rules of evidence applicable to pending cases would be uncertain since they would depend on whether the judge decided to apply the new rules or decided to apply the old rules.

It was pointed out that there will be a very small number of "hearings" in progress on the effective date of the new code. Attorneys will seek to

have a matter set for trial prior to or subsequent to the operative date of the new code, depending on whether it will be of benefit to them in the particular case. Many hearings will be concluded before Christmas or will be deferred until after the first of the year. If the application of the rules to a hearing in progress would be unfair to the party who presents his portion of the evidence prior to the operative date of the new code, the judge will most likely allow that party to reopen and get his additional evidence in (where it is admissible under the new code but excluded under the old rules).

In view of the few cases involved, the Commission decided to retain Section 12 without change. To attempt to deal with the problem would create more problems of interpretation than it would resolve.

Division 2-Words and Phrases Defined

After considerable discussion, the Commission determined not to move the definitions of "declarant," "statement," "unavailable as a witness," "burden of producing evidence," "burden of proof," and "writings" (State Bar Committee - items 2, 3, and 4).

First of all, the great majority of the Commission prefers having definitions that are used in more than one division of the code at the beginning of the code. In addition, the reorganization of the code, by moving these definitions, would require the renumbering of sections in Divisions 5, 10, and 11; it would be conducive to error to attempt to make such a substantial revision at this time.

The Commission's Comments are to be revised to include a cross-reference under each particular section to all sections containing definitions pertinent to the particular code section.

Definition of "witness"

The Commission considered whether a definition of "witness" should be included in the Evidence Code (State Bar Committee - item 5). After considerable discussion, it was concluded that it would be undesirable to attempt to draft a definition of "witness," that the context of particular sections where the word is used makes its meaning clear, and that the particular problem that arises from the absence of the definition is the status of a deponent whose deposition was taken in the action in which it is offered. This problem should be resolved by an express provision. In response to the suggestion of the State Bar Committee, Section 1202 was revised to add a sentence to make clear the status of a deponent whose deposition is taken in the action in which it is offered.

Section 311

The Commission considered the suggestion of the State Bar Committee (item 6) that this section be revised to give discretion to the court to retain jurisdiction of the case where the ends of justice require it. The Commission decided not to adopt this suggestion for several reasons. First of all, Section 311 restates existing California law. Second, the Comment to Section 311 is to be revised to take care of the problem that apparently concerns the State Bar Committee. The substance of the following should be added to the Comment to Section 311:

> 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 rules that govern the disposition of the case.

Section 353

The State Bar Committee (item 7) objected to this section. Some Commissioners expressed concern about the deletion of the section, but its deletion was approved in view of the objection of the State Bar Committee.

Section 402

The State Bar Committee (item 8) objected to subdivision (c) of this section. Because the State Bar Committee considered this objection to be "most important," the Commission deleted subdivision (c) in view of the fact that subdivision (c) changes existing law.

Treatment of spontaneous and dying declarations under Sections 403 and 405

The State Bar Committee (item 9) objected to the change in existing law which prevents the jury having a "second crack" on the preliminary showing required to obtain admission of a spontaneous statement or dying declaration. After considerable discussion, the Commission decided to retain the Evidence Code provisions as drafted and not to make the change suggested by the State Bar Committee. See discussion below in connection with the treatment of confessions and admissions of criminal defendants.

Treatment of confessions under Sections 403 and 405

The State Bar Committee (item 10) suggested that the Evidence Code be revised to restore the "second crack" doctrine on confessions and admissions of criminal defendants. The State Bar Committee was concerned that this change in existing law will operate to the detriment of criminal defendants. After considerable discussion, during which it was pointed out that the defendant has no opportunity to present to the jury the question of the preliminary determination on evidence obtained by unreasonable search or

seizure, it was determined not to restore the "second crack" doctrine on confessions. The Commission's reason for this action can be stated as follows:

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 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 it to exclude the confession.

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 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 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.

Division 4--Judicial Notice

The Commission considered the State Bar Committee's suggestion that "ordinary meaning" be inserted for "true signification" in subdivision (e) of Section 451. The Commission decided to retain the language in subdivision (e) which is the same language as is found in Section 1875 of the Code of Civil Procedure. The court should take judicial notice of the correct meaning of words and phrases and legal expressions, and the correct meaning is not necessarily the "ordinary" meaning. For example, in appropriate cases, expert testimony may be necessary to determine the correct meaning of expressions used by criminals, even though criminals do not give such expressions their "ordinary meaning."

The Commission considered a letter from Professor Davis and the suggestion of the State Bar Committee (item 12) and made the following changes in this division:

(1) In Section 450, the word "law" was substituted in place of the word "statute." This change was made to make it clear that Section 450 does not prevent the use of legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts and findings or that indicate contemporary opinion, and similar materials. Moreover, the change will make the Evidence Code consistent with existing law which does not limit the court to taking judicial notice of matters not specified in the statutes.

(2) Section 455 was revised to read in substance:

> 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 close of the taking of evidence 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) [No change.]

(3) Section 456 was deleted as unnecessary in view of the revision of Section 455.

(4) Section 460 is to be revised to make it consistent with Section 455. This will require that "reasonably subject to dispute" be deleted from subdivisions (c) and (d) and the addition of a reference to subdivision (f) of Section 451 in both subdivision (c) and (d).

Division 5--Burden of Proof, etc.

The preprinted bill was revised to take care of objections (items 13, 14, and 15) of the State Bar Committee. The portion of the Comment that concerned the State Bar Committee (item 16) has been revised to delete the discussion that concerned the Committee since, in view of the revisions of the statute, that discussion no longer is necessary.

Section 600

Section 600 was revised to read:

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.

This revision adopts the suggestion of the State Bar Committee (item 17) and also the suggestion of the State Bar Committee that the new code deal with inferences (item 18). With respect to item 18, see also the revision of Section 604.

Section 604

The following sentence was added at the end of Section 604: "Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

Section 608

In response to a suggestion of the State Bar Committee (item 18), this section was deleted.

Articles 3 and 4 of Chapter 2 of Division 5

The suggestion of the State Bar Committee (item 19) that the order of these articles be reversed was not adopted because it would require too substantial a revision of the statute and would be conducive to error.

Section 721

In response to a suggestion from the State Bar Committee (item 20), the words "the matter upon which his opinion is based and the reasons for his opinion" were added at the end of subdivision (a) of Section 721.

Section 731

Section 731 has been revised as suggested by the State Bar Committee (item 21).

Direct and cross-examination

To clarify the matter of direct and cross-examination, the Commission approved the following statutory provisions to be added to the proposed code:

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.

§ 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 Code of Civil Procedure Section 2045. In accordance with existing law, it limits cross-examination 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).

§ 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 are 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.

§ 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.

§ 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 restrictions on the use of leading questions in the examination of a witness, see EVIDENCE CODE § 767 and the Comment thereto.

Article 2. Examination of Witness

Section 765

In response to a suggestion of the State Bar Committee (item 22), Section 765 was revised to read:

> 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.

§ 766. Responsive answers [No change]

§ 767. Leading questions

767. Except under special circumstances where the interests of justice

require otherwise:

(a) A leading question may not be asked of a witness on direct or redirect examination.

(b) Subject to subdivision (c), a leading question may be asked of a witness on cross- or recross-examination.

(c) A leading question may not be asked of a witness on cross- or recross-examination by any party whose interest is not adverse to the direct examiner.

Comment. Subdivision (a) restates the substance of and supersedes the last sentence of Code of Civil Procedure Section 2046. Subdivision (b) is based on, and supersedes, a phrase that appears in Code of Civil Procedure Section 2048.

Subdivision (c) is based on the holding in A. T. & Santa Fe Ry. v. So. 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 Section 773, 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).

§ 768. Writings [No change.]

§ 769. Inconsistent statement or conduct [No change.]

§ 770. Evidence of inconsistent statement of witness [No change.]

§ 771. Refreshing recollection with a writing [No change.]

§ 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 Code of Civil Procedure Section 2045. The language of the Code of Civil Procedure 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 ("but 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).

§ 773. Cross-examination

773. Subject to Section 721, 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.

Comment. Section 773 restates the substance of Sections 2045 (part) and 2048 of the Code of Civil Procedure and Section 1323 of the Penal Code.

§ 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.

§§ 775-778 [No change.]

Section 780

The State Bar Committee (item 23) suggests that this section specifically be made subject to Section 352. This suggestion was not accepted because many sections which are subject to Section 352 do not contain such specific reference. The Comment is to contain a cross-reference to Section 352.

In response to a suggestion of the State Bar Committee (item 23) that the words "of the witness" be inserted in line 50 following the word "conduct," the Commission deleted the words "statement or other conduct" in line 50 and inserted "matter."

The word "improper" was deleted in line 12, page 36.

Section 788

In response to a suggestion of the State Bar Committee (items 24 and 26), this section was revised to read:

> 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:
> (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.

The substance of the Comment to Section 788 will read:

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 certain kind of felony. 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 truly. 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 "a willful perversion of truth or a stealing, cheating, or defrauding." MERRIAM-WEBSTER, NEW COLLEGIATE DICTIONARY (1953). "[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 and 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 unlessthe appropriate showing has first been made to the court in proceedings out of the presence and hearing of the jury. Thus, a party may not ask a witness on cross-examination 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 only to witnesses; hence it is applicable to a defendant in a criminal action only 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.

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.

The Commission considered the suggestion of the State Bar Committee (item 25) that the statute make clear that the party attacking credibility need not show the absence of any of the circumstances specified in subdivision (b) of Section 788. The Commission determined that this should be made clear in the Comment to Section 788.

Section 800

The State Bar Committee suggested (item 27) a revision of this section to permit the witness to testify in the form of an opinion where the opinion is related to a subject that is within common experience, is rationally based on the perception of the witness, and is helpful to the determination of any disputed fact that is of consequence to the determination of the action. The Commission declined to make this change because it was feared that the revision would permit a witness to testify in the form of opinion on a subject within common experience in any case where the testimony was relevant. The revision made of this section (noted below) takes care of the problem that concerned the Committee.

The Commission revised the introductory clause of Section 800, in response to a suggestion of the State Bar Committee (item 28), to read:

> 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:

This revision will permit a lay witness to testify to the value of his property or the value of his services. The Comment should note that these are instances covered by the language "permitted by law."

Section 801

The State Bar Committee (item 29) suggested that the phrase "whether or not admissible" be deleted from subdivision (b) of Section 801. This phrase was included to make it clear that an expert could rely on hearsay information that would not meet the requirements of a hearsay exception (as, for example, information concerning comparable sales, results of lab tests, etc.). The Department of Public Works and the members of the

Commission urged that the phrase was desirable to make it clear that such hearsay could be matter upon which an opinion could be based unless the expert is precluded by law from relying on it.

In response to a suggestion of the State Bar Committee (item 29), the Commission substituted "that is of a type that reasonably may be relied upon by an expert in forming an opinion" for the phrase "that is of a type commonly relied upon by experts in forming an opinion . . . . . " The revised language states the existing law. The deleted language, as the State Bar Committee pointed out, is too restrictive.

Section 802

The Commission in response to a suggestion of the State Bar Committee (item 30) added the following sentence at the end of Section 802:

> The court in its 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.

This additional sentence should provide adequate protection to a party faced with an expert witness. At the same time, it will not require that the matter be first stated before the opinion be given in a case where it would not be reasonable to so require.

The State Bar Committee (item 31) also suggests the deletion of the clause "unless he is precluded by law from using such reasons or matter as a basis for his opinion." This clause was inserted because many persons commenting on the tentative recommendation believed that it was essential to protect the party against whom the opinion is offered from the witness stating on direct examination incompetent matter. Thus, it permits such party to object to a question that calls for the witness to

state incompetent matter on direct examination. The section does not prevent the cross-examiner from going into matters on which the opinion is based and demonstrating that the opinion is based on improper matter. For example, many persons believe that it is not proper to use an offer on comparable property to justify an opinion as to the value of property. Section 802 permits the opposing party to prevent the witness from stating the offer on direct examination.

Section 803

In response to a suggestion of the State Bar Committee (item 32), the phrase ", if there remains a proper basis for his opinion," was inserted after the word "may" in line 14 on page 38.

Section 804

In response to suggestions of the State Bar Committee (items 33 and 34) and a suggestion of the staff, subdivisions (a) and (b) of Section 804 were revised to read:

> 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 indentified 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.

Section 830

The suggestion of the State Bar Committee (item 35) that this section not be a separate article was no longer pertinent since the section was deleted. It was reported that the State Bar Committee on Condemnation Law

and Procedure by a vote of 10 to 1 approved the deletion of this section.

New Section on Opinion of Property Owner or Opinion on Value of Services

The suggestion of the State Bar Committee (item 36) that the statute codify the rules concerning testimony in the form of an opinion by the owner of property or the person providing services as to the value of property or services was not adopted. It was considered unnecessary to attempt to codify these rules since Section 800 was revised to preserve the case law that establishes the rules.

Section 870

In response to a suggestion of the State Bar Committee (item 37), subdivision (b) of Section 870 was revised to read:

> (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

Section 894

In response to a suggestion of the State Bar Committee (item 38), the Commission deleted the last sentence of Section 894 and added a new section to read as follows:

> 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.

It was noted that the new section is based on Section 733 of the Evidence Code.

Section 895

The comment of the State Bar Committee (item 39) was noted, but no action was taken.

Section 896

The comment of the State Bar Committee (item 39) was noted, but no action was taken.

Section 912

The comment has been revised as suggested by the State Bar Committee (item 42).

Section 914

The Commission considered the comment of the State Bar Committee (item 40) that Section 914 will require the State Industrial Accident Commission, for example, to obtain a court order compelling a witness to answer before he may be adjudged in contempt for refusing to disclose information claimed to be privileged. The Commission had previously considered this matter and reaffirmed its decision not to make this section inapplicable to the proceedings of the State Industrial Accident Commission. It was noted that the Assembly Subcommittee on Law Revision seemed to take the view that Section 914 was a reasonable requirement when applied to the State Industrial Accident Commission.

It was suggested by Mr. Powers that a provision be added to Section 914 to provide a procedure for obtaining a court order compelling the witness to disclose information claimed to be privileged after a court has determined that it is not privileged. He believed that no such procedure is presently provided for some cases where a particular officer is authorized to compel testimony. The Commission determined that such a provision should be added to Section 914 if it would require only one or two sentences; otherwise, a provision should be added to the Code of Civil Procedure. The following sentence is to be added at the end of subdivision (b) of Section 914 to take care of this matter:

> If no other procedure is made applicable by statute, the procedure prescribed by Section 1991 of the Code of Civil Procedure shall be followed in obtaining an order of a court that the person disclose the information claimed to be privileged.

Section 958

In response to a suggestion of the State Bar Committee (item 41), the clause "including but not limited to an issue concerning the adequacy of the representation of the client by the lawyer" was deleted.

Section 971

In response to a suggestion of Mr. Powers, the words "unless the party calling the spouse does so in good faith without knowledge of the marriage relationship" were added at the end of Section 971.

Section 981

In lines 33 and 34, the words "to perpetrate or plan to perpetrate" were deleted.

The suggestion of the State Bar Committee (item 43) that Section 981 be deleted was not adopted. The Commission declined to delete this section because it is considered necessary in view of the fact that the confidential marital communications privilege has been extended to provide protection against disclosure by anyone, not just the spouses. The following discussion from Memorandum 64-101 points this out, together with other considerations:

> In People v. Pierce, 61 A.C. 977 (Oct. 1964), the Supreme Court held that a husband and wife who conspire only between themselves against others cannot claim immunity from prosecution for conspiracy on the basis of their marital status. The court pointed out that the contrary had been the rule in California since 1889 and overruled cases holding that a husband and wife could not conspire between themselves. The court stated:
>
> > The present case involves, not one spouse who has conspired with third persons against the other spouse, but a husband and wife who together have conspired against others. They now raise the stale contention that they should

> be protected from the law of conspiracy in the interest of their domestic harmony. The law, however, poses no threat to their domestic harmony in lawful pursuits. It would be ironic indeed if the law could operate to grant them absolution from criminal behavior on the ground that it was attended by close harmony. Their situation is akin to that of a husband and wife who can both be punished for committing a crime when one abets the other. [Citation omitted.] Moreover, even in such situations domestic harmony is amply protected, since, with certain exceptions not relevant here, one spouse cannot testify against the other without the consent of both.

It is important to note that the Evidence Code gives the witness spouse a privilege not to testify against her spouse. Thus, the protection referred to by the court is still retained so long as the spouses do not testify. However, if both spouses are parties and one spouse does testify, that spouse may be compelled to disclose a communication that was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud because of Section 981. In addition, even though neither spouse testifies, Section 981 provides an exception that permits an eavesdropper to testify. (Under existing law, the eavesdropper can testify because the marital communications privilege does not prevent his testimony as to any marital communication.)

In connection with Section 981, as indicated above, it is important to note that the privilege for confidential marital communications has been broadened to provide protection against disclosure of such communications by anyone, while the existing law is limited to preventing disclosure by a spouse. In view of this broad scope of the marital communications privilege, it will operate to exclude what often will be important evidence of the conspiracy.

The basic policy question is whether the marital privilege is to provide protection to communications made to enable or aid one to commit or plan to commit a crime or fraud. To say that two persons may conspire together with immunity merely because they are married seems undesirable as a matter of public policy. As the court states in the Pierce case: "There is nothing in the contemporary mores of married life in this state to indicate that either a husband or wife is more subject to losing himself or herself in the criminal schemes of his or her spouse than a bachelor or a spinster is to losing himself or herself in the criminal schemes of fellow conspirators. Spousehood may afford a cover for criminal conspiracy. It should not also afford automatically a blanket of immunity from criminal responsibility."

> It is not unlikely that the Supreme Court would recognize the exception provided by Section 981 if an appropriate case were presented. (It is significant to note that this exception is recognized in the case of the lawyer-client privilege and is not considered to be detrimental to that privilege.). But if we do not provide this exception in the statute, it will not exist; the court cannot create exceptions to the privilege, for under the Evidence Code such exceptions may be created only by statute.

It is also important to note that the exception in Section 981 is quite limited. It does not permit disclosure of communications such as those that reveal a plan to commit a crime or fraud, it only permits disclosure of communications made to enable or aid anyone to commit or plan to commit a crime or fraud. Thus, unless the communication is for the purpose of obtaining assistance in the commission of the crime or fraud, it is not made admissible by the exception provided in Section 981.

Section 1010

In response to a suggestion of the State Bar Committee (item 44), subdivision (a) of Section 1010 was revised to read:

> (a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his time to the practice of psychiatry; or

Section 1041

In line 28, page 52, after "United States" the words "or of a public entity in this State" were added to make the section cover informers who give information concerning the violation of a local ordinance. This change was made in response to a suggestion from the League of California Cities.

Section 1060

The State Bar Committee (item 45) suggested that Section 1060 be revised to substitute "secret process or development or of secret research" for "trade secret." The Commission decided that it was not possible to determine all the areas where protection of trade secrets should be protected. The section makes the matter discretionary with the judge, and this seems to be the best solution to a difficult problem.

Section 1072

In response to the suggestion of the State Bar Committee (item 46), the phrase "or otherwise required to prevent injustice" was added at the end of Section 1072.

Section 1150

The State Bar Committee (items 47 and 48) objects to the change in existing law that would expand the use of evidence of jurors as to jury misconduct. In response to these objections, the Commission decided to retain the existing law. This requires the deletion of the proposed amendment to Code of Civil Procedure Section 657 from the proposed bill and the revision of the introductory clause of Section 1150 to read:

> 1150. Except as otherwise provided by law, upon an inquiry as to the validity of a verdict, any . . .

It was noted that the reference to Section 1150 in subdivision (d) of Section 704 would have to be deleted.

Division 10. Hearsay Evidence

The Commission noted the comment of the State Bar Committee (item 50) that the framing of exceptions to the hearsay rule in terms of a double negative ("not made inadmissible") makes for difficult reading. However, the Commission concluded that it would not be feasible to make the substantial revisions that would be required to avoid this method of stating the hearsay exceptions (and the best evidence rule exceptions as well) at this late time. Moreover, the form used is more accurate.

Section 1202

This section was revised to read:

> 1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

The last sentence was added when the Commission considered the suggestion of the State Bar Committee (item 5) that the word "witness" be defined.

Section 1203

In response to a suggestion of the State Bar Committee (item 49), subdivisions (a) and (b) were revised to conform to Section 804:

> 1203. (a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant 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 statement.

Section 1224

In response to a suggestion of the State Bar Committee (item 51), this section was deleted.

Section 1226

This section was revised to read:

1226. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

Section 1227

In response to a suggestion of the State Bar Committee (item 53), Section 1227 was deleted and the following two new sections inserted:

1227. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

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

Section 1237

The Commission considered a suggestion of the State Bar Committee (item 54) that writings prepared by some other person for the purpose of recording the witness' statement at the time it was made should be

admissible under this exception only if the statement is recorded verbatim or the witness himself authenticated the accuracy of the writing at the time it was made. This suggestion was not adopted because it was considered to be too limiting. For example, if an eyewitness to an accident narrates in detail the things that he observed at the scene and a person records only the pertinent information narrated, such as the color of the vehicle involved, its license number, and a description of the driver, it would seem much too limiting and inappropriate to exclude such a writing merely because it did not record verbatim the witness' account of what he was doing at the time, where he had come from, how he was feeling, the shock he experienced at seeing the incident, and like matters. It would seem to be a sufficient guarantee of trustworthiness to satisfy the requisites already specified in subdivisions (a)-(d) of Section 1237, and particularly subdivisions (c) and (d). If the witness who recorded the statement satisfies the condition specified in paragraph (d) by testifying to the accuracy of the recorded statement, this would seem to be a sufficient guarantee of its trustworthiness without also requiring similar authentication by the declarant at the time the statement was made or a verbatim recording of what was said on the previous occasion.

Section 1241

In response to a suggestion of the State Bar Committee (item 55) that this section be deleted, the Commission determined that the exception provided by this section should be limited to cases where the declarant is unavailable as a witness.

Section 1242

In response to a suggestion of the State Bar Committee (item 56), the Commission revised this section to read:

> 1242. Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

Section 1250

In response to a suggestion of the staff, paragraph (1) of subdivision (a) was revised to read:

> (1) The evidence is offered to prove such then existing state of mind, emotion, or physicial sensation when the declarant's state of mind, emotion, or physicial sensation at that time or at any other time is itself an issue in the action; or

The reason for this revision is stated as follows:

> Our Comment to this section explains that under existing law "a statement of the declarant's state of mind at the time of the statement is admissible when that state of mind is itself an issue in the case. . . . A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior to the statement." The first statement clearly appears in Section 1250(a)(1). The second statement is contained in Section 1250, if at all, in Section 1250(a)(2). The rationale seems to be that the then existing state of mind is evidence of a previously existing state of mind from

> which an inference to the declarant's acts or conduct is permissible. But, if the previously existing state of mind is the only matter in issue, it is difficult to see any basis for admissibility under Section 1250. Unless paragraph (1) of subdivision (a) is revised as indicated above, it will apparently make a change in the California law that we didn't intend.

The State Bar Committee (item 57) suggested a revision of subdivision (b) which was not adopted by the Commission. The Commission believes that subdivision (b) is sufficiently clear in meaning as stated and excludes evidence that is otherwise admissible under this section when it is offered to prove the fact remembered or believed. This is clearly stated in the existing subdivision but is not accurately reflected in the Committee's suggested language. The Comment which will be printed in the code under the section will make clear the meaning of subdivision (b).

Section 1260

Subdivision (b) of Section 1260 should be revised so that it is in the same form as Section 1252.

Section 1271

The Commission considered but did not adopt the suggestion of the State Bar Committee (item 58) that Section 1271 be revised to reflect the holding in the MacLean case. Section 1271 is a restatement of the existing code provisions that deal with business records and will not have any effect on the holding in the MacLean case. At the same time, the codification of the holding of the MacLean case might provide a foundational requirement for admission that would create problems; for example, it would require the showing of a "duty" to observe and report.

Section 1282 and 1283

The State Bar Committee (item 59) noted that these sections depart from the format of the rest of the division and are applicable to offices and other places as well as courts. The sections codify existing statutory provisions which have this broad application. Hence, the Commission did not change these sections since the Commission desires to retain the existing law.

Section 1290

In response to a suggestion of the State Bar Committee (item 60), the words "or affirmation" were deleted from this section.

Sections 1291 and 1292

The State Bar Committee (item 61) suggested that the comparison of Sections 1291 and 1292 would be facilitated if the format were the same. The Commission did not adopt this suggestion. Paragraphs (1) and (2) of Section 1291(a) are stated in the disjunctive while paragraphs (1), (2), and (3) of Section 1292(a) are stated conjunctively. Hence, it is apparent from the face of Section 1292(a) that three conditions must be satisfied, while as to subdivision (a) of Section 1291, only two conditions need be satisfied: unavailability of the declarant and either of the conditions specified in paragraph (1) or paragraph (2).

Article 9 (Sections 1290-1292)

The State Bar Committee suggested (item 62) that a section be added to Article 9 to make it clear that the discovery provisions of the Code of Civil Procedure govern the admissibility of depositions in the same

action. The Commission did not adopt this suggestion, but a cross reference to the pertinent Code of Civil Procedure section is to be included in the comment to Section 1290 or to Article 9. It was noted that no attempt has been made to collect the hearsay exceptions provided by other statutes in the Evidence Code.

Section 1451

A technical change was made in line 35, page 68: "Part 4," was inserted after "Title 4," to complete the reference.

Section 1560

In response to a suggestion from the League of California Cities, the Commission directed that this section and related sections be made applicable to all licensed hospitals and all hospitals of public entities in California, including hospitals of the State of California.

Civil Code Section 164.5

The new section to be added to the Civil Code--Section 164.5--was revised to delete the portion creating a presumption that property is community property and to retain only the portion that restates the apparent meaning of subdivision 40 of Section 1963. As revised, the section will read:

> 164.5. The presumption that property acquired during marriage is community property does not apply to any property to which legal or equitable title is held by a person at the time of his death if the marriage during which the property was acquired was terminated by divorce more than four years prior to such death.

New Code of Civil Procedure Section 631.7

The following new section is to be added to the Code of Civil Procedure:

631.7. Ordinarily, unless the court otherwise directs, the trial of a civil action tried by the court shall proceed in the order specified in Section 607.

The Comment to this section will state in substance:

Comment. Section 631.7 restates existing law as found in the second sentence of Code of Civil Procedure Section 2042 which reads: "Ordinarily, the party beginning the case must exhaust his evidence before the other party begins." The proposed section is a more accurate statement than that contained in Section 2042.

Code of Civil Procedure Section 1963

The Comment to subdivision 14 of Section 1963 (repealed) is to indicate that a presumption is created by Evidence Code Sections 1450-1454 and 1530.

Repeal of Government Code Section 34330

In response to a suggestion of the League of California Cities, it was determined not to repeal Government Code Section 34330. (Repeal had been previously proposed in Section 137 of Preprint Senate Bill No. 1.)

Section 152

In response to a suggestion of the Office of the Legislative Counsel, the phrase "become operative" was substituted for "take effect."

SUMMARY OF PRESENTATION BY MR. RINGER OF THE OFFICE OF

THE ATTORNEY GENERAL

Mr. Ringer: We have specific questions and objections to about a dozen sections of the proposed Evidence Code. I think that the proper way to present them will be to take them up in the order in which they appear in the code--I understand that you have been going through the code section by section.

SECTIONS 310 AND 402

[This suggestion was adopted by Commission.]

Mr Ringer: I begin by mentioning Sections 310 and 402, which have to do with the determination of questions of law outside the presence of the jury, particularly Section 402 which has to do with the introduction of evidence of the defendant's admission or confession in a criminal case.

Now, there would be no quarrel with the proposition that the admissibility of the admission or the confession should be determined by the judge alone, or by the jury alone. But Section 402(b), as written, will create serious problems, for this reason: Under Section 402(b), the judge shall hear and determine the question of the admissibility of the confession or admission outside the presence and hearing of the jury, unless the defense requests that the jury be present to hear the evidence that goes to the voluntary character of the admission or confession. Now this--I think--would be improper and not very helpful for two reasons: First, the defendant may want to have the jury listen to the testimony of the defendant as to how he has been beaten and coerced simply for the purpose of prejudicing the jury against the police--they are bad men, they whipped him, and all that.

Yet the jury on this issue would have no function as a factfinder. So it would serve no factfinding purpose to allow the jury to remain present if it was not to have any say as to the admissibility of the confession.

Second, on the other hand, Section 402(b) may result in reversals on appeal. Ordinarily the attorney is going to make a determination whether the jury shall listen to this voir dire testimony of the officers and the defendant and the other witnesses. Now, this evidence may well show that the defendant and his witnesses are liars as to whether he was beaten, coerced, promised, or threatened in order to have him make some confession or some incriminating statement. The jury is going to hear this evidence that makes out that the defendant is a liar and he is going to be convicted even though the jury has no say whatsoever on whether this confession itself goes into evidence. On appeal, you are going to have claims of incompetence of counsel to attack the criminal conviction because counsel made a wrong choice on this matter. So we think, that either the present rule allowing the jury to pass finally on the voluntariness of the confession should be retained, or the judge should be told that he alone must determine voluntariness on admissibility. But certainly, if the latter is the rule, the jury should not hear that evidence.

Question by Mr. DeMoully: Now, then, to make your point clear: There are two choices that would be acceptable to you. One would be to provide that the judge may hear and determine the question of the admissibility of a confession out of the presence of the jury--making it discretionary with the judge. The other would be to provide that the judge must determine such question out of the presence of the jury. Now either of these alternatives would be acceptable to you, but the present one isn't.

Answer by Mr. Ringer: Yes.

[A motion was then adopted to delete the phrase ", unless otherwise requested by the defendant," in lines 31 and 32, page 20. Mr. Ringer stated that this deletion eliminated the problem that concerned the office of the Attorney General.]

SECTIONS 440-445

[The Commission took action in response to this suggestion.]

Mr. Ringer: The next point concerns jury instructions on the effect of evidence.

I begin with a general comment. The Penal Code, for instance, contains a number of instructions that are to be given to the jury in criminal cases. For example, I think that it is Penal Code Section 1127(b)--correct me if I'm wrong--that says that the judge has to give a certain instruction as to the effect of expert testimony. Here some of the--shall we say mandatory--instructions are incorporated in the Evidence Code article, and others are not. And I would think that if mandatory instructions on the effect of evidence are to be put in the Evidence Code--rather than left in the Code of Civil Procedure--that you should (if only for the purpose of convenience) put them all in rather than to exercise a choice.

Mr. DeMoully: We have C.C.P. Section 2061 that contains the instructions that have been codified in Sections 430-445. We wanted to clean out of the C.C.P. all rules of evidence, but we didn't want to undertake to add any more statutory instructions. The only changes we made in the instructions in Section 2061 were conforming changes--changes to conform the language of the instuctions to our code. Some of the Commissioners were not enthusiastic about having these instructions in the Evidence Code at

all; they would prefer that they be left to the courts. I doubt that we will want to take anyone on--or to upset anyone--by moving some of the instructions out of the Penal Code into the Evidence Code. Our problem with Section 2061 is that we didn't want to give the impression we were changing the law by repealing it and, at the same time, not continuing the instructions contained in that section in the new code.

Mr. Ringer: I understand that the Commission has considered revising the instructions in Section 2061 so that they are a more accurate statement of the law. But take, for example, Section 443--that's the instruction that the testimony of an accomplice ought to be viewed with distrust. Now that statutory statement is not the whole story about testimony by accomplices. We would like to suggest that if an instruction like that were required to be given--as it may be required in a lot of cases--that you should include the entire CALJIC instruction: "But you are not to arbitrarily disregard the testimony of an accomplice, but you are to give it the effect you think it is entitled to."

There is another twist on this: It would seem to me that the instruction can and should only be given when the alleged accomplices are the People's witnesses. Let's say that you have two defendants on the stand; one defendant testifies and the other demands an accomplice instruction; both are convicted. Giving the instruction in this case is a reversible error as to the defendant if the jury was told that an accomplice's testimony ought to be viewed with distrust. Now, of course, there is the saving qualification in Section 443 that the jury is to be given the substance of the instruction on all "proper occasions." But, I would think that if this were to be put into the Evidence Code the proper and complete instruction should be stated.

Suggestion of Commissioner: Why not have no instructions in the Evidence Code on the matter covered by Section 2061?

Mr. DeMoully: Our initial difficulty with repealing Section 2061 and not stating the substance thereof in the Evidence Code was that we would thereby create an implication that what is contained in Section 2061 is not continued as the law.

Answer by Commissioner: That can be covered in our Comment.

Commissioner: I would say this, Mr. Ringer--you can propose to us what you want to put in. If you want to put in the substance of the instruction give us the provisions you want us to add.

Mr. Harvey: This is related to another matter, and it bothers me--I mean the suggestion that we repeal the whole article. We had two presumptions in subdivisions 5 and 6, Section 1963 of the Code of Civil Procedure that we are also deleting. And the reason we are deleting those is because they are not true presumptions; they are in effect instructions to the jury on how they are to treat evidence or the failure to produce evidence. When we revised them in our original recommendation, we suggested that the last two subdivisions of Section 2061 be revised. And when we recodified Section 2061 in this article we revised Section 445 to express the cases that have developed under those two sections. Section 445 now expresses that law. And our Comment now over there in the right to comment on privileges relies on Section 445 to make the law clear: You are commenting on a person's failure to produce evidence, regardless of the reason; you are only commenting on the evidence in the case, not his exercise of the privilege, and therefore it is not detracting from the rule of privilege against self-incrimination, so called, although the courts thought it was up until 1934. Now, in our Comment to Section 445 and in our Comment to the privilege rule relating to commenting on privileges, we are trying to make this

distinction clear--that nothing that we have in the privilege rule saying that you cannot comment on the evidence detracts or is inconsistent with the rule declared in Section 445: That is, that in determining what inferences to draw from the evidence or facts in the case agaist a party you may consider, among other things, a party's failure to explain or deny by the testimony such evidence or facts in the case against him. And, in view of all of this, I'd be very unhappy with the repeal of Section 445. We have two presumptions to take care of; we've got the problem of interrelationship with comment of privilege to take care of . . . . .

Commissioner: What about the other side of the plate . . . first of all your list of instructions is not complete. Anybody who has any practice knows that. The real question, it seems to me, is whether or not you want to do the job properly and state the other necessary instructions in here and make the code complete.

Mr. Smock: There is no reason, though, why the substance of what Joe said can't be included as a substantive section rather than as an instruction to take care of the repeal of those two presumptions of 1963--5 and 6--so that Section 445 could easily be stated as a substantive section of the Evidence Code.

Chairman: Gentlemen, it seems to me the proper way to approach this suggestion is to consider whether we want any listing of instructions.

Mr. Stanton: Well, I feel that we should leave the instructions in the new code because of the existing law.

Commissioner: We could leave 2061 where it is without any real damage.

Mr. Stanton: I would prefer to leave it as it is if that's the alternative.

Mr. DeMoully: Mr. Ringer--Do you think the Attorney General's office feels that we should expand these instructions the way we started out to do

at one time? But some of the Commissioners objected--they didn't think it was our job to write jury instructions. I think your answer to this question might have some influence on the Commission.

Commissioner: I would like to suggest exactly that: Do you have specific suggestions concerning the way this should be rewritten properly to cover not only what is here but to cover anything else you think should properly be in this article.

Commissioner: Would you be willing to make a written submission of the suggestions as to how this article should be written.

Mr. Ringer: Yes, I'd be delighted.

My suggestions would be subject to this limitation: My original objection to putting in the 3 or 4 instruction was that, if some why not all? Bearing in mind the policy of the Commission--that they're merely attempting to codify the Section 2061 material in the Evidence Code--I would limit it to an expansion of these particular instructions rather than put in every conceivable evidentiary instruction.

When is your next meeting? I'd be glad to do it.

Mr. DeMoully: November 19, 20, and 21 in Berkeley.

If you would send us 25 copies of what you're producing so we don't have to take the time to reproduce it.

Mr. DeMoully: Do you favor allowing any instructions at all in the Evidence Code?

Mr. Ringer: I hadn't given it any thought until the discussion arose.

Mr. DeMoully: Would you object to repealing Section 2061 on the grounds that it's undesirable to write jury instructions of this type in the code and stating in the Comment that the repeal won't have any effect on existing law.

Mr. Ringer: I think that's the case.

[A motion was then adopted to: (1) delete all of Chapter 6 on Instructions; to compile Section 445 as a substantive section in Chapter 5 on Weight of Evidence; and to compile Article 1 (Section 430) in the Division on Burden of Proof. If the office of the Attorney General disagrees with this, it was suggested that the office of the Attorney General submit suggestions for the instructions to be set out in Chapter 6.]

DIVISION 5. BURDEN OF PROOF, ETC.

Mr. Ringer: There are a couple of things mentioned in C.C.P. Section 1963 that we thought of as presumptions: I am thinking specifically of subdivisions 2 and 3 of Section 1963.

Subdivisions 1, 2, and 3 of Section 1963

Mr. Ringer: These appear to me to be presumptions even under your definition of presumptions: That an unlawful act is done with an unlawful intent; that a person intends the ordinary consequences of his voluntary act. So that my comments won't appear to be unfairly weighted I also mention that you have eliminated subdivision 1.

Mr. Harvey: We really haven't eliminated subdivision 1; we've moved that over to Section 520.

On the other two, we concluded from our research that both of these presumptions weren't really presumptions. They can properly be applied only to cases where intent isn't really involved as such. And where intent is really important to the case, some courts relying on these presumptions, and some old and some recent decisions, too, citing these presumptions in the course of their opinions, say that's reversible error because you can't presume specific intent on the basis of these presumptions.

Hence, we felt that these two presumptions had been a source of error in the cases as a result and they should be repealed.

The only time they would really have any operative effect is when you really do have to prove intent - specific intent. Then you really do have to prove intent and can't rely on the presumption.

If you're dealing with a presumption which relates to the burden of proof it is purely an allocation of the burden of proof. That is, someone has to come forward with evidence and establish some degree of belief on the mind of the trier of fact. On specific intent this is not and can never be placed on the defendant. This is the burden of the prosecution which the prosecution has to carry and it cannot rely on a presumption to satisfy that burden. It can rely on circumstantial evidence and it can argue and it is proper to instruct the jury that they can infer from the circumstances under which the crime is committed that they can infer the specific intent necessary. Our repeal of these has absolutely nothing to do with what inferences can be drawn from the evidence in the case.

Mr. Ringer: In other words, the interpretation under Section 608 is that these former presumptions (removed from Section 1963) are still matters of inference?

Mr. Harvey: Yes.

Section 665

Mr. Ringer: We have a more serious objection. We object stremuously to Section 665. You state this is existing law.

To say that it is existing law is somewhat misleading in the context which I have in mind. The only time in a criminal case that I can think of

where validity of arrest was an issue is when there's a search which is incident to the arrest. In other words, a defendant is tried for murder: It's no defense, it's not ground for dismissing the prosecution, that he may have been arrested illegally. The only question there is what consequences flowed from the illegal arrest--say an unlawful search of his person or perhaps a coerced confession.

The mere fact that somebody is arrested without probable cause doesn't mean that he subsequently confesses. The confession has to be thrown out because of the unlawful arrest. The other branch, the first branch, is that if a search is made without warning, the burden of proof shifts to the prosecuting officials to establish the validity of the search either as incident to the arrest, by consent, or some other reason. But what this would do - let's take the case of a false arrest suit against a policeman - what this means is that under Section 665 a plaintiff could take the stand and establish there was no warrant for his arrest and thus make out a prima facie case.

Mr. Harvey: I believe that's the existing law that it's all the plaintiff has to establish--arrest without a warrant and then the burden is on the defendant to show that either he has probable cause or to prove that he actually did have a warrant.

Mr. _____ Whether it's a public officer or a private citizen, Section 665 codifies the common law presumption recognized in California cases--People v. Agnew. 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 justified the arrest without a warrant. Bedillo v. Superior Court; Dragna v. White. To quote from the last case: "Upon proof of arrest without process the burden is on the defendant to prove justification for the arrest."

Mr. Harvey: Dragna v. White was a false arrest civil action.

Mr. Smock: This is included in the presumptions affecting the burden of proof.

Mr. Ringer: I wanted to continue with one comment. Were you intending by enacting Section 665 to make the validity of arrest an issue in every criminal case?

Mr. Harvey: No! All we're intending to say by Section 665: if the issue of the validity of arrest is otherwise in issue in the case, as it would be, for instance, in the search and seizure problem or something of that sort or in a false arrest case, all Section 665 says is: How does the judge figure out who has to prove what in the case? He looks at Section 665 and the moving party--the person trying to supress the evidence or the person suing for false arrest--all that person has to prove is the arrest without a warrant--that's all his burden is and the presumption says then the burden is on the other party to prove that he had justification, or that the moving party's evidence is false and he did in fact have a warrant.

Mr. DeMoully: Joe, we can expand the Comment to make it entirely clear what he's got to do.

Mr. Harvey: This section is designed only to allocate the burden of proof where it's otherwise in issue.

Mr. Smock: That's why I suggest that we indicate that it's in the list of presumptions that affect the burden of proof.

Mr. Ringer: I would suggest that an expansion of the comment is needed because Section 665 could be understood to interfere with a lot of well settled law in criminal cases. That was, I think, the first thing in the

code that caught my eye--it simply just sort of lashes out in every direction and raises irrelevant issues.

Mr. DeMoully: I wish I had been able to provide you with a set of the Comments. They would have been helpful in considering this matter.

Section 788

Mr. Ringer: I'll begin with what I think is the least controversial provision of Section 788--subdivision (3) which provides in substance that you can't impeach a witness for a prior where he has obtained a dismissal under Penal Code Section 1203.4 or 1203.4a. Those statutes do provide that where the defendant is charged with subsequent crimes his prior can be pleaded and proved against him even though he has had the action dismissed or is serving his probationary period. It would seem to me an inconsistency with those sections, at least in the case of a witness defendant, that that prior which has been dissolved could be pleaded and proved as a prior against him yet he could not be impeached by it. It doesn't make any sense at all to maintain that distinction.

Mr. Smock: My understanding, even where he is a witness, Gordon, is that it's only for the purpose of showing the prior for the purposes of offenses rather than going to credibility.

Mr. Ringer: Sections 1203.4 and 1203.4a provide a dismissal procedure, but there's a proviso in each section that says that nothing in this section prohibits the pleading and proving of the prior against the defendant in a subsequent criminal case.

Mr. DeMoully: Just so you can give him a heavier penalty?

Mr. Smock: But coupled with the existing law that you can show any felony to impeach, then you could also show it to impeach.

Mr. DeMoully: The purpose of the proviso is to give the prosecution the benefit of this prior so the State can give the defendant the heavier penalty.

Mr. Smock: That's what I'm getting at--the purpose of those sections is to give them a heavier penalty and not to impeach. Because there are cases where he is not a defendant in a criminal case but where he is only a witness in the criminal case, then you cannot show it to impeach and if the purpose of those were to allow impeachment of the witness wherever his testimony is material in a lawsuit they would permit the showing of it to impeach. But I think the purpose of those sections, even as they're presently worded, coupled with the existing law that you can show any felony to impeach, you can show that prior both for the purposes for imposing the heavier penalty and for the purposes of impeachment solely in the case of, as you mentioned, a defendant witness. But I think the purpose of the section is more to visit upon the defendant the heavier penalty for the prior and not for the impeachment purposes. What we have holds up under analysis of the existing law.

Mr. Ringer: But you're saying that we plead the prior for the enhancement of the penalty. In fact, we plead the priors without reference to anything else.

Staff: For what purpose?

Mr. Ringer: There's no purpose named in the code and we have to plead them in every case.

Mr. Smock: That's a defect in the Penal Code.

Mr. Ringer: Possibly so, but that is existing law.

Mr. Smock: But you cannot deny that the purpose of it is--if you plead and prove enough of them--to visit upon him a heavier penalty. Just because

you make a blanket rule that the easiest way to find out all prior convictions of a criminal defendant on trial now is to require the prosecution to plead and prove all priors--just because in some cases it doesn't result in imposing a heavier penalty--doesn't mean that that's not the reason why you do it.

Mr. Powers: I don't buy that that's the only reason. I don't know that it is the complete reason. I haven't gone into the legislative history, maybe Gordon knows more than I do--but we have that type of command. We plead them and we prove them and we have. A lot of times it comes up afterwards--I strike the prior if it won't enhance the penalty. I have the authority to. But there may be other reasons that I'm not acquainted with as to why that mandatory section originally went into the code.

Mr. Smock: But what other possible reason can there be?

Mr. Sato: What I would like to know is whether these pleadings now which are dismissed under Penal Code Section 1203.4 and the other sections here can be used in terms of the habitual criminal statute.

Mr. Smock: Yes--the sole purpose of it.

Mr. Sato: Is there an inconsistency here because even though we still count these offenses in terms of imposing it a heavier penalty, yet we don't allow them for impeachment purposes.

Mr. DeMoully: But why can't we show them in a civil case then? There they go strictly to credibility, and they can't be shown.

Mr. Smock: As a witness, is there any reason why he should be treated any differently from any other witness merely because he is now a defendant in a criminal case? If you take a defendant in a criminal case

who is up on a second robbery who had his first conviction erased under these sections. You can show that prior robbery for the purpose of visiting upon him any additional punishment that may be meted out if he is convicted for the second offence, but why should that permit using the first conviction for the purpose of testing his credibility? That's why I say that the purpose of the sections is solely to visit upon him additional penalties if and when it is appropriate, but the sections should have nothing to do with determining his credibility as a witness in a second trial any more than the credibility of a criminal defendant in a first trial.

Mr. Harvey: There is this distinction. You impose the heavier penalty after he has again been convicted. At the trial stage, you can't assume that he is guilty. He may very well have been rehabilitated and we were right the first time. At the trial stage, before he's been convicted again, should you be using the conviction to impeach his credibility?

Mr. Smock: That's why I say that this is not inconsistent.

Mr. Powers: A man who has counsel knows that if he is convicted--take a narcotic case--obviously, if he is convicted he faces that additional penalty. I would say that he would do anything, including lying--he'll lie just as soon as he'll sell heroin--to keep from facing that extra penalty. I can't sell the Commission that, obviously, but I just don't buy their theory that it doesn't affect credibility. It affects him because he knows that if he doesn't get out of it he's facing that extra penalty.

Mr. Smock: I don't think that you can make a case under the sections that say that you can show the conviction of the defendant--you can plead and prove a prior conviction of a defendant that's been set aside under any of these sections--as any justification for showing it for impeachment purposes. When the person convicted is an ordinary witness in the case you

can't now show it. It's only when he is a criminal defendant. And as a defendant in a subsequent trial there's no reason why he should be treated so far as his credibility is concerned any differently from any other defendant. But, sofar as visiting punishment on him, you can show that prior.

Mr. Powers: With that prior facing him, don't you think he's got an awful lot riding on his credibility?

Mr. Smock: You've got a $100,000 judgment riding against you; you've got a lot on your credibility, too. I don't buy this argument that a person who committed one robbery is lying when you pick him up for his second robbery.

Mr. Powers: He has a motive for lying doesn't he?

Mr. Smock: I'd say a person faced with a potential $100,000 judgment has a motive for lying, too. He'd say I never signed that contract! it's a forgery. Everybody has motives for lying.

Mr. Ringer: I would like to discuss Section 788 as a whole: The section substantially limits the crimes that can be shown to impeach a witness. I don't want to rehash the arguments that I'm sure the Commission has had in the past. I'm not advancing any position that the existing law should be retained as is. I wish simply to point out some anomilies here. Now, the significant part of Section 788 limits the types of crimes to those where an essential element of the crime is a false statement or intention to deceive or defraud. We're not particularly happy with the kind of voir dire trial before the judge in which the People have got to have a certified copy of the judgment and conviction plus fingerprint testimony, or else a stipulation. Setting that aside for a minute, there's something anamolous about this false statement or the intention to deceive or defraud. That is,

I can be impeached under this for a prior of defrauding an innkeeper or for misdemeanor bad checks under $50--or, what is it? $100 now?--but not for murder, rape, arson, burglary, or something else. But even under your categories, there are some odd things. Under the wording that you have here, I could be impeached for petty or grand theft by false pretenses or by trick or device because those involve the intention to deceive or defraud. But I couldn't be impeached for grand theft or for strict larceny. Now, under the laws of the State, under Penal Code Section 484 and subsequent sections, all of those are thefts. Now--let's suppose the People follow this section, and they come in with a certified copy of the judgment and conviction, and if there's some doubt as to who he is, they're prepared to put on fingerprint testimony. All you have is a flat conviction under Section 484 for theft. Now the court is going to have to go behind that judgment and decide what the devil the man did. Isn't it?

Mr. DeMoully: You can't go behind the judgment to show that an essential element of the crime of theft in the particular case was fraud. Fraud is not an essential element of the crime of theft. The effect of this section--and we should understand this--is that you can't show conviction of theft.

Mr. Smock: The crime of theft does present the greatest problem because of the various forms of theft--embezzlement, false pretenses, and the like, false personation, coupled with the Section 490a that says that regardless of how these things are referred to in the Penal Code they are all going to be called theft. In other words, if he could have been convicted of the same crime by any means other than showing the intent to deceive or defraud, you could not show that conviction to impeach--and that is what we intend by this language.

Mr. Ringer: That seems to be totally unfair.

Mr. Harvey: I'd like to be enlightened here on the procedure. Although there is this Penal Code section that says all of these various forms of stealing are theft, when you charge a man, do you charge him under that or do you charge him with the substantive section that says that larceny by trick or device is a crime . . .

Mr. Ringer: Just theft. He wilfully and feloniously took a certain sum of money or a certain piece of property belonging to whoever it was . . .

Mr. Harvey: And in the judgment, that's all it says?

Mr. Ringer: Yes.

Mr. Powers: You mention in the Comment one of the crimes that you say can be proved--the using of credit cards. Well, that's just a new section. It used to be incorporated under the theft section. So now you are saying that because they specify using credit cards you can show that as an intent to defraud. Suppose the defendant uses a false credit card to obtain a car. Suppose he takes a car out of a parking lot--it's just strictly grand theft. The pleading will be the same--the prior will be the same. We can't tell how he got the car.

Gordon's objection is we're going to have to stop right in the middle--I have the defendant on cross: "Have you ever been convicted of a felony?" Then we have a hearing on that issue. We show the papers to the judge and the judge says: "Well, I can't tell what this is going to be", and then we have to go back and go all over and try the first case again.

Mr. DeMoully: No you don't--you can't.

Mr. Powers: I could have a reporter's transcript in my hand and this would show that he went around conning people in bunko oil leases. Here was obviously an attempt to cheat or defraud. And by applying the Hallinan

rule you are telling us that under this Section 788 that we are prevented from impeaching him.

Mr. DeMoully: That's right.

Mr. Harvey: The problem is this--let me explain--the basic rule is that you cannot prove prior criminal acts to impeach even though he committed them and this is a rule generally. But the general exception to that is that you can use prior convictions. But under Hallinan, when you're going to rely on the conviction and the conviction only, you can't go back and prove the crime over again because then you're back within the basic rule saying that you can't prove prior crimes for impeachment. And so, since you have to rely on the conviction only, the minimum elements of the offense necessarily have to involve the particular condition specified. Otherwise you're just using prior criminal acts generally without regard to the conviction.

Mr. Powers: Gordon's perfectly right. All we're going to be able to do is prove perjury and about nothing else. And perjury is committed by a bunch of old ladies that are victimizing the BPA out of the aid and assistance. You don't have the normal defendant who has a long record who has a perjury conviction on him. You will look through a hundred and you'll never run into a perjury conviction.

Mr. Smock: I'm not arguing with you on that, but I am saying that this is what is intended by this section. That is what it does.

Mr. Ringer: I think it's a horrible consequence of what I would regard as a rather stale and scholastic argument. You're going to have to revise Section 484 of the Penal Code. The Legislature would revise these substantive sections of the code to distinguish between theft involving deceit and other types of theft. If that's considered worthwhile, it is going to mess up the substantive law of theft. First of all, the minimum record

of the judgment will have to indicate the theory of theft on which the defendant was convicted if its going to be of any use at all in attempting to prove the prior.

Mr. Keatinge: I doubt that they would want to revise the substantive law relating to theft just to impeach.

Mr. Sato: That was the question I wanted to ask: How important do you consider that you're able to impeach a defendant?

Mr. Ringer: Fairly important. But I don't know if it's important enough to rewrite the law of theft.

Mr. Sato: But when you say it's fairly important--you mean it's significant in getting convictions.

Mr. Ringer: It's significant in showing the character of the defendant.

Mr. Smock: The philosophy of Section 788, of course, is that when a fellow is convicted of taking a car off the parking lot, the fact that he did and he was convicted for it does not properly bear upon his credibility as a witness in a later rape case, or a murder case, or any other kind of case.

Mr. Ringer: Doesn't it bear on his credibility?

Mr. Harvey: Even though it bears on it, the prejudicial effect of putting evidence of the conviction in, is that the jury is going to infer from the fact that this guy has three convictions, he's just a crook, and we're going to convict him 'cause he's a bad man, even though the evidence is weak on that crime with which he is now charged.

Mr. Smock: The low probative value of a prior conviction so far as the truth-telling capacity of a witness, whether he be a defendant witness or any witness. He can be a witness in a civil action. He gets up and he says, "yes, I saw A and B meeting in an office and they agreed that these were to be the terms of the contract," and so B's attorney jumps up and says, "Weren't

you convicted of negligent manslaughter in 1943?" The guy says, "Yes". Now what does that have to do with whether he was there and observed what he says he observed, as to what happened between A and B? The fact is that it is of negligible probative value toward his truth telling capacity and is highly prejudicial.

Mr. Ringer: Of course every piece of evidence bearing on the credibility of the witness and showing a prior conviction is prejudicial in the sense that it will convince the trier of fact that he's guilty. This is, of course, true in the criminal case and true of any type of evidence that is produced in a civil case. In effect, all evidence bearing on credibility is prejudicial in that sense. But your argument goes to the corner when you have, say, a prior conviction of perjury, or a prior conviction of defrauding an innkeeper 10 years ago. A man comes on the stand and says: "I did not shoot John Smith in the head last night." The other lawyer says: "Well, 10 years ago you defrauded an innkeeper out of a $30 bar bill." So, I think your argument breaks down.

Commissioner: If we were to include in the list of the crimes that may be used for impeachment for crime of theft, does that take care of your problem substantially?

Mr. DeMoully: But there's no logic to that--is there?

Commissioner: No, I'm not proposing that as an affirmative substitution. I was using that as a wedge.

Mr. DeMoully: Would you be willing to put a time limit--say within 5 years or so? 10 years? I don't know whether the Commission would change it. I would like to know whether there is some way you could reduce showing these things when they are really so far removed.

Mr. Ringer: I'm not prepared now--this is a very controversial matter--

with the opinion of the Attorney General on the alternative proposal. But there'd be more sense in the similarity of the crime kind of thing than there would be in this.

Mr. DeMoully: Well, I think he's showed us the problems in Section 778.

Section 950

Mr. Ringer: I have a minor problem about 950. I don't know whether you'll consider it ridiculous or not--the lawyer may be the person authorized, or reasonably believed by the client to be authorized, to practice law. Someone from our Sacramento office who handles writs is aware that our state prisons are full of ex-lawyers, would-be lawyers, and what-have you. He suggested the possibility of the claim of confidentiality in the state prisons for the writ writers--of whom there are some ex-lawyers.

Mr. DeMoully: We don't think that anybody would say that that is a reasonable belief.

Mr. Ringer: The one remaining problem I have--looking at some of the Comments has resolved some of the objections that I had previously intended to make--is this on the informer privilege. Now, this again, is a controversial matter--I have several serious objections to the statute as drafted.

Mr. Harvey: Before you go further let me call to your attention that we already deleted subdivision (c) from both 1040 and 1041.

Mr. Ringer: My objections ran to other subsections. I don't really begin with the least controversial one--this 1040(a)(2)--and I don't quite understand what you have in mind in saying that determining whether disclosure of the identity of the informer is against public interest, the interest of the public entity as a party in the outcome of the proceeding may not

be considered. To me that's kind of opaque.

Mr. DeMoully: We're intending to say that if a public entity is a party to the proceeding, whether they win or lose the proceeding isn't a factor to consider. You have to consider the interest of the public in keeping the information confidential as compared to the interest of this particular person in having it. And this isn't just a privilege we give public entities to win law suits.

Mr. Ringer: Here's another problem: Under subdivision (d) of Section 1041, I don't know if the language will bear the construction that I'm about to put on it--a man from our San Francisco office told me of the case in which the police used a confidential informant--I think it was a narcotic case--the defendant started putting people on the stand and asking: "Are you the informant?"--hoping finally to get to somebody who was the informant. And the informant got no privilege. The government can't complain--so you simply subpoena half the street and put them up: "Are you the man who told Officer X about the alleged selling of heroin?"--and the People have no protection.

Mr. Smock: The government has a privilege to prevent another from disclosing. What we don't want to do is to give the privilege to the informer himself.

Mr. DeMoully: What do you think about this? Should a person have a right to ask somebody if they're the informer and would such person have to say yes or no?

Mr. Smock: The idea was that if the defendant, through his own resources, is able to find the informer--he ought to be able to elicit whatever information from the informer may be appropriate to his defense.

Mr. Ringer: Well, if he finds the informer he's got a right to put him on the stand. My objection is that the case where they put on everybody--and for what purpose? To elicit who he is. The assumption that when the State examines the man he's going to clam up and deny everything--as they often do in cases where the name of the informer is disclosed--then, the informer goes on the stand and perjures himself saying that: "I never gave any information."

Mr. DeMoully: Do we feel strongly enough about subdivision (d) to leave that in or not?

It seems to me that when you start asking a group of individuals--one by one--"Are you the informer?"--you're in effect disclosing the identity, one way or another, by the process of elimination. I think it's within the privilege myself. If we extended the identity of the informer privilege to cover not only the public official but to prevent anybody else from doing it, we might have it.

Commissioner: Part of the problem here, Gordon, was that in this situation if the defendant, by his own resources, does come across an informant, assuming that he has never been an informant before, just comes across an informant, then he has no opportunity to determine the materiality of the informers testimony--so that you then visit adverse consequences upon the agency if they actively withheld his identity.

Mr. DeMoully: But if you take that out--if you take subdivision (d) out, what happens? The government can say no, you can't ask the informer to identify himself to begin with. Therefore, no further question can be asked. Unless the judge says: "Well, in the public interest in this case, I think the interests require disclosure."

Commissioner: There has been no breach of the privilege maintained by the government here because we're not trying to force the government to divulge anything.

Mr. DeMoully: The question is whether you're going to recognize the privilege. You've got a public interest test here. If this is important, you will get an adverse order. I don't see that there is any great harm, really. We're not letting the eavesdropper testify. He knows who the informer is. We're not letting that testimony come in. We've given this broad protection even if they go around and blabber it to everybody.

What we're doing is, we're letting somebody give out what is official information, and generally we say we don't care if somebody else has the official information, the government can stop them from giving it out.

I'm not sure we should change the law. I think we've extended this privilege beyond what it is now. We've given them a lot more protection than we have. How far do we want to go? Here is some party in a civil case needing this information--and he isn't going to get it now. There isn't going to be any adverse order, where, under existing law he could get it.

Commissioner: Do we have a motion on this thing? I made a motion--I didn't get any second.

Mr. DeMoully: Okay--what's the next point?

Section 1042

Mr. Ringer: My next and last point--Section 1042(a)--I first want to be sure that I understand it correctly. If the claim of privilege is made under 1042(a) as written, the claim of privilege is sustained. An I correct in understanding that as to any issue to which the identity of the informer

is material or his information is material, the court has to find the fact against the government. Is that correct?

Mr. DeMoully: Not necessarily. They could merely strike his testimony.

On a warrant issued on the basis of information from an informer and other information, the issue is if the warrant is valid. You strike the testimony of the informer and if there's enough left the warrant stands; the Comments spell it out. [Comment read.]

Mr. Ringer: . . . . and the finding--an adverse finding--of the people does not follow necessarily or as a natural consequence. Now I think the first comment should take that into consideration. Priestly and McShann are not the entire California law. Because it would not require the striking of the officer's testimony and the change of that Comment, I think, would necessarily affect the last words of Section 1042. Because, what strikes me, is you say "the court shall make such order or findings . . . adverse to the public entity . . . as is appropriate upon any issue of the proceeding to which the privileged information is material. . . . This changes California law which you do not wish to do. Because the identity information received from the informer will, of course, be material in any case where it's relied on. But, in cases where there is evidence corroborating the evidence from the informant and which goes to probable cause, then, I think, you'd have to say insead of "is material," you'd have to say "is conclusively dispositive"--or something like that to eliminate the interpretation by the courts . . . . I think both have to be re-looked at. My first reaction, of course I was looking for things that were bugs--I'm not an unprejudiced looker--but it struck me that this is the only conceivable interpretation of the section. And coupled with the Comment, I think the courts would have to interpret it that way.

Mr. Sato: Would it help any if the subdivision stated: "as is required under any rule of law?"--That would help.

Mr. DeMoully: That seems to be a desirable change; it makes it clear that finding of fact adverse to the public entity bringing the proceeding is required when "required by law" as opposed to "when such finding "is appropriate".

[The Commission then substituted the phrase suggested by Mr. Sato]