

#34(L)

11/16/64

First Supplement to Memorandum 64-101

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1)

Attached as Exhibit I is a letter from the League of California Cities commenting on Preprint Senate Bill No. 1. For the convenience of the Commission, we summarize and comment on this letter below.

Section 451

The League suggests that charters of cities and counties should be given judicial notice. We have already revised Section 451(a) to so provide.

The League objects to the repeal of Section 34330 of the Government Code (requiring judicial notice of the incorporation of general law cities). We think this is clearly included under subdivisions (b) and (c) of Section 452 and recommend that Section 34330 be repealed. Judicial notice of the incorporation of all cities, not just general law cities, is required by Section 452. We see no necessity for retaining Section 34330 and believe the retention of Section 34330 to be undesirable in view of the fact that the application of Section 34330 is limited to general law cities.

The League would prefer that judicial notice be required under Section 451 of incorporation of cities, rather than permitted under Section 452. We suggest no change be made in the statute.

Psychotherapist-Patient Privilege

The League suggests that there should be an exception to the psychotherapist-patient privilege for disciplinary proceedings. The exception

provided by Section 1016 will cover all cases where the patient has tendered the issue of his mental or emotional condition. As to other cases, we believe that the privilege should be recognized in a disciplinary proceeding to the same extent as in a criminal proceeding.

The League also points out that a problem exists in distinguishing between a physician and a psychotherapist. As the League correctly points out, the distinction is predicated on the type of treatment being sought or given, so that if one doctor does both, a problem is bound to arise as to the type of information that can be revealed. We believe that this comment reveals the basic defect in the existing statute. The staff further believes that it would be better to base the distinction between the physician-patient privilege and the psychotherapist-patient privilege primarily on the type of doctor involved rather than on the type of treatment sought. The distinction can be made clear by limiting the doctors involved to psychiatrists. (Of course, if one seeks the services of a psychiatrist on a matter that does not involve a mental or emotional condition, only the physician-patient privilege would be applicable.)

Section 1041

The League suggests that the words "or of a public entity in this State", be added after the word "State" in line 28 (page 52). We believe that this is a desirable change; it is necessary so that protection is provided to an informer who discloses information concerning the violation of a local ordinance.

Sections 1530 and 1532

We have already made the change suggested by the League.

Section 1560

The League suggests that Section 1560(a) refer to "city hospital" as well as the other types of hospital. We see no need to add "city hospital" since such hospitals are "licensed" hospitals and already included under Section 1560. We have, however, no objection to the addition of "city hospital" to Section 1560.

Penal Code Section 963

Penal Code Section 963 is amended to require judicial notice when an ordinance is pleaded. At the same time, the procedural protections afforded by the Judicial Notice Division apply as in any other case where notice of an ordinance is taken. Hence, we do not believe that the comment by the League concerning Section 963 is well taken.

The League also suggests that "private statute" be deleted from Penal Code Section 963 as unnecessary since "we are not aware of any 'private statutes' mentioned in Section 963."

Respectfully submitted,

John H. DeMouilly
Executive Secretary

LEAGUE OF CALIFORNIA CITIES

MEMBER AMERICAN MUNICIPAL ASSOCIATION

"WESTERN CITY" OFFICIAL PUBLICATION

Berkeley (5) . . Hotel Claremont . . THornwall 3-3083

Los Angeles (17) . . 702 Statler Center . . MAdison 4-4934

Berkeley, California
October 30, 1964

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear John:

In reviewing the proposed Evidence Code as set forth in Preprint Senate Bill No. 1, I have done it with the idea of how the provisions relate to city government operation. I'm sure the trial lawyers are better qualified to advise on the substantive concepts involved.

At this time let me say that so far as cities are concerned there do not appear any major objections. I have not heard from any city attorneys, and perhaps they may be able to suggest changes of greater significance; however at this time we can only suggest the following:

1. Judicial Notice.

Charters of cities and counties should be given judicial notice. At the present time, courts do take judicial notice of them. Teachout v. Bogy, 175 Cal. 481; Clark v. City of Pasadena, 102 C.A. 2d. 198. Since they actually are ratified by the legislature and therefore are included within the meaning of "public statutory law" as described in Section 451, you may have included them already. We believe specific reference of inclusion would be desirable, preferably in the mandatory provisions of Section 451 because of legislative approval.

Section 34330 of the Government Code (requiring judicial notice of the incorporation of cities) is being repealed because it is now included within Section 452 (b), the "permissive" section. We are not certain whether 452 (b) accomplishes this and also believe it would be better to require such judicial notice, rather than make it permissive. To require proof of such incorporations seems unnecessary.

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Along the same lines, Section 963 of the Penal Code is being amended on p. 118 to require judicial notice in the same manner as the court notices matters listed in Section 452. However, an inconsistency arises because 452 is the "permissive" section. Shouldn't Section 451 be the section referred to in the amendment to Section 963. Incidentally, we are not aware of any "private statutes" mentioned in Section 963, and therefore reference to such statutes could be deleted.

2. Psychotherapist - Patient Privilege.

Although we have noted the distinction drawn between this privilege and the physician - patient privilege, we would like to point out the problem that might arise by permitting the privilege to be claimed in a disciplinary proceeding. It would not be unusual to require testimony from a psychotherapist in a disciplinary hearing the same as from a physician. Although Section 1026 indicates the inapplicability when the information is required to be reported to a public employee, the failure to specifically include a section like Section 998 insofar as it relates to disciplinary hearings plus the analysis on page 240 may lead to an interpretation that the privilege can be claimed in disciplinary proceedings. For these reasons we would suggest that the privilege not apply in disciplinary hearings.

Another problem may arise in distinguishing between a physician and a psychotherapist. As referred to Sections 990, 991, 1010 and 1011, a physician may include a psychotherapist. A distinction will have to be predicated on the type of treatment being sought or given, so that if one doctor does both, a problem is bound to arise as to the type of information that can be revealed.

3. Identity of Informer.

Section 1041 should also relate to disclosure of violations of a law of "a public entity" to include local ordinances and not just California or federal laws.

4. Official Writings.

Sections 1530 (a) (1) and 1532 (a) (1) should be re-phrased to specifically include all public entities. A governmental subdivision does not include a municipal corporation. Although the words are used interchangeably, some cases draw a distinction. Use of the words "public entity" would obviate any ambiguity and be consistent with language of other sections.

Mr. John H. DeMouilly
October 30, 1964

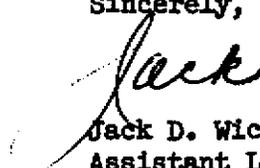
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5. Hospital Records.

Section 1560 (a) should refer to city hospitals as well as other types. A few cities do maintain and operate hospitals.

We hope these comments will be helpful and want to thank you for the opportunity to present them. The efforts of the Commission are monumental and the members and staff should be congratulated on the accomplishment of this great task.

Sincerely,



Jack D. Wickware
Assistant Legal Counsel

JDW:gh

BUSINESS AND PROFESSIONS CODE

Section 2904 (Repealed)

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

Section 5012 (Amended)

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

Section 25009 (Amended)

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

CIVIL CODE

Section 53 (Amended)

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

Section 164.5 (Added)

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

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

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

Section 193 (Repealed)

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

Section 194 (Repealed)

Comment. See the Comment to Civil Code Section 193.

Section 195 (Repealed)

Comment. See the Comment to Civil Code Section 193.

Section 3544 (Added)

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

Section 3545 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3546 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3547 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3548 (Added)

Comment. See the Comment to Civil Code Section 3544.

CODE OF CIVIL PROCEDURE

Section 1 (Amended)

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

Section 117g (Amended)

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

Section 125 (Amended)

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

Section 153 (Amended)

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

Section 433 (Amended)

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

Section 657 (Amended)

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

Section 1256.2 (Repealed)

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

Section 1747 (Amended)

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

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

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

Section 1823 (Repealed)

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

Section 1824 (Repealed)

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

Section 1825 (Repealed)

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

Section 1826 (Repealed)

Comment. Section 1826 contains an inaccurate description of the normal burden of proof. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N., REP., REC. § STUDIES 1001, 1149-1150 (1964). Section 1826 is superseded by Division 5 (commencing with Section 500) of the Evidence Code. See also EVIDENCE CODE § 430.

Section 1827 (Repealed)

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

Section 1828 (Repealed)

Comment. Section 1828 attempts to classify evidence into a number of different categories, each of which in turn is defined by the sections that follow, i.e., Sections 1829-1837. This very elaborate classification system represents the analysis of evidence law of a century ago. Writers, courts, and lawyers today use different classifications and different terminology. Accordingly, Section 1828 is repealed. To the extent that the terms defined in Sections 1829-1837 should be retained, those terms are defined in the Evidence Code. See, e.g., EVIDENCE CODE § 410, defining "direct evidence."

Section 1829 (Repealed)

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

Section 1830 (Repealed)

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

Section 1831 (Repealed)

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

Section 1832 (Repealed)

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

The repeal of Section 1832 will not affect the instructions that are to be given to the jury in appropriate cases as to the difference between direct and circumstantial evidence. Nor will the repeal of this section affect the case law or other statutes relating to what evidence is sufficient to sustain a verdict or finding.

Section 1833 (Repealed)

Comment. Section 1833 is inconsistent with Evidence Code Section 602. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1143-1149 (1964).

Section 1834 (Repealed)

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

Section 1836 (Repealed)

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

Section 1837 (Repealed)

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

Section 1838 (Repealed)

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

Section 1839 (Repealed)

Comment. The definition of "corroborative evidence" in Section 1839 (which requires corroborative evidence to be evidence "of a different character") is inconsistent with the case law developed in California which has not required that corroborating evidence be of a "different character". The repeal of Section 1839, therefore, will have no effect on the interpretation of the sections in various codes that require corroborating evidence; the case law that has developed under these sections will continue to determine what constitutes corroborating evidence for the purposes of the particular sections.

One out-dated case indicates that an instruction on what constitutes corroborating evidence is adequate if given in the words of Section 1839. People v. Sternberg, 111 Cal. 11, 43 Pac. 201 (1896). See also People v. Monteverde, 11 Cal. App.2d 156, 244 P.2d 447 (1952). On the other hand, recent cases do not cite or rely on Section 1839 in defining what constitutes corroborating evidence, and California Jury Instructions, Criminal provides definitions of corroborating evidence derived from the case law rather than from Section 1839. See, e.g., CALJIC (2d ed. 1958) Nos. 203 (Rev.) (possession of stolen property), 235 (Rev.) (possession of stolen property), 592-C (Rev.) (abortion), 766 (perjury), and 822 (Rev.) (corroboration of testimony of accomplices). See CALIFORNIA CRIMINAL LAW PRACTICE 473-477 (Cal. Cont. Ed. Bar 1964);

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

Section 1844 (Repealed)

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

Section 1845 (Repealed)

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

Section 1845.5 (Repealed)

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

Section 1846 (Repealed)

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

Section 1847 (Repealed)

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

Section 1848 (Repealed)

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

Section 1849 (Repealed)

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

Section 1850 (Repealed)

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

Section 1851 (Repealed)

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

Section 1852 (Repealed)

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

Section 1853 (Repealed)

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

Section 1854 (Repealed)

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

Section 1855 (Repealed)

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

Section 1855a (Repealed)

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

Section 1863 (Repealed)

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

Section 1867 (Repealed)

Comment. Section 1867 is based on the obsolete theory that some allegations are necessary that are not material, i.e., essential to the claim or defense; it provides that only the material allegations need be proved. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1119-1121 (1964). Since Section 1867 is obsolete and is not a correct statement of existing law, it is repealed.

Section 1868 (Repealed)

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

Section 1869 (Repealed)

Comment. Section 1869 is inconsistent with and superseded by Evidence Code Sections 500 and 510. Moreover, it is an inaccurate statement of the manner in which the burden of proof is allocated under existing law. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1122-1124 (1964).

Section 1870 (Repealed)

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

Section 1870
(subdivision)

Evidence Code
(section)

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

Section 1871 (Repealed)

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

Section 1871
(paragraph)

Evidence Code
(section)

1	730
2	731
3	733
4	732
5	723

Section 1872 (Repealed)

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

Section 1875 (Repealed)

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

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

Section 1879 (Repealed)

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

Section 1880 (Repealed)

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

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

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

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

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

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

Section 1881 (Repealed)

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

Subdivision 1. Subdivision 1 of Section 1881 is superseded by Evidence Code Sections 970-973 and 980-987. Under subdivision 1 of Section 1881

~~and Section 1881~~ and Section 1822 of the Penal Code, a married person has a privilege, subject to certain exceptions, to prevent his spouse from testifying for or against him in a civil or criminal action to which he is a party. Section 1822 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

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

The "against" privilege. Under existing law, either spouse may claim the privilege to prevent one spouse from testifying against the other in a criminal action, and the party spouse may claim the privilege to prevent his spouse from testifying against him in a civil action. The privilege under ~~Section 1881~~ given exclusively to the witness spouse because he, instead of the party spouse is more likely to make the determination of whether to claim the privilege on the basis of its probable effect on the marital relationship. For example, because of his interest in the outcome of the action, a party spouse would be under considerable temptation to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse probably would not. Illustrative of the possible misuse of the existing privilege is the recent case of *People v. Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958), involving a defendant who murdered his wife's mother and 13-year-old sister. He had threatened to murder his wife, and it seems likely that he would have done so had she not died. The marital relationship was as thoroughly shattered as it could have been; yet, the defendant was entitled to invoke the privilege to prevent his wife from testifying. In such a situation, the privilege does not serve at all its true purpose of preserving a marital relationship from disruption; it serves only as an obstacle to the administration of justice.

Evidence Code Sections 970 and 971 ~~is~~ is

Subdivisions 2-6.

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

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

Section 1883 (Repealed)

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

Section 1884 (Repealed)

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

Section 1885 (Repealed)

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

Section 1893 (Amended)

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

Section 1901 (Repealed)

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

Section 1903 (Repealed)

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

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

Section 1905 (Repealed)

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

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

Section 1906 (Repealed)

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

Section 1907 (Repealed)

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

Section 1908.5 (Added)

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

Section 1918 (Repealed)

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

Section 1919 (Repealed)

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

Section 1919a (Repealed)

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

Section 1919b (Repealed)

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

Section 1920 (Repealed)

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

Section 1920a (Repealed)

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

Section 1920b (Repealed)

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

Section 1921 (Repealed)

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

Section 1922 (Repealed)

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

Section 1923 (Repealed)

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

Section 1924 (Repealed)

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

Section 1925 (Repealed)

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

Section 1926 (Repealed)

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

Section 1927 (Repealed)

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

Section 1927.5 (Repealed)

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

Section 1928 (Repealed)

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

Sections 1928.1-1928.4 (Repealed)

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

Section 1928.1 (Repealed)

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

Section 1928.2 (Repealed)

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

Section 1928.3 (Repealed)

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

Section 1928.4 (Repealed)

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

Section 1936 (Repealed)

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

Section 1936.1 (Repealed)

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

Section 1937 (Repealed)

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

Section 1938 (Repealed)

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

Section 1939 (Repealed)

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

Section 1940 (Repealed)

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

Section 1941 (Repealed)

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

Section 1942 (Repealed)

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

Section 1943 (Repealed)

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

Section 1944 (Repealed)

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

Section 1945 (Repealed)

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

Section 1946 (Repealed)

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

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

Section 1947 (Repealed)

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

Section 1948 (Repealed)

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

Section 1951 (Repealed)

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

Sections 1953e-1953h (Repealed)

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

Sections 1953i-1953L (Repealed)

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

Section 1954 (Repealed)

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

Sections 1957-1963 (Repealed)

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

Section 1957 (Repealed)

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

Section 1958 (Repealed)

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

Section 1959 (Repealed)

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

Section 1960 (Repealed)

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

Section 1961 (Repealed)

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

Section 1962 (Repealed)

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

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

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

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

See EVIDENCE CODE § 626.

Section 1963 (Repealed)

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

Section 1963 (subdivision)	Superseded by
1	Evidence Code Section 620
2	Not continued
3	Civil Code Section 3544 (added in this recommendation)
4	Evidence Code Section 521
5	Not continued
6	Not continued
7	Evidence Code Section 621
8	Evidence Code Section 632
9	Evidence Code Section 633
10	Evidence Code Section 636
11	Evidence Code Section 637
12	Evidence Code Section 638
13	Evidence Code Section 634
14	Not continued
15	Evidence Code Section 644
16	Evidence Code Section 666
17	Evidence Code Section 636
18	Not continued
19	Civil Code Section 3545 (added in this recommendation)
20	Not continued
21	Commercial Code Sections 3306, 3307, and 3408
22	Not continued
23	Evidence Code Section 640
24	Evidence Code Section 641
25	Not continued
26	Evidence Code Section 607
27	Not continued
28	Civil Code Section 3546 (added in this recommendation)
29	Not continued
30	Not continued
31	Evidence Code Section 661
32	Civil Code Section 3547 (added in this recommendation)
33	Civil Code Section 3548 (added in this recommendation)
34	Evidence Code Section 643
35	Evidence Code Section 644
36	Evidence Code Section 645
37	Evidence Code Section 642
38	Not continued
39	Unnecessary (duplicates Civil Code Section 1614)
40	Civil Code Section 1615 (added in this recommendation)

Subdivision 2 is not continued because it has been a source of error and confusion in the cases. An instruction based upon it is error whenever specific intent is in issue. *People v. Snyder*, 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Maciel*, 71 Cal. App. 233, 234 Pac. 577 (1925). A person's intent may be inferred from his actions and the surrounding circumstances, and an instruction to that effect may be given. *People v. Besold*, 154 Cal. 363, 97 Pac. 871 (1908).

Subdivisions 5 and 6 are not continued because, despite Section 1963, there is no presumption of the sort stated. The "presumptions" merely indicate that a party's evidence should be viewed with distrust if he could produce better evidence and that unfavorable inferences should be drawn from the evidence offered against him if he fails to deny or explain it. A party's failure to produce evidence cannot be turned into evidence against him by reliance on these presumptions. *Hampton v. Rose*, 8 Cal. App.2d 447, 56 P.2d 1243 (1935); *Carvitz v. Boys' Market, Inc.*, 91 Cal. App. 2d 827, 830, 206 P.2d 6, 8-9 (1949). The substantive effect of these "presumptions" is stated more accurately in Section 9061 of the Code of Civil Procedure as amended in this recommendation.

Evidence Code Section 445 (jury instruction).

Subdivision 14. The presumption stated in subdivision 14 is not continued, for it is inaccurate and misleading. The cases have used this presumption to sustain the validity of the official acts of a person acting in a public office when there has been no evidence to show that such person had the right to hold office. See, e.g., *City of Monterey v. Jacks*, 139 Cal. 542, 73 Pac. 436 (1903); *Delphi School Dist. v. Murray*, 53 Cal. 29 (1878); *People v. Beal*, 108 Cal. App.2d 200, 239 P. 2d 84 (1951). The presumption is unnecessary for this purpose, for it is well settled that the "acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it." *In re Redevelopment Plan for Bunker Hill*, 61 Cal.2d, ---, ---, 37 Cal. Rptr. 74, 58, 389 P.2d 533, 552 (1964); *Oakland Paving Co. v. Donovan*, 19 Cal. App. 488, 494, 126 Pac. 388, 390 (1912). Under the de facto doctrine, the validity of the official acts taken is conclusively established. *Town of Susanville v. Long*, 144 Cal. 362, 77 Pac. 987 (1904); *People v. Hecht*, 105 Cal. 621, 38 Pac. 941 (1895); *People v. Sassovich*, 29 Cal. 480 (1866). Thus, the cases applying subdivision 14 are erroneous in indicating that the official acts of a person acting in a public office may be attacked by evidence sufficient to overcome the presumption of a valid appointment. These cases can be explained only on the ground that they have overlooked the de facto doctrine.

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

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

Subdivision 20. The cases have used this "presumption" merely as a justification for holding that evidence of a business custom will sustain a finding that the custom was followed on a particular occasion. E.g., *Robinson v. Puls*, 28 Cal.2d 664, 171 P.2d 430 (1946); *American Can Co. v. Agricultural Insur. Co.*, 27 Cal. App. 647, 150 Pac. 996 (1915). ~~Section 20, provides for the admissibility of business custom evidence to prove that the custom was followed on a particular occasion. *Pentecost v. Pentecost*, 10 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000. There is no reason to compel the trier of fact to find that the custom was followed by applying a presumption. The evidence of the custom may be strong or weak, and the trier of fact should be free to decide whether the custom was followed or not. No case has been found giving a presumptive effect to evidence of a business custom under subdivision 20.~~

Evidence Code Section 1105

Subdivision 22. The purpose of subdivision 22 appears to have been to compel an accommodation endorser to prove that he endorsed in accommodation of a subsequent party to the instrument and not in accommodation of the maker. See, e.g., *Pacific Portland Cement Co. v. Reincke*, 30 Cal. App. 501, 158 Pac. 1041 (1916). The liability of accommodation endorsers is now fully covered by the Commercial Code. Accommodation is a defense which must be established by the defendant. COM. CODE §§ 3207, 3415(5). Hence, subdivision 22 is no longer necessary.

Subdivision 23. Despite subdivision 23, the California courts have refused to apply the presumption of identity of person from identity of the name when the name is common. E.g., *People v. Wong Sang Lung*, 3 Cal. App. 221, 224, 84 Pac. 843, 845 (1906). The matter should be left to inference, for the strength of the inference will depend in particular cases on whether the name is common or unusual.

Subdivision 27 has been rarely cited in the reported cases since it was enacted in 1872. It has been applied to situations where a statement has been made in the presence of a person who has failed to protest to the representations in the statement. The apparent acquiescence in the statement has been held to be proof of belief in the truth of the statement. *Estate of Flood*, 217 Cal. 763, 21 P.2d 579 (1933); *Estate of Clark*, 13 Cal. App. 786, 116 Pac. 828 (1910).

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

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

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

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

Section 1967 (Repealed)

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

Section 1968 (Repealed)

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

Section 1973 (Repealed)

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

Section 1974 (Amended)

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

Section 1978 (Repealed)

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

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

Sections 1980.1-1980.7 (Repealed)

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

Sections 1981-1983 (Repealed)

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

Section 1981 (Repealed)

Comment. Section 1981 is superseded by Evidence Code Sections 500 and 510. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1124-1125 (1964).

Section 1982 (Repealed)

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

Section 1983 (Repealed)

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

appears to have been designed principally to facilitate the enforcement of the Alien Land Law. Since that law has been held unconstitutional (Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952)) and has been repealed (Cal. Stats. 1955, Ch. 316, § 1, p. 767), Section 1983 should no longer be retained in the law of California.

Section 1998 (Repealed)

Comment. Sections 1998-1998.5 provide a special exception to the best evidence rule for hospital records. These sections are recodified as Evidence Code Sections 1560-1566.

Section 1998.1 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.2 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.3 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.4 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.5 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 2009 (Amended)

Comment. Section 2009 has been amended to reflect the fact that statutes in other codes may also authorize the use of affidavits. See, e.g., PROB. CODE §§ 630, 705.

Section 2016 (Amended)

Comment. The amendment of Section 2016 merely substitutes the general definition of "unavailable as a witness" used in the Evidence Code for the substantially similar language in Section 2016.

Sections 2042-2056 (Repealed)

Comment. Article 6 of Chapter 3, Title 3, Part IV, of the Code of Civil Procedure consists of Sections 2042 through 2056. These sections are discussed individually below.

Section 2042 (Repealed)

Comment. Section 2042 is superseded by Evidence Code Section 320.

Section 2043 (Repealed)

Comment. Section 2043 is substantially recodified in Evidence Code Section 777.

Section 2044 (Repealed)

Comment. The first sentence of Section 2044 is recodified as Evidence Code Section 765. The second sentence is superseded by Evidence Code 352.

Section 2045 (Repealed)

Comment. The first sentence of Section 2045 is superseded by Evidence Code Sections 760, 761, and 772. The second sentence of Section 2045 is recodified as Evidence Code Section 773.

Section 2046 (Repealed)

Comment. The first sentence of Section 2046 is recodified as Evidence Code Section 762. The second sentence of Section 2046 is recodified as Evidence Code Section 767.

Section 2047 (Repealed)

Comment. The last sentence of Section 2047 is superseded by Evidence Code Section 1237. The remainder of Section 2047 is superseded by Evidence Code Section 771.

Section 2048 (Repealed)

Comment. Section 2048 is superseded by Evidence Code Sections 767 and 772.

Section 2049 (Repealed)

Comment. Section 2049 is inconsistent with and superseded by Evidence Code Section 785. See the Comment to that section. See also EVIDENCE CODE §§ 769, 770, and 1235.

Section 2050 (Repealed)

Comment. Section 2050 is recodified as Evidence Code Sections 774 and 778.

Section 2051 (Repealed)

Comment. Section 2051 is inconsistent with Evidence Code Sections 780 and 785-788. The provision of Section 2051 excluding evidence of particular wrongful acts is continued in Evidence Code Section 787. The principle of excluding criminal convictions where there has been a subsequent pardon has been broadened to cover analogous situations in Evidence Code Section 788.

Section 2052 (Repealed)

Comment. The first clause of Section 2052 is superseded by Evidence Code Section 780(h). The remainder of Section 2052 is inconsistent with Evidence Code Sections 768-770. See the Comments to those sections.

Section 2053 (Repealed)

Comment. Insofar as Section 2053 deals with the inability to support a witness' credibility until it has been impeached, it is superseded by Evidence Code Section 790. Insofar as Section 2053 deals with the inadmissibility of character evidence in a civil action, it is superseded by Evidence Code Sections 1100-1104.

Section 2054 (Repealed)

Comment. Section 2054 is recodified in substance as Evidence Code Section 768(b).

Section 2055 (Repealed)

Comment. Section 2055 is recodified as Evidence Code Section 776.

Section 2056 (Repealed)

Comment. Section 2056 is recodified in substance as Evidence Code Section 766.

Section 2061 (Repealed)

Comment. The first sentence of Section 2061 is recodified in Evidence Code Section 312. The remainder of Section 2061 is superseded by Chapter 6 (commencing with Section 430) of Division 3 of the Evidence Code.

Section 2065 (Repealed)

Comment. The first clause of Section 2065 is superseded by Evidence

Code Sections 351 and 351. ~~Section 2065~~

Insofar as ~~the~~ Section permits a witness to refuse to give an answer having a tendency to subject him to punishment for a felony, it is superseded by ~~Section 2065~~ dealing with the self-incrimination privilege.

Evidence Code Sections 949

The language relating to an answer which would have a tendency to degrade the character of the witness is unnecessary. The meaning of this language seems to be ~~that~~. A witness must testify to non-incriminating but degrading matter that is relevant to the merits of the case.

Clark v. Rose, 50 Cal. 89 (1891) (breach of promise to marry; defense that plaintiff had immoral relations with X; held, X must answer to such relations, though answer degrading); Sanchez v. Superior Court, 113 Cal. App.2d 162, 814 P.2d 135 (1977) (spousal maintenance on ground of equity; defendant required to answer as to equity, albeit degrading).

Nevertheless the witness is privileged to refuse to testify to such matter when the matter is relevant only for the purpose of impeachment. However this privilege seems to be largely -- if not entirely -- superfluous. ~~Section 2065~~ provides that a witness may not be impeached by evidence of ~~acts~~.

Evidence Code Section 787 Specific instances of conduct

Manifestly, to the extent that the degrading matter referred to in Section 2065 ~~is~~ makes this portion of Section 2065 unnecessary.

Evidence Code Section 787

Moreover, since the witness is protected against impeachment by evidence of ~~acts~~, though relevant, and against matter which is degrading but is irrelevant (as to which no special rule is needed), there seems to be little, if any, scope left to the "degrading matter" privilege. For criticisms of this privilege, see 8 WIGMORE, EVIDENCE § 2215, 2255 (McNaughton rev. 1961); 8 WIGMORE, EVIDENCE § 984 (3d ed. 1940); McGovney, *Self-Incriminating and Self-Disparaging Testimony*, 5 IOWA LAW BULL. 174 (1923). This privilege seems to be seldom invoked in California opinions and, when invoked, it arises in cases in which the evidence in question could be excluded merely by virtue of its irrelevancy, or by virtue of Section 2031, or by virtue of both. See, for example, the following cases: *People v. Watson*, 46 Cal.2d 818, 299 P.2d 242 (1956) (homicide case involving cross-examination as to defendant's efforts to evade military service; held, irrelevant and violative of Section 2065); *People v. T. Wah Hing*, 15 Cal. App. 195, 203, 114 Pac. 413, 419 (1911) (abortion case in which the prosecuting witness was asked on cross-examination who was father of child; held, immaterial--and, if asked to degrade, "equally inadmissible"); *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105 (1907) (defendant's witness in statutory rape case asked whether the witness was seller of lottery tickets and operator of poker game; held, improper, *inter alia*, on ground of Section 2065. Note, however, the additional grounds for exclusion, *viz.*, immateriality and Section 2051. Thus, Section 2065 was not at all necessary for the decision.). Hence, this portion of Section 2065 is superfluous ~~and~~ under ~~the~~ Evidence Code ~~Section~~.

(pertinent portion continued as Evidence Code Section 787),

The remainder of ~~the~~ Section is superseded by ~~Section 2065~~ dealing with the ~~admissibility of criminal convictions for impeachment purposes.~~

Evidence Code Section 788

admissibility of criminal convictions for impeachment purposes.

Section 2066 (Repealed)

Comment. Section 2066 is unnecessary in the light of Evidence Code Section 765, which restates the provisions of Code of Civil Procedure Section 2044.

Section 2078 (Repealed)

Comment. Section 2078 is superseded by Evidence Code Sections 1152-1154.

Section 2079 (Repealed)

Comment. Section 2079 is unnecessary because it repeats what is said in Civil Code Section 130. Moreover, it is misleading to the extent that it suggests that adultery is the only ground for divorce which requires corroboration of the testimony of the spouses.

Sections 2101-2103 (Repealed)

Comment. Chapter 4 of Title 5, Part IV, of the Code of Civil Procedure consists of Sections 2101 through 2103. These sections are discussed individually below.

Section 2101 (Repealed).

Comment. Section 2101 is superseded by Evidence Code Section 312.

Section 2102 (Repealed)

Comment. The first sentence of Section 2102 is recodified in Evidence Code Section 310. The second sentence of Section 2102 is superseded by Evidence Code Section 458.

Section 2103 (Repealed)

Comment. Section 2103 is superseded by Evidence Code Section 300.

CORPORATIONS CODE

Section 6602 (Amended)

Comment. This revision of Section 6602 provides, in effect, that the judge may take judicial notice of the matters listed in amended Section 6602, and he is required to take such judicial notice if he is requested to do so and the party supplies him with sufficient information. See EVIDENCE CODE §§ 452 and 453 and the Comments thereto.

The portion of Section 6602 which has been deleted is either unnecessary because it duplicates the provisions of Evidence Code Sections 451 and 452 or undesirable because it conflicts with Evidence Code 1452.

Section 25310 (Amended)

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

GOVERNMENT CODE

Section 11513 (Amended)

Comment. The revision of the last sentence of Section 11513 is necessary because, under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions.

The substitution of "other" for "direct" in the third sentence of subdivision (c) of Section 11513 makes no significant substantive change but is desirable because "direct evidence" is not defined for the purposes of Section 11513. See the Comment to CODE CIV. PROC. § 1831 (Repealed).

Section 19580. (Amended)

Comment. The amendment merely substitutes a reference to the correct Evidence Code section for the reference to the superseded Code of Civil Procedure section.

Section 34330 (Repealed)

Comment. Section 34330 is unnecessary. The matters to be noticed under Section 34330 may be noticed under Division 4 (commencing with Section 450) of the Evidence Code, and that division provides the applicable procedures for taking judicial notice.

HEALTH AND SAFETY CODE

Section 3197 (Amended)

Comment. The revision of Section 3197 merely substitutes references to the pertinent Evidence Code sections that supersede subdivisions 1 and 4 of Code of Civil Procedure Section 1881.

PENAL CODE

Section 270e (Amended)

Comment. The revision of Section 270e merely inserts a reference to the pertinent sections of the Evidence Code.

Section 686 (Amended)

Comment. Section 686 sets forth three exceptions to the right of a defendant in a criminal trial to confront the witnesses against him. These exceptions purport to state the conditions under which the court may admit testimony taken at the preliminary hearing, testimony taken in a former trial of the action, and testimony in a deposition that is admissible under Penal Code Section 882. The section inaccurately sets forth the existing law, for it fails to provide for the admission of hearsay evidence generally or for the admission of testimony in a deposition that is admissible under Penal Code Sections 1345 and 1362, and its reference to the conditions under which depositions may be admitted under Penal Code Section 882 is not accurate. As ~~the~~ ~~sections~~ ~~cover~~ the situations in which testimony in another action or proceeding and testimony at the preliminary hearing is admissible as exceptions to the hearsay rule, Section 686 ~~is~~ ~~revised~~ by eliminating the specific exceptions for these situations and by substituting for them a general cross reference to admissible hearsay. The ~~present~~ statement of the conditions under which a deposition may be admitted ~~is~~ ~~also~~ ~~deleted~~, and in lieu of the deleted language there ~~is~~ ~~substituted~~ language that accurately provides for the admission of depositions under Penal Code Sections 882, 1345 and 1362. ~~The~~

Evidence Code
Sections ~~1290-1292~~
has been

has been
is

Section 688 (Amended)

Comment. The language deleted from Section 688 is superseded by Evidence Code Sections 930 and 940.

Section 939.6 (Amended)

Comment. The revision of Section 939.6 makes no substantive change. The amendment, however, states more clearly and precisely the meaning that has been given the section by the California courts. See, e.g., People v. Freudenberg, 121 Cal. App.2d 564, 263 P.2d 875 (1953). See also WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 175, 228 (1963).

Section 961 (Amended)

Comment. This revision of Section 961 makes it clear that matters that will be judicially noticed, whether such notice is mandatory or discretionary, need not be stated in an accusatory pleading. See EVIDENCE CODE §§ 451 and 452.

Section 963 (Amended)

Comment. This revision of Section 963 makes the procedure provided in Evidence Code Sections 454-458 applicable when judicial notice is taken of the matter listed in Penal Code Section 963. Note that, notwithstanding Evidence Code Section 453, notice is mandatory if the private statute or ordinance is pleaded by reference to its title and the day of its passage.

Section 1120 (Amended)

Comment. Section 1120 requires a juror who discovers that he has personal knowledge of a fact in controversy in the case to disclose the same in open court. If he reveals such personal knowledge during the jury's retirement, the jury must return into court. The section then requires that the juror be sworn

as a witness and examined in the presence of the parties.

The section does not make it clear whether this examination in the presence of the parties is for the purpose of determining if "good cause" exists for the juror's discharge in accordance with Penal Code Section 1123 or whether this examination is for the purpose of obtaining the juror's knowledge as evidence in the case. The circumstances under which a juror may testify in a criminal case are fully covered in Evidence Code Section 704. Therefore, Section 1120 has been amended to eliminate the ambiguity in its provisions and to provide assurance the juror's examination is to be used solely to determine whether "good cause" exists for his discharge.

Section 1322 (Repealed)

Comment. Section 1322 is superseded by Evidence Code Sections 970-973 and 980-987. See the Comment to subdivision 1 of Section 1881 of the Code of Civil Procedure, which also is superseded by the same Evidence Code sections.

Section 1323 (Repealed)

Comment. The first clause of the first sentence of Section 1323 is superseded by Evidence Code Sections 930 and 940. The second clause is recodified as Evidence Code Section 772b. The last sentence of Section 1323 is unnecessary because it merely duplicates the provisions of Article I, Section 13 of the California Constitution.

Section 1323.5 (Repealed)

Comment. Section 1323.5 is superseded by Evidence Code Section 930, which retains the only effect the section has ever been given--to prevent the prosecution from calling the defendant in a criminal action as a witness. See People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952). Whether Section 1323.5

provides a broader privilege than Evidence Code Section 930 is not clear, for the meaning of the phrase "persons accused or charged" is uncertain. For example, a witness before the grand jury or at a coroner's inquest is not technically a person "accused or charged," and Section 1323.5 would appear not to apply to such proceedings. A person who claims the privilege against self-incrimination before the grand jury, at a coroner's inquest, or in some other proceeding is provided with sufficient protection under Evidence Code Section 913, for his claim of privilege cannot be shown to impeach him or to provide a basis for inferences against him in a subsequent civil or criminal proceeding.

Section 1345 (Amended)

Comment. Section 1345 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Codes Sections 1290-1292.

Section 1362 (Amended)

Comment. Section 1362 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Code Sections 1290-1292.

PUBLIC UTILITIES CODE

Section 306 (Amended)

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