#34(L) 3/16/64

Memorandum 64-20

Subject: Study No. 34(L) - Uniform Rules of Evidence (Existing Provisions of Part IV of the Code of Civil Procedure)

Attached is a copy of a portion of the research study on the existing provisions of Part IV of the Code of Civil Procedure. We had received at the time this memorandum was prepared only the portion of the research study on C.C.P. §§ 1823-1839 (Definitions and Divisions). Hence, this memorandum is limited to consideration of those sections, although we hope to be able to provide you with the portion of the research study covering other sections as well.

The following matters should be noted:

(1) Section 1823 is repealed in the tentative recommendation on General Provisions. It is superseded by the definition of "evidence" in Revised Rule 1(1).

(2) Section 1824 is repealed in the tentative recommendation on General Provisions. It is superseded by the definition of "proof" in Revised Rule 1(3).

(3) Section 1827 is repealed in the tentative recommendation on General Provisions. It is superseded by the definition of "evidence" in Revised Rule 1(1).

(4) In connection with the definitions of "direct evidence" (Section 1831) and "indirect evidence" (Section 1832), the following definitions from the Proposed Missouri Evidence Code should be considered:

> "Direct" or "positive evidence" is that evidence where the factum pro bandum or fact to be proved is directly attested by an exhibit or by those who speak from their own actual and personal knowledge, the proof applying immediately to the fact to be proved without any intervening processes.

"Circumstantial evidence" is that evidence where the fact to be proved is inferred from other facts satisfactorily proved, the proof applying immediately to collateral facts supposed to have a connection, real or remote, with the fact in controversy. Circumstantial evidence is of two kinds: "certain," from which the conclusion necessarily follows, and "uncertain," from which the conclusion does not necessarily follow but is probable only and is obtained by process of reasoning.

(5) Section 1834 can be repealed. It appears to be retained in substance in Revised Rule 8(4), which provides in part: "The judge may admit conditionally the proffered evidence, subject to the evidence of the preliminary fact being supplied later in the course of the trial." The comment to Revised Rule 8 states: "The final paragraph of subdivision (4) restates the provisions of Section 1834 of the Code of Civil Procedure, that the judge may admit evidence that is conditionally relevant subject to the presentation of evidence of the preliminary fact later in the course of the trial."

(6) In connection with the definitions of "cumulative evidence" (Section 1838) and "corroborative evidence" (Section 1839), the Commission should consider the following definitions which are taken from the Proposed Missouri Evidence Code:

"Corroborative evidence" is that evidence which tends to strengthen and confirm the same fact. It may be cumulative evidence or may be evidence differing in kind. The testimony of a witness is not corroborated by prior consistent statements or by additional consistent testimony of the same witness.

"Cumulative evidence" is evidence of the same kind addressed to the same fact issue. Cumulative evidence may, in the exercise of a reasonable discretion, be excluded by the court when the fact to be proved is already supported by substantial uncontroverted or credible evidence.

Respectfully submitted,

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Executive Secretary

#34(L) 2/18/64

A STUDY

relating to

EXISTING PROVISIONS OF PART IV OF THE

CODE OF CIVIL PROCEDURE

PART I

This study was made for the California Law Revision Commission by Professor Ronan E. Degnan of the School of Law, University of California at Berkeley. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

This Study is a report by the consultant retained by the Commission for the purpose of re-examining the existing provisions of Part IV of the Code of Civil Procedure (Evidence) in light of the approval by the Commission of the Uniform Rules of Evidence as revised by the Commission. Some preliminary observations on the approach of the Study may help explain its organization.

The Uniform Rules of Evidence as promulgated by the National Conference of Commissioners on Uniform State Laws and as approved by the American Bar Association do not purport to be a comprehensive Code of Evidence. With few exceptions, the concern of the Rules is with the question of admissibility of evidence. They do not regulate the manner in which it is to be obtained, or the use which may be made of it after introduction, or how the jury is to be instructed concerning its weight and effect. This is made clear in the Prefatory Note to the Rules:

> One substantial variation from the Model Code approach lies in the omission from the present draft of procedural rules which are thought to be either unnecessary or not within the scope of the general scheme to deal primarily with problems of admissibility of evidence.

Comparison of this confined purpose with the scope of Part IV of the Code of Civil Procedure shows that many of the sections in that Part deal with matters which would remain wholly unaffected by adoption of the Revised Uniform Rules in anything resembling the form the Law Revisions Commission proposals have taken.

Certain assumptions thus underlie the recommendations made in this Study. First is that there will continue to be a Part IV (Evidence) of the Code of Civil Procedure. It will include the Revised Uniform Rules. It will also include some other provisions governing the gathering and offering of evidence. It may but need not contain some of the other sections, such as those dealing with maxims for construction of documents or statutes or for the reconstructing of records destroyed by "conflagration" or "calamity."

Some of the existing sections will be repealed entirely by adoption of the Revised Uniform Rules as now proposed. Others would be modified and still others would have to be reclassified if they are to conform to the general classification system upon which the Uniform Rules are constructed and which system is followed by the Revised Rules recommended by the Commission. Some sections which have only a tenuous connection with the law of evidence (such as reconstructing of records) might be removed from Part IV or even entirely from the Code of Civil Procedure to other Codes.

The Study which follows attempts to determine the nature of the sections in numerical order, determining first whether (and how) the section would be affected by adoption of the Rules as proposed in the present and most current draft. Secondly, a disposition is suggested based upon the continued vitality of the section, if any, and the classification in which it might fall. At present it seems advisable to split off Rule 1 (definitions) from the body of the rest of the Rules and have it serve as the vehicle for definitions of terms within the Revised URE and also for the same words in those sections of Part IV which will not be incorporated into the structure of the Revised URE.

This is important in connection with Title I of Part IV, General Principles, since most of the content of this Title is merely definitional. I do not attempt to make that kind of a decision at this time, however.

C.C.P. § 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

The present section speaks in terms of manner or method of ascertaining facts -- "evidence is the means . . . of" determining a fact. URE 1(1) also uses the word "means" but seemingly in another sense -- "That through which, or by the help of which, an end is attained," as Webster's Collegiate Dictionary defines it. The Tentative Draft of Revised Rule 1 departs from the language of the URE but adheres to its general purport of describing the things rather than the process.

This section should be repealed as superseded, but attention is called to the fact that under the Draft of February 5 the URE definition is restricted to "As used in these rules, . . ." There should be a general definition applicable throughout Part IV.

C.C.P. § 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

The section as such is superseded by substitution of its language for that of the URE in Revised Rule 1(3). There is a school which uses

"proof" to describe things. See Michael & Adler, Real Proof, 5 Vanderbilt L. Rev. 344 (1952). All use it that way occasionally, as when filing a "proof of loss" with an insurance company. It was this latter sense that it was employed in the URE; the proof was the whole bundle of evidence. The definition of § 1824 should be preserved because it is more consonant with American usage and with California terminology.

C.C.P. § 1825. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;

2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,

3. For the production of legal evidence;

4. For the exclusion of whatever is not legal;

5. For determining, in certain cases, the value and effect of evidence.

This section is not superseded as such. It describes more than the content of the Rules, although some of the topics enumerated are covered by the Rules. Subsection (1) is judicial notice. Subdivisions

(3) and (4) seem to describe generally admission and exclusion, although subsection (3) might well be thought to include means of obtaining evidence, such as discovery, as well as regulation of the manner in which evidence is offered in court. But the Rules do not, unless the Commission changes them in its Revision, cover subsection (2), the creation of presumptions; Rules 13-16 regulate the management of presumptions only. And because of the concentration of the URE on the question of admissibility, subsection (5) includes much that the Rules deliberately avoid.

Thus adoption of the Revised Rules would not seem to abolish whatever need there might be for having this section. It appears to be useless. The absence of any cases involving it would seem to indicate that it is also harmless. The only difficulty is in knowing where to put the section if it is to be retained.

> C.C.P. § 1826. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

This section once had a companion, § 1835, which read:

> That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

In People v. Miller, 171 Cal. 649, 654-55, 154 Pac. 468, (1916), the Supreme Court criticized both as "rather carelessly drawn provisions . . . enacted in an attempt to satisfactorily define or declare the degree of proof essential to the establishment of a fact by evidence . . . . Manifestly these provisions are not in accord with other provisions of law in all respects, even on the subject to which they relate." Elaboration of this was directed primarily at § 1835, which (probably as a consequence) was repealed in 1923. Calif. Laws 1923, ch. 110. The same should have been done with § 1826. The second sentence is wrong and it would surely be error to instruct in its terms, at least in a civil case. See Mella v. Hooper, 200 Cal. 628 254 Pac. 256 (1927); comment, BAJI Inst. No. 21-B. Indeed, the best that can be said of its use in a criminal case is that stating it to the jury may not be prejudicial, if made clear that it means the same thing as "reasonable doubt," People v. Hatch, 163 Cal. 368, 383, 125 Pac. 907 (1912). The second sentence should be repealed.

The first sentence is not so much wrong as it is unnecessary. The underlying predicates are the measures of persuasion needed to justify findings. There are covered elsewhere: preponderance of the evidence (C.C.P. § 2061 (5)), and beyond a reasonable doubt. P. C. §§ 1096, 96a and 97. Clear and convincing (sometimes including "cogent", to be alliterative) seems not have a statutory origin. In general, it is applied to the kind of issues -- fraud, reformation of instruments and the like -- which our present courts inherited from their equity ancestors. McCormick, Evidence 679 (1954).

The first sentence is really an argument addressed to an old and now forgotten dispute over whether verdicts could rest upon probabilities rather than certainty or satisfaction. At one time it was useful as the basis of BAJI Inst. No. 21-B. Perhaps some judges still use it. But the revised Insts. No. 21 and No. 22 depart from the formula of §1826, concentrating on what the evidence must be -- a preponderance -- rather than upon what it need not be. If this shift in emphasis is generally accepted, and it appears desirable that it be, what little justification ever existed for §1826 disappears. It should be repealed.

Tentative Recommendation, Article I, Revised URE 1 (4) contains a statement that unless otherwise provided the bruden of proof is by a preponderance of the evidence. This is presently found in C.C.P. §2061(5), with no recognition that there may be another burden in civil cases, clear and convincing. There is no definition of presumptions in either URE 1 or in the definitions part of Part IV; these are found in Rule 13 and C.C.P. §1959.

C.C.P. §1827. <u>There are four kinds of evidence</u>:

1. <u>The knowledge of the Court</u>;

2. <u>The testimony of witnesses</u>;

3. <u>Writings</u>;

4. <u>Other material objects presented to the senses</u>.

This section states a fact which doubtless is true. Whether it serves any purpose is doubtful. It is not, as are most of the other sections in this Title, a definition. It does serve at present to

anticipate the structure of Title II, which in its Chapters 1 through 4 covers the items listed. The only use the court seems to have made of the section is to employ it to rule that judicial notice is a form of evidence, People v. Chee Kee, 61 Cal. 404 (1882), and to put California in the camp which holds that what a trier of fact sees on a view is independent evidence which can support a finding. Cutting v. Vaughn, 182 Cal. 151, 187 Pac. 19 (1920). Other courts have held to the contrary. McCormick, Evidence § 392 (1954).

Whether judicial notice is evidence or whether it is a substitute for evidence seems little more than a quibble. Relative to it, however, might be noted that Revised URE 1(1), as presently proposed by the Commission, defines "evidence" in terms of the things described by the word -- it "means testimony, writings, or other things that are offered to prove the existence or nonexistence of a fact in judicial or fact finding tribunals." This type of definition, unlike the present definition of "judicial evidence" in CCP § 1823, and also unlike the URE definition, tends to overlap with § 1827's division of evidence into "kinds." Judicial notice would not seem to be "testimony, writings or other things." Should the definition of Rule 1(1) be enlarged to include judicial notice?

C.C.P. § 1828. <u>There are several degrees of evidence</u>:

One -- <u>Primary and secondary</u>.

Two -- <u>Direct and indirect</u>.

Three -- <u>Prima facie, partial, satisfactory, indispensable, and conclusive</u>.

(In its 1872 form, subs. (1) contained the word "original" rather than "primary.")

This is an attempt to classify evidence into several different categories, each of which in turn is defined by the succeeding §§ 1829 through 1837. Assessment of this section is best made by an examination of the individual classifications.

> C.C.P. § 1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.
>
> C.C.P. § 1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents.

These two sections should be repealed, and along with them, of course, subsection (1) of § 1828. It is interesting to notice that neither section was in this form when the Code was adopted in 1872. Section 1829 then read:

> Original evidence is an original writing on [or?] material object introduced in evidence.

The Code Amendments of 1873-74 substituted the present language for that of 1872. Section 1830 originally read:

> Secondary evidence is a copy of such original writing or object, or oral evidence thereof.

In 1872, then, these sections were appropriately contained in the definitions portion of Part IV. They served to define the terms employed

in C.C.P. § 1855, which is the substance of the so-called best evidence rule. See also C.C.P. §1937 ("The original writing must be produced and proved, except as provided in sections [1855] . . . .") Because of the change in wording, the two sections no longer serve a definition purpose.

As statements of a rule of evidence, or even a general principle of it, they are erroneous. There may well have been a "best evidence" rule at one time. See McCormick, Evidence §195 (1954). At the time the present wording was inserted in the Code there were many abstract statements of one. A California lawyer who used Greenleaf's second edition (1844) would have found the following:

> A FOURTH RULE, which governs in the production of evidence, is that, which requires the best evidence, of which the case, in its nature, is susceptible. This rule does not demand the greatest amount of evidence, which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent, that better evidence is withheld, it is fair to presume, that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice.

I. Greenleaf 97. Greenleaf goes on to say, at 98-99, that this rule:

> naturally leads to the division of evidence into PRIMARY and SECONDARY. Primary evidence is that, which we have just mentioned, as the best evidence, or, that kind of proof which, under any possible circumstances, affords the greatest certainty of the fact in question; and it is illustrated by the case of a written document; the instrument itself being always regarded as the primary, or best possible evidence of its existence and contents.

The influence of Greenleaf on the original Code Commissioners is quite apparent. C.C.P. § 2061 (5) and (6) provide that the jury should be instructed that evidence is to be weighed in light of what was in the power of one party to produce or the other to contradict, and that if weaker evidence is offered when stronger was available, "the evidence offered should be viewed with distrust." See also C.C.P. § 1963(6)

(presumption "That higher evidence would be adverse from inferior being produced.") But the Commissioners were too sophisticated to believe, with Greenleaf, that this was a rule of exclusion; of which the original documents rule was but an illustration. Comparison of the second quotation from Greenleaf, supra, discloses the source of the 1873-74 amendments of §§ 1828-30. So these are not definitions. Nor do they express a rule or principle of law. Finally, Art. VII (Authentication) of the Revised URE would seem to need no definitional aid, although it does use the terms "original," "writing," and "secondary."

Chapter 3 (Documentary Evidence) of Title 2, Part IV, does contain a number of sections dealing with proving the content of records by introduction of copies. E.g., §1919 (public record of private writing); §§ 1905-06 (judicial records). But the wording of these sections does not employ the original-secondary distinction, and certainly not the primary-secondary distinction. Most of those sections are not recommended for repeal and replacement by the authentication article of the Revised URE in any event. See California Law Revision Commission, Tentative Recommendation and Study Relating to the Uniform Rules of Evidence

> C.C.P. § 1831. Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

C.C.P. § 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

This difference in "degree" of evidence is one commonly noted, although the more common name for the latter is circumstantial evidence. See revised BAJI Inst. No. 22 (1962 supp.). This distinction is one not drawn in the URE, for the reason that the URE are primarily designed to govern admissibility, and circumstantial evidence is as admissible as direct evidence. It will support a finding of fact even in the face of contradictory direct evidence. Bruce v. Ullery, 58 Cal. 2d 702, 711, 25 Cal Rptr. 841, ,375 P.2d 833, , (1962); McNulty v. Copp, 91 Cal. App. 2d 484, 205 P.2d 438 (1949). The only limitation which appears to exist is that ". . . circumstantial evidence alone is not sufficient to support a conviction of perjury." People v. O'Donnel, 132 Cal. App. 2d 840, 844, 283 P.2d 714, (1955). Whether this is because of C.C.P. §1968:

> Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

or the similar language of P.C. § 1103a is not made clear. Perhaps it derives from some more general command. See Note, 35 So. Calif. L. Rev.

86, 96 (1961). The Supreme Court has indicated that less evidence is needed to prove perjury in a non-criminal contest. Fischer v. State Bar of California, 6 Cal. 2d 671, 58 P.2d 1277 (1936).

Although these two sections are in the definitions part of Part IV, they serve little definitional purpose. The Code seems not further to distinguish between the two forms, although jury instructions do differentiate, and in both civil and criminal cases it may be error to refuse to instruct on the difference in appropriate cases. People v. Navarro, 74 Cal. App. 2d 544, 169 P.2d 265 (1946); Trapani v. Holzer, 158 Cal. App. 2d 1, 8, 9, 321 P.2d 803, , (1958) (three opinions). They might be worth retaining for that purpose alone, with the word "indirect" in § 1832 changed to "circumstantial."

It should be noted here that indirect evidence as defined by § 1832 is further divided in Chapter 5 of Title II into inferences and presumptions, both of which are defined in §§ 1957-58.

> C.C.P. § 1833. Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is prima facie evidence of a record, but it may afterwards be rejected upon proof that there is no such record.

This is the most elusive of all the definitions contained in this portion of Part IV. It should be noted that it does not include a very common usage, a prima facie case. In that context, the expression normally means no more that that the party who has the burden of proof has produced enough evidence on every matter on which he bears that burden to

survive a motion for nonsuit or directed verdict; that is, sufficient evidence, if believed, to warrant findings in his favor on those points.

The Code Commissioners employed the word "primary" in place of "prima facie," but their note states that "this definition corresponds with what has heretofore been known as prima facie evidence." The 1873-74 amendments borrowed the word "primary" to substitute for "original" in §§ 1828 and 1829 and inserted "prima facie" in § 1833. The Commissioners' note should, therefore, be evidence of what this section meant to them. It was:

> such evidence as, in judgment of law, is sufficient to establish the fact, and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light. No judge would hesitate to set aside their verdict and grant a new trial if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part which would require the remedial interposition of the court. In a legal sense, then, such primary evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact.

There are objections to this construction of the term. One is that it is inconsistent with the other usage mentioned above, the prima facie case. But that term can be distinguished; the statute refers to proof "of a particular" fact, while the prima facie case normally involves more than one. More important is that the statute on its face does not require such a result. It says merely that it "suffices," not that it compels, the acceptance of the fact as true. So construed, the statute would conform to the prima facie case conception discussed above; the fact finder may, but need not, accept the fact as true, and the judge cannot nonsuit on the point.

The most serious objection to accepting the interpretation of the Commissioners, however, is that it becomes very difficult to reconcile their prima facie evidence as defined in § 1833 with their presumption as

defined in § 1959:

> A presumption is a deduction which the law expressly directs to be made from particular facts.

The possible difference between evidence which only suffices for proof and evidence which requires a deduction is somewhat canceled by §1961:

> A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption.

The only difference which seems to remain, under the Commissioners' interpretation of § 1833, is that a new trial will be granted if the jury fails to find in accord with uncontroverted prima facie evidence, while they will be directed to find in accord with uncontroverted presumptions. (All theories of presumptions -- Thayer, Morgan or Traynor -- agree that uncontroverted presumptions require direction if the jury belives the basic facts exist.) But a judge without a jury would have a dreadful time trying to observe the Commissioners' interpretation of the section. He is not told that he had to accept the fact, because it was not a presumption. But he, like a jury, would not be able to refuse to find in accord with it in the absence of contrary evidence. Should he order himself to grant a new trial?

Having a difference as narrow as between granting a new trial and directing a verdict may not be as pointless as it now appears, however. In those days there was little discovery in civil actions, no machinery for the demanding of admissions, no interrogatories to parties. Further, the general denial was the order of the day. Suppose that some point of fact was part of a plaintiff's case. To the plaintiff it looked indisputable, and he proposed to prove it by introducing a "book of science or art," which by C.C.P. § 1936 is made "prima facie evidence of facts of general notoriety and interest" when made by persons indifferent between the

parties. If fully confident that no contrary proof could be adduced, the plaintiff might risk going to court with no more proof than the book because he might rather risk an adverse verdict, assured as he was of a new trial, than go to the expense and difficulty of assembling the proof necessary to establish the fact. If that was the purpose of the Commissioners, it seems wholly unnecessary today. Plaintiff could, in such a case, demand an admission of the fact under C.C.P. § 2033. If one were forthcoming, he would not need even prima facie evidence; if none did, he could proceed to prove the fact with at least the hope that the cost of doing so would be chargeable to his adversary under C.C.P. § 2034(c).

Turning from the history of the section to judicial use, it is not possible to arrive at any single meaning for the term prima facie. Courts use it to refer to presumptions. E.g., "Appellants offered no other instruction setting forth the correct rule as to the burden of meeting the prima facie case where the presumption of undue influence had been established." Estate of Hampton, 55 Cal. App. 2d 543, 565, 131 P.2d 565, , (1942). And the Supreme Court, in what seems to be its only direct pronouncement on the meaning of the statute, seemed to make it at least as strong as a presumption:

> It is to be noted that the code does not say "until contradicted or overcome by other evidence," but "until contradicted and overcome by other evidence." Therefore, when prima facie evidence of a given fact has been introduced, its effect is not distroyed by the introduction of contradictory evidence. It stands as proof of that particular fact unless and until it is both contradicted and overcome by such other evidence. "Proof" is something more than merely "evidence." It is "the establishment of a fact by evidence." (Code Civ. Proc., sec. 1824.).

Miller & Lux Inc. v. Secara, 193 Cal. 755, 770-71, 227 Pac. 171, (1924). If this case is not distinguishable or downright wrong, it stands for the proposition that prima facie evidence is even stronger than all but

Morgan-type presumptions. It seems distinguishable, in that the evidence involved was the assessment book of an irrigation district, and in essence Miller & Lux was attempting to make a collateral attack upon the assessment when it had failed to resort to the statutory procedure. But the language is nevertheless an explicit construction of the section in question. It has frequently been cited since. Some language in People v. Mahoney, 13 Cal. 2d 729, 734-35, 91 P.2d 1029, (1939), might justify restricting it to assessment cases as a device to shift to defendant the burden of showing "the extent of any claimed non-liability." (Mahoney's argument was that since he had paid some of the sales tax represented by the assessment, the State had the obligation to show how much he still owed by evidence other than the certificate of delinquency.)

How much evidence is needed to "overcome" has not been discussed in quantitative terms; it would seem that nothing less than a preponderance could suffice. Pacific Freight Lines v. Ind. Acc. Comm'n, 26 Cal. 2d 234, 157 P.2d 634 (1945), was a proceeding to review a compensation award for the death of a truck driver. The claim was that the death was caused by his own intoxication, of which there was evidence. An Arizona death certificate was received in evidence; under Arizona law it was "prima facie evidence of the facts therein stated." (As a California death certificate would be under Health & Safety Code § 10577.) The certificate recited that "Evidence shows that right rear wheel locked due to some mechanical defect." The majority called this an opinion or conclusion of the coroner's jury and found that it had "no foundation in fact when correlated with the transcript of the evidence produced at the coroner's inquest." It could therefore be disregarded. 26 Cal. 2d at 239, 157 P.2d at . Justice Carter dissented, citing Miller & Lux v. Secara and Smellie v. Southern Pacific Co., 212 Cal. 540, 299 Pac. 529 (1931). The majority ignored

the point,

It should be noticed that many uses of the term prima facie evidently have a purpose quite different from the problem raised under §1833. An order of problems can arise:

a) Is the evidence admissible at all? In many instances the particular item made "prima facie" would not be admissible at all without a statute to that effect. Health & Safety Code § 10577 makes admissible records of "birth, fetal death, death or marriage" if properly registered and certified as "prima facie evidence in all courts and places of the facts stated therein." Absent this section, these records would be excludable as hearsay under present law.

b) Is the evidence sufficient to support a finding? It is in this sense that the term is used when it is asked whether a plaintiff has made a "prima facie case" and can survive a motion for nonsuit.

c) Does the evidence compel a finding in the absence of any controverting evidence? In this sense, prima facie resembles a Thayer presumption. The treatment of the death certificate in Pacific Freight Lines, supra, is consistent with this view, if it does not directly support it. It seems also to be the view of the Code Commissioners who drafted the language.

d) Does the evidence compel a finding until contradicted AND overcome? This is the construction of the Supreme Court in Miller & Lux, Inc. v. Secara, supra.

It seems quite apparent that the words prima facie have no single set meaning. Cf. People v. Carmona, 80 Cal. App. 159, 166, 251 Pac. 315, (1926) ("The words 'prima facie' have, by long usage, become a part of the English language, and their meaning is readily understood by a person of common understanding.") Further, § 1833 seems not to serve any definitional purpose. It is seldom used in the Evidence code itself Cf., § 1936. Most

prima facie standards come from other codes, with no indication whatever that the legislature thereby intended to adopt § 1833 as its meaning, much less which of the possible constructions of 1833. It is better in such instances to examine the context of the particular legislation to determine which of the several possible senses set out above was in the legislative intendment. Finally, the definition serves no purpose in connection with the URE, which are concerned only with admissibility, not with the weight which may subsequently be given to evidence or what it will take to overcome contrary evidence.

The section should be repealed. Even if it were possible to come up with a single, precise definition, it would be impossible to get everyone, and particularly the legislature, to agree to consistent use of the term.

C.C.P. § 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute.

This is no more than a statement of a principle without which it would be impossible to try a lawsuit. A court may admit evidence even if a necessary foundation element is not yet shown. Brea v. McGlashen, 3 Cal. App. 2d 454, 39 P.2d 877 (1934). If the foundation or other connecting element is not later supplied, the evidence already received may be stricken on motion. People v. Balmain, 16 Cal. App. 28, 116 Pac. 303 (1911). The judge's control over the order of proof is necessarily great. C.C.P. § 2042. Compare Revised URE 63(9)(b), indicating that the judge has no discretion to receive declarations of conspirators against each other until the existence of the conspiracy has been proved by independent evidence.

This section is more than a definition of terms; it authorizes receipt of the evidence. Doubtless that would be the law if the section

never existed, or if it were repealed. Probably it should be retained, placed in a grouping related to ordering the general conduct of the trial. There is no comparable provision in the URE.

C.C.P. § 1835. This section was repealed in 1923. See discussion under § 1826 supra.

C.C.P. § 1836. Indispensable evidence is that without which a particular fact cannot be proved.

This section seems to serve no purpose. It purports to be a definition but does not function as one. Its principal reference is to Chapter 6 of Title II of Part IV. Section 1968 in that Chapter [as well as P.C. §§ 1103 and 1103a] state a "two witness" rule for treason and perjury. But they do not employ the term "indispensable." They simply state what is required. The remainder of Chapter 6 is the Statute of Frauds. Whether the Statute of Frauds is a part of the law of evidence at all may well be debated. It does little good to label the writing or memorandum "indispensable" evidence. This section should be repealed and the word "indispensable" removed from § 1828.

The URE contains no comparable concept because of the concern with admissibility only.

C.C.P. § 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a Court of competent jurisdiction cannot be contradicted by the parties to it.

Within Part IV this does serve some definitional purpose. C.C.P. § 1978 says: "No evidence is by law made conclusive or unanswerable, unless so declared by this code." There are some declarations in Part IV (and elsewhere) which employ the term "conclusive." Among them is § 1962:

> The following presumptions, and no others, are deemed conclusive:
>
> 1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;
>
> 2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;
>
> 3. Whenever a party has, by his own declaration, act, of omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;
>
> 4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;
>
> 5. Notwithstanding any other provision of law, [1] the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;
>
> 6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;
>
> 7. Any other presumption which by statute is expressly made conclusive.

It is apparent from examination that only one of these categories even fits the terminology of presumption. This is subsection (5). In Kusior v. Silver, 54 Cal.2d 603, 619, 354 P.2d 657, 7 Cal. Reptr. 129 (1960), the Supreme Court affirmed, in dictum, the stability of this "presumption," but pointed out that "A conclusive

presumption is in actuality a substantive rule of law . . . ."

The other subsections do not even have the virtue of sounding like presumptions. Subsection (1) is not a case of one fact deduced from the existence of another but a mere tautology -- deliberate commission of an unlawful act for the purpose of injuring another is not merely evidence of malice, it is malice. As the Supreme Court said in People v. Gorshen, 51 Cal.2d 716, 731, 330 P.2d 492, (1959):

> This 'conclusive presumption' has little meaning, either as a rule of substantive law or as a rule of evidence, for the facts of deliberation and purpose which must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent.

Subsection (3) states the principal ingredients of estoppel. Subsection (4) was a general common law rule subject to some exceptions not stated in the section. Yuba River Sand Co. v. Marysville, 78 Cal. App. 2d 421, 177 P.2d 642 (1947) (tenant can deny title when landlord sues to quiet title as well as for possession). Subsection (6) appears to be a reference over to the matter covered by C.C.P. § 1908, discussed below. Subsection (7) appears designed to incorporate such things as Labor Code § 3501 (certain persons conclusively presumed dependent upon employee for workmen's compensation purposes).

> The effect of a judgment or final order in an action or special proceeding before a court or judge of this State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.
>
> 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive

> between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

This is an attempt to state the mid-nineteenth century conception of the operation of the doctrine of res judicata. It has had no discernible effect upon the formulation and development of that doctrine in California, however; here as elsewhere the law has looked to the policy bases. See Comment, Res Judicata in California, 40 Calif. L. Rev. 411 (1952).

The same may be said of C.C.P. § 1913 (full faith and credit to judgments of sister states) and § 1915 (judgments of foreign countries).

The preceding discussion relates to use of the word "conclusive" in other parts of Part IV. The Commissioners had something else -- or something additional -- in mind. The example contained in the section itself, that a record of a court of competent jurisdiction cannot be contradicted by the parties to it, is not a problem of "judicial evidence" as § 1823 defines it and still less within the scope of the term "evidence" defined in Revised URE 1(1). It is rather a problem of establishing the sanctity of a record on appeal. This was the problem in Hahn v. Kelly, 34 Cal. 391 (1868), the case cited by the Commissioners' Note; the holding in substance was that the inquiry into jurisdiction was limited to matters properly included in the judgment roll, on which the appeal in that case had been taken. It remains the California view that inquiry cannot go behind the record on a collateral attack; the appropriate remedy is by a direct attack on the judgment in the court which rendered it. When the judgment is a foreign judgment, inquiry may go behind the record. See 3 Witkin, California Procedure 2046-50 (1954). As such, this is not a rule

of evidence at all but a procedural limitation upon collateral attack. It exists quite independently of § 1837.

C.C.P. § 1903 provides:

> The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

The cases abound with statements that statutes are "presumed" to be constitutional; one of the latest is In re Cregler, 56 Cal. 2d 308, 311, 363 P.2d 305, , 14 Cal. Reptr. 289, (1961). A few cases are more in point. Galeener v. Honeycutt, 173 Cal. 100, 159 Pac. 595 (1916), states that the findings of the legislature, express or implied, are conclusive. The section was not cited, however. Analytically, it would seem that this is not an evidence problem. To the extent that the proposition is valid, it is a statement that the court cannot inquire into the legislative premises, not that they must accept the facts as true. Indeed, the section so indicates -- acceptance of the fact is for the sole purpose of sustaining the validity of the statute.

A final possible application of the concept of "conclusive" in an evidence setting is the type of case mentioned in Blank v. Coffin, 20 Cal. 2d 457, 461, 126 P.2d 868, (1942). This is the situation in which there is some evidence, enough standing by itself to warrant a finding of fact. But "If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the non-existence of the fact has been established as a matter of law." This rule is distinguishable on two grounds. Such evidence is

conclusive not because the law does not permit contradiction but because there has not been enough of it. Secondly, it applies not to any particular item of evidence but to the whole record.

Does this section serve any purpose as a definition? If Part IV will continue to treat doctrines of substantive law, of estoppel and of res judicata as matters of evidence, the definition provided by this section seems possible useful, although far from necessary. In the light of the definition of "evidence" stated in Revised URE 1(1), to say that evidence is conclusive is self-contradictory. Evidence is that which is offered to prove the existence of a fact; under Rule 1(2) relevant evidence is that which has any tendency in reason to prove or disprove any disputed fact. The kinds of conclusive evidence defined in Part IV are, without exception, it seems, instances in which as a matter of policy the fact cannot be disputed. Writers have long noted that a conclusive presumption is merely a rule of law. Witkin, Evidence 81 (1958). Even less apart of evidence law are the other instances of so-called conclusive evidence explored above; they do not result from drawing inferences from other facts. For reasons wholly apart from probabilities we are unwilling to examine a factual predicate.

The thrust of such an argument is that C.C.P. § 1837 be repealed and that the word be eliminated from § 1828(3). Whether any of the other sections discussed (as well as others not mentioned) which purport to employ the concept should be retained at all, or transferred to other places in Part IV, is a separate question. The answer to it must await individual consideration of those sections.

C.C.P. § 1838. Cumulative evidence is additional evidence of the same character, to the same point.

This definition has several significations. The court may prevent repeated examination of the same witness when the question has already been "asked and answered." Spitter v. Kaeding, 133 Cal. 500, 503, 65 Pac. 1040, (1901). And it may limit proof of the same thing from other sources where the issue is already adequately proved. The last sentence of C.C.P. § 2044 reads: "The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt." But when the issue is still in doubt the tribunal may not refuse to hear further testimony on the ground that it is merely cumulative. Evans v. Industrial Acc. Comm'n, 71 Cal. App. 2d 244, 162 P.2d 488 (1945).

That evidence is cumulative may have significance at another stage of the proceedings. Newly discovered evidence which is merely cumulative usually is not sufficient support for a motion for a new trial under C.C.P. § 657(4). Dayton v. Landon, 192 Cal. App. 2d 739, 13 Cal. Reptr. 703 (1961). But this is not a hard and fast rule. See 3 Witkin, California Procedure 2058-59 (1954).

Neither of the two sections mentioned employs the term "cumulative", although cases under both of them do. For that reason alone, it seems advisable to retain some form of definition of the term.

C.C.P. § 1839. Corroborative evidence is additional evidence of a different character, to the same point.

Section 1844 provides that the direct evidence of one witness is sufficient for proof of any fact, except perjury and treason. This exception is reenforced by C.C.P. § 1968 and enlarged by other sections discussed below. Treason requires two witnesses. Calif. Const. art. I, § 20. Perjury may be proved by two witnesses, or one witness and corroborating circumstances. P.C. § 1103a. Similar requirements are imposed by P.C. § 1108 (abortion or inducing previously chaste woman into prostitution; her testimony not sufficient unless corroborated); P.C. § 1110 (no conviction of obtaining by oral false pretense unless making of the pretense is shown by two witnesses, or one and corroborating circumstances); P.C. § 1111 (testimony of accomplices); P.C. § 653F (solicitation to commit certain felonies). Increasingly, the corroborating circumstances may be very slight. E.g., People v. Kutz, 187 Cal. App. 2d 431, 436, 9 Cal. Reptr. 626, (1960):

> corroborating evidence need not by itself establish that the crime was committed or show any element thereof, but must relate to some act or fact of the offense and connect the defendant with this act or fact independently of the testimony of the abortee.

(Under the view announced in People v. O'Donnell, discussed under § 1832 supra, this generalization may not be applicable to perjury prosecutions.)

Divorces cannot be granted upon the uncorroborated testimony of the parties. Civ. C. § 130.

There is, of course, no comparable provision in the URE. Because there are so many instances in which the term is employed, there may be need for a central definition of the expression. The present form, however, is somewhat misleading. It is apparent that the corroboration required under the Penal Code provisions particularly might be satisfied

by evidence defined in § 1838 as cumulative ("additional evidence of the same character to the same point") as well as that defined under the present section as corroborative ("different character"). It seems apparent that the Code Commissioners' employed cumulative in the sense of unnecessarily duplicative, for their note refers to proof of that which "has already been established by other evidence." (emphasis added)