#34 7/20/64

First Supplement to Memorandum 64-45

Subject: Study No. 34 - Uniform Rules of Evidence (Evidence Code--Division 6--Witnesses.)

Since preparing the principal memorandum on Witnesses, we received Comments on the Commission's tentative recommendation on this subject from the Special Committee of the Conference of California Judges. Questions raised by these Comments are presented herein for Commission consideration. (The Rule and subdivision references in these comments have been changed to direct your attention to the appropriate section numbers as compiled in the proposed Evidence Code).

General

Except for questions specifically raised herein, the Judges' Committee generally approves the tentative recommendation of the Commission. Hence only questions that expose areas of differences are specifically raised herein.

Section 701.

The Judges' Committee recommends restoring the URE phrase "if the Judge finds" in the introductory language in this section. The Committee comments that "the qualification of a witness is necessarily a question for the judge; so, to eliminate the phrase, 'if the judge finds that,' creates an uncertainty."

The staff recommends against approval of this suggestion. A conscientious effort has been made to eliminate the phrase "if the judge finds" throughout the Evidence Code wherever it is unnecessary. It is not necessary in Section 701 because the subject of this section is covered by Evidence Code Section 405, providing in part "The judge shall determine

the existence or nonexistence of the preliminary fact . . . . ."

The second point raised by the Judges' Committee in connection with this section is the suggestion to delete the phrase "by the judge and jury" following the word "understood" in subdivision (a), The Judges' Committee states that this phrase adds nothing to the substance of the section.

Section 702.

The Judges' Committee recommends restoring the URE "prerequisite" language to this section. This is coupled with two other suggestions. First, the Committee suggests that the phrase "provided that the requirement of personal knowledge is deemed waived unless there is objection" should be added to the section; second, The Committee recommends that the discretionary authority of the judge to receive testimony conditionally, subject to the showing of the witness' personal knowledge being later supplied in the course of the trial, should be deleted from this section. The net effect of this suggestion is that, against objection of a party, a witness' personal knowledge must be shown "before the witness is permitted to give any testimony". The Committee comments in support of this recommendation as follows:

> The difficulty of erasing from the minds of the jury that which they already heard is well known. If evidence is received and the jury later instructed to disregard it, it is difficult for the jury to heed the court's admonition to disregard such testimony. Conversely, we can conceive of no particular difficulty in requiring, as a prerequisite, proof of personal knowledge prior to the giving of relevant or material testimony.

Section 702 eliminates specific language indicating that the judge can receive the testimony of a witness conditionally subject to evidence

of his personal knowledge being later supplied in the course of the trial. This identical matter is covered in Section 403(b), dealing generally with proffered evidence as to the existence of the preliminary fact. (Subdivision (a)(2) of Section 403 refers specifically to the personal knowledge required of a witness.) Hence, the Committee's suggestion in regard to this matter is already reflected in Section 702 as presently drafted.

Though not dealt with specifically, the question of waiver is substantively covered by Evidence Code Section 353, which provides in part that a "finding shall not be set aside . . . by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ."

Similarly, the "prerequisite" language suggested by the Committee is not specifically included in the Evidence Code, this matter is substantively treated in Section 403. The Commission previously approved the deletion of the "prerequisite" language for reasons exactly opposite to that mentioned in the comment by the Judges' Committee, namely, that the Commission did not want to make it explicitly clear that personal knowledge must be shown as "prerequisite" to the giving of testimony by a witness, i.e., explicitly stating that a personal knowledge foundation must be laid before a witness is permitted to testify. Under both the existing law and the proposed statute as drafted, it is clear that this must be done; however, this is not made as explicitly clear as it would be by accepting the suggestion of the Judges' Committee. In light of the strong views expressed by the Commission in this regard, the staff makes no recommendation in regard to this suggestion. However, if

the Commission desires to put in explicit language regarding this matter, the staff suggests the following to accomplish this purpose, changing subdivision (a) of Section 702 to read:

> (a) Except as provided in Section 721, the testimony of a witness concerning a particular matter is inadmissable unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown as a prerequisite for the testimony of the witness.

It should be noted that the Judges' Committee approved including explicit reference to the power of the judge to reject the testimony of a witness concerning a matter if the witness does not have personal knowledge thereof. While this matter also is covered by Section 403 (regarding the judge's authority with respect to findings of preliminary fact) the Commission previously disapproved including specific language in this section.

Section 710

The Judges' Committee recommends the deletion of the specific reference in this section to "Chapter 3 (commencing with Section 2093) of Title 6 of Part 4 of the Code of Civil Procedure," which presently sets forth the form of oath, affirmation, or declaration. Instead, the Committee would substitute a reference to "as required by law" for the reason that "the code section, or its number, may be changed at any time."

The Commission previously considered this problem and specifically rejected the original URE language containing a broad reference to "as required by law", preferring instead that the specific reference be included. The staff believes that the specific reference is helpful since

the section refers to "in the form provided by law." In accord with the Commission's previous decision, the staff recommends against changing the present language. However, the staff does not feel strongly one way or the other in regard to this matter.

Section 750

Insofar as this section relates to interpreters and, therefore, is a restatement of subdivision (2) of Rule 17, the Judges' Committee approved this section.

Sections 781, 785, and 788

The comments of the Judges' Committee relate specifically to Section 781 only. (Section 785 is a restatement of subdivision (3) of Rule 20, as to which the judges had no specific comment but apparently approved sub silentio; Section 788 is new and supersedes subdivision (2) of Rule 20, as to which the judges had no specific comment but apparently approved sub silentio.)

The Judges' Committee had two specific comments in regard to Section 781. First, they comment that "no purpose is served by substituting the word 'attacked' or 'impaired' (URE) for the word 'impeached' which has a common meaning in law." The staff believes that the word "attack" is more appropriate than either of the other words since both "impaired" and "impeached" preperly relate to the effect of the evidence rather than the purpose for which it is admitted. Second, the Committee would substantially revise Section 781 to read in substance as follows:

> The credibility of a witness may be attacked (impeached) or supported by any party, ~~including the party calling him~~, providing the party calling him first shows that reasonable diligence was employed to ascertain what the nature of the

witness' testimony would be, and the actual testimony is different.

The effect of this suggestion would be to substantially re-enact the present law (which requires surprise and damaging testimony) and would emasculate the theory of permitting a party to attack the credibility of his own witness. The staff believes that the Commission's current recommendation, that eliminates the theory of a party vouching for the credibility of a witness for all of the reasons mentioned in its original comment to Rule 20 (see printed pamphlet on Witnesses at 714), is a sound rule and a desirable change in existing law. Hence, the staff recommends against changing Section 718 in the manner suggested by the Judges' Committee.

Section 784

In accord with the comments received from the two district attorneys (see Exhibits I and II to Memorandum 64-45), the Judges' Committee strongly condemns what is now subdivision (a) of Section 784 and notes that "all members of the committee are in agreement that subdivision [(a)] should be eliminated." For the reasons mentioned in the principal memorandum and in light of this additional condemnation, the staff renews its recommendation that subdivision (a) of Section 784 be eliminated.

The Judges' Committee was divided as to what is now subdivision (b) of Section 784. "Some members of the committee believe that subdivision [(b)] should be amended to make the conviction of a felony always admissible to attack the credibility of a witness, provided that prima facie evidence of conviction is available. Other members of the committee

believe that subdivision [(b)] should be adopted substantially as proposed by the Commission, except that [paragraph (2)] should be amended to provide that such evidence is admissible only if the party attacking his credibility produces prima facie evidence of conviction." Thus, while there is disagreement as to the merits of this subdivision, the committee appears to be in accord that paragraph (2) of this subdivision should be amended to require the production of competent evidence of conviction rather than, as at present, attempting to retain the existing law in regard to permitting the conviction to be shown by the testimony of the witness himself (but adding the requirement that competent evidence of the conviction is available, if required). The staff strongly recommends against making any substantive change in subdivision (b) that would permit impeachment by the showing of any felony and suggests that the existing language in this regard (modified as suggested in Memorandum 64-45 at pages 16-17) be retained. However, the staff feels that there is some merit in requiring independent evidence of the record of conviction to be produced before the credibility of a witness may be attacked by such record. Accordingly if the Commission approves the judges' recommendation in this regard, the staff recommends that paragraph (2) of subdivision (b) of Section 784 be revised to read as follows:

> (2) The party attacking the credibility of the witness has produced competent evidence of the record of conviction.

The Judges' Committee was similarly divided as to subdivision (c) of Section 784. "Some members of the committee believe that subdivision (3) should be eliminated entirely; other members of the committee believe it should be amended so as to permit the various items mentioned there-

under to be used as rebuttal by the witness sought to be impeached." The staff strongly recommends against either of these suggestions. Paragraph (2) of subdivision (c) states existing California law as explicitly stated in Sections 2051 and 2065 of the Code of Civil Procedure. Paragraphs (1), (3), and (4) of subdivision (3) are logical extensions of the present policy based upon a desire to eliminate the present illogical distinctions arising from the type of conviction (i.e., whether felony or misdemeanor) and the type of rehabilitation (i.e., whether a certificate of rehabilitation following a state prison sentence for a felony, or rehabilitation of a probationer, whether a felon or a misdemeanant (Penal Code Section 1203.4), or rehabilitation of a misdemeanant who was not granted probation (Penal Code Section 1203.4a), or rehabilitation of a juvenile (Penal Code Section 1203.45)). Paragraph (5) of Subdivision (c) of Section 784 is included to provide similar treatment to persons who have been convicted for a crime in another jurisdiction and relieved of the penalties and disabilities therefrom pursuant to substantially equivalent provisions. Hence, the staff strongly urges that this subdivision be retained intact for the purpose of making a substantial improvement in the present chaotic law.

Sections 768 and 769

These sections are based in part on subdivision (1) of Rule 22. The Committee suggests that "in all fairness to the witness he should have an opportunity to examine the written statement or writing claimed to be contradictory, before being required to answer concerning the prior statement." For this reason, "and because it is contrary to the theory of discovery in California" the Committee suggests in effect that the existing law be retained, thereby requiring a party to exhibit to the witness a writing made by him that is inconsistent with any part of his testimony before examining him concerning the inconsistency. For the several reasons mentioned in the comments to these sections, the staff recommends that the existing language be retained and that the Committee's recommendation in this regard be disapproved.

Section 787

The Committee suggests that the following be added at the end of subdivision (a) of this section (new matter underlined):

> (a) The witness was so examined while testifying as to give him an opportunity to identify, explain, or deny the statement <u>at the time the prior statement is first offered in evidence</u>.

The staff is not quite sure what the Judges' Committee intends by this suggested addition in language. Apparently, the Committee would require that a witness be examined so as to give him an opportunity to identify, explain, or deny the statement coincidentally with the introduction of the prior inconsistent statement. This is contrary to the Commission's primary purpose in permitting the judge to exclude such evidence and permitting an attack on the credibility of several different witnesses who are parties to a prior inconsistent statement in writing--i.e., if the judges' recommendation were adopted, it would appear that a single written statement that affects the credibility of several witnesses could not be used effectively to attack the credibility of each of the witnesses since the statement would have to be disclosed during the examination of the first witness.

The Committee further recommends that subdivision (b) of this section be eliminated for the reason that "the witness should have an opportunity at any time to refute prior inconsistent statements." This is precisely what is accomplished by the present language in that the judge has discretionary authority to exclude extrinsic evidence of the prior inconsistent statement if the witness has been excused from giving further testimony in the action. The staff thus recommends against making any change in this section.

[The staff believes that there may be some misunderstanding with respect to the operation of Sections 768, 769, and 788. Insofar as these sections relate to the admissability of extrinsic evidence of a witness' prior statement in writing that is inconsistent with any part of his testimony, the effect of these sections is as follows. The examining party need not disclose any information concerning the writing nor exhibit the

writing to the witness (Sections 768 and 769), but the judge may exclude extrinsic evidence (e.g., the writing itself) unless the witness was so examined as to give him an opportunity to identify, explain or deny the statement or the witness has not been excused from giving further testimony (Section 788). We believe this treatment of prior written statements, which is generally consistent with the present law's treatment of prior oral statements, is superior to the existing California law. Hence, we recommend that no changes be made in these sections.]

The Judges' Committee raised no other questions in regard to this subject.

Respectfully submitted,

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DIVISION 6. WITNESSES

CHAPTER 1. COMPETENCY

§ 700. General rule as to competency.

700. Except as otherwise provided by statute, every person is qualified to be a witness and no person is disqualified to testify to any matter.

§ 701. Disqualification of witness.

701. A person is disqualified to be a witness if he is:

(a) Incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him; or

(b) Incapable of understanding the duty of a witness to tell the truth.

§ 702. Personal knowledge.

702. (a) Subject to Section 721, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter.

(b) Evidence of a witness' personal knowledge of a matter may be provided by his own testimony.

§ 703. Judge as witness.

703. Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. If, after such objection, the judge finds that his testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another judge.

§ 704. Juror as witness.

704. (a) A member of a jury, sworn and empaneled in the trial of an action, may not testify in that trial as a witness. If the judge finds that the juror's testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another jury.

(b) This section does not prohibit a juror from testifying as to the matters covered by Section 1150 or as provided in Section 1120 of the Penal Code.

CHAPTER 2. OATH AND CONFRONTATION

§ 710. Oath required.

710. Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by Chapter 3 (commencing with Section 2093) of Title 6 of Part 4 of the Code of Civil Procedure.

§ 711. Confrontation.

711. At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

CHAPTER 3. EXPERT WITNESSES

Article 1. Expert Witnesses Generally

§ 720. Qualification as an expert witness.

720. (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

(b) Evidence of a witness' special knowledge, skill, experience, training, or education may be provided by his own testimony.

(c) In exceptional circumstances, the judge may receive conditionally the testimony of a witness as an expert, subject to evidence of his special knowledge, skill, experience, training, or education being later supplied in the course of the trial.

§ 721. Testimony by expert witness.

721. A person who is qualified to testify as an expert may testify:

(a) To any matter of which he has personal knowledge to the same extent (including testimony in the form of an opinion) as a person who is not an expert.

(b) To any matter of which he has personal knowledge if such matter is within the scope of his special knowledge, skill, experience, training, or education.

(c) Subject to Section 801, in the form of an opinion upon a subject that is within the scope of his special knowledge, skill, experience, training, or education.

§ 722. Cross-examination of expert witness.

722. (a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to his qualifications and as to the subject to which his expert testimony relates.

(b) A witness testifying as an expert in the form of an opinion may not be cross-examined in regard to the content or tenor of any publication unless he referred to, considered, or relied upon such publication in arriving at or forming his opinion.

§ 723. Credibility of expert witness.

723. (a) The fact of the appointment of an expert witness by the judge may be revealed to the trier of fact as relevant to the credibility of such witness and the weight of his testimony.

(b) The compensation and expenses paid or to be paid to an expert witness not appointed by the judge is a proper subject of inquiry as relevant to his credibility and the weight of his testimony.

§ 724. Limit on number of expert witnesses.

724. The judge may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.

Article 2. Appointment of Expert Witness by Court

§ 730. Appointment of expert by court.

730. When it appears to the judge, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the judge on his own motion or on motion of any party may appoint one or more persons to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or may be required. The judge may fix the compensation for such services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at such amount as seems reasonable to the judge in the exercise of his discretion.

§ 731. Payment of expert appointed by court.

731. (a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court.

(b) In any county in which the procedure prescribed in this article has been authorized by the board of supervisors, on order of the court in any civil action, the compensation so fixed of any medical expert or experts shall also be a charge against and paid out of the treasury of such county. Except as otherwise provided in this section, in all civil actions, such compensation shall, in the first instance, be apportioned and charged to the several parties in such proportion as the judge may determine and may thereafter be taxed and allowed in like manner as other costs.

§ 732. Calling and examining court-appointed expert.

732. Subject to Article 1 (commencing with Section 720), any person appointed by the court under Section 730 may be called and examined by any party to the action or by the court itself. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 774 to cross-examine the witness and to object to the questions asked and the evidence adduced.

§ 733. Right to produce other evidence.

733. Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence as to such fact or matter, but where other expert witnesses are called by a party to the action, they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees.

CHAPTER 4. INTERPRETERS AND TRANSLATORS

§ 750. Rules relating to witnesses apply to interpreters.

750. An interpreter or translator is subject to all the rules of law relating to witnesses.

§ 751. Interpreters for witnesses.

751. (a) When a witness, including a witness who cannot communicate in the English language, is incapable of expressing himself concerning the

matter so as to be understood by the judge and jury directly, an interpreter who can understand him shall be sworn to interpret for him.

(b) The interpreter shall be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

§ 752. Translators of writings.

752. (a) When the written characters in a writing offered in evidence, including a writing in any language other than the English language, are incapable of being deciphered or understood by the judge and jury directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

(b) The translator shall be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

§ 753. Interpreters for deaf in criminal and commitment cases.

753. (a) As used in this section, "deaf person" means a person with a hearing loss so great as to prevent his understanding normal spoken language with or without a hearing aid.

(b) In any criminal action where the defendant is a deaf person, all of the proceedings of the trial shall be interpreted to him in a language that he can understand by a qualified interpreter appointed by the court.

(c) In all cases where the mental condition of a person who is a deaf person is being considered and where such person may be committed to a mental institution, all of the court proceedings pertaining to him shall be

interpreted to him in a language that he understands by a qualified interpreter appointed by the court.

(d) An interpreter appointed under this section shall take an oath that he will make a true interpretation to the person accused or being examined of all the proceedings of his case in a language that he understands and that he will repeat such person's answers to questions to counsel, judge, or jury, in the English language, with his best skill and judgment.

(e) Interpreters appointed under this section shall be paid for their services a reasonable sum to be determined by the judge, which shall be a charge against the county.

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions and Construction

§ 760. Direct examination.

760. The examination of a witness by the party producing him is denominated the direct examination.

§ 761. Cross-examination.

761. The examination of a witness by any party other than the party producing him is denominated the cross-examination.

§ 762. Leading question.

762. A question that suggests to the witness the answer that the examining party desires is denominated a leading question.

§ 763. Parties represented by same attorney.

763. For the purpose of this division, parties represented by the same attorney are deemed to be a single party.

Article 2. Examination of Witnesses

§ 765. Judge to control mode of interrogation.

765. (a) The judge shall exercise reasonable control over the mode of interrogation of a witness so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of truth, as may be.

(b) Subject to subdivision (a) and Section 352, the parties may ask a witness such legal and pertinent questions as they see fit.

§ 766. Responsive answers.

766. A party examining a witness is entitled to answers that are responsive to his questions, and answers that are not responsive shall be stricken on motion of any party.

§ 767. Leading questions.

767. A leading question may not be asked of a witness on direct examination except in the sound discretion of the judge where, under special circumstances, it appears that the interests of justice require it.

§ 768. Writings.

768. (a) In examining a witness concerning a writing, including a statement made by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to show, read, or disclose to him any part of the writing.

(b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

§ 769. Inconsistent statement or conduct.

769. In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.

§ 770. Refreshing recollection with a writing.

770. If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, the writing must be produced at the request of any party, who may, if he chooses, inspect the writing, cross-examine the witness concerning it, and read it to the jury.

§ 771. Cross-examination.

771. Subject to the limitations of Chapter 6 (commencing with Section 780):

(a) A witness called by one party may be cross-examined on any fact or matter relevant to the action by all other parties to the action in such order as the judge directs.

(b) Notwithstanding subdivision (a), a defendant in a criminal action who testifies in that action upon the merits before the trier of fact may be cross-examined only as to those matters about which he was examined in chief.

§ 772. Order of examination.

772. Unless the judge otherwise directs, the direct examination of a witness must be concluded before the cross-examination of the same witness begins.

§ 773. Re-examination.

773. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by another party to the action. Leave is granted or withheld in the exercise of the sound discretion of the court.

§ 774. Judge may call witnesses.

774. The judge on his own motion may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the judge directs.

§ 775. Cross-examination of another party or witness.

775. A party to the record of any civil action, or a person for whose immediate benefit such action is prosecuted or defended, or a director, officer, superintendent, member, agent, employee, or managing agent of any such party or person, or any public employee of a public entity when such public entity is a party to the action, may be called and examined by any other party to the action as if under cross-examination at any time during the presentation of evidence by the party calling the witness. The party calling such witness is not bound by his testimony, and the testimony of such witness may be rebutted by the party calling him for such examination by other evidence.

A witness examined under the provisions of this section may be cross-examined by all other parties to the action in such order as the judge directs, but the attorney for the party with whom the witness is identified may cross-examine such witness only as if under direct examination.

§ 776. Exclusion of witnesses.

776. (a) Subject to subdivisions (b) and (c), if any party requests it, the judge may exclude from the courtroom any witness of another party not at the time under examination so that such witness cannot hear the testimony of other witnesses.

(b) A party to the action cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

§ 777. Recall of witnesses.

777. After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave is granted or withheld in the exercise of the sound discretion of the court.

CHAPTER 6. CREDIBILITY OF WITNESSES

Article 1. Credibility Generally

§ 780. Credibility of witnesses generally.

780. Except as otherwise provided by rule of law, the credibility of a witness may be affected by any statement or other conduct that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any fact or matter about which he testifies.

(d) The extent of his opportunity to perceive any fact or matter about which he testifies.

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other improper motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact or matter testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

Article 2. Attacking or Supporting Credibility

§ 781. Parties may attack or support credibility.

781. The credibility of a witness may be attacked or supported by any party, including the party calling him.

§ 782. Character evidence generally.

782. Evidence of traits of his character other than honesty or veracity or their opposites is inadmissible to attack or support the credibility of a witness.

§ 783. Specific instances of conduct.

783. Subject to Section 784, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

§ 784. Conviction of witness for a crime.

784. (a) In a criminal action, evidence of the defendant's conviction for a crime is inadmissible for the purpose of attacking his credibility as a witness unless he has first introduced evidence of his character for honesty or veracity for the purpose of supporting his credibility.

(b) Subject to subdivision (c), evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibility unless the judge, in proceedings held out of the presence and hearing of the jury, finds that:

(1) An essential element of the crime is deception or false statement; and

(2) The party attacking the credibility of the witness can produce, if required, competent evidence of the record of conviction.

(c) Evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibility if:

(1) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

(2) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(3) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4 or 1203.4a.

(4) The record of conviction has been sealed under the provisions of Penal Code Section 1203.45.

(5) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in paragraph (2), (3), or (4).

§ 785. Good character of witness.

785. Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking his credibility.

§ 786. Religious belief.

786. Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.

§ 787. Inconsistent statement of witness.

787. If offered for the purpose of attacking the credibility of a witness, extrinsic evidence of a statement made by the witness that is inconsistent with any part of his testimony at the hearing may be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to identify, explain, or deny the statement;

(b) The witness has not been excused from giving further testimony in the action; or

(c) The statement is alleged to have been made after the witness had been excused from giving further testimony in the action.

§ 788. Prior consistent statement of witness.

788. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement.

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

DIVISION 6. WITNESSES

§ 700. General rule as to competency

Comment. Section 700 declares that, except as otherwise provided by statute, "Every person is qualified to be a witness" and "no person is disqualified to testify to any matter." This section thus states a broad rule of competency that is limited only by specific statutory statement. It is based on subdivisions (a) and (c) of the Uniform Rules of Evidence.

There are several sections in this article and elsewhere that contain specific limitations on Section 700. Thus, Section 701 states the minimum capabilities that a person must possess to be a witness, i.e., the ability to communicate and an understanding of the duty to tell the truth. Section 702 requires that a person have personal knowledge in order to testify as a witness concerning a particular matter. Sections 703 and 704 preclude judges and jurors from testifying under certain conditions. Section 710 requires that every witness testify under oath. Various other sections relate to the special qualifications required of a person in order to testify as an expert.

Considered in connection with the various sections that limit or restrict the application of this section, Section 700 thus sets forth a general scheme regarding the competency and qualification necessary to be a witness. Under this scheme, matters that relate to a witness' ability or opportunity to perceive a particular matter or his memory, mental competence, experience, and the like, go to the weight to be given his testimony rather than to his right to testify at all concerning a particular matter (unless, of course, the witness'

capabilities are so deficient that they negate the existence of any of these requisites, such as personal knowledge (Section 702) or the matters mentioned in Section 701).

In many respects, this scheme is similar to the present California law, for Code of Civil Procedure Section 1879 declares the general rule that "all persons . . . who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses." This general rule specifically is made subject to the rules of disqualification on the basis of insanity, infancy, and the dead man statute (CODE CIV. PROC. § 1880, superseded by this article) and privilege (CODE CIV. PROC. § 1881, superseded by Division 8). In addition, the witness must take an oath to testify truthfully--or make an affirmation or declaration to the same effect--and must have an understanding of the oath. CODE CIV. PROC. §§ 1846 (oath requirement, continued in effect by Section 701(b)), 2094-2097 (form of oath, affirmation, or declaration). Other code sections limit testimony in particular cases or circumstances. Penal Code Section 1321 makes the rules of competency in criminal cases the same as in civil cases unless otherwise specifically provided.

The principal effect of this general scheme upon the existing California law is considered in the discussion of each of the separate sections containing limitations upon Section 700. See, particularly, the Comment to Section 701.

§ 701. Disqualification of witness

Comment. Section 701 relates to the minimum capabilities that a person must possess to be a witness. Under existing California law, the competency of a witness depends upon his ability to understand the oath and to perceive, recollect, and communicate. "Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact." People v. McCaughan, 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957). On the other hand, Section 701 requires merely the ability to communicate and the ability to understand the duty to tell the truth. The two missing qualifications--the ability to perceive and to recollect--are found only to a very limited extent in Section 702, which permits the trial judge to exclude the testimony of a witness where it is obvious that the witness does not have "personal knowledge" (as, for example, where his knowledge of the event is derived solely from the statements of others).

The practical effect of Section 701 (together with Section 702) is to change the nature of the judge's inquiry regarding the competency of a child or a person suffering from mental impairment to testify concerning an event. These sections have little significant effect on existing law with respect to other persons as witnesses. As the following discussion indicates, these sections in some cases would permit testimony by children and persons suffering from mental impairment who are disqualified from testifying under existing law. But, in such cases, where a person an communicate adequately, can understand the duty to tell the truth, and has personal knowledge, the sensible course of action is to put the person on the stand and to let him tell his story for what it may be worth. The trier of fact can consider his immaturity or mental condition in determining the credibility of his testimony. The alternative--to exclude the testimony--may deprive the trier of fact

of the only testimony available.

Children. Code of Civil Procedure Section 1880(2) (superseded by Sections 700-702) provides that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," are incompetent as witnesses. This section means that a child under 10 must possess sufficient intelligence, understanding, and ability to receive and fairly accurately recount his impressions, and he must have an understanding of the nature of an oath and a moral sensibility to realize that he should tell the truth and that he is likely to be punished for a falsehood. People v. Burton, 55 Cal.2d 328, 341, 11 Cal. Rptr. 65, 69-70, 359 P.2d 433, 437-438 (1961). If the judge is not persuaded that the child has these abilities, the child is disqualified as a witness.

Under Section 701, the judge makes no similar inquiry as to the witness' ability to perceive and to recollect, except to the extent that these matters are necessary to determine whether the child has the requisite personal knowledge under Section 702 (which requires the judge to permit the child to testify if any trier of fact could reasonably conclude (see Section 403) that the child has the ability to perceive and to recollect). It is unlikely, however, that the difference in the nature of the judge's inquiry would result in any great change in actual practice. Under existing law, as under Sections 701 and 702, the person objecting to the testimony of the child has the burden of showing incompetency. People v. Craig, 111 Cal. 460, 469, 44 Pac. 186, 188 (1896); People v. Gasser, 34 Cal. App. 541, 543, 168 Pac. 157, 158 (1917); People v. Holloway, 28 Cal. App. 214, 218, 151 Pac. 975,

977 (1915). Moreover, the determination of competency is primarily within the judge's discretion, and the California cases indicate that children of very tender years are commonly permitted to testify. WITKIN, CALIFORNIA EVIDENCE § 389 (1958). See Bradburn v. Peacock, 135 Cal. App.2d 161, 164-165, 286 P.2d 972, 974 (1955) (held, it was reversible error to refuse to permit a child to testify without conducting a voir dire examination to determine his competency. "We cannot say that no child of 3 years and 3 months is capable or receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that no child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5." (Emphasis in original.)).

Persons "of unsound mind." Code of Civil Procedure Section 1880 (1) (superseded by Sections 700-702) provides that "those who are of unsound mind at the time of their production for examination" cannot be witnesses. But the test is the same as for other witnesses under California law--an understanding of the oath and the ability to perceive, recollect, and communicate; and if, for example, a proposed witness suffers from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event. People v. McCaughan, 49 Cal.2d 409, 421, 317 P.2d 974, 981 (1957). Although the trial judge determines whether the person is competent as a witness, "sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not simply whether or not an act was done but, rather, the manner in which

it was done and in which testimony as to details may mean the difference between conviction and acquittal." Id. at 421, 317 P.2d 981-982.

Sections 701 and 702 significantly change the nature of the inquiry the judge makes to determine the competency of a person suffering from mental impairment. Under existing law, the judge must be persuaded that a person of "unsound mind" has the ability to perceive and recollect; whereas, under these sections, the judge must permit such person to testify if any trier of fact could conclude that he has the ability to perceive and to recollect, i.e. "personal knowledge" under Section 702. See Section 403. See the Comment to Section 702.

The Dead Man Statute. The repeal of the Dead Man Statute (CODE CIV. PROC. § 1880(3) is recommended elsewhere. See the Comment to Code of Civil Procedure Section 1880. Hence, this statute would no longer be a ground for disqualification of a proposed witness.

§ 702. Personal knowledge

Comment. Section 702 concerns the qualifications which a person who is otherwise competent to be a witness must possess in order to testify concerning a particular matter. It deals only with the qualifications of a witness who is not testifying as an expert. (The qualifications of an expert witness are set forth in Article 1 (commencing with Section 720) of Chapter 3.)

Subdivision (a). Subdivision (a) restates the substance of and supersedes Code of Civil Procedure Section 1845, which requires that a witness must have personal knowledge of the subject about which he testifies. "Personal knowledge" means an impression derived from the exercise of the witness' own senses. 2 WIGMORE, EVIDENCE § 657 at 762 (3d ed. 1940).

Although Section 702 requires the testimony of a witness to be based on his personal knowledge, testimonial evidence not based on the witness' personal knowledge is competent in the absence of timely objection or motion to strike. (Section 353 permits inadmissible evidence to be received and relied on by the court unless there is a timely objection or motion to strike.) This is existing California law. Under existing law, as under Section 702, an objection must be made to the testimony of a witness who does not have personal knowledge; and, if there is no reasonable opportunity to object during the direct examination, a motion to strike is appropriate after lack of knowledge has been shown on cross-examination. Fildew v. Shattuck & Mimmo Warehouse Co., 39 Cal. App. 42, 46, 177 Pac. 866, 867 (1918)(objection to question properly sustained when foundational showing of personal knowledge was not made); Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704, 709, 87 Pac. 376, 378 (1906)(error to overrule motion to strike testimony after lack of knowledge shown on cross-examination); Parker v. Smith , 4 Cal. 105 (1854)(testimony properly stricken by court when lack of knowledge shown on cross-examination).

The requisite showing of personal knowledge required by Section 702 must be by evidence from which a trier of fact could reasonably conclude that the witness has personal knowledge, i.e, evidence sufficient to warrant a finding of personal knowledge. The judge need not be convinced of the personal knowledge of the witness, and his determination to admit the evidence does not require the jury to find that the witness has personal knowledge. See Section 403 and the Comment thereto. Little discussion of the extent of the foundational showing required can be found in the California cases. Apparently, however, a prima facie showing of personal knowledge is all that is required; the question as to whether the witness actually has personal knowledge is left for the trier of fact to

resolve on the issue of credibility. See, e.g., People v. McCarthy, 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910). Section 702 clarifies the law in this respect.

The judge may receive a witness' testimony conditionally, subject to the necessary foundation of personal knowledge being supplied later in the trial. This is merely a specific application of the broad power of the judge with respect to the order of proof. See Section 403(b). See also Section 320. Unless the foundation is subsequently supplied, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion.

The judge also may reject the testimony of a witness that he has personal knowledge where no trier of fact could reasonably conclude that the witness has personal knowledge. See Section 403(c) and the Comment thereto. The rule is well settled in California that a trial judge may decide an issue of fact for a jury if but one conclusion can reasonably be reached from the evidence. Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870, (1942)(dictum)("If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law."). In other jurisdictions, this rule relating to the functions of judge and jury has given rise to the subsidiary rule that the judge may exclude the testimony of a witness if no trier of fact could reasonably conclude that he has personal knowledge of the matter in question. See Annots., 21 A.L.R. 141 (1922); 8 A.L.R.

796 (1920). No appellate case has been found in California applying the subsidiary rule, although it seems likely that it would be applied in an appropriate case as a specific application of the general rule governing the functions of the judge and the jury. Cf. Gackstetter v. Market Street Ry., 130 Cal. App. 316, 323-324, 20 P.2d 93, 96 (1933)(court should have stricken passenger's testimony concerning speed of vehicle where witness admitted he was reading newspaper at time of collision and "had little opportunity to observe the speed").

Subdivision (a) has been made subject to Section 721 because an expert witness in some instances may give opinion testimony not based on personal knowledge. See Sections 721 and 801.

Subdivision (b). This subdivision states that evidence of personal knowledge may be provided by the witness' own testimony. This is the means ordinarily used to establish that the witness has personal knowledge.

§ 703. Judge as witness

Comment. Section 703 precludes the presiding judge from testifying at the trial of action over the objection of a party. It is based on Rule 42 of the Uniform Rules of Evidence. Under existing California law, a judge may be called as a witness, but the judge may in his discretion order the trial postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by Section 703).

Section 703 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to his testimony must be ruled on by the witness himself.

The extent of cross-examination may be limited by the fear of appearing to attack the judge personally. A party might be embarrassed to introduce impeaching evidence. For these and similar reasons, Section 703 appears to be superior to Code of Civil Procedure Section 1883. See generally People v. Connors, 77 Cal. App. 438, 450-457, 246 Pac. 1072, 1076-1079 (1926)(abuse of discretion for the presiding judge to testify as to important and necessary facts without proof of which the issue, which his testimony is designed to support, cannot be sustained).

The second sentence, based on Section 1883 of the Code of Civil Procedure, indicates the procedure to be followed in those cases where the judge's testimony would be important.

§ 704. Juror as witness

Comment. Section 704 prohibits a juror from testifying as a witness even without objection by a party. It is based on Rule 43 of the Uniform Rules of Evidence. Under existing California law, a juror may be called as a witness, but the judge in his discretion may order the trial postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by Evidence Code Section 704).

A juror-witness is in an anomalous position. He (as juror) is required to weigh his own testimony (as witness) with complete impartiality. Manifestly, this is impossible. The adverse party, too, is placed in an embarrassing position. He cannot cross-examine in such a manner as to antagonize the juror. He cannot impeach for fear of antagonizing the juror. If he objects to the juror appearing as a witness, the juror may regard the objection as a personal reflection upon his character and veracity. For these reasons, Section 704, which prohibits a juror from testifying even though no objection is made, appears to be superior to Code of Civil Procedure Section 1883.

The second sentence of subdivision (a), which is based on Code of Civil Procedure Section 1883, preserves the existing California practice of continuing the case for trial before another jury when it is necessary for a juror to testify and it would be improper to permit him to do so.

Section 704 does not prohibit a juror from testifying as to the occurrence of events likely to have improperly influenced a verdict. The language in subdivision (b) makes this clear. Therefore, under Section 700 (which provides that all persons are competent to testify) a juror is competent to testify as to the matters specified in Section 1150.

Together with Section 1150, subdivision (b) will change the existing California law. Under existing law, a juror is incompetent to give evidence as to matters that might impeach his verdict. People v. Gray, 61 Cal. 164, 183 (1882). See also Siemsen v. Oakland, S.L., & H. Elec. Ry., 134 Cal. 494, 66 Pac. 672 (1901). He is competent, however, to give evidence that no misconduct was committed by the jury after independent evidence has been given that there was misconduct. People v. Deegan, 88 Cal. 602, 26 Pac. 500 (1891). By statute, a juror may give evidence by affidavit that a verdict was determined by chance. CODE CIV. PROC. § 657(2) (recommended for amendment to exclude reference to specific types of misconduct, preserving general reference to any misconduct). The courts have further held that affidavits of jurors may be used to prove that a juror concealed bias or other disqualification by false answers on voir dire (Williams v. Bridges, 140 Cal. App. 537, 35 P.2d 407 (1934)) or was mentally incompetent to serve as a juror (Church v. Capital Freight Lines, 141 Cal. App.2d 246, 296 P.2d 563 (1956)).

The rule that jurors' affidavits may be used to show concealed disqualification has been extended by recent cases so that there may be little left of the underlying rule of incompetency. In Shipley v. Permanente Hospital, 127 Cal. App.2d 417, 274 P.2d 53 (1954) (disapproved in Kollert v. Cundiff, 50 Cal.2d 768, 329 P.2d 897 (1958), insofar as the court's interpretation of Code of Civil Procedure Section 657(1) is concerned, though the Kollert case reaffirms disqualification by juror's affidavit for concealed bias on voir dire), the court held that jurors' affidavits could be received to show a concealed bias of some jurors in favor of physicians charged with malpractice even though there was no intentional or conscious concealment on voir dire. And, in

Noll v. Lee, 221 Cal. App.2d ___, 34 Cal. Rptr. 223 (1963) (hearing denied), the court held that the falsity of a juror's answers on voir dire--i.e., that he would follow the law given in the judge's instructions--could be shown by his affidavit that he read and relied on portions of a Vehicle Code summary that he took with him to the jury room. Despite the evidence in the record that the juror did not believe he was violating the trial court's instructions and did not believe that he was deceiving the court on his voir dire examination, the appellate court held as a matter of law that he did in fact deceive the court by false answers on voir dire and that jurors' affidavits could be used to prove it. Apparently, then, if the questions asked on voir dire are sufficiently comprehensive to cover in general terms the kinds of misconduct that would warrant an attack on the verdict, jurors' affidavits may be used to show that such misconduct occurred and that, consequently, the answers on voir dire were false.

Thus, under existing law, a juror is permitted to give evidence of a chance verdict or evidence of misconduct when an intention to engage in misconduct is denied on voir dire, but he is prohibited from giving evidence of misconduct under any other circumstances. No reason is apparent for this distinction. The danger to the stability of verdicts appears to be as great in the one case as it is in the other. Jurors are the persons most apt to know whether misconduct has occurred. Not to hear evidence as to misconduct from the jurors themselves (except when it can be linked to an answer on voir dire) may at times conceal the only evidence of misconduct that exists. The existing rule is a temptation to eavesdropping and similar undesirable practices, for the only admissible evidence of misconduct in the jury room must come from those not authorized to be there.

§ 704

The existing rule is based on an ancient common law precedent. Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). The reason given for the rule in that case--that the jurors should not be permitted to give evidence of their own crime or misconduct--is no longer apposite. The rule is now based on a fear that juries will be tampered with and their verdicts imperiled. Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 505, 58 Pac. 169, 170 (1899). But the peril to the verdict flows from the substantive rule permitting verdicts to be set aside for misconduct, not from the source of the evidence. If verdicts may be set aside for jury misconduct, it is absurd to deny access to the most reliable evidence of such misconduct. See criticism of existing rule in 8 WIGMORE, EVIDENCE § 2353 (McNaughton rev. 1961). Experience with the exception to the existing rule that permits jurors to impeach verdicts made by chance or by jurors who answer falsely on voir dire indicates that fears of jury tampering are unrealistic. Therefore, the rule forbidding a juror to give evidence of misconduct of the jury is repudiated.

Penal Code Section 1120 requires a juror who discovers that he has personal knowledge of the case being tried before him to declare that fact. The section requires the juror to be sworn as a witness and examined in the presence of the parties. Section 704 retains this method for determining whether a juror is qualified to continue to sit as a juror in the case.

§ 710. Oath required

Comment. Section 710 states the substance of existing California law as found in Section 1846 of the Code of Civil Procedure.

§ 711. Confrontation

Comment. Section 711 restates without substantive change the rule of confrontation provided in Section 1846 of the Code of Civil Procedure.

§ 720. Qualification as expert witness

Comment. Section 720 states the special requisites necessary to qualify a witness as an expert. It is based on similar language contained in Rule 19 of the Uniform Rules of Evidence.

Subdivision (a). Subdivision (a) requires that a person offered as an expert witness have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the particular matter. This subdivision states existing law. CODE CIV. PROC. § 1870(9)(portion relating to experts superseded by Evidence Code Sections 720 and 721).

The judge must be satisfied that the proposed witness is an expert. People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953); Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Bossert v. Southern Pac. Co., 172 Cal. 405, 157 Pac. 597 (1916); People v. Pacific Gas & Elec. Co., 27 Cal. App.2d 725, 81 P.2d 584 (1938). The judge's determination that a witness qualifies as an expert witness is binding on the trier of fact, but the trier of fact may consider the witness' qualifications as an expert in determining the weight to be given his testimony. Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Howland v. Oakland Consol. St. Ry., 110 Cal. 513, 42 Pac. 983 (1895); Estate of Johnson, 100 Cal. App.2d 73, 223 P.2d 105 (1950). See Section 405 and the Comment thereto.

Subdivision (b). This subdivision states that the requisite special qualifications required of an expert witness may be provided by the witness' own testimony. This is the usual method used to qualify a person as an expert. See, e.g., Moore v. Belt, 34 Cal.2d 525, 532, 212 P.2d 509, 513 (1949).

Subdivision (c). This subdivision provides that the judge may receive the witness' testimony conditionally, subject to the necessary foundation being supplied later in the trial. This is merely an express statement of the broad power of the judge with respect to the order of proof. See Section 320. Unless the foundation is subsequently supplied, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion. The introductory phrase is intended to suggest that the discretionary power to depart from established practices should be sparingly exercised.

§ 721. Testimony by expert witness

Comment. Section 721 is included in this article to clarify any ambiguity that may exist with respect to the type of testimony permitted a person who is qualified to testify as an expert.

Subdivision (a). Subdivision (a) permits an expert witness to testify to any matter to the same extent as an ordinary witness not testifying as an expert. Thus, as to those matters that are outside the scope of his special expertise, the expert witness is treated the same in all respects as an ordinary witness. In such cases, the witness is, of course, not testifying as an expert.

Subdivisions (b) and (c). These subdivisions relate to those matters as to which an expert witness may testify within the scope of his special expertise. Generally speaking, expert testimony is required for either or both of two reasons. First, the facts involved in a particular lawsuit may be beyond the competence of ordinary persons, and expert testimony is needed to translate these special facts into language that can be readily understood by the trier of fact. Chemical properties of particular substances are an example of such special facts that may not be within the competence of persons of common experience. Second, expert testimony also may be required to interpret common facts whose significance to the particular litigation cannot be fully appreciated without the aid of expert testimony. Thus, the color of a paint chip or the shape of a fragment of glass recovered at the scene of an accident may have significance to an expert with respect to the type of vehicle involved that cannot be appreciated by the trier of fact without the aid of expert testimony. Subdivisions (b) and (c) cover both of these situations.

Subdivision (c) does not specify the precise matters upon which an expert's opinion may be based; the subdivision merely indicates that an expert may testify in the form of an opinion upon a subject that is within the scope of his special expertise. See Section 801 and the Comment thereto. The matter upon which an expert's opinion is based, however, will affect the way in which the direct examination of the expert is conducted. Thus, when an expert witness testifies from his personal knowledge of the facts, data, or other matter upon which his opinion is based, there is no necessity that his examination be conducted through hypothetical questions designed to elicit specific details concerning the basis for his opinion. Nor are hypothetical questions necessarily

required when the expert bases his opinion in part upon otherwise inadmissible hearsay. See People v. Wilson, 25 Cal 2d 341, 153 P.2d 720 (1944). On the other hand, where an expert witness testifies in the form of opinion based upon assumed facts not personally known to him, it may be essential to examine the expert by using hypothetical questions. The assumed facts must be stated as an hypothesis upon which the opinion is based in order to permit the trier of fact to weigh the opinion in the light of its findings as to the existence or nonexistence of the assumed facts. See discussion in Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 150-154, 180 Pac. 671, 673-675 (1919)(hearing denied). It is largely in the discretion of the judge to control the extent to which the hypothetical nature of the assumed facts need to be shown, i.e., the extent to which the examiner's questions need be classically "hypothetical" in form. Graves v. Union Oil Co., 36 Cal. App. 766, 173 Pac. 618 (1918). See also Estate of Collin, 150 Cal. App.2d 702, 310 P.2d 663 (1957)(hearing denied).

§ 722. Cross-examination of expert witness

Comment. Section 722 governs the cross-examination permitted of a witness who testifies as an expert. Subdivision (a) restates the substance of the last clause of Code of Civil Procedure Section 1872. This subdivision states the existing California law. "Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based (Code Civ. Proc., § 1872), and which he took into consideration; and he may be 'subjected to the most rigid cross examination' concerning his qualifications, and his opinion and its sources

[citation omitted]." Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App.2d 222, 230, 344 P.2d 428, 433 (1959).

In addition to permitting full cross-examination of an expert witness in regard to his qualifications as an expert (and such other matters as the reasons for any opinion expressed and the matter upon which it is based), subdivision (a) of Section 722 provides that an expert witness may be cross-examined to the same extent as any other witness. In this respect, the substance of Chapter 6 (commencing with Section 780) is made applicable to expert witnesses.

Subdivision (b) of Section 722 clarifies a matter concerning which there is considerable confusion in the California decisions. It is at least clear under existing law that an expert witness may be cross-examined in regard to the same books relied upon by him in forming or arriving at his opinion. Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); People v. Hooper, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). Dictum in some decisions indicates that the cross-examiner is strictly limited to such books as those relied upon by the expert witness. See, e.g., Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904). Other cases, however, suggest that the cross-examiner is not thus limited, and that an expert witness may be cross-examined in regard to any books of the same character as the books relied upon by the expert in forming his opinion. Griffith v. Los Angeles Pac. Co., 14 Cal. App. 145, 111 Pac. 107 (1910). See Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal. App.2d 560, 317 P.2d 170 (1957); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 209 P.2d 98 (1949)(reviewing California authorities). There may be a limitation on the permissible scope of such cross-examination, however, restricting the cross-examiner to the use of such books as "are not in harmony with the testimony of the witness."

Griffith v. Los Angeles Pac. Co., supra. Language in several earlier cases indicated that the cross-examiner also could use books to test the competency of an expert witness, whether or not the expert relied upon books in forming his opinion. Fisher v. Southern Pac. R.R., 89 Cal. 399, 26 Pac. 894 (1891); People v. Hooper, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). More recent decisions indicate, however, that the opinion of an expert witness must be based either generally or specifically upon books before the expert can be cross-examined concerning them. Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal. App.2d 560, 317 P.2d 170 (1957); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 209 P.2d 98 (1949). The conflicting California cases are gathered in Annot., 60 A.L.R.2d 77 (1958).

Subdivision (b) of Section 722 limits the cross-examiner to use of those publications that have been refered to, considered, or relied upon by the expert in forming his opinion. If an expert has relied upon a particular book, it is necessary to permit cross-examination in regard to that book to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is an important adjunct of cross-examination technique to question an expert witness as to those publications referred to or considered by him in forming his opinion. An expert's reasons for not relying upon particular publications that were considered by him may reveal important information bearing upon the credibility of his testimony. However, a broader rule--one that would permit cross-examination on works not referred to, considered, or relied upon by the expert--would permit the cross-examiner to place the opinions of absentee authors before the jury without the safeguard of cross-examination. Although the court would be required upon request to caution the jury that the statements read are not to be considered evidence of the truth

of the propositions stated, there is a danger that at least some jurors might rely on the author's statements for this purpose. Yet, the statements in the book might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable in the case before the court, or might be unreliable for some other reason that could be revealed if the author were subject to cross-examination. Therefore, such statements should not be permitted to be brought before the jury under the guise of testing the competence of another expert. The rule stated in subdivision (b) of Section 722 thus provides a fair and workable solution to this conflict of competing interests with respect to the permissible use of publications by the cross-examiner.

§ 723. Credibility of expert witness

Comment. Subdivision (a) of Section 723 codifies a rule recognized in the California decisions. People v. Cornell, 203 Cal. 144, 263 Pac. 216 (1928); People v. Strong, 114 Cal. App. 522, 300 Pac. 84 (1931).

Subdivision (b) of Section 723 is a restatement of the existing California law applicable in condemnation cases. CODE CIV. PROC. § 1256.2 (superseded by Evidence Code Section 723). It is uncertain whether the California law in other fields of litigation is as stated in Section 723. At least one California case has held that an expert could be asked whether he was being compensated, but could not be asked the amount of the compensation. People v. Tomalty, 14 Cal. App. 224, 111 Pac. 513 (1910). However, the decision may have been based on the discretionary right of the trial judge to curtail collateral inquiry.

In any event, the rule enunciated in Section 1256.2 and in Section 723 is a desirable rule. The tendency of some experts to become advocates for the party employing them has been recognized. 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940); Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 STAN. L. REV. 455, 485-486 (1962). The jury can better appraise the extent to which bias may have influenced an expert's opinion if it is informed as to the amount of his fee--and, hence, the extent of his obligation to the party calling him.

§ 724. Limit on number of expert witnesses

Comment. This section restates existing California law as expressed in the last sentence of Code of Civil Procedure Section 1871.

§ 730. Appointment of expert by court

Comment. Section 730 restates without substantive change the existing California law as expressed in the first paragraph of Code of Civil Procedure Section 1871. The language of Section 1871 has been revised to use terms defined in the Evidence Code and to shorten its length by the elimination of unnecessary language.

§ 731. Payment of expert appointed by court

Comment. Except for minor changes in language necessary to incorporate terms defined in the Evidence Code, this section duplicates and supersedes the second paragraph of Code of Civil Procedure Section 1871.

§ 732. Calling and examining court-appointed expert

Comment. Section 732 restates the substance of the fourth paragraph of Code of Civil Procedure Section 1871. This section is specifically made subject

to the first article in this chapter, which deals with the competency and qualification of a person to testify as an expert. The section also refers to Section 774, the specific language of which is based on language originally contained in Section 1871. Section 774 permits each party to the action to object to questions asked and evidence adduced and to cross-examine any person called by the court as a witness to the same extent as if such person were called as a witness by an adverse party. Hence, a reference to this basic section is included in Section 732 in lieu of repeating the language of that section.

§ 733. Right to produce other evidence

Comment. Section 733 duplicates and supersedes the third paragraph of Code of Civil Procedure Section 1871.

§ 750. Rules relating to witnesses apply to interpreters

Comment. Section 750 makes all of the rules relating to witnesses applicable to interpreters. This is existing law. E.g., People v. Lem Deo, 132 Cal. 199, 201, 64 Pac. 265, 266 (1901). Presumably, this section also states existing law in regard to translators, who are treated as expert witnesses. See, e.g., People v. Bardin, 148 Cal. App.2d 776, 307 P.2d 384 (1957).

§ 751. Interpreters for witnesses

Comment. Section 751 is based on and supersedes Section 1884 of the Code of Civil Procedure. The language of this section, however, is new; it is cast in terms similar to Section 701(a), dealing with the disqualification of a person to be a witness if he is incapable of expressing himself so as to be understood by the judge and jury.

Judicial proceedings are required to be conducted in the English language. CAL. CONST., Art. 4, § 24; CODE CIV. PROC. § 185. Hence, when a person who is otherwise qualified to testify as a witness cannot communicate in the English language, an interpreter must interpret for him. Language, however, is not the only barrier to effective communication. Physical disability may prevent a person who is able to "understand and speak" (CODE CIV. PROC. § 1884) the English language from being understood by the judge and jury, as where a person is unable to speak above a whisper. See generally discussion in People v. Walker, 69 Cal. App. 475, 231 Pac. 572 (1924). Section 751 assures the exercise of broad discretion by the court to appoint an interpreter in appropriate cases, as is consistent with the discretion presently exercised. People v. Holtzclaw, 76 Cal. App. 168, 243 Pac. 894 (1926).

Subdivision (b) of Section 751 substitutes for detailed language in Section 1884 of the Code of Civil Procedure a reference to the general authority of a court to appoint expert witnesses, since interpreters are in all respects treated as expert witnesses and subject to the same rules of competency and examination as are experts generally.

§ 752. Translators of writings

Comment. Section 752 is based on and supersedes Code of Civil Procedure Section 1863, but the language of this section is new. The same principles that underlie the necessity for the appointment of an interpreter for a witness who is incapable of expressing himself so as to be understood by the judge and jury apply with equal force to documentary evidence. See Section 751 and the Comment thereto.

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§ 753. Interpreters for deaf in criminal and commitment cases

Comment. Except for minor language changes necessary to incorporate terms defined in the Evidence Code, this section duplicates and supersedes Code of Civil Procedure Section 1885.

§ 760. Direct examination

Comment. Section 760 duplicates and supersedes the definition of "direct examination" found in Code of Civil Procedure Section 2045.

§ 761. Cross-examination

[The Comment to this section and to Section 771 will be prepared after the July meeting.]

§ 762. Leading question

Comment. Section 762 restates the substance of and supersedes the first sentence of Section 2046 of the Code of Civil Procedure. As to the prohibition against the use of leading questions in the examination of a witness, see Section 767 and the Comment thereto.

§ 763. Parties represented by same attorney

Comment. Section 763 is needed to prevent abuse of the expanded right of cross-examination. Without this section, the attorney for one party could call a witness and, after a superficial examination, cross-examine the same witness under the guise of acting on behalf of another party to the action. Such conduct would circumvent the rule against putting leading questions to a witness on direct examination. See Section 767.

§ 765. Judge to control mode of interrogation

Comment. Section 765 is a restatement without substantive change of the existing California law as declared in Section 2044 of the Code of Civil Procedure. Section 765 is but a specific application of the general discretion of the judge to exercise control over the conduct of the trial of

an action. The reference to Section 352 in subdivision (b) of this section refers to another specific instance of the judge's discretion to control the conduct of a trial. As to the latitude permitted the judge in controlling the examination of witnesses under existing law, continued in effect by Section 765, see Commercial Union Assur. Co. v. Pacific Gas & Elec. Co., 220 Cal. 515, 31 P.2d 793 (1934). See also People v. Davis, 6 Cal. App. 229, 91 Pac. 810 (1907).

§ 766. Responsive answers

Comment. Section 766 restates without substantive change and supersedes Code of Civil Procedure Section 2056.

§ 767. Leading questions

Comment. Section 767 restates without substantive change and supersedes the second sentence of Code of Civil Procedure Section 2046.

§ 768. Writings

Comment. This section deals with the same matters presently contained in Sections 2052 and 2054 of the Code of Civil Procedure. Under existing California law, a cross-examiner need not disclose to a witness any information concerning a prior inconsistent oral statement of the witness before asking him questions about the statement. People v. Kidd, 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961); People v. Campos, 10 Cal. App.2d 310, 317, 52 P.2d 251, 254 (1935). Nor does a party examining his own witness need to make such a disclosure in cases where he is permitted to attack the credibility of his own witness. People v. Kidd, 56 Cal.2d 759, 16 Cal. Rptr. 793, 366 P.2d 49 (1961). But, if a witness'

prior inconsistent statements are in writing, or, as in the case of former oral testimony, have been reduced to writing, "they must be shown to the witness before any question is put to him concerning them." CODE CIV. PROC. § 2052 (superseded by EVIDENCE CODE § 768); Umemoto v. McDonald, 6 Cal.2d 587, 592, 58 P.2d 1274, 1276 (1936).

Section 768 eliminates the distinction made in existing law between oral and written statements. Under this section, a witness may be asked questions concerning prior inconsistent statements even though no disclosure is made to him concerning the prior statement. Whether a foundational showing is required before other evidence of the prior statement may be admitted is not covered in Section 768; the prerequisites for the admission of such evidence are set forth in Section 769.

The rule requiring that prior inconsistent written statements be shown to the witness has been eliminated for much the same reason that there presently is no such requirement in regard to prior oral statements. The requirement of disclosure limits the effectiveness of cross-examination by removing the element of surprise. The forewarning required gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement and thus avoid being exposed. The present rule is based on an English common law rule that has been abandoned in England for over 100 years. See McCORMICK, EVIDENCE § 28, at 53 (1954). The California rule applicable to prior oral statements is the more desirable rule and should be applicable to all prior inconsistent statements.

With respect to other types of writings (such as those that are not made by the witness himself or, even though made by him, are not inconsistent

statements used for impeachment purposes), the existing law is uncertain. Except where a writing is shown to a witness for purposes of identification or refreshing recollection, it is not clear under the existing law whether other types of writings like those suggested need be shown to the witness before he can be examined concerning them. For example, it is not clear whether a witness necessarily must be shown a written contract executed by him before he can be examined concerning its terms. Section 2054 of the Code of Civil Procedure requires only that the adverse party must be given an opportunity to inspect any writing that is actually shown to a witness before the witness can be examined concerning the writing; it does not in terms require that any writing need be shown to the witness before he can be examined concerning it (unless, of course, it be an inconsistent statement within the terms of Section 2052 or it is used to refresh recollection as provided in Section 2047). See People v. Briggs, 58 Cal.2d 385, 413, 24 Cal. Rptr. 417, 435, 374 P.2d 257, 275 (1962); People v. Keyes, 103 Cal. App. 624, 284 Pac. 487 (1930)(hearing denied); People v. De Angelli, 34 Cal. App. 716, 168 Pac. 669 (1917). Section 768 clarifies whatever doubt may exist in this regard by declaring the general rule that such writing need not be shown to the witness before he can be examined concerning it.

Subdivision (b) of Section 768 preserves the right of the adverse party to inspect a writing that is actually shown to a witness before the witness can be examined concerning it. As indicated above, this preserves the existing requirement declared in Code of Civil Procedure Section 2054. In keeping with the expanded scope of cross-examination, however, the right of inspection has been extended to all parties to the action.

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§ 769. Inconsistent statement or conduct

Comment. Section 769 is consistent with the existing California law regarding the examination of a witness concerning prior inconsistent oral statements. People v. Kidd, 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961). Insofar as this section also relates to inconsistent statements of a witness that are in writing (see the definitions of "statement" and "conduct" in Sections 225 and 125, respectively), see the Comment to Section 768.

§ 770. Refreshing recollection with a writing

[The Comment to this section will be prepared after the Commission has considered the substance of this section.]

§ 771. Cross-examination

[The Comment to this section and to Section 761 will be prepared after the July meeting.]

§ 772. Order of examination

Comment. Section 772 is the same in substance as and supersedes the second sentence in Section 2045 of the Code of Civil Procedure. It is a specific application of the broad discretion of the judge to regulate the order of proof and the general conduct of the trial of an action. See Section 320 and the Comment thereto.

§ 773. Re-examination

Comment. Section 773 is based on and supersedes the first and third sentences of Section 2050 of the Code of Civil Procedure. The language of

Section 2050 is retained except that "another party" has been substituted for "adverse party." This change is required in light of the expanded scope of cross-examination permitted under this chapter.

§ 774. Judge may call witnesses

Comment. The power of the judge to call expert witnesses is well-recognized by statutory and case law in California. CODE CIV. PROC. § 1871 (recodified as Section 724 and Article 2 (commencing with Section 730) of Chapter 3); PENAL CODE § 1027; Citizens State Bank v. Castro, 105 Cal. App. 284, 287 Pac. 559 (1930). See also CODE CIV. PROC. § 1863 (translators of writings), §§ 1884, 1885 (interpreters), continued in effect by Chapter 4 (commencing with Section 750).

The power of the judge to call other witnesses also is recognized by case law. In Travis v. Southern Pac. Co., 210 Cal. App.2d 410, 26 Cal. Rptr. 700 (1962), over plaintiff's objection, the court permitted the defendant to call a particular witness with the understanding that both parties could cross-examine him--in effect, the court called the witness. "[W]e have been cited to no case, nor has our independent research disclosed any case, dealing with a civil action in which a witness has been called to the stand by the court, over objection of a party. However, we can see no difference in this respect between a civil and a criminal case. In both, the endeavor of the court and the parties should be to get at the truth of the matter in contest. Fundamentally, there is no reason why the court in the interests of justice should not call to the stand anyone who appears to have relevant, competent and material information." Travis v. Southern Pac. Co.,

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supra at 425, 26 Cal. Rptr. at 707-708.

Section 774 expressly authorizes the judge to call witnesses, assuring to the parties the same rights to which they would be entitled if the witnesses were called by a party to the action. The language used to express these rights is taken from the fourth paragraph of Section 1871 of the Code of Civil Procedure (superseded by Section 732), dealing with the rights of the parties when an expert witness is called and examined by the court.

§ 775. Cross-examination of another party or witness

[The Comment to this section will be prepared after the July meeting.]

§ 776. Exclusion of witnesses

Comment. Section 776 is based on and supersedes Section 2043 of the Code of Civil Procedure. Under the existing law, the judge exercises broad discretion in regard to the exclusion of witnesses. People v. Larisey, 14 Cal.2d 30, 92 P.2d 638 (1939); People v. Garbutt, 197 Cal. 200, 239 Pac. 1080 (1925). Cf. PENAL CODE § 867 (power of magistrate to exclude witnesses during preliminary examination). See also CODE CIV. PROC. § 125 (general discretionary power of the court to exclude witnesses).

Under the existing law, the judge has no discretion to exclude a party to an action. If the party is a corporation, one of its officers designated by its attorney is entitled to be present. Because there is little practical distinction between corporations and other artificial entities and organizations as parties to actions in existing practice, subdivision (b) of Section 774 extends the right of presence to all artificial parties and, further, includes an employee as well as an officer of any such party.

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§ 777. Recall of witnesses

Comment. Section 777 duplicates and supersedes the second and third sentences of Section 2050 of the Code of Civil Procedure.

Under Section 777, as under existing law, the judge exercises broad discretionary power in regard to the recall of witnesses for examination or for cross-examination. People v. Raven, 44 Cal.2d 523, 282 P.2d 866 (1955). This is a specific example of the broad discretion in the judge to regulate the order of proof (see Section 320) and the mode of interrogation of witnesses (see Section 765).

§ 780. Credibility of witnesses generally

Comment. Section 780 is a restatement of the existing California law as declared in several sections of the Code of Civil Procedure, all of which are superseded by this section and other sections in Article 2 (commencing with Section 781) of this chapter. Thus, subdivisions (a), (b), (e), (f), and (i) restate without substantive change several matters contained in Code of Civil Procedure Section 1847. The matters mentioned in subdivisions (e) and (i) also are covered by Code of Civil Procedure Section 2051. Subdivision (h), dealing with statements made by a witness that are inconsistent with his testimony at the hearing, restates the substance of Code of Civil Procedure Sections 2049 and 2052. The use of character evidence as affecting the credibility of a witness also is covered in Section 2053 of the Code of Civil Procedure.

Section 780 is a general statement of principle regarding those matters that have any tendency in reason to affect the credibility of a witness. So far as the admissibility of evidence relating to credibility is concerned,

it is technically unnecessary because of Section 351, which declares that "all relevant evidence is admissible." It seems desirable, however, to state explicitly that any statement or other conduct may affect the credibility of a witness. See Kilstrom v. Bronnenberg, 110 Cal. App.2d 62, 242 P.2d 65 (1952). For specific limitations on the admissibility of certain kinds of evidence used for the purpose of attacking or supporting the credibility of a witness, see Article 2 (commencing with Section 781).

§ 781. Parties may attack or support credibility

Comment. Section 781 sweeps away all pre-existing limitations on the right to support or attack the credibility of witnesses. Together with Section 351 (providing that all relevant evidence is admissible), Section 781 makes all evidence relevant to the issue of the credibility of a witness admissible. However, Section 781 is subject to several qualifications on the admissibility of such evidence. Thus, for example, Sections 785 (good character) and 788 (prior consistent statements) limit the admissibility of evidence supporting credibility; the remaining sections in this article limit the admissibility of certain types of evidence relevant to credibility; the rules of privilege and the rules excluding hearsay evidence also operate to exclude evidence that may otherwise be admissible on this issue; and Section 352 permits the judge to exclude evidence relating to credibility where it would be unduly prejudicial, consume too much time, cause confusion, and the like.

Attacking the credibility of one's own witness. Section 781 eliminates the present restriction on attacking the credibility of one's own witness. Under the existing California law, a party is precluded from attacking the

credibility of his own witness unless he has been surprised and damaged by the witness' testimony. CODE CIV. PROC. §§ 2049, 2052 (superseded by EVIDENCE CODE §§ 768, 769, 781, 787); People v. LeBeau, 39 Cal.2d 146, 148, 245 P.2d 302, 303 (1952). In large part, the present law rests upon the theory that a party producing a witness is bound by his testimony. See discussion in Smellie v. Southern Pac. Co., 212 Cal. 540, 555-556, 299 Pac. 529, 535 (1931). This theory has long been abandoned in several jurisdictions where the practical exigencies of litigation have been recognized. See McCORMICK, EVIDENCE § 38 (1954). A party has no actual control over a person who witnesses an event and is required to testify to aid the trier of fact in its function of determining the truth. Hence, a party should not be "bound" by the testimony of a witness produced by him. It follows that he should be permitted to attack the credibility of the witness without anachronistic limitations. Moreover, denial of the right to attack credibility often may work a hardship on a party where by necessity he must call a hostile witness. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure. In regard to attacking the credibility of a "necessary" witness, see generally People v. McFarlane, 134 Cal. 618, 66 Pac. 865 (1901); Anthony v. Hobbie, 85 Cal. App.2d 798, 803-804, 193 P.2d 748, 751 (1948); First Nat'l Bank v. De Moulin, 56 Cal. App. 313, 321, 205 Pac. 92, 96 (1922).

"Collateral matter" limitation. The so-called "collateral matter" limitation on attacking the credibility of a witness, where evidence relevant to credibility is excluded unless such evidence is independently relevant to the issue being tried, stems from the sensible approach that trials should be

concerned with settling specific disputes between parties. Accordingly, matters that are collateral or too remote to this purpose should be excluded from consideration. Under existing law, this "collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, e.g., People v. Wells, 33 Cal.2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.

The effect of Section 781 is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352, the judge has wide discretion in regard to the exclusion of collateral evidence. The effect of Section 781, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

§ 782. Character evidence generally

Comment. Section 782 limits evidence relating to the character of a witness to the character traits necessarily involved in a proper determin of credibility. Other character traits of the witness are not of sufficient probative value concerning the reliability of the witness' testimony to offset the prejudicial effect that would be caused by their admissibility.

Section 782 is substantially in accord with the present California law insofar as it admits evidence of the witness' bad reputation for "truth, honesty, or integrity." CODE CIV. PROC. § 2051 (superseded by EVIDENCE CODE § 782). See People v. Yslas, 27 Cal. 630, 633 (1865). Insofar as Section 782 would permit opinion evidence on this subject, it represents a change in the present law. As to this, the opinion evidence that may be offered by

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those persons intimately familiar with the witness would appear to be of more probative value than the generally admissible evidence of reputation. See, e.g., 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

§ 783. Specific instances of conduct

Comment. Section 783 makes specific instances of conduct inadmissible to prove a trait of character for the purpose of attacking or supporting the credibility of a witness. This is in accord with the present California law. Sharon v. Sharon, 79 Cal. 633, 673-674, 22 Pac. 26, 38 (1889); CODE CIV. PROC. § 2051 (superseded by Section 783 and several other sections in this chapter).

§ 784. Conviction of witness for a crime

Comment. Section 784 limits the extent to which evidence of conviction for a crime can be used for the purpose of attacking the credibility of a witness. Evidence of a conviction is inadmissible if it falls within the proscription of any of the three subdivisions.

Section 783 provides that evidence of specific acts of conduct is inadmissible on the issue of credibility; but the section is expressly made subject to this section, thereby excepting from its provisions evidence of the witness' conviction for a crime. Hence, evidence of a conviction is admissible under the general provisions of Sections 351 and 781 unless it is made inadmissible by this section.

Subdivision (a). Subdivision (a) prohibits a party from attacking the credibility of a criminal defendant by evidence of his prior conviction unless the defendant-witness first has introduced character evidence insupport of his credibility. Under Section 785, the defendant may introduce character evidence in support of his credibility only after his credibility has been attacked by evidence of bad character. Under the provisions of subdivision (a), therefore, the initial attack on the defendant-witness' credibility cannot include evidence of his conviction for a crime.

Subdivision (a) is based on a recognition that evidence of a defendant's prior conviction is highly prejudicial. By limiting the use of such evidence, Section 784 avoids its excessively prejudicial effect and thus encourages a defendant with a criminal record to take the stand to explain the evidence against him.

Subdivision (b). Subdivision (b) follows the recommendation of the Commissioners on Uniform State Laws by limiting the crimes that may be used for impeachment purposes to crimes involving dishonesty or false statement. The reason is that these crimes have a considerable bearing on credibility whereas others do not. Other crimes are excluded because the probative value of such crimes on the issue of credibility is low and the prejudice that may result from their introduction may be great.

The subdivision will substantially change the existing California law. Under existing law, a conviction for a felony may be used for impeachment purposes--even though the crime does not involve the trait of honesty--but a conviction for a misdemeanor may not be used to attack credibility--even though the crime involves lying. CODE CIV. PROC. § 2051; People v. Carolan, 71 Cal. 195, 12 Pac. 52 (1886)(misdemeanor conviction inadmissible; gratuitous remark suggesting possible admissibility of misdemeanor conviction for purpose of discrediting a witness if "it should be made to appear that the offense involved moral turpitude or infamy" effectively quashed in People v. White, 142 Cal. 292, 294, 75 Pac. 828, 829 (1904), with the statement, "But the language of the code in question [CODE CIV. PROC. § 2051] clearly limits it to cases where there has been a conviction of felony."). Under existing California law, an offense that is punishable either as a felony or a misdemeanor is deemed a misdemeanor for all purposes if the punishment actually imposed is that applicable to misdemeanors. PENAL CODE § 17. Hence, if a person is charged with a felony and is punished with imprisonment in a county jail, the conviction may not be shown to attack his credibility. People v. Hamilton, 33 Cal.2d 45, 198 P.2d 873 (1948). But if probation is granted instead of imprisonment, the conviction may be shown to attack the credibility of the defendant in a subsequent criminal

case, even after the conviction is expunged under the provisions of Penal Code Section 1203.4 (People v. Burch, 196 Cal. App.2d 754, 17 Cal. Rptr. 102 (1961)), unless the court at the time of granting probation declares the offense to be a misdemeanor (PENAL CODE § 17--provision added by Cal. Stats. 1963, Ch. 919, after the decision in the Burch case, supra). Apparently, however, the conviction may not be used to attack the credibility of a person who is not a defendant in a subsequent criminal case once the conviction is expunged under the provisions of Penal Code Section 1203.4 People v. Mackey, 58 Cal. App. 123, 128-131, 208 Pac. 135, 137-138 (1922).

Thus, under existing law, evidence of considerable significance on the issue of credibility if frequently excluded while much evidence of little probative value on the issue is admitted. Section 784 removes these anomalies from the California law.

Subdivision (b) also requires a party, before attacking the credibility of a witness on the basis of prior crimes, to satisfy the judge in proceedings out of the presence and hearing of the jury that the crime in question is admissible under Section 784 and that the witness actually committed the crime. The purpose of the provision is to avoid unfair imputations of crimes that either do not fit within the rule or are nonexistent. This provision is based in part on a proposal made by the Committee on Administration of Justice of the State Bar of California. See 29 CAL. S. B. J. 224, 238 (1954).

Subdivision (b) makes any evidence of a conviction of the witness for a crime inadmissible unless the appropriate showing has been made to the judge. This includes evidence in the form of testimony from the witness himself. Hence, a party may not ask a witness if he has been convicted of a crime unless the party has made the requisite showing to the judge.

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Subdivision (c). Subdivision (c) is a logical extension of the policy expressed in Section 2051 of the Code of Civil Procedure that prohibits the use of a conviction to attack credibility if a pardon has been granted upon the basis of a certificate of rehabilitation. Section 2051 is too limited, however, because it excludes a conviction only when a pardon based on a certificate of rehabilitation has been granted. Insofar as other convictions and pardons are concerned, the conviction is admissible to attack credibility, and the pardon--even though it may be based on the innocence of the defendant and his wrongful conviction for the crime--is admissible merely to mitigate the effect of the conviction. People v. Hardwick, 204 Cal. 582, 269 Pac. 427 (1928). Moreover, the certificate of rehabilitation referred to in Section 2051 is available only to felons who have been confined in a state prison or penal institution; it is not available to persons given misdemeanor sentences or to persons granted probation. PENAL CODE § 4852.01. Sections 1203.4, 1203.4a, and 1203.45 of the Penal Code provide procedures for setting aside the convictions of rehabilitated probationers and misdemeanants. Yet, under Section 2051 of the Code of Civil Procedure, a conviction that has been set aside under Penal Code Section 1203.4, for example, may be shown to attack the credibility of the defendant in a subsequent criminal prosecution. People v. James, 40 Cal. App.2d 740, 105 P.2d 947 (1940). As to the use of such prior convictions generally, see the discussion under subdivision (b), supra. Subdivision (c) eliminates these anachronisms by prohibiting the use of any conviction to attack credibility if the person convicted has been determined to be either innocent or rehabilitated and a pardon has been granted or the conviction has been set aside by court order pursuant to the cited provisions of the Penal Code or he has been relieved of the penalties

and disabilities of the conviction pursuant to a similar procedure provided by the laws of another jurisdiction.

§ 785. Good character of witness

Comment. Section 785 precludes the introduction of character evidence to support the credibility of a witness unless and until evidence of the witness' bad character has been admitted for the purpose of attacking his credibility as a witness. This section restates without substantive change a rule that is well recognized by statutory and case law in California. CODE CIV. PROC. § 2053 (superseded by Section 785); People v. Bush, 65 Cal. 129, 131, 3 Pac. 590, 591 (1884). Unless the credibility of a witness is put in issue by an attack impugning his character for honesty or veracity (see Section 782), the good character of the witness is irrelevant to a determination of any legitimate issue in the trial of an action. In the absence of such an attack, evidence of the witness' character admitted merely to support his credibility introduces collateral material that is unnecessary to a proper determination of the action. See People v. Sweeney, 55 Cal.2d 27, 38-39, 9 Cal. Rptr. 793, 799, 357 P.2d 1049, 1055 (1960).

§ 786. Religious belief

Comment. Section 786 restates the present California law as expressed in People v. Copsey, 71 Cal. 548, 12 Pac. 721 (1887), where the Supreme Court held that evidence relating to a witness' religious belief or lack thereof is incompetent on the issue of his credibility as a witness.

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§ 787. Inconsistent statement of witness

Comment. Under Section 2052 of the Code of Civil Procedure, a proper foundation must be laid before evidence of a witness' inconsistent statement may be admitted for the purpose of attacking his credibility. The foundation required includes giving the witness the opportunity to identify, explain, or deny the contradictory statement. The principle of permitting a witness to explain the circumstances surrounding the making of an inconsistent statement is sound; but this does not compel the conclusion that the explanation must be made before the inconsistent statement is introduced. Accordingly, Section 787 permits the judge to exclude evidence of a prior inconsistent statement only if the witness (a) was not examined so as to give him an opportunity to explain the statement and (b) has been unconditionally excused and is not subject to being recalled.

Section 787 will permit effective cross-examination and impeachment of several collusive winesses, for under this section there need be no disclosure of prior inconsistency before all witnesses have been examined.

Under Section 787, the judge in his discretion may permit the evidence of the prior statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement. An absolute rule forbidding introduction of evidence of the prior statement unless the conditions specified are met may cause hardship in some cases. For example, the party seeking to introduce the prior statement may not have learned of its existence until after the witness has left the court and is no longer available. Hence, Section 787 grants the trial judge discretion to admit evidence of the prior statement where justice so requires. For a discussion regarding the credibility of a hearsay declarant, see Section 1202 and the Comment thereto.

§ 788. Prior consistent statement of witness

Comment. Section 788 concerns the admissibility of prior consistent statements made by a witness that are offered for the purpose of supporting his credibility as a witness. This section precludes the introduction of such statements unless and until there has been an attack on the credibility of the witness by evidence of the type mentioned in subdivisions (a) and (b) of this section. This is similar to the treatment of character evidence in Section 785 and is consistent with the existing California law. See People v. Doyell, 48 Cal. 85. 90-91 (1874). Unless there has been an attack on the credibility of the witness, thereby placing his credibility in issue, the witness' prior consistent statements are no more than self-serving hearsay declarations. Scuh statements are irrelevant to any legitimate issue necessary for determination in the action and are merely cumulative to the witness' testimony at the hearing. See 4 WIGMORE, EVIDENCE § 1124 (3d ed. 1940). Moreover, admission of prior consistent statements without an attack on his credibility would permit a party to prove his case by the indroduction of statements carefully prepared in advance even though no issue is raised in regard to the credibility of his present testimony at the hearing.

For a discussion of the effect to be given to the evidence admitted under this section, see Section 1236 and the Comrent thereto.

Subdivision (a). Subdivision (a) permits the introduction of a witness' prior consistent statement if (1) evidence of a prior inconsistent statement of the witness has been admitted for the purpose of attacking his credibility and (2) the prior consistent statement was made before the alleged inconsistent statement.

Under existing California law, evidence of a prior consistent statement apparently is admitted only to rebut a charge of bias, interest, recent

fabrication, or other improper motive. See the Comment to subdivision (b). However, existing law may preclude admission of a prior consistent statement to rehabilitate a witness where a prior inconsistent statement has been admitted for the purpose of attacking his credibility. See People v. Doyle, 48 Cal. 85, 90-91 (1874). Nevertheless, when an attack has been made on the credibility of a witness by evidence of his prior inconsistent statement, evidence of his prior consistent statement clearly has probative value on the issue of his credibility when the consistent statement was made before the alleged inconsistent statement. Proof of a prior inconsistent statement necessarily is an implied charge that some intervening circumstance has influenced the witness' testimony at the hearing. Subdivision (a) makes it clear that evidence of the prior consistent statement is admissabl. under these circumstances. This is no more than a logical extension of the general rule that such evidence is admissible to rehabilitate a witness following an expressed or implied charge or recent fabrication.

Subdivision (b). This subdivision codifies existing California law. See People v. Kynette, 15 Cal.2d 731, 104 P.2d 794 (1940). Of course, if the consistent statement is made after the time the improper motive is alleged to have arisen, the logical thrust of the evidence is lost and the statement is inadmissible. See People v. Doetschman, 69 Cal. App.2d 486, 159 P.2d 418 (1945).