#34 7/31/64

First Supplement to Memorandum 64-49

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 10--Hearsay Evidence)

Attached to this memorandum is a revised outline of Division 10 and a revision of pages 1000 through 1004 of the Hearsay Division. Also attached is a revision of pages 1000 through of the Comments relating to the Hearsay Division. This memorandum will discuss the problems presented in these revised pages. Memorandum 64-49 discusses the problems presented by pages 1005 et seq. of the Hearsay Division and the related Comments.

The following matters should be noted in regard to these revised pages:

Section 1200

Section 1200 has been revised to reflect the actions of the Commission at the July meeting. The Commission instructed the staff to include the definition of "hearsay evidence" in the section. Whether the definition should be repeated in the definitions division was left to the staff's discretion. We did not repeat the definition; instead, we provided in Section 155 as follows:

155. "Hearsay evidence" is defined in Section 1200.

The cross-reference avoids the necessity for amending two sections whenever the definition is to be altered.

The Commission also instructed the staff to redraft the rule to permit the courts to develop additional hearsay exceptions. Section 1200 has been amended to reflect these changes.

Section 1205

At the July meeting, the Commission instructed the staff to prepare a

recommended Section 1205 and to state the policy reasons for including some hearsay exceptions and excluding others. Section 1205 has been prepared to carry out that instruction.

The policies applicable seem to be the following: We deleted Rule 64 from the URE originally because the right of discovery provided in civil actions seemed adequate to protect the parties to civil actions against unfair surprise. When we considered the comments to our tentative recommendation, we discovered that our rationale did not take criminal cases into account. In criminal cases, the defendant has quite a broad right of discovery. The prosecution's right of discovery was, until recently, non-existent; and the scope of the prosecution's recently discovered right of discovery is still largely unknown. If the Supreme Court's decisions are construed as broadly as possible, it may be possible for the prosecution to discover any documentary evidence the defendant intends to introduce at the trial. In any event, the Commission believed that the greatest need for Section 1205 was caused by the limited right of the prosecution to discovery in criminal cases. Hence, the exigencies of the prosecution should be of paramount concern in considering the details of Section 1205.

The especial need for Section 1205 stems from the lack of opportunity to confront and cross-examine the hearsay declarant. Concern over the accuracy of the evidence of the hearsay statement is not involved. If we were concerned with the accuracy of the evidence offered, we would have no reason to limit Section

1205 to hearsay evidence. Since we are not creating a similar condition for the admissibility of other documentary evidence, we must believe that ordinary discovery techniques and the right to confront and cross-examine the witnesses at the trial are sufficient protection against the introduction of unreliable evidence. Therefore, hearsay exceptions should be included within the section only when there is especial need to check the accuracy of the perceptions and the veracity of the declarant as distinguished from the accuracy of the perceptions and the veracity of the witness who testifies to the hearsay statement.

Another consideration is the extent to which particular kinds of hearsay appear in writing. If statements within an exception usually are not in writing, a party might be unfairly trapped by the 1205 requirement in the rare case in which he seeks to introduce a written statement of the particular kind.

Finally, we think the matters included should fall in easily recognized, broadly defined categories. Counsel should not be required to make subtle distinctions between similar kinds of evidence in order to comply with a procedural requirement of this sort when such distinctions otherwise are principally of academic interest.

With the foregoing policies in mind, we have concluded that we should include and exclude hearsay exceptions as indicated in the following list. In some cases, we may have made seemingly inconsistent decisions. However, lines have to be drawn somewhere, and where we think policies indicate the line should be

one place, others may think that the line should be in a slightly different place. Nonetheless, these are our recommendations:

Article 1 (Confessions and Admissions). EXCLUDE. So far as direct and adoptive admissions are concerned, it seems clear enough that we are concerned solely with the accuracy of the evidence given at the trial. There is no need for a party to confront and cross-examine the declarant to test the accuracy of the hearsay statement. He was the declarant.

We think that the same rule should apply to authorized admissions and to admissions of persons whose right or duty is in issue. The real problem is whether the party in fact authorized the admission or whether the declarant in fact made the statement; and whether he did or not is a matter involving the veracity of witnesses at the trial who may be confronted and cross-examined.

Possibly unauthorized written statements of agents, partners, and employees, that relate to the subject matter of the agency, partnership, or employment should be subject to the procedure; but there is such a subtle distinction between these and authorized admissions, and so few of such statements are in writing, that we think to include them would probably trap more parties unjustifiably than the inclusion would ever protect.

Article 2 (Declarations Against Interest). EXCLUDE. Here, we think the real need for cross-examination relates to the witnesses at the trial. Some may disagree, but we think that the "against interest" test sufficiently verifies the hearsay statement that pretrial notice is not required. Then, too, most of such statements will not be in writing.

Article 3 (Prior Statements of Witnesses). EXCLUDE. Inconsistent statements cannot be included without destroying the efficacy of this form of impeachment. It is impractical to include consistent statements because a party cannot anticipate when his witness is going to be attacked in the requisite manner. It is unnecessary to include recorded memory because the declarant is at the trial and subject to cross-examination.

Article 4 (Spontaneous, etc. Declarations). EXCLUDE. Here, few of the declarations, if any, will ever be in writing. The fact that such statements are natural effusions, not deliberative statements, seems sufficient to warrant omitting these statements so long as there is adequate opportunity to cross-examine the trial witness. The main question involves the foundational facts of spontaneity, etc., and a party has an adequate opportunity to examine into those facts at the trial. Dying declarations are excluded because, in addition, it would be impossible to cross-examine the declarant even if notice were given.

Article 5 (State of mind, physical symptoms). EXCLUDE. There is an additional problem associated with the state of mind exception that does not appear in regard to the others. Frequently state of mind evidence consists of statements that are circumstantial evidence of the state of mind, not hearsay evidence. For example, a homicide victim's prior statements that she feared the defendant are hearsay evidence of her state of mind, but her statements that the defendant threatened her or beat her are circumstantial evidence of her state of mind. The two varieties of

state of mind evidence shade into each other. We see no reason to compel pretrial notice of intention to offer one variety and require no such notice of intention to offer the other. Compelling such a nice distinction--which will be of academic interest only in most cases--will, we think, entrap more parties than it will protect.

Then, too, most of these statements are not in writing; hence, the 1205 requirement would apply to only a few. We don't think that it is desirable to impose the requirement on only a few of the statements that are within a particular exception.

Article 6 (Statements Relating to Wills, Claims Against Estates). EXCLUDE. These exceptions are, for all practical purposes, limited to civil actions. Hence, the normal discovery techniques may be used. The need for 1205 is minimal.

Then, too, a decedent's statements concerning his will are quite similar to the statements within the state of mind exception in that they are statements of his belief concerning certain facts. Other evidence that is circumstantial in nature may also be introduced concerning that belief. To require compliance with Section 1205 would force a discrimination in treatment between the two kinds of evidence that we do not think is warranted. Moreover, it is the declarant's own intent the court is seeking to discover and to carry out. Hence, it seems to us that the principal question before the court is whether the decedent in fact made the statement --and this involves the veracity and reliability of the evidence offered, not the veracity and reliability of the declarant.

The exception for the statements of a decedent in actions against his estate was created to balance the fact that we are permitting the claimant to testify in the action. The claimant does not have to give pretrial notice of his testimony; hence, we see no reason for the estate to give pretrial notice of the decedent's hearsay.

Article 7 (Business Records). INCLUDE. A business record is authenticated by the custodian. He is likely to have little or no knowledge concerning the subject matter of the particular entry. Yet the adverse party's principal concern is with the veracity of the original declarant and the reliability of his perceptions. Here we are not dealing with natural or spontaneous effusions; we are dealing with carefully considered declarative statements. In McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696 (1945), the court held that the business records exception justified admission of a medical diagnosis appearing in a hospital record. In People v. Gorgol, 122 Cal.App.2d 281 (1953), a hospital record was admitted under the business records exception even though it contained the statement (the defendant was already under investigation for the charged crime): "I believe that the patient may be endeavoring to manipulate his way into the hospital in order to strengthen his defense." The court justified admitting the statement under the business records exception because the physician making the report would have been permitted to say the same thing in substance--but perhaps not the same words--if he had testified as a witness. See 122 Cal.App.2d at 302. We think that the policy underlying 1205 requires that the adverse party be given an opportunity to check

these statements prior to trial. Cross-examination of the custodian affords no protection at all.

Moreover, our decision on business records is strongly influenced by our decision on official records, for frequently official records can be qualified under both exceptions. We would not want to create a large gap in our requirement relating to official records by permitting those records to be offered under another exception that does not require compliance with 1205. Then, too, to distinguish between a record of a private hospital and a record of a public hospital insofar as 1205 is concerned seems to make little sense. And, to distinguish between the records of private schools and public schools, privately owned utilities and publicly owned utilities, etc., similarly makes little sense.

Accordingly, we think the need for determining the identity of the original declarant and his reliability is sufficiently great insofar as business records are concerned that they should be included in Section 1205.

Article 8 (Official Records). INCLUDE. Many of the considerations discussed in regard to business records are applicable here. But, in addition, an official record will be admitted in some cases without an appearance even by the custodian. Hence, the opportunity for cross-examination at the trial may be totally lacking. Our principal concern is with the accuracy and reliability of the original declarant--there is not much chance that the evidence offered will be incorrect--hence, the official records

exception seems to fall clearly within the criteria we discussed that indicate a need for inclusion within 1205.

Article 9 (Former Testimony). INCLUDE. Here, again, we are concerned principally with the reliability of the original declarant. There seems to be little likelihood that there will be serious dispute over the evidence of the former testimony in the usual case. The party concerned will have no opportunity to test the declarant by cross-examination at the trial. He is being compelled to rely on cross-examination at another place, in another trial, under different circumstances. Hence, he might at least be given some advance warning so that he can substitute investigation for cross-examination if he so desires.

Possibly former testimony offered against a person who was a party to the former proceeding might be excluded on the ground that opportunity for personal examination of the declarant has already been provided. However, we think the rule will be easier to administer if parties are not required to distinguish between different kinds of former testimony for procedural purposes. Moreover, direct examination under different circumstances, or even cross-examination under different circumstances, may not be an adequate substitute for pretrial notice and an opportunity for further investigation.

Article 10 (Judgments). EXCLUDE. Here we are concerned almost exclusively with the accuracy of the evidence being offered. The party is not going to call the judge for cross-examination. He is not going to question the jurors. They have no personal know-

ledge to impart. We see no reason for the inclusion of judgments that is not applicable to all other forms of evidence.

Moreover, it seems to us unwise to create a procedural distinction between judgments offered as hearsay and judgments offered for some other purpose--such as credibility.

Article 11 (Family History). EXCLUDE ALL EXCEPT CHURCH RECORDS AND CERTIFICATES. We include church records and certificates for the reasons applicable to business and official records. The remainder of the sections in the article are excluded for a variety of reasons. Many of the statements will not be in writing, so a uniform rule applicable to substantially all of the evidence admissible under the article will not be achieved. Other articles included in 1205 refer to evidence that is almost always in writing. We think, too, that our primary concern is with the accuracy of the testimony at the trial. Did the declarant actually make a statement, ante litem motam, concerning his own pedigree? Was the declarant actually so closely associated with the family whose history he stated that he was virtually a member of the family? The determination of these questions involves principally the veracity of trial witnesses, and we see no particular need to investigate the substance of their expected testimony that is distinguishable in any degree from the need to investigate the testimony of any other witness.

Entries in family bibles, carvings on crypts and gravestones, etc., will of course be in writing. But, nonetheless, we think the principal concern is again with the accuracy of the evidence at the trial.

Article 12 (Reputation: Statements Concerning Boundary).

EXCLUDE. We have excluded the reputation exceptions because reputation evidence is usually not in writing. Moreover, the principal concern seems to be with the sufficiency of the trial witness's actual knowledge of the reputation.

The exception for statements concerning boundary might be included, for there appears to be some need to investigate the accuracy of the declarant's perception and narration as well as the accuracy of the evidence offered. However, the exception is little used. It has appeared in but three cases--two in 1860. The original declaration is likely to be oral, so that a general rule applicable to most statements within the exception will not be created by inclusion of it within Section 1205. Hence, on balance, we have concluded that it is more desirable to exclude it.

Article 13 (Dispositive Instruments and Ancient Writings.

INCLUDE. It may be that there is little to distinguish these exceptions in principle from the family history exceptions. However, the declarations involved here are required to be in writing. Hence, unlike the family history exceptions, we can here impose a procedural requirement applicable to a complete category of evidence.

There are other reasons indicating exclusion. The principal matters to be investigated seem to be the foundational facts for admissibility--have the dealings with the property been consistent with the statement?--has the statement actually been acted upon as if true by the persons interested? These questions involve the veracity of the trial witnesses, not the reliability of the hearsay declarant.

Nonetheless, we recommend inclusion because there does seem to be some need to investigate the reliability of the original declarant's information as well.

Article 14 (Commercial, Scientific, and Similar Publications). INCLUDE. The early California cases (the only authorities on the subject) excluded commercial lists and the like--stock market quotations, price lists, etc.--unless an adequate foundation was laid in the form of evidence of the manner in which the list was prepared. The proponent was supposed to show whether the report was based on reports of actual sales, the sources of information, etc. Section 1340 dispenses with this foundation and substitutes the foundation of reliance by persons engaged in a particular occupation. The previous foundational facts, however, would seem to be an appropriate subject for inquiry and a proper basis for an attack on the reliability of the hearsay evidence. Hence, the 1205 notice is required in order to provide a party with opportunity to make the requisite investigation.

The California cases have limited the exception in Section 1341 (historical works, books of science or art) to matters which almost qualify for judicial notice. See Hearsay Study on URE 63(31). Certainly the facts of general notoriety and interest provable under Section 1341 shade into the indisputable facts or facts of common knowledge of which judicial notice may be taken. As a party must give adequate opportunity to the adverse party to meet his request for judicial notice of these matters, we think a party should also give adequate opportunity to the adverse party to meet

his evidence when he decides to prove such facts by evidence instead of relying on judicial notice.

The foregoing are our recommendations on inclusion and exclusion of hearsay exceptions from Section 1205. You will notice that the first subdivision of Section 1205 refers to all official writings. This is because many official writings may be admitted under some specific statute relating thereto instead of the general official records exceptions found in Article 8.

The second subdivision of Section 1205 is worded as it is in order that evidence that qualifies under an exception other than one listed may be admitted without regard to Section 1205 even though it might also be admissible under one of the exceptions listed in Section 1205.

We have followed in general the form of the rule recommended by the New Jersey Supreme Court Committee in Section 1205 instead of the URE Rule 64. For comparison, URE Rule 64 is as follows:

> Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such a copy.

The version now recommended by the New Jersey Committee is contained in Memorandum 64-49, p. 5.

Section 1223.

You instructed the staff to see if the parenthetical phrase "or in the judge's discretion as to the order of proof subject to" could be moved from its location immediately after the word "after". Subdivision (b) reflects this change. As similar provisions appear in Sections 1224 and 1225, we made comparable changes in those sections.

Section 1224.

The Commission directed the staff to revise Section 1224 to provide for the admission of co-conspirators' statements made before the party became a participant in the conspiracy as well as such statements that are made while the party was a participant in the conspiracy. This change, together with the change conforming to the revision of Section 1223(b), necessitated some redrafting. The revision of the section is indicated below:

> 1224. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> (a) The statement [~~is that of a co-conspirator of the party~~] was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and within the scope of his expressed or implied authority to act in furtherance of the objective of that conspiracy;
>
> (b) The statement was made [~~during the existence of the conspiracy and in furtherance of the common object thereof~~] prior to or during the time that the party was also participating in that conspiracy; and
>
> (c) The evidence is offered either after [~~, or in the judge's discretion as to the order of proof subject to,~~] admission of evidence sufficient to sustain a finding of the [~~existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made~~] facts specified in subdivisions (a) and (b) or, in the judge's discretion as to the order of proof, subject to the admission of such evidence.

Note particularly the revision of subdivision (a). Several times when this section has been under consideration doubt has been expressed as to the exact meaning of the phrase "in furtherance of the common object thereof". We have spelled the meaning out at greater length in subdivision (a) so that it will be abundantly clear that we are dealing here with one kind of an authorized admission.

Sections 1226 and 1227.

The Commission asked the staff to consider Section 1226 as revised to determine whether its reference to "right" is too broad--are more cases covered by the amended section than were intended to be covered by the amendment? The Commission also asked the staff to consider whether there are other situations analogous to those mentioned in Sections 1226 and 1227 where the same principle should be applied.

Sections 1226 and 1227 do, as a matter of fact, touch upon a larger principle. It is discussed at some length in Wigmore, Evidence §§ 1077-1086. The two branches of the principle are as follows:

> So far as one person is privy in obligation with another, i.e., is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. [4 Wigmore, Evidence 118.]
>
> The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (ante, § 1077). Having the same interest to learn the facts and the same motive to make correct statements, and being identical with the party (either contemporaneously or antecedently) in respect to his

> ownership of the right in issue, his admissions may, both in fairness and on principle, be proffered in impeachment of the present claim. [4 Wigmore, Evidence 134-135.]

Section 1226 (before its amendment at the July meeting) expressed the first branch of this principle. If a party--for example, a surety--is liable to be affected by the acts of another--in our example, his principal--the statements of the other are as admissible against the party as they are against the declarant. Wigmore gives as examples the principal-surety case, authorized admissions, and statements of joint obligors.

The amendment made of Section 1226 at the July meeting (inserting "right") was an attempt to articulate the second branch of the principle. Wigmore gives as examples statements of a decedent offered against his executor (under our statute as it read before the July meeting, such statements could be offered against the executor in an action against the estate but not in an action brought by the estate), statements of a bankrupt offered against the trustee in bankruptcy, and statements of a grantor of property offered against a grantee.

The common law carried this principle to the point of making admissible against a party any statement of a co-owner, joint obligor, joint obligee, etc. The Commission rejected this aspect of the common law when it decided that Section 1870(5) of the Code of Civil Procedure should be repealed. The Commission at one time also rejected the principle that the statement of a predecessor in title should be admissible against the successor and decided that Section 1849 should be repealed. See Hearsay Study pp. 597-598.

The rationale in the study that previously was deemed persuasive would justify omitting entirely Sections 1226 and 1227 as well as the existing Code

of Civil Procedure sections relating to statements of joint owners and predecessors in interest. It still persuades us there should be no general exception for statements of persons jointly interested. But, to permit admissions of a decedent to be introduced in actions against his estate and to require their exclusion in actions brought by his estate seems totally unjustifiable. Accordingly, we recommend the retention of Sections 1226 and 1227 with certain modifications. The modifications have necessitated a certain amount of redrafting. We have now articulated the principles involved in three sections--Sections 1226, 1227, and 1228.

The principles that we have identified and have attempted to draft in statutory form are as follows:

1. When the liability of a party is dependent upon the liability of another, a statement by that other is as admissible against the party as it would be against the declarant in an action on that liability. Conversely, where the right of a party that is being asserted in action--such as a right to damages for the defendant's negligence--may be defeated by a showing of a breach of duty on the part of another--such as contributory negligence--a statement by that other person is as admissible against the party as it would be against the declarant if he were the party.

Section 1226 now expresses this principle. We have eliminated the word "right" from the draft so that the admissibility of statements of declarants whose right or title is in issue might be handled in a separate section. The principal change in Section 1226 from the form in which it appeared at the July meeting is the insertion of the reference to "breach of duty". We believe this specific reference is necessary because the word "duty" alone does not appear to pick up the cases we believe should be

included. The word "duty" by itself appears to refer to some existing duty that is to be enforced as distinguished from a past duty that has been breached.

2. When a right or title asserted in an action requires a determination that such right or title existed or exists in another--as, for example, when an executor brings an action upon a cause of action of his decedent--a statement made by that other person while the holder of the right or title in question is as admissible against the party as it would be against the declarant if he were the party.

The insertion of the word "right" in Section 1226 was an attempt to state this principle. We believe that it is now stated more accurately in Section 1227. Under Section 1227, as under the common law, a statement made by the prececessor in interest after parting with title is inadmissible under this principle.

Subdivision (b) of Section 1227 contains the phrase "while the declarant was claimed by the party to be the holder . . ." for the following reasons stated by Wigmore:

> It is to be noted that, upon this principle, statements made before title accrued in the declarant will not be receivable. On the other hand, the time of divestiture, after which no statements could be treated as admissions, is the time when the party against whom they are offered has by his own hypothesis acquired the title; thus, in a suit, for example, between A's heir and A's grantee, A's statements at any time before his death are receivable against the heir; but only his statements before the grant are receivable against the grantee. [4 Wigmore, Evidence 153.]

3. Wrongful death cases, and wrongful injury of a child (C.C.P. § 376) cases, need separate treatment. At the July meeting, the Commission decided that the plaintiff in a wrongful death case stands so completely

on the right of the decedent that the decedent's admissions of the nonliability of the defendant should be admitted against plaintiff, even though as a technical matter the plaintiff is asserting an independent right. Because the wrongful death, wrongful child-injury causes of of action are technically independent, a separate section is needed to make the statements of the person injured or deceased admissible as admissions. Section 1228 does so.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§ 1200. The hearsay rule.

1200. (a) "Hearsay evidence" is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated.

(b) Except as provided by rule of law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

§ 1201. Multiple hearsay.

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

§ 1202. Credibility of hearsay declarant.

1202. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to the hearsay rule is not inadmissible for the purpose of discrediting the declarant, though he is given and has had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

§ 1203. Cross-examination of hearsay declarant.

1203. (a) Except as provided in subdivisions (b) and (c), the declarant of a statement that is admitted as hearsay evidence may be called as a witness by the adverse party and examined as if under cross-examination concerning the statement and its subject matter.

(b) This section is not applicable if the declarant is (1) a party, (2) an agent, partner, or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended, or (4) a witness who has testified in the action.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not inadmissible under this section because the declarant who made the statement is unavailable for cross-examination pursuant to this section.

§ 1204. Hearsay statement offered against criminal defendant.

1204. A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action unless the statement would be admissible under Section 1220 against the declarant if he were the defendant in a criminal action.

§ 1205. Pretrial notice of certain hearsay statements.

1205. The judge may exclude evidence of a writing that is offered as hearsay evidence if the proponent's intention to offer the evidence was not made known to the adverse party at such a time as to provide him with a fair opportunity to prepare to meet it and:

(a) The writing is a record or other writing in the custody of a public employee; or

(b) The evidence is inadmissible under the hearsay rule except under Article 7 (commencing with Section 1270), Article 8 (commencing with Section 1280), Article 9 (commencing with Section 1290), Article 13 (commencing with Section 1330), or Article 14 (commencing with Section 1340) of Chapter 2 of this division, or Sections 1315 or 1316 of this code.

§ 1206. No implied repeal.

1206. Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Confession or admission of criminal defendant.

1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the defendant in a criminal action if the statement was made by him freely and voluntarily and was not made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

§ 1221. Admission of party to civil action.

1221. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in a civil action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

§ 1222. Adoptive admission.

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption of it or his belief in its truth.

§ 1223. Authorized admissions.

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the judge's discretion as to the order of proof, subject to the admission of such evidence.

§ 1224. Admission of co-conspirator.

1224. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and within the scope of his express or implied authority to act in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was also participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the judge's discretion as to the order of proof, subject to the admission of such evidence.

§ 1225. Statement of agent, partner, or employee.

1225. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement is that of an agent, partner, or employee of the party;

(b) The statement concerned a matter within the scope of the agency, partnership, or employment and was made during that relationship;

(c) The statement would be admissible if made by the declarant at the hearing; and

(d) The evidence is offered either after proof of the existence of the relationship between the declarant and the party or, in the judge's discretion as to the order of proof, subject to such proof.

§ 1226. Statement of declarant whose liability or breach of duty is in issue.

1226. Evidence of a statement offered against a party in a civil action is not made inadmissible by the hearsay rule if:

(a) The liability, obligation, or duty of the declarant, or a breach of duty by the declarant, is in issue between the party and the proponent of the evidence; and

(b) The evidence would be admissible if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

§ 1227. Statement of declarant whose right or title is in issue.

1227. Evidence of a statement offered against a party in a civil action is not made inadmissible by the hearsay rule if:

(a) A right or title of the declarant is in issue between the party and the proponent of the evidence;

(b) The statement was made while the declarant was claimed by the party to be the holder of such right or title; and

(c) The evidence would be admissible if offered against the declarant in an action upon that right or title.

§ 1228. Statement of declarant in action for his wrongful injury or death.

1228. Evidence of a statement is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for the injury or death of the declarant.

Article 2. Declarations Against Interest

§ 1230. Declaration against interest.

1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Article 3. Prior Statements of Witnesses

1235. Prior inconsistent statement.

1235. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if:

(a) The statement would have been admissible if made by him while testifying, and

(b) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 787.

1236. Prior consistent statement.

1236. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if:

(a) The statement would have been admissible if made by him while testifying, and

(b) The statement is consistent with his testimony at the hearing and is offered in compliance with Section 788.

1237. Past recollection recorded.

1237. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying at the hearing and the statement concerns a matter as to which the witness has no present recollection and is contained in a writing which:

(a) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(b) Was made by the witness himself or under his direction or by some other person for the purpose of recording the witness' statement at the time it was made;

(c) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(d) ~~Is offered after the writing is authenticated as an accurate~~ record of the statement.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

1240. Spontaneous statement.

1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to state what the declarant perceived relating to an act, condition, or event which the statement narrates, describes, or explains; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

1241. Contemporaneous statement.

1241. Evidence of a statement that narrates, describes, or explains an act, condition, or event is not made inadmissible by the hearsay rule if the statement was made while the declarant was perceiving the act, condition, or event.

1242. Dying Declaration.

1242. Evidence of a statement made by a person since deceased is not made inadmissible by the hearsay rule if the statement would be admissible if made by the declarant at the hearing and was made under a sense of impending death, voluntarily and in good faith, and in the belief that there was no hope of his recovery.

Article 5. Statements of Mental or Physical State

1250 Statement of declarant's then existing physical or mental condition.

1250. (a) Subject to Section 1253, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) Such mental or physical condition is in issue and the evidence is offered on that issue; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

1251. Statement of declarant's previously existing physical or mental condition.

1251. Subject to Section 1253, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

(a) The declarant is unavailable as a witness; and

(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

1252. Statement of previous symptoms.

1252. Subject to Section 1253, evidence of a statement of the declarant's previous symptoms, pain, or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, is not made inadmissible

by the hearsay rule when relevant to an issue of the declarant's bodily condition.

1253. Limitation on admissibility of statements of mental or physical state.

1253. This article does not make evidence of a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

Article 6. Statements Relating to Wills and to Claims Against Estates

1260. Statement concerning declarant's will.

1260. (a) Evidence of a statement by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

(b) This section does not make evidence of a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1261. Statement of decedent offered in action against his estate.

1261. Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear and when the declarant in making such statement had no motive or reason to deviate from the truth.

Article 7. Business Records

1270. "A business."

1270. As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

1271. Business record.

1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business, at or near the time of the act, condition, or event;

(b) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1272. Absence of entry in business records.

1272. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the non-occurrence of the act or event, or the non-existence of the condition, if:

(a) It was the regular course of that business to make records of all such acts, conditions, or events, at or near the time of the act, condition, or event, and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business are such as to indicate that the absence of a record of an act, condition, or event warrants an inference that the act or event did not occur or the condition did not exist.

Article 8. Official Reports and Other Official Writings

1280. Report of public employee.

1280. Evidence of a writing made as a record or report of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made by and within the scope of duty of a public employee of the United States or a public entity of any state;

(b) The writing was made at or near the time of the act, condition, or event; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1281. Report of vital statistic.

1281. Evidence of a writing made as a record or report of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by statute to file the writing in a designated public office and the writing was made and filed as required by the statute.

1282. Finding of presumed death by authorized federal employee.

1282. A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (50 U.S.C. App. Supp. 1001-1016), as enacted or as heretofore or hereafter amended shall be received in any court, office or other place in this State as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

1283. Report by federal employee that person is missing, captured, or the like.

1283. An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force,

beleaguered by a hostile force, or besieged by a hostile force, or is dead, or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force, or is dead, or is alive, as the case may be.

1284. Statement of absence of public record.

1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

Article 9. Former Testimony

1290. "Former testimony."

1290. As used in this article, "former testimony" means testimony given under oath or affirmation in:

(a) Another action or in a former hearing or trial of the same action;

(b) A proceeding to determine a controversy conducted by or under the supervision of a governmental agency having the power to determine such a controversy;

(c) A deposition taken in compliance with law in another action; or

(d) An arbitration proceeding if the evidence of such former testimony is a correct verbatim transcript thereof made by a certified shorthand reporter.

1291. Former testimony offered against party to former proceeding.

1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine with an interest and motive similar to that which he has at the hearing, except that testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not made admissible by this paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action.

(b) Except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying in person.

1292. Former testimony offered against person not a party to former proceeding.

1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the people in a criminal action; and

(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying in person.

Article 10. Judgments

1300. Judgment of felony conviction.

1300. Evidence of a final judgment adjudging a person guilty of a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.

1301. Judgment against person entitled to indemnity.

1301. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment.

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment.

(c) Recover damages for breach of warranty substantially the same as a warranty determined by the judgment to have been breached.

1302. Judgment determining liability of third person.

1302. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

Article 11. Family History

1310. Statement concerning declarant's own family history.

1310. (a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, legitimacy, relationship by blood or marriage, racial ancestry, or other similar fact of his family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) This section does not make evidence of a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1311. Statement concerning family history of another.

1311. (a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, legitimacy, racial ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) This section does not make evidence of a statement admissible if the statement was made under circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1312. Entries in family records and the like.

1312. Evidence of entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, legitimacy, racial ancestry, or other similar fact of the family history of a member of the family by blood or marriage.

1313. Reputation in family concerning family history.

1313. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, legitimacy, racial ancestry, or other similar fact of the family history of a member of the family by blood or marriage and the evidence is offered to prove the truth of the matter reputed.

1314. Community reputation concerning family history.

1314. Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed.

1315. Church records concerning family history.

1315. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, racial ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if:

(a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271;

(b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing; and

(c) The writing was made as a record of a church, religious denomination or religious society.

1316. Marriage, baptismal, and similar certificates.

1316. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, racial ancestry relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

(a) The certificate was made by a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and

(b) The certificate was issued by such person at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

Article 12. Reputation and Statements Concerning Community History, Property Interests, and Character

1320. Reputation concerning community history.

1320. Evidence of reputation in a community is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

1321. Reputation concerning public interest in property.

1321. Evidence of reputation in a community is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed if the reputation concerns the interest of the public in property in the community and the reputation, if any, arose before controversy.

1322. Reputation concerning boundary or custom affecting land.

1322. Evidence of reputation in a community is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation, if any, arose before controversy.

1323. Statement concerning boundary.

1323. Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section if the statement was made under such circumstances

that the declarant in making such statement had motive or reason to deviate from the truth.

1324. Reputation concerning character.

1324. Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule when offered to prove the truth of the matter reputed.

Article 13. Dispositive Instruments and Ancient Writings

1330. Recitals in writings affecting property.

1330. Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

1331. Recitals in ancient writings.

1331. Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

Article 14. Commercial, Scientific, and Similar Publications

1340. Commercial lists and the like.

1340. Evidence of a statement, other than an opinion, contained in a tabulation, list, director, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon by persons engaged in an occupation as accurate.

1341. Publications concerning facts of general notoriety and interest.

1341. Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§1200. The hearsay rule.

Comment. Section 1200 states the hearsay rule. That hearsay evidence is inadmissible unless the evidence is within an exception to that rule has been the law of California since the earliest days of the state. See, e.g., People v. Bob, 29 Cal.2d 321, 175 P.2d 12 (1946); Kilburn v. Ritchie, 2 Cal. 145 (1852). Nevertheless, Section 1200 is the first statutory statement of the rule. Code of Civil Procedure Section 1845 (superseded by Evidence Code § 702) permits a witness to testify concerning those facts only that are personally known to him "except in those few express cases in which . . . the declarations of others, are admissible"; and that section has been considered to be the statutory basis for the hearsay rule. People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964). It has been recognized, however, as an insufficient basis for the hearsay rule. The section merely states the requirement of personal knowledge, and a witness testifying to the hearsay statement of another must have personal knowledge of that statement just as he must have personal knowledge of any other matter concerning which he testifies. Sneed v. Marysville Gas etc. Co., 149 Cal. 704, 708, 87 Pac. 376, 378 (1906).

Under Section 1200, exceptions to the hearsay rule must be created by statute. This will change the California law; for inasmuch as the rule excluding hearsay was not statutory, the courts have not been bound by the statutes in recognizing exceptions to the rule. See, People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964).

"Hearsay evidence" is defined in Section 155 as "evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." Under existing case law, too, the hearsay rule applies only to out-of-court statements that are offered to prove the truth of the matter asserted. If the statement is offered for some purpose other than to prove the fact stated therein, the evidence is not objectionable under the hearsay rule. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892, (1944); Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892). See WITKIN, CALIFORNIA EVIDENCE §§ 215-218 (1958).

The word "statement" that is used in the definition of "hearsay evidence" is defined in Section 225 as "oral or written expression" or "nonverbal conduct . . . intended . . . as a substitute for words in expressing the matter stated." Hence, evidence of a person's out-of-court conduct is not inadmissible under the hearsay rule expressed in Section 1200 unless that conduct is clearly assertive in character. Nonassertive conduct is not hearsay.

Some California cases have regarded evidence of nonassertive conduct as hearsay evidence if it is offered to prove the actor's belief in a particular fact as a basis for an inference that the fact believed is true. See, e.g., Estate of De Laveaga, 165 Cal. 607, 624, 133 Pac. 307, (1913)("the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extra-judicial expression of opinion on the part of the family"); People v. Mendez, 193 Cal. 39, 52, 223 Pac. 65, (1924) ("Circumstances of flight [of other persons from the scene of a crime] are in the nature of confessions . . . and are, therefore, in the nature of hearsay evidence").

Other California cases, however, have admitted evidence of nonassertive conduct as evidence that the belief giving rise to the conduct was based on fact. See, e.g., People v. Reifenstuhl, 37 Cal. App.2d 402, 99 P.2d 564 (1940)(hearing denied)(incoming telephone calls made for the purpose of placing bets admissible over hearsay objection to prove that place of reception was bookmaking establishment).

Under the Evidence Code, nonassertive conduct is not regarded as hearsay for two reasons: First, such conduct, being nonassertive, does not involve the veracity of the declarant; hence, one of the principal reasons for the hearsay rule--to exclude declarations where the veracity of the declarant cannot be tested by cross-examination--does not apply. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct because the actor has based his actions on the correctness of his belief. To put the matter another way, in such cases actions speak louder than words.

Of course, if the probative value of evidence of nonassertive conduct is outweighed by the likelihood that such evidence will confuse the issues, mislead the jury, or consume too much time, the judge may exclude the evidence under Section 352.

§ 1201. Multiple hearsay.

Comment. Section 1201 makes it possible to use admissible hearsay to prove another statement was made that is also admissible hearsay. For example, under Section 1201, an official reporter's transcript of the testimony at another trial may be used to prove the nature of the testimony previously given (Section 1280), the former testimony may be used

as hearsay evidence (under Section 1291) to prove that a party made an admission. The admission is admissible (Section 1221) to prove the truth of the matter stated. Thus, under Section 1201, the evidence of the admission contained in the transcript is admissible because each of the hearsay statements involved is within an exception to the hearsay rule.

Although no California case has been found where the admissibility of "multiple hearsay" has been analyzed and discussed, the practice is apparently in accord with the rule stated in Section 1201 See, e.g., People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946)(transcript of former testimony used to prove admission).

§ 1202. Credibility of hearsay declarant.

Comment. Section 1202 deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it makes clear that the rule applying to impeachment of a witness--that a witness may be impeached by a prior inconsistent statement only if he is provided with an opportunity to explain it--does not apply to a hearsay declarant.

The California courts have permitted a party to impeach hearsay evidence given under the former testimony exception with evidence of an inconsistent statement by the hearsay declarant, even though the declarant had no opportunity to explain or deny the inconsistency, when the inconsistent statement was made after the former testimony was given. People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946). The courts have also permitted dying

declarations to be impeached by evidence of contradictory statements by the deceased, although no foundation was laid. People v. Lawrence, 21 Cal. 368 (1863). Apparently, however, former testimony may not be impeached by evidence of an inconsistent statement made prior to the former testimony unless the would-be impeacher either did not know of the inconsistent statement at the time the former testimony was given or provided the declarant with an opportunity to deny or explain the inconsistent statement. People v. Greenwell, 20 Cal. App.2d 266, 66 P.2d 674 (1937) as limited by People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946).

Section 1202 substitutes for this case law a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to deny or explain the inconsistency. If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach. Cf., People v. Lawrence, 21 Cal. 368, 372 (1863). If the hearsay declarant is available, the party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies.

Of course, the trial judge may curb efforts to impeach hearsay declarants if he determines that the inquiry is straying into remote and collateral matters. Section 352.

Section 1202 provides that inconsistent statements of a hearsay declarant may not be used to prove the truth of the matters stated. In contrast, Section 1235 provides that evidence of prior inconsistent statements made by a trial witness may be admitted to prove the truth of the matters stated. Unless the declarant is a witness and subject to cross-examination upon the

subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

§ 1203. Cross-examination of hearsay declarant.

Comment. Hearsay evidence is generally excluded from evidence because of the lack of opportunity for the adverse party to cross-examine the hearsay declarant before the trier of fact. People v. Bob, 29 Cal.2d 321, 325, 175 P.2d 12, (1946). In some situations, hearsay evidence is admitted because of some exceptional need for the evidence and because there is some circumstantial evidence of trustworthiness that justifies a violation of a party's right of cross-examination. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, (1957); Turney v. Sousa, 146 Cal. App.2d 787, 791, 304 P.2d 1025, (1956).

Even though it is necessary or desirable to permit some hearsay evidence to be received without guaranteeing the adverse party the right to cross-examine the declarant, there seems to be no reason to prohibit the adverse party from cross-examining the declarant altogether. The policy in favor of cross-examination that underlies the hearsay rule, therefore, indicates that the adverse party should be accorded the right to call the declarant of a statement that has been received and to cross-examine him concerning the subject matter of his statement.

Hence, Section 1203 has been included in the Evidence Code to reverse, insofar as a hearsay declarant is concerned, the traditional rule that a witness called by a party is a witness for that party and may not be cross-examined by him. As a hearsay declarant is in practical effect a witness

against that party, Section 1203 gives the party against whom a hearsay statement is admitted the right to call and cross-examine the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at the trial.

§ 1204. Hearsay statement offered against criminal defendant.

Comment. In People v. Underwood, 61 Cal.2d ___, ___ P.2d ___, 37 Cal. Rptr. 313 (1964), the California Supreme Court held that a prior inconsistent statement of a witness could not be introduced to impeach him in a criminal trial when the prior inconsistent statement would have been inadmissible as an involuntary confession if the witness had been the defendant. Section 1204 applies the principle of the Underwood decision to all hearsay statements

§ 1205. Pretrial delivery of copy of certain hearsay statements.

Comment. [The form of this rule has not yet been formulated.]

§ 1206. No implied repeal.

Comment. Although some of the statutes providing for the admission of hearsay evidence will be repealed when the Evidence Code is enacted, there will remain in the various codes a number of statutes which, for the most part, are narrowly drawn to make a particular type of hearsay evidence admissible under specifically limited circumstances. It is neither desirable nor feasible to repeal these statutes. Section 1206 makes it clear that these statutes will not be impliedly repealed by the enactment of the Evidence Code.

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Confession or admission of criminal defendant.

Comment. Section 1220 restates the existing law governing the admissibility of the confession or admission of a defendant in a criminal action. People v. Jones, 24 Cal.2d 601, 150 P.2d 801 (1944); People v. Rogers, 22 Cal.2d 787, 141 P.2d 722 (1943); People v. Loper, 159 Cal.6, 112 P. 720 (1910); People v. Speaks, 156 Cal. App.2d 25, 319 P.2d 709 (1957); People v. Haney, 46 Cal. App. 317, 189 Pac. 338 (1920); People v. Lisenba, 14 Cal.2d 403, 94P.2d 569 (1939); People v. Atchley, 53 Cal.2d 160, 346 P.2d 764 (1959). See also Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 475-482 (1963).

Although subdivision (b) is technically unnecessary, for the sake of completeness it is desirable to give express recognition to the fact that any rule of admissibility established by the Legislature is subject to the requirements of the Federal and State Constitutions.

§ 1221. Admission of party to civil action.

Comment. Section 1221 states existing law as found in Code of Civil Procedure Section 1870(2). The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant, since the party himself made the statement. Moreover, the party can cross-examine the witness who testifies to the party's statement and can deny or explain the purported admission. The statement need not be one which would be admissible if made at the hearing. See Shields v. Oxnard Harbor Dist., 46 Cal. App.2d 477, 116 P.2d 121 (1941).

§ 1222. Adoptive admission.

Comment. Section 1222 restates and supersedes subdivision 3 of Code of Civil Procedure Section 1870. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 484 (1963).

§ 1223. Authorized admission.

Comment. Section 1223 provides a hearsay exception for authorized admissions. Under this exception, if a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same conditions as if they had been made by the party himself. Section 1223 restates and supersedes the first portion of subdivision 5 of Code of Civil Procedure Section 1870. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 484-490 (1963).

§ 1224. Admission of co-conspirator.

Comment. Section 1224 is a specific example of a kind of authorized admission that is admissible under Section 1223. The statement is admitted because it is an act of the conspiracy for which the party, as a co-conspirator, is legally responsible. People v. Lorraine, 90 Cal. App. 317, 327, 265 Pac. 893, (1928). See CAL. CONT. ED. BAR, CALIFORNIA CRIMINAL LAW PRACTICE 471-472 (1964). Section 1224 restates and supersedes the provisions of subdivision 6 of Code of Civil Procedure Section 1870.

§ 1225. Statement of agent, partner, or employee.

Comment. Section 1223 makes authorized extrajudicial statements admissible. Section 1225 goes beyond this, making admissible against a party

specified extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under Section 1225, however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions.

The practical scope of Section 1225 is quite limited. The spontaneous statements that it covers are admissible under Section 1240. The self-inculpatory statements which it covers are admissible under Section 1230 as declarations against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by Section 1225 would be admissible as inconsistent statements under Section 1235. Thus, Section 1225 has independent significance only as to unauthorized, nonspontaneous, noninculpatory statements of agents, partners and employees who do not testify at the trial concerning the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under Section 1230, it would be inadmissible as an authorized admission under Section 1223, it would be inadmissible under Section 1235 unless the employee testified inconsistently at the trial, it would be inadmissible under Section 1240 unless made spontaneously, but it would be admissible under Section 1225.

Section 1225 goes beyond existing California law as found in subdivision 5 of Section 1870 of the Code of Civil Procedure (superseded by Evidence Code Section 1223). Under existing California law only the statements that the principal has authorized the agent to make are admissible. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 (1903).

There are two justifications for the limited extension of the exception for agents' statements provided by Section 1225. First, because of the relationship which existed at the time the statement was made, it is unlikely that the statement would have been made unless it were true. Second, the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

§ 1226. Statement of declarant whose liability is in issue.

Comment. Section 1226 restates in substance a hearsay exception found in Section 1851 of the Code of Civil Procedure (superseded by Evidence Code Sections 1226 and 1302). Cf., Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115 (1888); Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956); Standard Oil Co. v. Houser, 101 Cal. App.2d 480, 225 P.2d 539 (1950). Section 1226, however, limits this hearsay exception to civil actions. Much of the evidence within this exception is also covered by Section 1230, which makes admissible declarations against interest. However, to be admissible under Section 1230 the statement must have been against the declarant's interest when made whereas this requirement is not stated in Section 1226.

Section 1302 supplements the rule stated in Section 1226. Section 1302 permits the admission of judgments against a third person when one of the issues between the parties is the liability, obligation, or duty of the third person and the judgment determines that liability, obligation, or duty. Together, Sections 1226 and 1302 codify the holdings of the cases applying Code of Civil Procedure Section 1851. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 491-496 (1963).

Article 2. Declarations Against Interest

§ 1230. Declaration against interest.

Comment. Section 1230 codifies the hearsay exception for declarations against interest as that exception has been developed in the California courts. People v. Spriggs, 60 Cal.2d ___, 389 P.2d 377, 36 Cal. Rptr. 841 (1964). It is not clear, however, whether existing law extends the declaration against interest exception to include statements that make the declarant an object of hatred, ridicule, or social disgrace in the community.

Section 1230 supersedes the partial and inaccurate statements of the declarations against interest exception found in Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). See People v. Spriggs, 60 Cal.2d at ___, 389 P.2d at 380-381, 36 Cal. Rptr. at 844-845 (1964).

Article 3. Prior Statements of Witnesses

§ 1235. Prior inconsistent statement.

Comment. Under existing law, a prior statement of a witness that is inconsistent with his testimony at the trial is admissible, but because of the hearsay rule such statements may not be used as evidence of the truth of the matters stated. They may be used only to cast discredit on the testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 456, (1917).

Section 1235, however, permits a prior inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise

admissible under the rules relating to the impeachment of witnesses. In view of the fact that the declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter, there seems to be little reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that they cannot believe a witness was telling the truth on a former occasion when they believe the contrary story given at the trial is not true. Moreover, in many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to litigation.

Section 1235 will permit a party to establish a prima facie case by introducing prior inconsistent statements of witnesses. This change in the law, however, will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

§ 1236. Prior consistent statement.

Comment. Under existing law, a prior statement of a witness that is consistent with his testimony at the trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is admitted, however, only to rehabilitate the witness--to support his credibility--and not as evidence of the truth of the matters stated. People v. Kynette, 15 Cal.2d 731, 753-754, (1940).

Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible

under the rules relating to the rehabilitation of impeached witnesses. The reasons for this change in the law are much the same as those discussed in the Comment to Section 1235.

§ 1237. Past recollection recorded.

Comment. Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." The section makes no radical departure from existing law, for its provisions are taken largely from the provisions of Section 2047 of the Code of Civil Procedure. There are, however, two substantive differences between Section 1237 and existing California law:

First, existing law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the fact recorded in the writing actually occurred or at such other time when the fact was fresh in the witness' memory and (3) that the witness "knew that the same was correctly stated in the writing." Under Section 1237, however, the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness' statement at the time it was made. In addition, Section 1237 permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under Section 1237 the document or other writing embodying the statement is itself admissible in evidence whereas under the present law the declarant reads the writing on the witness stand and the writing is not otherwise made a part of the record unless it is offered in evidence by the adverse party.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

§ 1240. Spontaneous statement.

Comment. Section 1240 is a codification of the existing exception to the hearsay rule which makes excited statements admissible. Showalter v. Western Pacific R.R., 16 Cal.2d 460, 106 P.2d 895 (1940); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 465-466 (1963). The rationale of this exception is that the spontaneity of such statements and the declarant's state of mind at the time when they are made provide an adequate guarantee of their trustworthiness.

§ 1241. Contemporaneous statement.

Comment. Section 1241, which provides a hearsay exception for contemporaneous statements, may go beyond existing law, for no California case in point has been found. Elsewhere the authorities are conflicting in their results and confused in their reasoning owing to the tendency to discuss the problem only in terms of res gestae. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 466-468 (1963).

The statements admissible under subdivision (2) are highly trustworthy because: (1) the statement being simultaneous with the event, there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who has equal opportunity to observe and check misstatements. In applying this exception, the courts should insist on actual contemporaneousness; otherwise, the trustworthiness of the statements becomes questionable.

§ 1242. Dying declaration.

Comment. Section 1242 is a broadened form of the well-established exception to the hearsay rule which makes dying declarations admissible. The existing law--Code of Civil Procedure Section 1870(4) as interpreted by our courts--makes such declarations admissible only in criminal homicide actions and only when they relate to the immediate cause of the declarant's death. People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. § STUDIES 472-473 (1963). The rationale of the exception--that men are not apt to lie in the shadow of death--is as applicable to any other declaration that a dying man might make as it is to a statement regarding the immediate cause of his death. Moreover, there is no rational basis for differentiating, for the purpose of the admissibility of dying declarations, between civil and criminal actions, or among various types of criminal actions.

Under Section 1242, the dying declaration is admissible only if it would be admissible if made by the declarant at the hearing. Thus, the dying declaration is admissible only if the declarant would have been a competent witness and made the statement on personal knowledge.

Article 5. Statements of Mental or Physical State

§ 1250. Statement of declarant's then existing physical or mental condition.

Comment. Section 1250 provides an exception to the hearsay rule for statements of the declarant's then existing physical or mental condition. It

codifies an exception that has been developed by the courts.

Thus, under Section 1250 as under existing law, a statement of the declarant's state of mind at the time of the statement is admissible when that state of mind is itself in issue in the case. Adkins v. Brett, 184 Cal. 252, 193 Pac. 5 (1920). A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior to the statement. Watenpaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959); Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530 (1942); Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921); Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915). Section 1250 also makes a statement of then existing state of mind admissible to "prove or explain acts or conduct of the declarant." Thus, a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944); Benjamin v. District Grand Lodge, 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition are also admissible to prove the existence of such condition. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496 (1919); People v. Wright, 167 Cal. 1, 138 Pac. 349 (1914).

A statement is not admissible under Section 1250 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

In light of the definition of "hearsay evidence" in Section 155, a distinction should be noted between the use of a declarant's statements of his then existing mental state to prove such mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state.

Under the Evidence Code, if the declarant's statements are not being used to prove the truth of their contents but are being used as circumstantial evidence of the declarant's mental state, no hearsay problem is involved. See the Comment to Section 1200.

Section 1250 (b) does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind--his memory or belief--concerning the past event. If the evidence of that state of mind--the statement of memory--were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.

The limitation in Section 1250(b) is, in general, in accord with the law developed in the California cases. Thus, in Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921), a declaration of a testatrix made after the execution of a will to the effect that the will had been made at an aunt's request was held to be inadmissible hearsay "because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it." 185 Cal. at 720, 198 Pac. at 415 (1921).

A major exception to the principle expressed in Section 1250(b) was created in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that statements made by the victims of a double homicide relating threats by the defendant were admissible to show the victims' mental state--their fear of the defendant. Their fear was not itself in issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct

engendering the fear, i.e., that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. In People v. Purvis, 56 Cal.2d 93, 362 P.2d 713, 13 Cal. Rptr. 801 (1961), the doctrine of the Merkouris case was limited to cases where identity is in issue.

Section 1250(b) is contrary to the Merkouris case. The doctrine of that case is repudiated because it is an attack on the hearsay rule itself. Other exceptions to the hearsay rule are based on some peculiar reliability of the evidence involved. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, (1957). The exception created by Merkouris was not based on any evidence of the reliability of the declarations, it was based on a rationale that destroys the very foundation of the hearsay rule.

§ 1251. Statement of declarant's previously existing physical or mental condition.

Comment. Section 1250 forbids the use of a statement of memory or belief to prove the fact remembered or believed. Section 1251, however, permits a statement of memory or belief of a past mental state to be used to prove the previous mental state when the previous mental state is itself in issue in the case. If the past mental state is to be used merely as circumstantial evidence of some other fact, the limitation in Section 1250 still applies and the statement of the past mental state is inadmissible hearsay.

Section 1251 is generally consistent with the California case law, which also permits a statement of a prior mental state to be used as evidence of that

mental state. See, e.g., People v. One 1948 Chevrolet Conv. Coupe, 45 Cal.2d 613, 290 P.2d 538 (1955) (statement of prior knowledge admitted to prove such knowledge). However, Section 1251 requires that the declarant be unavailable as a witness. No similar condition on admissibility has been imposed by the cases. Note, too, that no similar condition appears in Section 1250.

A statement is not admissible under Section 1251 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

§ 1252. Statement of previous symptoms.

Comment. Under existing California law, a statement of previous symptoms made to a physician for purposes of treatment is considered inadmissible hearsay; although the physician may relate the statement as a matter upon which he based his diagnosis of the declarant's ailment. See discussion in People v. Brown, 49 Cal.2d 577, 585-587, 320 P.2d 5, (1958).

Section 1252 permits statements of previous symptoms made to a physician for purposes of treatment to be used to prove the facts related in the statements. If there is no motive to falsify such statements, they are likely to be highly reliable, for the declarant in making them has based his actions on his belief in their truth--he has consulted the physician and has permitted the physician to use them as a basis for prescribing treatment. Statements made to a physician where there is a motive to manufacture evidence or any other motive to deceive are inadmissible under this section because of the limitation in Section 1253.

§ 1251
§ 1252

§ 1253. Limitation on admissibility of statements of mental or physical state.

Comment. Section 1253 limits the admissibility of hearsay statements that would otherwise be admissible under Sections 1250, 1251, and 1252. If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence. The limitation expressed in Section 1253 has been held to be a condition of admissibility in some of the California cases. See, e.g., People v. Hamilton, 55 Cal.2d 881, 893, 895, 13 Cal. Rptr. 649, , , 362 P.2d 473, , (1961); People v. Alcalde, 24 Cal.2d 177, 187, 148 P.2d 627, (1944).

The Hamilton case mentions some further limitations on the admissibility of statements of mental state. These are not given express recognition in the Evidence Code. However, under Section 352, the judge may in a particular case exclude such evidence if he determines that its prejudicial effect will substantially outweigh its probative value. The specific limitations mentioned in the Hamilton case have not been codified because they are difficult to understand in the light of conflicting and inconsistent language in the case and because in a different case, prosecuted without the excessive prejudice present in the Hamilton case, a court might be warranted in receiving evidence of the kind involved there where its probative value is great.

For example, the opinion states that statements of a homicide victim that are offered to prove his state of mind are inadmissible if they refer solely to alleged past conduct on the part of the accused. 55 Cal.2d at 893-894, 13 Cal. Rptr. at , 362 P.2d at . But the case also states, nonetheless, that statements of "threats . . . on the part of the accused" are admissible on the

issue. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . The opinion also states that the statements, to be admissible, must refer primarily to the state of mind of the declarant and not the state of mind of the accused. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . But the case also indicates that narrations of threats made by the accused--statements of his intent--are admissible, but statements of conduct by the accused having no relation to his intent or mental state are not admissible. 55 Cal.2d at 893, 895-896, 13 Cal. Rptr. at 362 P.2d at .

Much of the evidence involved in the Hamilton case is not classified as hearsay under the Evidence Code. It is classified as circumstantial evidence. Hence, the problem presented there is not essentially a hearsay problem. It is a problem of the judge's discretion to exclude highly prejudicial evidence when its probative value is not great. Section 352 of the Evidence Code continues the judge's power to curb the use of such evidence. But the Evidence Code does not freeze the courts to the arbitrary and contradictory standards mentioned in the Hamilton case for determining when prejudicial effect outweighs probative value.

Article 6. Statements Relating to Wills and to Claims Against Estates

§ 1260. Statement concerning declarant's will.

Comment. Section 1260 codifies an exception recognized in California case law. Estate of Morrison, 198 Cal. 1, 242 Pac. 939 (1926); Estate of Tompson, 44 Cal. App.2d 774, 112 P.2d 937 (1941). The section is, of course, subject to the provisions of Probate Code Sections 350 and 351 which relate to the establishment of a lost or destroyed will.

The limitation in subdivision (b) is not mentioned in the few decisions involving this exception. The limitation is desirable, however, to assure the reliability of the hearsay admissible under this section.

§ 1261. Statement of decedent offered in action against his estate.

Comment. The Dead Man Statute (subdivision 3 of Code of Civil Procedure Section 1880) prohibits a party suing on a claim against a decedent's estate from testifying to any fact occuring prior to the decedent's death. The theory apparently underlying the statute is that it would be unfair to permit the surviving claimant to testify to such facts when the decedent is precluded from doing so by his death. Because the dead cannot speak, the living may not.

The Dead Man Statute operates unsatisfactorily. It prohibits testimony concerning matters of which the decedent had no knowledge. It does not prohibit testimony relating to claims under, as distinguished from against, the decedent's estate even though the effect of such a claim may be to frustrate the decedent's plan for the disposition of his property. See the Comment to Code of Civil Procedure Section 1880 and Recommendation and Study Relating to the Dead Man Statute, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at D-1 (1957). Hence, the Dead Man Statute is not continued in the Evidence Code.

To equalize the positions of the parties, the Dead Man Statute excludes otherwise relevant and competent evidence--even if it is the only available evidence. This forces the courts to decide cases with a minimum of information concerning the actual facts. See the Supreme Court's complaint in Light v. Stevens, 159 Cal. 288, 292, 113 Pac. 659, 660 (1911): "Owing to the fact that the lips of one of the parties to the transaction are closed by death and those of the other party by the law, the evidence on this question is somewhat unsatisfactory."

Section 1261 balances the positions of the parties in the opposite manner. It is based on the belief that the problem at which the Dead Man Statute is directed is better solved by throwing more light, not less, on the actual facts. Instead of excluding the competent evidence of the claimant, Section 1261 permits the hearsay statements of the decedent to be admitted, provided that they would have been admissible had the decedent made the statements as a witness at the hearing. Certain additional safeguards--recent perception, absence of motive to falsify--are included in the section to provide some protection for the party against whom the statements are offered, for he has no opportunity to test the hearsay by cross-examination.

Article 8. Business Records

§ 1270. "A business."

Comment. This article restates and supersedes the Uniform Business Records as Evidence Act appearing in Sections 1953e-1953h of the Code of Civil Procedure. The definition of "a business" in Section 1270 is substantially the same as that appearing in Code of Civil Procedure Section 1953e. A reference to "governmental activity" has been added to the Evidence Code definition to make it clear that records maintained by any governmental agency are admissible if the foundational requirements are met. This does not change existing California law, for the Uniform Act has been construed to be applicable to governmental records. See, e.g., Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569 (1952); Fox v. San Francisco Unified School Dist., 11 Cal. App.2d 885, 245 P.2d 603 (1952).

The definition is sufficiently broad to encompass institutions not customarily thought of as businesses. For example, the baptismal and wedding records of a church would be admissible under the section to prove the events recorded. 5 WIGMORE, EVIDENCE 371 (3d ed. 1940). Cf. EVIDENCE CODE § 1315.

§ 1271. Business record.

Comment. Section 1271 is the business records exception to the hearsay rule. It is stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e-1953h of the Code of Civil Procedure). Section 1271 does not, however, include the language of Section 1953f.5 of the Code of Civil Procedure because that section is not contained in the Uniform Act and inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf or some other form. The case-law rule is satisfactory and Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 516 (1963).

§ 1272. Absence of entry in business records.

Comment. Technically, evidence of the absence of a record may not be hearsay. Section 1272 removes any doubt that there might be, however, concerning the admissibility of such evidence under the hearsay rule. It codifies existing case law. People v. Torres, 201 Cal. App.2d 290, 20 Cal. Rptr. 315 (1962).

Article 8. Official Reports and Other Official Writings

§ 1280. Report of public employee.

Comment. Section 1280 restates in substance and supersedes Code of Civil Procedure Sections 1920 and 1926.

The evidence that is admissible under this section is also admissible under Section 1271, the business records exception. However, Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance. Under Section 1280, as under existing law, the court may admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court has judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness. See, e.g., People v. Williams, 64 Cal. 87, 27 Pac. 939 (1883) (census report admitted, the court noting the statutes prescribing the method of preparing the report); Vallejo etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 Pac. 238, 250 (1915) (statistical report of state agency admitted, the court noting the statutory duty to prepare the report).

§ 1281. Report of vital statistic.

Comment. Section 1281 provides a hearsay exception for official reports concerning birth, death, and marriage. Reports of such events occurring within California are now admissible under the provisions of Section 10577 of the Health and Safety Code. Section 1281 provides a broader exception which includes similar reports from other jurisdictions.

§ 1282. Finding of presumed death by authorized federal employee.

Comment. Section 1282 restates and supersedes the provisions of Code of Civil Procedure Section 1928.1. The evidence admissible under Section 1282 is limited to evidence of the fact of death and of the date, circumstances, and place of disappearance.

The determination of the date of the presumed death by the federal employee is a determination ordinarily made for the purpose of determining whether the pay of a missing person should be stopped and his name stricken from the payroll. The date so determined should not be given any consideration in the California courts since the issues involved in the California proceedings require determination of the date of death for a different purpose. Hence Section 1282 does not make admissible the finding of the date of presumed death. On the other hand, the determination of the date, circumstances, and place of disappearance is reliable information that will assist the trier of fact in determining the date when the person died and is admissible under this section. Often the date of death may be inferred from the circumstances of the disappearance. See, In re Thornburg's Estate, 186 Or. 570, 208 P.2nd 349 (1949); Lukens v. Camden Trust Co., 2 N.J. Super. 214, 62 A.2nd 886 (1948).

Section 1282 provides a convenient and reliable method of proof of death of persons covered by the Federal Missing Persons Act. See, e.g., In re Jacobsen's Estate, 208 Misc. 443, 143 N.Y.S.2nd 432 (1955)(proof of death of 2-year old dependent of serviceman where child was passenger on plane lost at sea).

§ 1283. Report by federal employee that person is missing, captured, or the like.

Comment. Section 1283 restates and supersedes the provisions of Code of Civil Procedure Section 1928.2. The language of Section 1928.2 has been revised to reflect the 1953 amendments to the Federal Missing Persons Act.

§ 1284. Statement of absence of public record.

Comment. Just as the existence and content of a public record may be proved under Section 1510 by a copy accompanied by the attestation or certificate of the custodian reciting that it is a copy, the absence of such a record from a particular public office may be proved under Section 1284 by a writing made by the custodian of the records in that office stating that no such record was found after a diligent search. The writing must, of course, be properly authenticated. See Sections 1401, 1451. The exception is justified by the likelihood that such statement made by the custodian of the records is accurate and by the necessity for providing a simple and inexpensive method of proving the absence of a public record.

Article 9. Former Testimony

§ 1290. "Former testimony."

Comment. The purpose of Section 1290 is to provide a convenient term for use in the substantive provisions in the remainder of this article. It should be noted that depositions taken in another action are considered former testimony under Section 1290, and their admissibility is determined by Sections 1291 and 1292.

The use of a deposition taken in the same action, however, is not covered by this article. Code of Civil Procedure Sections 2016-2035 deal comprehensively with the conditions and circumstances under which a deposition taken in a civil action may be used at the trial of the action in which the deposition was taken, and Penal Code Sections 1345 and 1362 prescribe the conditions for admitting the deposition of a witness that has been taken in the same criminal action. These sections will continue to govern the use of depositions in the action in which they are taken.

§ 1291. Former testimony offered against party to former proceeding.

Comment. Section 1291 provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given. For example, if a series of cases arise involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met.

Former testimony is admissible under Section 1291 only if the declarant is unavailable as a witness.

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. This evidence, in effect, is somewhat analogous to an admission. If the party finds that the evidence he originally offered in his favor now works to his disadvantage, he can respond as any party does to an admission. Moreover, since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine.

Paragraph (2) of subdivision (a) of Section 1291 provides for the admissibility of former testimony where the party against whom it is now offered had the right and opportunity in the former proceeding to cross-examine the declarant with an interest and motive similar to that which he now has. Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence--lack of opportunity to cross-examine the declarant--is not applicable. On the other hand, paragraph (2) does not make the former testimony admissible where the party against whom it is offered did not have a similar motive and interest to cross-examine. In determining the similarity of interest and motive to cross-examine, the judge should be guided by practical considerations and not merely by the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

Under paragraph (2), testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not admissible against the defendant in a criminal case unless it was received in evidence at the trial of such other action. This limitation insures that the person accused of crime will have an adequate opportunity to cross-examine the witnesses against him.

Section 1291 supersedes Code of Civil Procedure Section 1870(8) which permits former testimony to be admitted in a civil case only if the former proceeding was an action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial of the action in which the testimony is offered. Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under Penal Code Section 686. Under that section, former testimony has been admissible against the defendant in a criminal action only if the former testimony was given in the same action--at the preliminary examination, in a deposition, or in a prior trial of the action.

Subdivision (b) of Section 1291 makes it clear that objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given, but others indicate that competency and privilege are to be determined as of the time the former testimony is offered in evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 581-585 (1963).

Subdivision (b) also provides that objections to the form of the question may not be used to exclude the former testimony. Where the former testimony is offered under paragraph (1) of subdivision (a), the party against whom the former testimony is now offered himself phrased the question; and where the former testimony comes in under paragraph (2) of subdivision (a), the party against whom the testimony is now offered had the opportunity to object to the form of the question when it was asked on the former occasion. Hence, the

party is not permitted to raise this technical objection when the former testimony is offered against him.

§ 1292. Former testimony offered against person not a party to former proceeding.

Comment. Section 1292 provides a hearsay exception for former testimony given at the former proceeding by a person who is now unavailable as a witness when such former testimony is offered against a person who was not a party to the former proceeding but whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant when the former testimony was given. For example, if a series of cases arise involving one occurence and one defendant but several plaintiffs, Section 1292 permits testimony given against the plaintiff in the first trial to be used against a plaintiff in a later trial if the conditions of admissibility stated in the section are met.

Code of Civil Procedure Section 1870(8) (which is superseded by this article), does not permit admission of the former testimony made admissible by Section 1292. The out-dated "identity of parties" and "identity of issues" requirements of Section 1870 are too restrictive, and Section 1292 substitutes what is, in effect, a more flexible "trustworthiness" approach characteristic of other hearsay exceptions. The trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine with an interest and motive similar to that of the present adverse party. Although the party against whom the former testimony is offered did not himself have an opportunity to cross-examine the witness on the former occasion, it can be generally assumed that most prior cross-examination is

adequate, especially if the same stakes are involved. If the same stakes are not involved, the difference in interest or motivation would justify exclusion. And, even where if the prior cross-examination was inadequate, there is better reason here for providing a hearsay exception than there is for many of the presently recognized exceptions to the hearsay rule. As Professor McCormick states:

> . . . I suggest that if the witness is unavailable, then the need for the sworn, transcribed former testimony in the ascertainment of truth is so great, and its reliability so far superior to most, if not all the other types of oral hearsay coming in under the other exceptions, that the requirements of identity of parties and issues be dispensed with. This dispenses with the opportunity for cross-examination, that great characteristic weapon of our adversary system. But the other types of admissible oral hearsay, admissions, declarations against interest, statements about bodily symptoms, likewise dispense with cross-examination, for declarations having far less trustworthiness than the sworn testimony in open court, and with a far greater hazard of fabrication or mistake in the reporting of the declaration by the witness. [McCormick, Evidence § 238, p. 501 (1954).]

Section 1292 does not make former testimony admissible against the defendant in a criminal case. This limitation preserves the right of a person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake--as it is in a criminal trial--the accused should not be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.

Subdivision (b) of Section 1292 makes it clear that objections based on competency or privilege are to be determined by reference to the time when the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given but others indicate that competency and privilege are to be determined as of the time

the former testimony is offered in evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 581-585 (1963).

Article 10. Judgments

§ 1300. Judgment of felony conviction.

Comment. Analytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. UNIFORM RULES OF EVIDENCE, RULE 63(20), Comment (1953); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 539-541 (1963). It is in substance a statement of the court that determined the previous action ("a statement made other than by a witness while testifying at the hearing") that is offered "to prove the truth of the matter stated." Section 155. Therefore, unless there is an exception to the hearsay rule provided, a judgment is inadmissible if offered in a subsequent action to prove the matters determined. This article provides hearsay exceptions for certain kinds of judgments, and thus permits them to be used in subsequent actions as evidence despite the restrictions of the hearsay rule.

Of course, a judgment may, as a matter of substantive law, conclusively establish certain facts insofar as a party is concerned. Teitlebaum Furs, Inc. v. Dominion Ins. Co., 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962); Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942). The sections of this article do not purport to deal with the doctrines of res judicata and estoppel by judgment. These sections deal only with the evidentiary use of

judgments in those cases where the substantive law does not require that the judgments be given conclusive effect.

Section 1300 provides an exception to the hearsay rule for a final judgment adjudging a person guilty of a felony. The exception does not, however, apply in criminal actions. Hence, if a plaintiff sues to recover a reward offered by the defendant for the arrest and conviction of a person who committed a particular crime, Section 1300 permits the plaintiff to use a judgment of felony conviction as evidence that the person convicted committed the crime. But, Section 1300 does not permit the judgment to be used in a criminal action as evidence of the identity of the person who committed the crime or as evidence that the crime was committed.

Section 1300 will change the California law. Under existing California law, a conviction of a crime is inadmissible as evidence in a subsequent action. Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856 (1894) (evidence of murder conviction inadmissible to prove insured was intentionally killed); Burke v. Wells, Fargo & Co., 34 Cal. 60 (1867) (evidence of robbery conviction inadmissible to prove identity of robber in action to recover reward). The change, however, is desirable; for the evidence involved is peculiarly reliable. The seriousness of the charge assures that the facts will be thoroughly litigated, and the fact that the judgment must be based upon a unanimous determination that there was not a reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered.

The exception in Section 1300 for cases where the judgment is based on a plea of nolo contendere is a reflection of the policy expressed in Penal Code Section 1016.

§ 1301. Judgment against person entitled to indemnity.

Comment. If a person entitled to indemnity, or if the obligee under a warranty contract, complies with certain conditions relating to notice and defense, the indemnitor or warrantor is conclusively bound by any judgment recovered. CIVIL CODE § 2778(5); CODE CIV. PROC. § 1912; McCormick v. Marcy, 165 Cal. 386, 132 Pac. 449 (1913).

Where judgment against an indemnitee or person protected by a warranty is not made conclusive on the indemnitor or warrantor, Section 1301 permits the judgment to be used as hearsay evidence in an action to recover on the indemnity or warranty. Section 1301 reflects the existing law relating to indemnity agreements. CIVIL CODE § 2778, subdivision 6. Section 1301 probably restates the law relating to warranties, too, but the law in that regard is not altogether clear. Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92 (1905). But see Peabody v. Phelps, 9 Cal. 213 (1858).

§ 1302. Judgment determining liability of third person.

Comment. Section 1302 expresses an exception contained in Code of Civil Procedure Section 1851. Ellsworth v. Bradford, 186 Cal. 316, 199 Pac. 335 (1921); Nordin v. Bank of America, 11 Cal. App.2d 98, 52 P.2d 1018 (1936). Together, Evidence Code Sections 1302 and 1226 restate and supersede the provisions of Code of Civil Procedure Section 1851.

Article 11. Family History

§ 1310. Statement concerning declarant's own family history.

Comment. Section 1310 provides a hearsay exception for a statement concerning the declarant's own family history. It restates in substance and

supersedes Section 1870(4) of the Code of Civil Procedure. Section 1870(4), however, requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Section 240 makes the statement admissible under Section 1310.

The statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. This permits the judge to exclude the statement where it was made under such circumstances as to case doubt upon its trustworthiness. The requirement is basically the same as the requirement of existing case law that the statement be made at a time when no controversy existed on the precise point concerning which the declaration was made. See, e.g., Estate of Walder, 166 Cal. 446, 137 Pac. 35 (1913); Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960).

§ 1311. Statement concerning family history of another.

Comment. Section 1311 provides a hearsay exception for a statement concerning the family history of another. Paragraph (1) of subdivision (a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure, which it supersedes. Paragraph (2) is new to California law, but it is a sound extension of the present law to cover a situation where the declarant was a family housekeeper or doctor or so close a friend as to be included by the family in discussions of its family history.

There are two limitations on admissibility of a statement under Section 1311. First, a statement is admissible only if the declarant is unavailable as a witness within the meaning of Section 240. (Section 1870(4) requires that

the declarant be deceased in order for his statement to be admissible.) Second, a statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. For a discussion of this requirement, see comment to Section 1310.

§ 1312. Entries in family bibles and the like.

Comment. Section 1312 restates in substance and supersedes the provisions of Code of Civil Procedure Section 1870(13).

§ 1313. Reputation in family concerning family history.

Comment. Section 1313 restates in substance and supersedes the provisions of Code of Civil Procedure Sections 1852 and 1870(11). See Estate of Connors, 53 Cal. App.2d 484, 128 P.2d 200 (1942); Estate of Newman, 34 Cal. App.2d 706, 94 P.2d 356 (1939). However, Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." This qualification is not included in Section 1313 because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in Sections 1300 and 1311, might be.

The family tradition admitted under Section 1313 is necessarily multiple hearsay. If, however, such tradition were inadmissible because of the hearsay rule, and if direct statements of pedigree were inadmissible because they are based on such traditions (as most of them are), the courts would be virtually helpless in determining matters of pedigree. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII.

Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. § STUDIES at 548 (1963).

§ 1314. Community reputation concerning family history.

Comment. Section 1314 restates what has been held to be existing law under Code of Civil Procedure Section 1963(30) with respect to proof of the fact of marriage. See Estate of Baldwin, 162 Cal. 471, 123 Pac. 267 (1912); People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956). However, Section 1314 has no counterpart in California law insofar as proof of the date or fact of birth, divorce, or death is concerned, proof of such facts by reputation now being limited to reputation in the family. See Estate of Heaton, 135 Cal. 385, 67 Pac. 321 (1902).

§ 1315. Church records concerning family history.

Comment. Church records generally are admissible as business records under the provisions of Section 1271. Under Section 1271, such records would be admissible to prove the occurence of the church activity--the baptism, confirmation, or marriage--recorded in the writing. However, it is unlikely that Section 1271 would permit such records to be used as evidence of the age or relationship of the participants; for the business records act has been held to authorize business records to be used to prove only facts known personally to the recorder of the information or to other employees of the business. Patek & Co. v. Vineberg, 210 Cal. App.2d 20, 23, 26 Cal. Rptr. 293 (1962) (hearing denied); People v. Williams, 187 Cal. App.2d 355, 9 Cal. Rptr. 722 (1960); Gough v. Security Trust & Sav. Bank, 162 Cal. App.2d 90, 327 P.2d 555 (1958).

Section 1315 permits church records to be used to prove certain additional information. Facts of family history such as birth dates, relationships,

marital records, etc., that are ordinarily reported to church authorities and recorded in connection with the church's baptismal, confirmation, marriage, and funeral records may be proved by such records under Section 1315.

Section 1315 continues in effect and supersedes the provisions of Code of Civil Procedure Section 1919a without, however, the special and cumbersome authentication procedure specified in Code of Civil Procedure Section 1919b. Under Section 1315, church records must be authenticated in the same manner that other business records are authenticated.

§ 1316. Marriage, baptismal, and similar certificates.

Comment. Section 1316 provides a hearsay exception for marriage, baptismal, and similar certificates. This exception is somewhat broader than that found in Sections 1919a and 1919b of the Code of Civil Procedure (superseded by Sections 1315 and 1316). Sections 1919a and 1919b are limited to church records and hence, as respects marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure whereas certificates made admissible by Section 1316 need only meet the general authentication requirement of Section 1401.

Article 12. Reputation and Statements Concerning Community History, Property Interest, and Character.

§ 1320. Reputation concerning community history.

Comment. Section 1320 provides a wider rule of admissibility than does Code of Civil Procedure Section 1870(11), which it supersedes in part. Section 1870 provides in relevant part that proof may be made of "common reputation

existing previously to the controversy, respecting facts of a public or general nature more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor is it necessary to include in Section 1320 the requirement that the reputation existed previous to controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy.

§ 1321. Reputation concerning public interest in property.

Comment. Section 1321 preserves the rule in Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524, 192 Pac. 144 (1920). It does not require, however, that the reputation be more than 30 years old, but merely that the reputation arose before controversy. See Comment to Section 1320.

§ 1322. Reputation concerning boundary or custom affecting land.

Comment. Section 1322 restates in substance existing law as found in Code of Civil Procedure Section 1870(11), which it supersedes in part. See Muller v. So. Pac. Ry. Co., 83 Cal. 240, 23 Pac. 265 (1890); Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950 (1931).

§ 1323. Statement concerning boundary.

Comment. Section 1323 restates the substance of existing but uncodified California law found in such cases as Morton v. Folger, 15 Cal. 275 (1860) and Morcom v. Baiersky, 16 Cal. App. 480, 117 Pac. 560 (1911).

§ 1320
§ 1321
§ 1322
§ 1323

§ 1324. Reputation concerning character.

Comment. Section 1324 codifies a well-settled exception to the hearsay rule. See, e.g., People v. Cobb, 45 Cal.2d 158, 287 P.2d 752 (1955). Of course, character evidence is admissible only when the question of character is material to the matter being litigated. The only purpose of Section 1324 is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule.

Article 13. Dispositive Instruments and Ancient Writings

§ 1330. Recitals in writings affecting property.

Comment. Section 1330 restates in substance the existing California law relating to recitals in dispositive instruments. Although language in some cases appears to require that the dispositive instrument be ancient, cases may be found in which recitals in dispositive instruments have been admitted without regard to the age of the instrument. Russell v. Langford, 135 Cal. 356, 67 Pac. 331 (1902) (recital in will); Pearson v. Pearson, 46 Cal. 609 (1873) (recital in will); Culver v. Newhart, 18 Cal. App. 614, 123 Pac. 975 (1912) (bill of sale). There is a sufficient likelihood that the statements made in a dispositive document, when related to the purpose of the document, will be true to warrant the admissibility of such documents without regard to their age.

§ 1331. Recitals in ancient writings.

Comment. Section 1331 clarifies the existing California law relating to the admissibility of recitals in ancient documents by providing that such recitals are admissible under an exception to the hearsay rule. Code of Civil

Procedure Section 1963(34) (superseded by Evidence Code) provides that a document more than 30 years old is presumed genuine if it has been generally acted upon as genuine by persons having an interest in the matter. The Supreme Court has held that a document meeting this section's requirements is presumed to be genuine--presumed to be what it purports to be--but that the genuineness of the document imports no verity to the recitals contained therein. Gwin v. Calegaris, 139 Cal. 384, 389, 73 Pac. 851, 853 (1903). Recent cases decided by district courts of appeal, however, have held that the recitals in such a document are admissible to prove the truth of the facts recited. E.g., Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960); Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1956). And in some of these cases the courts have not insisted that the hearsay statement itself be acted upon as true by persons with an interest in the matter; the evidence has been admitted upon a showing that the document containing the statement is genuine. The age of a document alone is not a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence. Accordingly, Section 1331 makes clear that the hearsay statement itself must have been generally acted upon as true for at least a generation by persons having an interest in the matter.

Article 14. Commercial, Scientific, and Similar Publications

§ 1340. Commercial lists and the like.

Comment. Section 1340 codifies an exception that has been recognized by statute and by the courts in specific situations. See, e.g., COM. CODE § 2724; Emery v. So. Cal. Gas Co., 72 Cal. App.2d 821, 165 P.2d 695 (1946);

Christiansen v. Hollings, 44 Cal. App.2d 332, 112 P.2d 723 (1941).

§ 1341. Publications concerning facts of general notoriety and interest.

Comment. Section 1341 recodifies without substantive change Section 1936 of the Code of Civil Procedure.

§ 1340
§ 1341