#34 8/7/64

Memorandum 64-54

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

Attached is the revised text of Division 6 (Witnesses) and the Commission's comments for this division. We do not plan to discuss the comments in any detail at the August meeting. However, you should read them in connection with the statute, and we would appreciate your marking on the attached copy any revisions you believe should be made in these comments.

Part of Division 6 contains provisions from the printed tentative recommendation on Expert and Other Opinion Testimony. Since the last meeting, we received comments on this subject from the Special Committee of the Conference of California Judges and from the Department of Public Works. These comments are attached as Exhibits I and II, respectively, to the First Supplement to Memorandum 64-46. Reference is made in this memorandum to those exhibits, which should be read with care when considering the portion of Division 6 relating to expert witnesses (Sections 720-723).

The witnesses division has been revised in light of the action taken by the Commission at the July meeting. Several section numbers have been changed. To avoid unnecessary duplication, we discuss in this memorandum only those sections as to which a question is raised or an explanation is required. Any section not mentioned in this memorandum appears in the same form as previously approved by the Commission or as revised to reflect previous Commission action, and the staff raises no question in regard to these.

Sections 703 and 704

These sections are new. They have been drafted to reflect the policy

approved by the Commission at the last meeting. The only substantive change made in this draft is in subdivision (a), which requires the judge to inform the parties of the information he has concerning any fact or matter about which he is offered to testify in any action instead of being limited to criminal actions only. This modification of the original suggestion by the Judge' Committee seems desirable in order to allow the parties in a civil action the same opportunity to act in an informed manner instead of subjecting themselves to an automatic mistrial by objecting to testimony about which they know nothing and which may concern a relatively insignificant matter.

Section 720

This section has been revised to reflect the action taken by the Commission at the last meeting. In this connection, the Judges' Committee approves the deletion of the subdivision that explicitly permitted the judge to receive the testimony of an expert witness subject to his special qualifications being later shown in the course of the trial, citing their comment on the previous suggestion to remove similar language in Section 702.

Section 721

This section appears in the same form as previously approved by the Commission at the last meeting. The Judges' Committee suggests that this section be deleted, stating that "the tenor of [the] subject matter is self-evident, and is adequately covered by other [sections]."

You will recall that this section was originally included in the tentative recommendation on Expert and Other Opinion Testimony in order to clarify any ambiguity resulting from the negative implication of what is now Section 801, dealing with opinion testimony by expert witnesses. The staff believes

this section is useful to clarify whatever ambiguity may exist with respect to the matters as to which an expert witness may testify. It is extremely unlikely, however, that the deletion of the section would result in the law being any different than as specified in the section.

Section 722

This section appears in the same form as previously approved by the Commission at the last meeting. The Judges' Committee suggests the deletion of this section, stating that "the subject of cross-examination should be covered in one section which would apply to all witnesses." The Judges' Committee then suggests that subdivision (a) of Section 772 should be revised to conform more closely to Code of Civil Procedure Section 2048, suggesting that it read:

> (a) The opposite party may cross-examine a witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions.

The staff believes Section 722 is a desirable section and recommends against its deletion. Subdivision (a) of this section restates without substantive change the existing law, which presently is not made clear except by judicial interpretation of existing statutes. The revision to this subdivision suggested by the Judges' Committee would leave uncertain the right of a party to cross-examine an expert witness in regard to his qualifications and other matters not stated as "facts . . . in his direct examination or connected therewith."

A separate suggestion is made by the Department of Public Works in connection with subdivision (b) of this section. The Department states (pages 3-4):

> We do not quarrel with extending the medical treatise rule to other types of expert testimony. However, we are concerned with the use of the term "publication" in [subdivision (b)] . . . . The Commission in its comment on subdivision [(b)] describes the California cases by referring to "books", but refers to the term "publication" when it describes the intent and effect of the new rule. Since there was no consideration in the Commission's comment, there is the possibility that the Commission may be inadvertently broadening the present common law rule of cross-examination of an expert on books or treatises.

The Department further comments that:

> . . . expert witnesses in
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> condemnation cases are cross-examined on many items of published or printed material to test the credibility of their opinions. Such published or printed documents include deeds, contracts of sale, zoning ordinances, building restrictions, etc. In another field, for example, in the case of Laird v. Matheron, 51 Cal.2d 210, 219, an engineer testified that a handrail was constructed to standard engineering practices in Pasadena. On cross-examination he volunteered that this would be standard engineering practice anywhere in the world. It was held that it was therefore permissible to impeach him by cross-examination on the contrary provisions of the Los Angeles Building Code.

The comment then notes that a contrary result would be required under subdivision (b) of Section 722 and suggests that it be revised to insert "book, text, or treatise," in place of the word "publication," in the second line of this subdivision.

The Department's comment accurately reflects the effect and operation of subdivision (b) of Section 722, but the Commission did not "inadvertently" broaden the present common law rule of cross-examination; the change was deliberate for the purpose of limiting the scope of permissible cross-examination of an expert witness with respect to the content or tenor of any publication. Attached as Exhibit I to this memorandum is an excerpt from Memorandum 63-50 that presents the conflicting California decisions with respect to this question. See also the Comment to Section 722.

The existing draft reflects a middle-of-the-road position between several reasonable approaches to this subject. The broadest in scope, of course, is

to have no limitation on the permissible extent of cross-examination in regard to any publication. The most restrictive in scope is to limit the cross-examiner to publications actually relied upon by the expert as a basis for his opinion. Between these two extremes are two other reasonable alternatives. First, the cross-examiner might be permitted to impeach an expert by the use of any publication, whether or not relied upon by the expert in forming his opinion, so long as the expert bases his opinion upon some publication. The other alternative is the one reflected in subdivision (b) of Section 722.

Adoption of the Department's suggestion would permit broad cross-examination as to any publication other than a "book, text, or treatise," and the cross-examiner would be limited in regard to "books, texts, and treatises" by the witness' references to, consideration of, or reliance upon such publication.

Section 730-733

These sections were not considered at the last meeting, pending the staff's review of language changes and sectional division to determine whether the existing law expressed in Code of Civil Procedure Section 1871 was being changed. The staff believes that these sections restate without substantive change the existing law as contained in Section 1871.

Section 733 has been slightly revised to clarify its meaning in light of the concern expressed by some Commissioners at the last meeting. The purpose of the section is twofold. First, it is intended to clarify any ambiguity that may exist with respect to the right of the parties to introduce expert evidence on the same matters as to which an expert is appointed by the court under Section 730. Second, the section is needed to make it clear that only court-appointed experts are entitled to the compensation mentioned in Sections 730 and 731; where other experts are called by parties to the action, the

experts are entitled only to ordinary witness fees. The staff believes the revised section reflects these purposes.

Section 751

This section is new. It reflects the Commission's decision to restate as a separate section the matter formerly contained in subdivision (d) of present Section 754 (Code of Civil Procedure Section 1885).

Sections 768-770

Sections 768 and 769 appear in the same form in which they were approved at the last meeting. Section 770 has been revised to reflect the action taken by the Commission at the last meeting.

The staff was directed to review the existing law to determine precisely what changes were being made in the existing law by these sections. The pertinent cases and discussion of this matter is contained in the comments to these sections. Briefly stated, the existing law is as follows:

> (1) In examining a witness concerning an oral statement made by him that is inconsistent with any part of his testimony, it is not necessary to disclose to him any information concerning the statement.
> (2) In examining a witness concerning a written statement made by him that is inconsistent with any part of his testimony, it is necessary to show the written inconsistent statement to him before any question may be put to him concerning the statement.
> (3) Before extrinsic evidence of a statement (whether oral or written) made by a witness that is inconsistent with any part of his testimony may be admitted in evidence, the witness must be given an opportunity to identify, explain, or deny the statement and, in the case of oral statements, the time, place, and persons present must be related to him.
> (4) When any writing is shown to a witness, the adverse party must be given an opportunity to inspect it before any question concerning the writing may be asked of the witness.

The principal effect of Sections 768, 769, and 770 is twofold. First, oral and written statements are treated exactly alike. Second, the present

absolute exclusionary rule is modified by the standard "unless the interests of justice otherwise require" and, additionally," unless the witness has not been excused from giving further testimony in the action." The purpose of this change is to eliminate the artificial distinction between oral and written inconsistent statements insofar as examining the witness is concerned and relaxing an arbitrary rule of exclusion insofar as the admissibility of extrinsic evidence of an inconsistent statement is concerned. Under these sections, therefore, comparing the results in each of the examples as shown under the existing law, the following would result:

> (1) In examining a witness concerning an oral statement made by him that is inconsistent with any part of his testimony, it is not necessary to disclose to him any part of the statement. (Same.)
> (2) In examining a witness concerning a written statement made by him that is inconsistent with any part of his testimony, it is not necessary to disclose to him any part of the statement. (Change.)
> (3) Before extrinsic evidence of a statement (whether oral or written) made by a witness that is inconsistent with any part of his testimony may be admitted in evidence, unless the interests of justice otherwise require, the witness must be given an opportunity to identify, explain, or deny the statement or the witness must not have been excused from giving further testimony. (Change, but quite similar.)
> (4) When any writing is shown to a witness, all parties must be given an opportunity to inspect it before any question concerning the writing may be asked of the witness. (Change, but only by extending right of inspection to all parties.)

The staff believes that the present draft reflects a sound and workable system that is a substantial improvement compared with the existing law. Hence, no change is recommended.

Section 771

The Commission has not previously considered this section except insofar as it determined in connection with its tentative recommendation on hearsay evidence that a party should be entitled to inspect a writing used to refresh the recollection of a witness prior to the hearing. The problems involved in this logical extension of present law are discussed by Jo Anne Friedenthal in a separate study previously sent to you. The crux of the problem may be briefly stated as follows: What result should obtain when a witness is unable (because he lacks control over the document) or unwilling (because of personal privilege) to produce a document used by him prior to the hearing to refresh his recollection? Various considerations involved in each of the several situations in which this problem can arise are discussed in the research study, which should be read with care. The author's conclusion is succinctly stated on page 15 of the research study.

One reasonable solution to the problem presented is to make no detailed rule regarding the effect of the failure of a witness to produce a writing for inspection by the adverse party used to refresh his recollection prior to the hearing. The following sentence could be added at the end of the section: "Unless the interests of justice otherwise require, the judge shall exclude the testimony of the witness if the writing is not produced as required by this section." This necessarily would leave to the courts the problem of resolving the competing interests involved. This alternative has the merit of simplicity and avoids a detailed statement of procedure in an already complicated statute.

The easiest solution to the problem, of course, it to retain the existing law by eliminating the specific reference to a writing used prior to the hearing to refresh the witness' recollection. This could be accomplished

by revising the introductory portion of Section 771 to read: "If a witness while testifying uses a writing . . . ." The scope of coverage also could be purposely obscured by making no specific reference to the time the writing is used by simply providing that: "If a witness uses a writing . . . ." Existing Code of Civil Procedure Section 2047 contains no specific reference to the time of use, it being commonly interpreted to mean at trial refreshing.

The only other alternative is to provide specific rules regarding the effect of a failure to produce in each specific situation (unless it is determined that the same result should obtain in every case; but, for the reasons pointed out in the research study, this result would appear to operate unfairly on the parties). Since different policies are involved in civil and criminal cases, the same as different interests are involved in cases where the government is and is not a party, differing results would seem to be required.

Assuming that a detailed statement of result is required in this section and that different results would obtain in different types of actions, the following types of actions and alternative results should be identified and compared. (A reference to "federal law" means that disclosure is forbidden by an Act of Congress; a reference to "state law" means that disclosure is forbidden by a claim of governmental privilege; and a reference to "personal privilege" means that disclosure is forbidden by any personal privilege).

(1) A criminal action in which a witness for the prosecution does not produce a writing used to refresh his recollection prior to the hearing because of (a) federal law, (b) state law, (c) personal privilege.

(2) A criminal action in which a witness for the defendant fails to produce a writing used to refresh his recollection prior to the hearing because of (a) federal law, (b) state law, (c) personal privilege.

(3) A civil action to which the State is a party in which a witness for the State fails to produce a writing used by him to refresh

his recollection prior to the hearing because of (a) federal law, (b) state law, (c) personal privilege.

(4) A civil action to which the State is a party in which a witness for a party adverse to the State fails to produce a writing used by him to refresh his recollection prior to the hearing because of (a) federal law, (b) state law, (c) personal privilege.

(5) A civil action in which a witness fails to produce a writing used to refresh his recollection prior to the hearing because of (a) federal law, (b) state law, (c) personal privilege.

The types of actions involved and the reasons for nonproduction are identified in each of the above examples. With respect to each different situation, the Commission should consider whether any of the following rules should apply:

(1) The testimony of the witness should be stricken.

(2) Upon motion by the party adversely affected, the judge should have discretion to strike the testimony after weighing the necessity for production of the writing in the interests of justice against the nature and effect of the witness' testimony.

(3) The judge should make such order or finding of fact adverse to the party producing the witness as is appropriate upon any issue in the action to which the testimony of the witness is material.

By identifying each of the specific situations in which the questions can arise, and the reason for nonproduction, and applying a sound rule to that situation, the staff believes that a workable, but very complex, statute could be drafted to accomplish the desired result in solving this difficult problem.

In addition, the Commission should consider whether in any case involving state law or personal privilege, the judge should have the right to require in camera disclosure in any case where he is required by the statute to be drafted to exercise his discretion in admitting or excluding the testimony.

In connection with this problem, if this alternative is used, the staff suggests that the following results should obtain:

(1) In a criminal action, unless disclosure is forbidden by federal law, the judge should make such order or finding of fact adverse to the party producing the witness as is appropriate upon any issue in the action in which the testimony of the witness is material, unless the witness was produced by the defendant and nonproduction is required by state law, in which case the testimony should be unqualifiedly admitted.

(2) In a criminal action where nonproduction is required by federal law, the judge should have discretion to admit or strike the testimony after weighing the necessity for production against the nature and effect of the witness' testimony.

(3) In any civil action in which the state is a party, unless nonproduction is required by federal law, the same result should obtain as in a criminal proceeding.

(4) In any civil action in which the state is not a party, the judge should have discretion to admit or strike the testimony after weighing the necessity for production against the nature and effect of the witness' testimony, and, in additiona, should have the right to in camera disclosure except where nonproduction is required by federal law.

Section 772

This section has been revised to conform with the action taken by the Commission at the last meeting. In commenting on Section 722, the Judges' Committee suggested that Section 772 should be revised to conform substantially to Code of Civil Procedure Section 2048, suggesting that it read:

(a) The opposite party may cross-examine a witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions.

The staff believes that the suggested revision is not a complete substitute for Section 722 and, hence, recommends against the deletion of Section 722 (see previous discussion in this memorandum).

The suggested replacement for subdivision (a) of this section substantially restates Section 2048. However, some concern was expressed by several Commissioners at the last meeting with respect to specific language regarding "any facts stated [by the witness] in his direct examination or connected therewith." The consensus of opinion seemed to be that the statement "upon the same matter," presently contained in the definition of "cross-examination"

in Code of Civil Procedure Section 2045, was a sufficient statement of the scope of cross-examination and would pick up the existing case law.

The direct statement of a cross-examiner's right to "put leading questions" might be added to subdivision (a) of this section without changing the purpose or effect of this section. It presently is stated in the Evidence Code only by negative implication from Section 767, but it is contained in the existing law in Code of Civil Procedure Section 2043. The right, of course, is subject to control by the judge in the exercise of his discretion. Section 765 (restating existing law).

Section 776

In light of the Commission's decision at the last meeting to restrict the right of cross-examination to adverse parties, this section was not considered. However, the staff was directed to review the recent discovery legislation to find language to make this section applicable to former as well as to present persons who serve as a director, officer, superintendent, member, agent, employee, or managing agent of any adverse party.

The revised section restates in substantially the same language existing Code of Civil Procedure Section 2055 without specific reference to former employees, agents, etc. The only reference found in the discovery legislation limits the right to take and freely use a deposition to similar persons "who at the time of taking the deposition" served in the named capacities. This legislation has been so construed as to prevent the free use of a deposition taken of a person who was not at the time of taking the deposition an officer, agent, or employee of the adverse party. Vivion v. National Cash Register Company, 200 Cal. App.2d 597, 607, 19 Cal. Rptr. 602 (1962). On

the other hand, Section 2055 has been held to apply explicitly to former officers, agents, and employees. Wells v. Lloyd, 35 Cal. App.2d 6, 12, 94 P.2d 373 (1939). Accord, Scott v. Del Monte Properties, 140 Cal. App.2d 756, 295 P.2d 947 (1956). The staff believes that an explicit statement to this effect would be unduly cumbersome and repetitive in this section, since it would require a statement along the lines of the following:

> . . . , or a person who was a director, officer, superintendent, member, agent, employee, or managing agent of any such party or person at the time the cause of action arose, or a person who was a public employee of such public entity at the time the cause of action arose, . . .

Hence, the staff believes it would be undesirable to include this specific statement in Section 776.

The second paragraph of Section 776 is in substantially the same form as previously considered by the Commission. It clarifies some ambiguity that exists in existing language.

The principle expressed in the third paragraph in Section 776 was previously approved by the Commission and reflects the substance of statements made in several cases. E.g., Gates v. Pendleton, 71 Cal. App. 752, 236 Pac. 365 (1925); Goehring v. Rogers, 67 Cal. App. 260, 262, 227 Pac. 689 (1924) (opinion of Supreme Court in denying hearing).

Section 788

This section has been revised to reflect the action of the Commission taken at the last meeting (a) to delete the procedural limitation upon showing the prior conviction of a criminal defendant who testifies as a witness in the criminal action, (b) to limit the types of crimes that may be shown for the purpose of attacking the credibility of any witness to those crimes that

involve "deceit or fraud," and (c) to require in proceedings held out of the presence and hearing of the jury actual proof of the prior conviction. The remainder of this section is unchanged.

The Commission also directed the staff to include in the Comment to this section a discussion of the types of crimes included in paragraph (1) of subdivision (a). In compiling an exemplary but not exclusive list of crimes and examining several cases decided thereunder, the staff recommends restoring either "dishonesty or false statement" or "deception or false statement" in place of "deceit or fraud." As an alternative, the staff suggests that paragraph (1) of subdivision (a) be revised to read as follows: "An essential element of the crime is false statement or the intention to deceive or defraud." The reason for the staff's concern is that "deceit or fraud" has a very narrow meaning in the law that is difficult to comprehend except in the setting of specific circumstances surrounding the commission of a particular offense and, further, that the very fact in issue--false statement--is left to inference instead of being stated explicitly.

There would seem to be little doubt that paragraph (1) of subdivision (a) would be substantively interpreted in the same restrictive manner as a "crime involving moral turpitude," as was involved in In re Hallinan, 43 Cal.2d 243, 272 P.2d 768 (1954). Thus, to paraphrase the court in that case:

> If a conviction for any crime can be had without proof of facts showing deceit or fraud, then such a crime cannot be shown to attack the credibility of a witness. Deceit or fraud must be inherent in the commission of the crime itself to warrant using a conviction for such a crime to attack the credibility of a witness. Thus, only when a witness is convicted for a crime the commission of which would in every case involve decit or fraud would such conviction be admitted for the purpose of attacking the credibility of the witness. If a person could possibly be convicted for a crime without the presence of deceit or fraud, that crime cannot be used to attack the credibility of a witness.

This is precisely the construction intended for this section and, although there are many crimes defined in terms of deceitful or fraudulent conduct,

the necessity of false statement is left to inference in all but a few of them. Moreover, many of the crimes are defined alternatively so that deceit or fraud is not a necessary element in every case. Hence, the staff believes that the Commission should reconsider the language that is appropriate for this subdivision.

The following list contains a few crimes that would fall within any of the above suggested language, including "deceit or fraud," followed by a reference to the Penal Code section relating to such crimes (but not specifically defining all of the various offenses that may be included within this language).

> Arson, with the intent to defraud an insurer (Sections 450a, 548). Embezzlement (Section 503. Compare Section 409a, substituting the word "theft" in every statute where "embezzlement" is used). Some forms of theft involving false personation or false pretences (Section 484). But compare In re Hallinan, supra). Forgery and counterfeiting (Sections 470, 471, 472, 474, 475, 475a, 476, 476a, 477, 479, 480, 481). Perjury and subornation thereof (Sections 118, 118a, 127). Touting (337.1). Credit card fraud (Section 484a(b)(5) and Section 484(c)). Defrauding liverymen or chattel mortgagees (Sections 537b, 538). Falsification of documents for evidence (Section 134). Producing spurious heir (Section 156). False personations (Sections 528, 530e, 146a, 538d). False pretences (Section 532).

These crimes are not presently mentioned in the Comment to this section. Should any or all of them (after careful checking) be included in the Comment?

In connection with paragraph (2) of subdivision (a), Mr. Powers, in a letter dated July 29, 1964, suggests that a party (the prosecution) should be permitted to "show from the examination of the witness such priors and only be required by the court on a showing of lack of good faith to be able to proceed with further proof" of the conviction. He indicates that this is a

desirable treatment "in view of the fact that priors for impeachment purposes may now be either misdemeanors or felonies, and with reference to the former there will be additional problems of getting adequate and legal proof" of the conviction.

This would retain the existing law as stated in People v. Perez, 58 Cal.2d 229, 238, 23 Cal. Rptr. 569, 373 P.2d 617 (1962), except that the Perez case strongly suggests that the examining party "should be prepared to show by documentary evidence that the witness has suffered a prior conviction, in the event of a denial thereof." 58 Cal.2d at 239. As previously indicated by Mr. Powers, the Perez case has resulted, as a practical matter, in having documentary proof available prior to putting the question to the witness. Thus, if the practical effect of the case is to require documentary proof, Section 788 as drafted would substantially restate existing law, perhaps even more accurately than permitting the question to be put to the witness without a prior showing. Under this subdivision as revised, however, it would seem that the same result sought by Mr. Powers would in fact be obtained, since there is no reason why the witness cannot be asked the question concerning a prior conviction in the proceeding held out of the presence and hearing of the jury (and his admission is sufficient proof under the revised subdivision).

Respectfully submitted,

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Memo 64-54

EXHIBIT I

The California law on the use of learned treatises in the cross-examination of expert witnesses is confused. See Annotation, 60 A.L.R.2d 77 (1958). Most of the language in the cases is dicta.

A number of cases contain language indicating that a cross-examiner may use those treatises upon which the expert witness has specifically relied to support his opinion. Some of these cases suggest that the cross-examiner is limited to use of treatises upon which the expert witness specifically relied to support his opinion. Gallagher v. Market St. Ry. Co., 67 Cal. 13 (1885) (dictum); Douglas v. Berlin Dye Works Etc. Co., 169 Cal. 28 (1914) (dictum); Lewis v. Johnson, 12 Cal.2d 558, 562 (1939) (error not to permit cross-examination of expert upon textbooks upon which his opinion was based in part); People v. Hooper, 10 Cal. App.2d 332 (1935) (cross-examiner not limited to textbooks upon which expert relied); Scarano v. Schnoor, 158 Cal. App.2d 612 (1958) (dictum); Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App.2d 222, 230-231 (1959) (dictum); Baily v. Kreutzmann, 141 Cal. 519, 521-522 (1904) (dictum).

A few cases state a rule that texts of recognized authority may be freely used to test the expert's competence regardless of whether or not he relied upon the particular texts used or any other text or authority. Fisher v. Southern P. R. R. Co., 89 Cal. 399 (1891) (dictum); People v. Hooper, 10 Cal.

App.2d 332 (1935).

Some recent cases state a third rule--that, while there must be some reliance by the expert witness upon authority in order to justify the use of learned treatises by the cross-examiner, it is not necessary that the witness rely on the particular treatise used on cross-examination. Griffith v. Los Angeles Pacific Co., 14 Cal. App. 145 (1910); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 400-404 (1949) (stating that the California cases upon the subject were not well defined, that there were not many holdings and that the dicta were somewhat inconsistent); Salgo v. Stanford University, 154 Cal. App.2d 560 (1957) (the court stating: "This rule does not permit reading to a witness who had not based his opinion on a medical work, text or brochure, extracts therefrom as a part of a question"). See also Brown v. Los Angeles Transit Lines, 282 Pac.2d 1032 (1955), vacated on rehearing, 135 Cal. App.2d 709.

The necessity of establishing the authoritative status of the treatise to be used on cross-examination has been generally recognized or assumed, but the cases contain little upon the proper mode of doing this. See Annotation, 60 A.L.R.2d 77 (1958). The proposed rule adopts the test generally used (witness recognizes the work as a reliable one) and, in addition, permits the authoritative status of the work to be established by judicial notice.

DIVISION 6. WITNESSES

CHAPTER 1. COMPETENCY

§ 700. General rule as to competency.

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

§ 701. Disqualification of witness.

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

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

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

§ 702. Personal knowledge.

702. (a) Subject to Section 721, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown as a prerequisite for the testimony of the witness.

(b) A witness' personal knowledge of a matter may be provided by any otherwise admissible evidence, including his own testimony.

§ 703. Judge as witness.

703. (a) Before the judge presiding at the trial of an action may testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he is offered to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, which shall be deemed a motion for mistrial, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) In the absence of objection by a party:

(1) The judge presiding at the trial of a civil action may testify in that trial as a witness unless his testimony would be of substantial consequence to the determination of the action, in which case the judge shall declare a mistrial and order the action assigned for trial before another judge.

(2) The judge presiding at the trial of a criminal action may testify in that trial as a witness.

§ 704. Juror as witness.

704. (a) Before a juror sworn and impaneled in the trial of an action may testify in that trial as a witness, he shall, in proceedings conducted by the judge out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he is offered to testify.

(b) Subject to subdivision (d), against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify in that trial as a witness. Upon such objection, which shall be deemed a motion for mistrial, the

judge shall declare a mistrial and order the action assigned for trial before another jury.

(c) Subject to subdivision (d), in the absence of objection by a party:

(1) A juror sworn and impaneled in the trial of a civil action may testify in that trial as a witness unless his testimony would be of substantial consequence to the determination of the action, in which case the judge shall declare a mistrial and order the action assigned for trial before another jury.

(2) A juror sworn and impaneled in the trial of a criminal action may testify in that trial as a witness.

(d) Nothing in this section prohibits a juror from testifying as to the matters covered by Section 1150 or as provided in Section 1120 of the Penal Code.

CHAPTER 2. OATH AND CONFRONTATION

§ 710. Oath Required.

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

§ 711. Confrontation.

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

CHAPTER 3. EXPERT WITNESSES

Article 1. Expert Witnesses Generally

§ 720. Qualification as an expert witness.

720. (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown as a prerequisite for the testimony of the witness.

(b) A witness' special knowledge, skill, experience, training, or education may be provided by any otherwise admissible evidence, including his own testimony.

§ 721. Testimony by expert witness.

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

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

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

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

§ 722. Cross-examination of expert witness.

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

(b) If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless: (1) the witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or

(2) Such publication has been admitted in evidence.

§ 723. Credibility of expert witness.

723. (a) The fact of the appointment of an expert witness by the judge may be revealed to the trier of fact.

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

§ 724. Limit on number of expert witnesses.

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

Article 2. Appointment of Expert Witness by Court

§ 730. Appointment of expert by court.

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

§ 731. Payment of expert appointed by court.

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

(b) In any civil action in any county in which the procedure prescribed in this article has been authorized by the board of supervisors, the compensation fixed under Section 730 for any medical expert or experts shall also be a charge against and paid out of the treasury of such county on order of the court. Except as otherwise provided in this subdivision, in all civil actions, such compensation shall, in the first instance, be apportioned and charged to the several parties in such proportion as the judge may determine and may thereafter taxed and allowed in like manner as other costs.

§ 732. Calling and examining court-appointed experts.

732. Subject to Article 1 (commencing with Section 720), any person appointed by the court under Section 730 may be called and examined by any party to the action or by the court itself. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced.

§ 733. Right to produce other evidence.

733. Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action.

CHAPTER 4. INTERPRETERS AND TRANSLATORS

§ 750. Rules relating to witnesses apply to interpreters.

750. A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses.

§ 751. Cath required of interpreters and translators.

751. (a) An interpreter shall take an oath that he will make a true interpretation to the witness in a language that the witness understands and that he will truly interpret the witness' answers to questions to counsel, judge, or jury, in the English language, with his best skill and judgment.

(b) A translator shall take an oath that he will make a true translation in the English language of any writing he is to decipher or translate.

§ 752. Interpreters for witnesses.

752. (a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself so as to be understood directly, an interpreter whom he can understand and who can understand him shall be sworn to interpret for him.

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

§ 753. Translators of writings.

753. (a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

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

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

754. (a) As used in this section, "deaf person" means a person with a hearing loss so great as to prevent his understanding language spoken in a normal tone.

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

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

language that he understands by a qualified interpreter appointed by the court.

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

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions

§ 760. Direct examination.

760. "Direct examination" is the examination of a witness by the party producing him.

§ 761. Cross-examination.

"Cross-examination" is the examination of a witness produced by an adverse party.

§ 762. Leading question.

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

Article 2. Examination of Witnesses

§ 765. Judge to control mode of interrogation.

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

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

§ 766. Responsive answers.

766. A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

§ 767. Leading questions.

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

§ 768. Writings.

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

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

§ 769. Inconsistent statement or conduct.

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

§ 770. Evidence of inconsistent statement of witness.

770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by the witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

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

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

§ 771. Refreshing recollection with a writing.

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

§ 772. Cross-examination.

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

(a) A witness examined by one party may be cross-examined upon the same matter by each adverse party to the action in such order as the judge directs.

(b) Notwithstanding subdivision (a), a defendant in a criminal action who testifies as a witness in that action may be cross-examined only as to those matters about which he was examined in chief.

§ 773. Order of examination.

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

§ 774. Re-examination.

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

§ 775. Judge may call witnesses.

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

§ 776. Examination of adverse party or witness.

776. (a) A party to the record of any civil action, or a person for whose immediate benefit such action is prosecuted or defended, or a director, officer, superintendent, member, agent, employee, or managing agent of any such party or person, or any public employee of a public entity when such public entity is a party to the action, or any person who was in any of the above named relationships at the time of the act or omission giving rise to the cause of action, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness. The party calling such witness is not bound by his testimony, and the testimony of such witness may be rebutted by the party calling him for such examination by other evidence.

(b) If a party is examined under this section, he may be cross-examined by all other parties to the action in such order as the judge directs, but his own counsel and counsel for any party whose interest is not adverse to the party being examined may cross-examine such party only as if under direct examination.

If a witness other than a party is examined under this section, he may be cross-examined by all other parties to the action in such order as the judge directs.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

§ 777. Exclusion of witnesses.

777. (a) Subject to subdivision (b) and (c), the judge may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.

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

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

§ 778. Recall of witnesses.

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

CHAPTER 6. CREDIBILITY OF WITNESSES

Article 1. Credibility Generally

§ 780. Credibility of witnesses generally.

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

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

(b) The character of his testimony.

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

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

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

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

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

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

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

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

(k) His admission of untruthfulness.

Article 2. Attacking or Supporting Credibility

§ 785. Parties may attack or support credibility.

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

§ 786. Character evidence generally.

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

§ 787. Specific instances of conduct.

787. Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

§ 788. Conviction of witness for a crime.

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

(1) An essential element of the crime is false statement or the intention to deceive or defraud; and

(2) The witness has admitted his conviction for the crime or the party attacking the credibility of the witness has produced competent evidence of the conviction.

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

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

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

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

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

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

§ 789. Religious belief.

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

§ 790. Good character of witness.

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

§ 791. Prior consistent statement of witness.

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

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

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

DIVISION 6. WITNESSES

§ 700. General rule as to competency

Comment. Section 700 declares that, except as otherwise provided by statute, "Every person is qualified to be a witness" and "no person is disqualified to testify to any matter." This section thus states a broad rule of competency that is limited only by specific statutory statement. It is based on subdivisions (a) and (c) of Rule 7 of the Uniform Rules of Evidence.

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

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

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

In many respects, this scheme is similar to the present California law. Code of Civil Procedure Section 1879 (superseded by Section 700) declares the general rule that "all persons . . . who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses." This general rule specifically is made subject to the rules of disqualification on the basis of insanity, infancy, and the dead man statute (CODE CIV. PROC. § 1880, superseded by this article) and privilege (CODE CIV. PROC. § 1881, superseded by Division 8). In addition, the witness must take an oath to testify truthfully--or make an affirmation or declaration to the same effect--and must have an understanding of the oath. CODE CIV. PROC. §§ 1846 (oath requirement, continued in effect by Sections 701(b) and 710), 2094-2097 (form of oath, affirmation, or declaration). Other code sections limit testimony in particular cases or circumstances. E.g., VEHICLE CODE § 40804 (testimony "based upon or obtained from or by the maintenance or use of a speed trap"). Penal Code Section 1321 makes the rules of competency in criminal cases the same as in civil cases unless otherwise specifically provided.

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

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§ 701. Disqualification of witness

Comment. Section 701 relates to the minimum capabilities that a person must possess to be a witness. Under existing California law, the competency of a witness depends upon his ability to understand the oath and to perceive, recollect, and communicate. "Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact." People v. McCaughan, 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957). On the other hand, Section 701 requires merely the ability to communicate and the ability to understand the duty to tell the truth. The two missing qualifications--the ability to perceive and to recollect--are found only to a very limited extent in Section 702, which permits the trial judge to exclude the testimony of a witness where it is obvious that the witness does not have "personal knowledge" (as, for example, where his knowledge of the event is derived solely from the statements of others). The language of Section 701 is based on Rule 17 of the Uniform Rules of Evidence.

Under existing law, as under Section 701, the competency of a person to be a witness is a question for determination by the judge. People v. McCaughan, 49 Cal.2d 409, 421, 317 P.2d 974, 981 (1957). See Section 405 and the Comment thereto. As the following discussion indicates, the

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

Children. Code of Civil Procedure Section 1880(2) (superseded by Sections 700-702) provides that "children under ten years of age,

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

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

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

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

it was done and in which testimony as to details may mean the difference between conviction and acquittal." 49 Cal.2d at 421, 317 P.2d 981-982.

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

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

§ 702. Personal knowledge

Comment. Section 702 concerns the qualifications which a person who is otherwise competent to be a witness must possess in order to testify concerning a particular matter. It is based on Rule 19 of the Uniform Rules of Evidence, but deals only with the qualifications of a witness who is not testifying as an expert. (The qualifications of an expert witness are set forth in Article 1 (commencing with Section 720) of Chapter 3.)

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

Under existing law, as under Section 702, an objection must be made to the testimony of a witness who does not have personal knowledge; and, if there is no reasonable opportunity to object during the direct examination, a motion to strike is appropriate after lack of knowledge has been shown on cross-examination. Fildew v. Shattuck & Nimmo Warehouse Co., 39 Cal. App. 42, 46, 177 Pac. 866, 867 (1918)(objection to question properly sustained when foundational showing of personal knowledge was not made); Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704, 709, 87 Pac. 376, 378 (1906)(error to overrule motion to strike testimony after lack of knowledge shown on cross-examination); Parker v. Smith, 4 Cal. 105 (1854)(testimony properly stricken by court when lack of knowledge shown on cross-examination). Upon such timely objection being made, however, Section 702 requires the personal knowledge of the witness to be shown as a prerequisite to his testimony on the merits.

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

The requisite showing of personal knowledge required by Section 702 must be by evidence from which a trier of fact could reasonably conclude that the witness has personal knowledge, i.e, evidence sufficient to sustain a finding of personal knowledge. The judge need not be convinced of the personal knowledge of the witness, and his determination to admit the evidence does not require the jury to find that the witness has personal knowledge. See Section 403 and the Comment thereto. Little discussion of the extent of the foundational showing required can be found in the California cases. Apparently, however, a prima facie showing of personal knowledge is all that is required; the question as to whether the witness actually has personal knowledge is left for the trier of fact to resolve on the issue of credibility. See, e.g., People v. McCarthy, 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910). Section 702 clarifies the law in this respect.

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

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

§ 703. Judge as witness

Comment. Section 703 precludes the presiding judge from testifying as a witness at the trial of the action under certain conditions and specifies the procedure to be followed when the judge is offered as a witness. It is based in part on Rule 42 of the Uniform Rules of Evidence and closely follows the provisions of Section 704, relating to the competency of a juror to testify as a witness.

Under existing California law, a judge may be called as a witness, but the judge may in his discretion order the trial postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by Section 703). There are few cases interpreting this section, and none that consider the effect of its procedure in a later criminal action.

Section 703 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to his testimony must be ruled on by the witness himself. The extent of cross-examination may be limited by the fear of appearing to attack the judge personally. A party might be embarrassed to introduce impeaching evidence. For these and similar reasons, Section 703 appears to be superior to Code of Civil Procedure Section 1883. See generally People v. Connors, 77 Cal. App. 438, 450-457, 246 Pac. 1072, 1076-1079 (1926) (dictum)(abuse of discretion for the presiding judge to testify as to important and necessary facts without proof of which the issue, which his testimony is designed to support, cannot be sustained).

Under Section 703, the judge presiding at the trial of a civil action is permitted to testify as a witness in that action only if no party objects to his testifying and he determines that his testimony would not be of importance. If a party objects to his testifying, however, or, even without objection, if he determines that his testimony would be of consequence to the determination of the action, he is required to declare a mistrial and order the action assigned for trial before another judge.

Criminal actions are treated somewhat differently under Section 703 because of the problems inherent in the constitutional concept of double jeopardy. Hence, the judge presiding at the trial of a criminal action is permitted to testify as a witness in that action unless a party objects to his testifying or moves for a mistrial. If such objection or motion is made, the judge is required to declare a mistrial and order the action assigned for trial before another judge. In the absence of such objection or motion, however, the judge may testify as a witness even though he determines that his testimony would be of consequence to the determination of the action. Thus, in a criminal action, the burden is placed entirely upon the parties to determine the availability of the judge as a witness. If the parties fail to act, the availability of an at trial remedy and the constitutional principles governing fair trial will determine the extent to which a judge presiding at the trial of a criminal action may testify as to any matter that is of consequence to the determination of the action.

Subdivision (a) of Section 703 requires the judge in both civil and criminal actions to privately disclose to the parties the information he has concerning the case before he may testify as a witness. Such disclosure out of the presence and hearing of the jury is required in order to inform the parties of the action they should take, if any.

§ 704. Juror as witness

Comment. Section 704 precludes a juror, sworn and impaneled in the trial of an action, from testifying as a witness at the trial of the action under

certain conditions and specifies the procedure to be followed when the juror is offered as a witness. It is based in part on Rule 43 of the Uniform Rules of Evidence and closely follows the provisions of Section 703, relating to the competency of the presiding judge to testify as a witness.

Under existing California law, a juror may be called as a witness, but the judge in his discretion may order the trial postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by Evidence Code Section 704). There are few cases interpreting this section, and none that consider the effect of its procedure in a later criminal action.

A juror-witness is in an anomalous position. He (as juror) is required to weigh his own testimony (as witness) with complete impartiality. Manifestly, this is impossible. The adverse party, too, is placed in an embarrassing position. He cannot cross-examine in such a manner as to antagonize the juror. He cannot impeach for fear of antagonizing the juror. If he objects to the juror appearing as a witness, the juror may regard the objection as a personal reflection upon his character and veracity. For these and similar reasons, Section 704 appears to be superior to Code of Civil Procedure Section 1883.

Subdivisions (a), (b), and (c). Under Section 704, a juror sworn and impaneled in the trial of a civil action is permitted to testify as a witness in that action only if no party objects and the judge determines that his testimony would not be of importance. If a party objects to his testifying, however, or, even without objection, if the judge determines that his testimony would be of consequence to the determination of the action, the judge is required to declare a mistrial and order the action assigned for trial before another jury.

Criminal actions are treated somewhat differently under Section 704 because of the problems inherent in the constitutional concept of double jeopardy. Hence, a juror sworn and impaneled in the trial of a criminal action is permitted to testify as a witness in that action unless a party objects to his testifying or moves for a mistrial. If such objection or motion is made, the judge is required to declare a mistrial and order the action assigned for trial before another jury. In the absence of such objection or motion, however, the juror may testify as a witness even though the judge determines that his testimony would be of consequence to the determination of the action. Thus, in a criminal action, the burden is placed entirely upon the parties to determine the availability of a juror as a witness. If the parties fail to act, the availability of an at trial remedy and the constitutional principles governing fair trial will determine the extent to which a juror sworn and impaneled in the trial of a criminal action may testify as to any matter that is of consequence to the determination of the action.

Subdivision (a) of Section 704 requires a juror in both civil and criminal actions to privately disclose to the parties the information he has concerning the case before he may testify as a witness. Such disclosure out of the presence and hearing of the remaining jurors is required in order to inform the parties of the action they should take, if any.

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

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

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

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

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

§ 704

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

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

§ 710. Oath required

Comment. Section 710 states the substance of existing California law as found in Section 1846 of the Code of Civil Procedure. The language in Section 710 is based in part on Rule 18 of the Uniform Rules of Evidence.

§ 711. Confrontation

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

§ 720. Qualification as expert witness

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

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

The judge must be satisfied that the proposed witness is an expert. People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953); Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Bossert v. Southern Pac. Co., 172 Cal. 405, 157 Pac. 597 (1916); People v. Pacific Gas & Elec. Co., 27 Cal. App.2d 725, 81 P.2d 584 (1938). Against the objection of a party, the special qualifications of the proposed witness must be shown as a prerequisite to his testimony as an expert. In the absence of such objection, the judge may receive the witness' testimony conditionally, subject to the necessary foundation being supplied later in the trial. See Section 320. Unless the foundation is subsequently supplied, however, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion.

The judge's determination that a witness qualifies as an expert witness is binding on the trier of fact, but the trier of fact may consider the witness' qualifications as an expert in determining the weight to be given his testimony. Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Howland v. Oakland Consol. St. Ry., 110 Cal. 513, 42 Pac. 983 (1895); Estate of Johnson, 100 Cal. App.2d 73, 223 P.2d 105 (1950). See Section 405 and the Comment thereto.

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

§ 721. Testimony by expert witness

Comment. Section 721 indicates the type of testimony permitted a person who is qualified to testify as an expert.

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

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

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

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

§ 722. Cross-examination of expert witness

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

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

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

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

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

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

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

§ 723. Credibility of expert witness

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

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

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

§ 724. Limit on number of expert witnesses

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

§ 730. Appointment of expert by court

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

§ 731. Payment of expert appointed by court

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

§ 732. Calling and examining court-appointed expert

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

to the first article in this chapter, which deals with the competency and qualification of a person to testify as an expert. The section also refers to Section 77 , the specific language of which is based on language originally contained in Section 1871. Section 77 permits each party to the action to object to questions asked and evidence adduced and to cross-examine any person called by the court as a witness to the same extent as if such person were called as a witness by an adverse party. Hence, a reference to this basic section is included in Section 732 in lieu of repeating the language of that section.

§ 733. Right to produce other evidence

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

§ 750. Rules relating to witnesses apply to interpreters and translators

Comment. Section 750 makes all of the rules of law relating to witnesses applicable to persons who serve as interpreters or translators in any action. This is existing law. E.g., People v. Lem Deo, 132 Cal. 199, 201, 64 Pac. 265, 266 (1901)(interpreter); People v. Bardin, 148 Cal. App.2d 776, 307 P.2d 384 (1957)(translator).

§ 751. Cath required of interpreters and translators

Comment. All of the rules of law relating to witnesses apply to interpreters and translators. See Section 750 and the Comment thereto.

A person who serves as an interpreter or translator, however, is in a different position than other witnesses. He does not "testify" from his personal knowledge of any facts in the case, but uses his knowledge and skill as a conduit through which the testimony of others or other evidence is obtained that otherwise would be unintelligible to the judge, the jury, and counsel. Hence, Section 751 provides a different form of oath for an interpreter or translator than is required of other witnesses. Under Section 751, an interpreter is required to commit himself to use his best skill in truthfully relating questions to and answers from witnesses. Similarly, a translator is required to commit himself to use his best skill in truthfully performing his task. The substance of this section is based on language presently contained in subdivision (d) of Section 1885 of the Code of Civil Procedure, restated in Section 751 as a separate section applicable to all interpreters and translators.

§ 752. Interpreters for witnesses

Comment. Section 752 is based on and supersedes Section 1884 of the Code of Civil Procedure. The language of this section, however, is new; it is cast in terms similar to Section 701(a), dealing with the disqualification of a person to be a witness if he is incapable of expressing himself so as to be understood.

Judicial proceedings are required to be conducted in the English language. CAL. CONST., Art. 4, § 24; CODE CIV. PROC. § 185. Hence, when a person who is otherwise qualified to testify as a witness cannot communicate in the English language, an interpreter must interpret for him. Language, however, is not the only barrier to effective communication. Physical disability may prevent a person who is able to "understand and speak" (CODE CIV. PROC. § 1884) the English language from being understood by the judge and jury, as where a person is unable to speak above a whisper. See generally discussion in People v. Walker, 69 Cal. App. 475, 231 Pac. 572 (1924). Section 752 assures the exercise of broad discretion by the court to appoint an interpreter in appropriate cases, as is consistent with the discretion presently exercised. People v. Holtzclaw, 76 Cal. App. 168, 243 Pac. 894 (1926).

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

§ 753. Translators of writings

Comment. Section 753 is based on and supersedes Code of Civil Procedure Section 1863, but the language of this section is new. The same principles that underlie the necessity for the appointment of an interpreter for a witness who is incapable of expressing himself so as to be understood directly apply with equal force to documentary evidence. See Section 752 and the Comment thereto.

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§ 754. Interpreters for deaf in criminal and commitment cases

Comment. Except for minor language changes necessary to incorporate terms defined in the Evidence Code and to clarify the meaning of this section, Section 754 restates the substance of and supersedes Code of Civil Procedure Section 1885. Subdivision (d) of Section 1885 is not continued in Section 754, but the substance of subdivision (d) is restated in Section 751.

§ 760. Direct examination

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

§ 761. Cross-examination

Comment. Section 761 restates the substance of the definition of "cross-examination" found in Code of Civil Procedure Section 2045. As to the permissible scope of such examination, see Section 772.

§ 762. Leading question

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

§ 765. Judge to control mode of interrogation

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

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

§ 766. Responsive answers

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

§ 767. Leading questions

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

§ 768. Writings

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

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

Section 768 eliminates the distinction made in existing law between oral and written statements. Under this section, a witness may be asked questions concerning prior inconsistent statements even though no disclosure is made to him concerning the prior statement. Whether a foundational showing is required before other evidence of the prior statement may be admitted is not covered in Section 768; the prerequisites for the admission of such evidence are set forth in Section 770.

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

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

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

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

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§ 769. Inconsistent statement or conduct

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

§ 770. Inconsistent statement of witness

Comment. Under Section 2052 of the Code of Civil Procedure, a proper foundation must be laid before evidence of a witness' inconsistent statement may be admitted for the purpose of attacking his credibility. The foundation required includes giving the witness the opportunity to identify, explain, or deny the contradictory statement. The principle of permitting a witness to explain the circumstances surrounding the making of an inconsistent statement is sound, but this does not compel the conclusion that the explanation must be made before the inconsistent statement is introduced. Accordingly, unless the interests of justice otherwise require, Section 770 requires the judge to exclude evidence of an inconsistent statement if the witness (a) was not examined so as to give him an opportunity to explain the statement and (b) has been unconditionally excused and is not subject to being recalled.

Section 770 will permit effective cross-examination and impeachment of several collusive winesses, for under this section there need be no disclosure of prior inconsistency before all witnesses have been examined.

Where the interests of justice require it, the judge in his discretion may permit extrinsic evidence of an inconsistent statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement. An absolute rule forbidding introduction of such evidence unless the specified conditions are met may cause hardship in some cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer available. Hence, Section 770 permits the trial judge to admit evidence of the statement where justice so requires. For a discussion regarding the credibility of a hearsay declarant, see Section 1202 and the Comment thereto.

§ 771. Refreshing recollection with a writing

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

§ 772. Cross-examination

Comment. Subdivision (a) of Section 772 restates the substance of Sections 2045 (part) and 2048 of the Code of Civil Procedure as to the scope of permissible cross-examination of a witness produced by an adverse party. See generally WITKIN, CALIFORNIA EVIDENCE §§ 622-638 (1958).

Subdivision (b) of Section 772 states a special rule applicable to the defendant in a criminal action who testifies as a witness in that action. It states existing law as found in Penal Code Section 1323 (superseded by Evidence Code). See People v. McCarthy, 88 Cal. App.2d 883, 200 P.2d 69 (1948). See also People v. O'Brien, 66 Cal. 602, 6 Pac. 695 (1885); People v. Arrighini, 122 Cal. 121, 54 Pac. 591 (1898); WITKIN, CALIFORNIA EVIDENCE § 629 (1958).

§ 773. Order of examination

Comment. Section 773 is the same in substance as and supersedes the

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

§ 775. Re-examination

Comment. Section 774 is based on and supersedes the first and third sentences of Section 2050 of the Code of Civil Procedure.

§ 774. Judge may call witnesses

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

The power of the judge to call other witnesses also is recognized by case law. In Travis v. Southern Pac. Co., 210 Cal. App.2d 410, 26 Cal. Rptr. 700 (1962), over plaintiff's objection, the court permitted the defendant to call a particular witness with the understanding that both parties could cross-examine him--in effect, the court called the witness. "[W]e have been cited to no case, nor has our independent research disclosed any case, dealing with a civil action in which a witness has been called to the stand by the court, over objection of a party. However, we can see no difference in this respect between a civil and a criminal case. In both, the endeavor of the court and the parties should be to get at the truth of the matter in contest. Fundamentally, there is no reason why the court in the interests of justice should not call to the stand anyone who appears to have relevant, competent and material information." 210 Cal. App.2d at 425, 26 Cal. Rptr. at 707-708.

Section 775 expressly authorizes the judge to call witnesses, assuring to the parties the same rights to which they would be entitled if the witnesses were called by a party to the action. The language used to express these rights is taken from the fourth paragraph of Section 1871 of the Code of Civil Procedure (superseded by Section 732), dealing with the rights of the parties when an expert witness is called and examined by the court.

§ 776. Cross-examination of another party or witness

Comment. Section 776 restates the substance of Code of Civil Procedure Section 2055 as it has been interpreted by the courts. See generally WITKIN, CALIFORNIA EVIDENCE §§ 607-613 (1958), and pertinent cases cited and discussed therein.

§ 777. Exclusion of witnesses

Comment. Section 777 is based on and supersedes Section 2043 of the Code of Civil Procedure. Under the existing law, the judge exercises broad discretion in regard to the exclusion of witnesses. People v. Larisey, 14 Cal.2d 30, 92 P.2d 638 (1939); People v. Garbutt, 197 Cal. 200, 239 Pac. 1080 (1925). Cf. PENAL CODE § 867 (power of magistrate to exclude witnesses during preliminary examination). See also CODE CIV. PROC. § 125 (general discretionary power of the court to exclude witnesses).

Under the existing law, the judge has no discretion to exclude a party to an action. If the party is a corporation, one of its officers designated by its attorney is entitled to be present. Because there is little practical distinction between corporations and other artificial entities and organizations as parties to actions in existing practice, subdivision (b) of Section 777 extends the right of presence to all artificial parties and, further, includes an employee as well as an officer of any such party.

§ 778. Recall of witnesses

Comment. Section 778 duplicates and supersedes the second and third sentences of Section 2050 of the Code of Civil Procedure.

Under Section 778, as under existing law, the judge exercises broad discretionary power in regard to the recall of witnesses for examination or for cross-examination. People v. Raven, 44 Cal.2d 523, 282 P.2d 866 (1955). This is a specific example of the broad discretion in the judge to regulate the order of proof (see Section 320) and the mode of interrogation of witnesses (see Section 765).

§ 780. Credibility of witnesses generally

Comment. Section 780 is a restatement of the existing California law as declared in several sections of the Code of Civil Procedure, all of which are superseded by this section and other sections in Article 2 (commencing with Section 785) of this chapter. Thus, subdivisions (a), (b), (e), (f), and (i) restate without substantive change several matters contained in Code of Civil Procedure Section 1847. The matters mentioned in subdivisions (e) and (i) also are covered by Code of Civil Procedure Section 2051. Subdivision (h), dealing with statements made by a witness that are inconsistent with his testimony at the hearing, restates the substance of Code of Civil Procedure Sections 2049 and 2052. The use of character evidence as affecting the credibility of a witness also is covered in Section 2053 of the Code of Civil Procedure.

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

it is technically unnecessary because of Section 351, which declares that "all relevant evidence is admissible." It seems desirable, however, to state explicitly that any statement or other conduct may affect the credibility of a witness. See Kilstrom v. Bronnenberg, 110 Cal. App.2d 62, 242 P.2d 65 (1952). For specific limitations on the admissibility of certain kinds of evidence used for the purpose of attacking or supporting the credibility of a witness, see Article 2 (commencing with Section 785).

§ 785. Parties may attack or support credibility

Comment. Section 785, which is based on the principle expressed in Rule 20 of the Uniform Rules of Evidence, sweeps away all pre-existing limitations on the right to support or attack the credibility of witnesses. Together with Section 351 (providing that "all relevant evidence is admissible"), Section 785 makes all evidence relevant to the credibility of a witness admissible regardless of which party offers the evidence. However, Section 785 is subject to several qualifications on the admissibility of such evidence. Thus, for example, Sections 790 (good character) and 791 (prior consistent statements) limit the admissibility of evidence supporting credibility; the remaining sections in this article limit the admissibility of certain types of evidence relevant to credibility; the rules of privilege and the rules excluding hearsay evidence also operate to exclude evidence that may otherwise be admissible on this issue; and Section 352 permits the judge to exclude evidence relating to credibility where it would be unduly prejudicial, consume too much time, cause confusion, and the like.

Attacking the credibility of one's own witness. Section 785 eliminates the present restriction on attacking the credibility of one's own witness. Under the existing California law, a party is precluded from attacking the

credibility of his own witness unless he has been surprised and damaged by the witness' testimony. CODE CIV. PROC. §§ 2049, 2052 (superseded by EVIDENCE CODE §§ 768, 769, 770, 785); People v. LeBeau, 39 Cal.2d 146, 148, 245 P.2d 302, 303 (1952). In large part, the present law rests upon the theory that a party producing a witness is bound by his testimony. See discussion in Smellie v. Southern Pac. Co., 212 Cal. 540, 555-556, 299 Pac. 529, 535 (1931). This theory has long been abandoned in several jurisdictions where the practical exigencies of litigation have been recognized. See McCORMICK, EVIDENCE § 38 (1954). A party has no actual control over a person who witnesses an event and is required to testify to aid the trier of fact in its function of determining the truth. Hence, a party should not be "bound" by the testimony of a witness produced by him. It follows that he should be permitted to attack the credibility of the witness without anachronistic limitations. Moreover, denial of the right to attack credibility often may work a hardship on a party where by necessity he must call a hostile witness. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure. In regard to attacking the credibility of a "necessary" witness, see generally People v. McFarlane, 134 Cal. 618, 66 Pac. 865 (1901); Anthony v. Hobbie, 85 Cal. App.2d 798, 803-804, 193 P.2d 748, 751 (1948); First Nat'l Bank v. De Moulin, 56 Cal. App. 313, 321, 205 Pac. 92, 96 (1922).

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

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

The effect of Section 785 (together with Section 351) is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352, the judge has wide discretion in regard to the exclusion of collateral evidence. The effect of Section 785, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

§ 786. Character evidence generally

Comment. Section 786 limits evidence relating to the character of a witness to the character traits necessarily involved in a proper determination of credibility. Other character traits of the witness are not of sufficient probative value concerning the reliability of the witness' testimony to offset the prejudicial effect that would be caused by their admissibility.

Section 786 is based on subdivision (c) of Rule 22 of the Uniform Rules of Evidence. It is substantially in accord with the present California law insofar as it admits evidence of the witness' bad reputation for "truth, honesty, or integrity." CODE CIV. PROC. § 2051 (superseded by EVIDENCE CODE § 782). See People v. Yslas, 27 Cal. 630, 633 (1865). Insofar as Section 786 would permit opinion evidence on this subject, it represents a change in the present law. As to this, the opinion evidence that may be offered by

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

§ 787. Specific instances of conduct

Comment. Section 787, based on subdivision (d) of Rule 22 of the Uniform Rules of Evidence, makes specific instances of conduct inadmissible to prove a trait of character for the purpose of attacking or supporting the credibility of a witness. This is in accord with the present California law. Sharon v. Sharon, 79 Cal. 633, 673-674, 22 Pac. 26, 38 (1889); CODE CIV. PROC. § 2051 (superseded by Section 787 and several other sections in this chapter). It is subject, however, to Section 788, relating to the admissibility of evidence of the conviction of a witness for a crime when offered for the purpose of attacking the witness' credibility.

§ 788. Conviction of witness for a crime

Comment. Section 788 limits the extent to which evidence of conviction for a crime can be used for the purpose of attacking the credibility of a witness. When offered to attack the credibility of a witness, evidence of a conviction is inadmissible if it falls within the proscription of this section.

Section 787 provides that evidence of specific acts of conduct is inadmissible on the issue of credibility; but the section is expressly made subject to this section, thereby excepting from its provisions evidence of the witness' conviction for a crime. Hence, evidence of a conviction is admissible under the general provisions of Sections 351 and 785 unless it is made inadmissible by this section.

Subdivision (a). Subdivision (a) follows the recommendation of the Commissioners on Uniform State Laws by limiting the types of crimes that may be used for impeachment purposes, but the limitation is further restricted to crimes involving deceit or fraud. These crimes have a considerable bearing on credibility, whereas others do not. Other crimes are excluded because the probative value of such crimes on the issue of credibility is low and the prejudice that may result from their introduction may be great.

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

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

Thus, under existing law, evidence of considerable significance on the issue of credibility is frequently excluded while much evidence of little probative value on the issue is admitted. Section 788 removes these anomalies from the California law.

Subdivision (a) also requires a party, before attacking the credibility of a witness on the basis of prior crimes, to satisfy the judge in proceedings out of the presence and hearing of the jury that the crime in question is admissible under Section 788 and that the witness actually committed the crime. The purpose of the provision is to avoid unfair imputations of crimes that either do not fit within the rule or are nonexistent. This provision is based in part on a proposal made by the Committee on Administration of Justice of the State Bar of California. See 29 CAL. S. B. J. 224, 238 (1954). Moreover, it is substantially in accord with existing California law as declared in People v. Perez, 58 Cal.2d 229, 23 Cal. Rptr. 569, 373 P.2d 617 (1962).

Subdivision (a) makes any evidence of the conviction of a witness for a crime inadmissible unless the appropriate showing has been made to the judge. This includes evidence in the form of testimony from the witness himself. Hence, a party may not ask a witness if he has been convicted of a crime unless the party has made the requisite showing to the judge. As indicated in paragraph (2) of

subdivision (a), a prior admission by the witness may be used to establish the conviction as well as any other competent evidence.

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

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

§ 789. Religious belief

Comment. Section 789 restates the present California law as expressed in People v. Copsey, 71 Cal. 548, 12 Pac. 721 (1887), where the Supreme Court held that evidence relating to a witness' religious belief or lack thereof is incompetent on the issue of his credibility as a witness. See CAL. CONST., Art. I, § 4.

§ 790. Good character of witness

Comment. Section 790 precludes the introduction of character evidence to support the credibility of a witness unless and until evidence of the witness' bad character has been admitted for the purpose of attacking his credibility as a witness. This section restates without substantive change a rule that is well recognized by statutory and case law in California. CODE CIV. PROC. § 2053 (superseded by Section 785); People v. Bush, 65 Cal. 129, 131, 3 Pac. 590, 591 (1884). Unless the credibility of a witness is put in issue by an attack impugning his character for honesty or veracity (see Section 786), evidence of the witness' good character admitted merely to support his credibility introduces collateral material that is unnecessary to a proper determination of any legitimate issue in the action. See People v. Sweeney, 55 Cal.2d 27, 38-39, 9 Cal. Rptr. 793, 799, 357 P.2d 1049, 1055 (1960).

§ 791. Prior consistent statement of witness

Comment. Section 791 concerns the admissibility of prior consistent statements made by a witness that are offered for the purpose of supporting his credibility as a witness. This section precludes the introduction of such statements unless and until there has been an attack on the credibility of the witness by evidence of the type mentioned in subdivisions (a) and (b) of this section. This is similar to the treatment of character evidence in Section 790 and is consistent with the existing California law. See People v. Doyell, 48 Cal. 85, 90-91 (1874). Unless there has been an attack on the credibility of the witness, thereby placing his credibility in issue, the witness' prior consistent statements are no more than self-serving hearsay declarations. Scuh statements are irrelevant to any legitimate issue necessary for determination in the action and are merely cumulative to the witness' testimony at the hearing. See 4 WIGMORE, EVIDENCE § 1124 (3d ed. 1940). Moreover, admission of prior consistent statements without an attack on his credibility would permit a party to prove his case by the indroduction of statements carefully prepared in advance even though no issue is raised in regard to the credibility of his present testimony at the hearing.

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

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

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

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

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