#34 10/2/64

Memorandum 64-90

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Division 10)

Attached are two copies of the revised Comments to Division 10. Mr. Sato is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Revised for Oct. 1964 Meeting

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§ 1200. The hearsay rule

Comment. Section 1200 states the hearsay rule. The statement of the hearsay rule found here is based on the similar statement of the rule in Rule 63 of the Uniform Rules of Evidence.

That hearsay evidence is inadmissible unless the evidence is within an exception to that rule has been the law of California since the earliest days of the State. See, e.g., People v. Bob, 29 Cal.2d 321, 175 P.2d 12 (1946); Kilburn v. Ritchie, 2 Cal. 145 (1852). Nevertheless, Section 1200 is the first statutory statement of the rule. Code of Civil Procedure Section 1845 (superseded by Evidence Code Section 702) permits a witness to testify concerning only those facts that are personally known to him "except in those few express cases in which . . . the declarations of others, are admissible." Section 1845 is considered to be the statutory basis for the hearsay rule. People v. Spriggs, 60 Cal.2d ___, ___, 36 Cal. Rptr. 841, 844, 389 P.2d 377, 380 (1964). It has been recognized, however, that Section 1845 does not expressly deal with the hearsay rule. The section merely states the requirement of personal knowledge, and a witness testifying to the hearsay statement of another must have personal knowledge of that statement just as he must have personal knowledge of any other matter about which he testifies. Sneed v. Marysville Gas etc. Co., 149 Cal. 704, 708, 87 Pac. 376, 378, (1906).

"Hearsay evidence" is defined in Section 1200 as "evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." Under existing case law, too, the hearsay rule applies only to statements made out of court that are offered to prove the truth of the matter asserted. If the statement is offered for some purpose other than to prove the fact stated therein, the evidence is not objectionable under the hearsay rule. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892, 896 (1944); Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892). See WITKIN, CALIFORNIA EVIDENCE §§ 215-218 (1958).

The word "statement" used in the definition of "hearsay evidence" is defined in Section 225 as "verbal conduct" or "nonverbal conduct . . . intended . . . as a substitute for verbal conduct." Cf. Rule 62(1) of the Uniform Rules of Evidence. Hence, evidence of a person's conduct out of court is not inadmissible under the hearsay rule expressed in Section 1200 unless that conduct is clearly assertive in character. Nonassertive conduct is not hearsay.

Some California cases have regarded evidence of nonassertive conduct as hearsay evidence if it is offered to prove the actor's belief in a particular fact as a basis for an inference that the fact believed is true. See, e.g., Estate of De Laveaga, 165 Cal. 607, 624, 133 Pac. 307, 314 (1913)("the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extra-judicial expression of opinion on the part of the family"); People v. Mendez, 193 Cal. 39, 52, 223 Pac. 65, 70 (1924) ("Circumstances of flight [of other persons from the scene of a crime] are in the nature of confessions . . . and are, therefore, in the nature of hearsay evidence").

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

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

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

Under Section 1200, exceptions to the hearsay rule may be found either in statutes or in decisional law. This continues existing California law; for, inasmuch as the rule excluding hearsay evidence is not statutory, the courts have recognized exceptions to the rule in addition to those exceptions expressed in the statutes. See, People v. Spriggs, 60 Cal.2d ___, ___, 36 Cal. Rptr. 841, 844, 389 P.2d 377, 380 (1964).

§ 1201. Multiple hearsay

Comment. Section 1201 makes it possible to use admissible hearsay to prove another statement that is also admissible hearsay. For example, under Section 1201, an official reporter's transcript of the testimony at another trial may be used to prove the nature of the testimony previously given (EVIDENCE CODE § 1280); the former testimony may be used as hearsay evidence (EVIDENCE CODE § 1291) to prove that a party made an admission; and the admission is admissible (EVIDENCE CODE § 1220) to prove the truth of the matter stated. Thus, under Section 1201, the evidence of the admission contained in the transcript is admissible because each of the hearsay statements involved is within an exception to the hearsay rule.

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

Section 1201 is based on Rule 66 of the Uniform Rules of Evidence.

§ 1202. Credibility of hearsay declarant

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

When the inconsistent statement was made after the former testimony was given, the California courts have permitted a party to impeach, by evidence

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

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

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

Section 1202 provides that inconsistent statements of a hearsay declarant may not be used to prove the truth of the matters stated. In

contrast, Section 1235 provides that evidence of inconsistent statements made by a trial witness may be admitted to prove the truth of the matter stated. If the declarant is not a witness and not subject to cross-examination upon the subject matter of his statements, there is no sufficient guarantee of the trustworthiness of the statements he has made out of court to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

Section 1202 is based on Rule 65 of the Uniform Rules of Evidence.

§ 1203. Cross-examination of hearsay declarant

Comment. Hearsay evidence is generally excluded from evidence because of the lack of opportunity for the adverse party to cross-examine the hearsay declarant before the trier of fact. People v. Bob, 29 Cal.2d 321, 325, 175 P.2d 12, 15 (1946). In some situations, hearsay evidence is admitted because there is some exceptional need for the evidence and because there is some circumstantial evidence of trustworthiness that justifies a violation of a party's right of cross-examination. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957); Turney v. Sousa, 146 Cal. App.2d 787, 791, 304 P.2d 1025, 1027-1028 (1956).

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

statement received in evidence and to cross-examine him concerning the subject matter of his statement.

Hence, Section 1203 has been included in the Evidence Code to reverse, insofar as a hearsay declarant is concerned, the traditional rule that a witness called by a party is a witness for that party and may not be cross-examined by him. As a hearsay declarant is in practical effect a witness against the party against whom his hearsay statement is admitted, Section 1203 gives that party the right to call and cross-examine the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at the trial.

§ 1204. Hearsay statement offered against criminal defendant

Comment. Section 1204 is a statutory recognition that hearsay evidence that fits within an exception to the hearsay rule may nonetheless be inadmissible under the Constitution of the United States or the Constitution of California. Thus, Section 1220, which creates an exception for the statements of a party, is subject to the constitutional rule excluding evidence of involuntary confessions against a criminal defendant.

In People v. Underwood, 61 Cal.2d ___, 37 Cal. Rptr. 313, 389 P.2d 937 (1964), the California Supreme Court held that a prior inconsistent statement of a witness could not be introduced to impeach him in a criminal action when the statement would have been inadmissible as an involuntary confession if the witness had been the defendant. To the extent that the Underwood decision is based on constitutional principles, its effect is continued by Section 1204 and its principle is made applicable to all hearsay statements.

§ 1205. No implied repeal

Comment. Although some of the statutes providing for the admission of hearsay evidence will be repealed when the Evidence Code is enacted, a number of statutes will remain in the various codes. For the most part, these statutes are narrowly drawn to make a particular type of hearsay evidence admissible under specifically limited circumstances. Since it is neither desirable nor feasible to repeal these provisions, Section 1205 states that they will not be impliedly repealed by the enactment of the Evidence Code.

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Admission of party

Comment. Section 1220 states existing law as found in subdivision 2 of Code of Civil Procedure Section 1870. The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself made the statement. Moreover, the party can cross-examine the witness who testifies to the party's statement and can explain or deny the purported admission. The statement need not be one which would be admissible if made at the hearing. See Shields v. Oxnard Harbor Dist., 46 Cal. App.2d 477, 116 P.2d 121 (1941).

§ 1221. Adoptive admission

Comment. Section 1221 restates an exception found in subdivision 3 of Code of Civil Procedure Section 1870. Section 1221 is based on Rule 63(8)(b) of the Uniform Rules of Evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 484 (1964).

§ 1222. Authorized admission

Comment. Section 1222 provides a hearsay exception for authorized admissions. Under this exception, if a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same conditions as if they had been made by the party himself. Section 1222 restates an exception found in the first portion of

subdivision 5 of Code of Civil Procedure Section 1870. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 484-490 (1964).

§ 1223. Admission of co-conspirator

Comment. Section 1223 is a specific example of a kind of authorized admission that is admissible under Section 1222. The statement is admitted because it is an act of the conspiracy for which the party, as a co-conspirator, is legally responsible. People v. Lorraine, 90 Cal. App. 317, 327, 265 Pac. 893, (1928). See CALIFORNIA CRIMINAL LAW PRACTICE 471-472 (Cal. Cont. Ed. Bar 1964). Section 1223 restates an exception found in subdivision 6 of Code of Civil Procedure Section 1870.

§ 1224. Statement of agent, partner, or employee

Comment. Section 1222 makes authorized extrajudicial statements admissible. Section 1224 goes beyond this, making admissible against a party

specified extrajudicial statements of an agent, partner, or employee, whether or not authorized. However, a statement is admitted under Section 1224 only if it would be admissible if made by the declarant at the hearing; no such limitation is applicable to authorized admissions.

The practical scope of Section 1224 is quite limited. The spontaneous statements that it covers are admissible under Section 1240. The self-inculpatory statements that it covers are admissible under Section 1230 as declarations against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by Section 1224 would be admissible as inconsistent statements under Section 1235. Thus, Section 1224 has independent significance only as to unauthorized, nonspontaneous, noninculpatory statements of agents, partners, and employees who do not testify at the trial concerning matters within the scope of the agency, partnership, or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under Section 1230; it would be inadmissible as an authorized admission under Section 1222; it would be inadmissible under Section 1235 unless the employee testified inconsistently at the trial; it would be inadmissible under Section 1240 unless made spontaneously; but it would be admissible under Section 1225.

Section 1225 is based on Rule 63(9)(a) of the Uniform Rules of Evidence; it goes beyond existing California law as found in subdivision 5 of Section 1870 of the Code of Civil Procedure (superseded by Evidence Code Section 1223). The only statements that are admissible under existing California law are those that the principal has authorized the agent to make. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 (1903).

There are two justifications for the limited extension of the exception for agents' statements provided by Section 1224. First, because of the relationship which existed at the time the statement was made, it is unlikely that the statement would have been made unless it were true. Second, the existence of the relationship makes it quite likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

§ 1225. Statement of declarant whose liability or breach of duty is in issue

Comment. Section 1225 restates in substance a hearsay exception found in Section 1851 of the Code of Civil Procedure (superseded by Evidence Code Sections 1225 and 1302). Cf. Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115 (1888); Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956); Standard Oil Co. v. Houser, 101 Cal. App.2d 480, 225 P.2d 539 (1950). Section 1225, however, limits this hearsay exception to civil actions. Much of the evidence within this exception is also covered by Section 1230, which makes admissible declarations against interest. However, to be admissible under Section 1230, the statement must have been against the declarant's interest when made; this requirement is not stated in Section 1225. A comparable exception is found in Rule 63(9)(c) of the Uniform Rules of Evidence.

Code of Civil Procedure Section 1951 has been construed to admit statements of a declarant whose breach of duty gives rise to a liability on the part of the party against whom the statements are offered. Nye & Nissen v. Central etc. Ins. Corp., 1 Cal. App.2d 570, 163 P.2d 100 (1945). Section 1225 of the Evidence Code refers specifically to

"breach of duty" in order to admit statements of a declarant whose breach of duty is in issue without regard to whether that breach gives rise to a liability of the party against whom the statements are offered or merely defeats a right being asserted by that party. For example, in Ingram v. Bob Jaffe Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956), a statement of a person permitted to operate a vehicle was admitted against the owner of the vehicle in an action seeking to hold the owner liable on the derivative liability of vechicle owners established by Vehicle Code Section 17150. Under Section 1225, the statement of the declarant would also be admissible against the owner in an action brought by the owner to recover for damage to his vehicle where the defense is based on the contributory negligence of the declarant.

Section 1302 supplements the rule stated in Section 1225. Section 1302 permits the admission of judgments against a third person when one of the issues between the parties is the liability, obligation, or duty of the third person and the judgment determines that liability, obligation, or duty. Together, Sections 1225 and 1302 codify the holdings of the cases applying Code of Civil Procedure Section 1851. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 491-496 (1964).

§ 1226. Statement of declarant whose right or title is in issue

Comment. Section 1226 expresses a common law exception to the hearsay rule that is recognized in part in Code of Civil Procedure Section 1849. Section 1849 (which is superseded by Section 1226) permits the

"breach of duty" in order to admit statements of a declarant whose breach of duty is in issue without regard to whether that breach gives rise to a liability of the party against whom the statements are offered or merely defeats a right being asserted by that party. For example, in Ingram v. Bob Jaffe Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956), a statement of a person permitted to operate a vehicle was admitted against the owner of the vehicle in an action seeking to hold the owner liable on the derivative liability of vechicle owners established by Vehicle Code Section 17150. Under Section 1225, the statement of the declarant would also be admissible against the owner in an action brought by the owner to recover for damage to his vehicle where the defense is based on the contributory negligence of the declarant.

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§ 1226. Statement of declarant whose right or title is in issue

Comment. Section 1226 expresses a common law exception to the hearsay rule that is recognized in part in Code of Civil Procedure Section 1849. Section 1849 (which is superseded by Section 1226) permits the

statements of predecessors in interest of real property to be admitted against the successors; however, the California cases follow the general rule of permitting predecessors' statements to be admitted against successors of either real or personal property. Smith v. Goethe, 159 Cal. 628, 115 Pac. 223 (1911); 4 WIGMORE, EVIDENCE §§ 1082 et seq.,(3d ed. 1940).

Section 1226 supplements the rule provided in Section 1225. Under Section 1225, for example, a party suing an executor on an obligation incurred by the decedent prior to his death may introduce admissions of the decedent. Similarly, under Section 1226, a party sued by an executor on an obligation claimed to have been owed to the decedent may introduce admissions of the decedent.

It should be noted that "statements made before title accrued in the declarant will not be receivable. On the other hand, the time of divestiture, after which no statements could be treated as admissions is the time when the party against whom they are offered has by his own hypothesis acquired the title; thus, in a suit, for example, between A's heir and A's grantee, A's statements at any time before his death are receivable aginst the heir; but only his statements before the grant are receivable against the grantee." 4 WIGMORE, EVIDENCE § 1082 at 153 (3d ed. 1940).

Despite the limitations of Section 1226, some statements of a grantor made after divestiture of title will be admissible; but another theory of admissibility must be found. For example, later statements of his state of mind may be admissible on the issue of his intent. EVIDENCE CODE §§ 1250 and 1251. Where it is claimed that a conveyance was in fraud of creditors, the later statements of the grantor may be admissible not as hearsay but

as evidence of the fraud itself (cf. Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 Pac. 967 (1901)) or as declarations of a co-conspirator in the fraud (cf. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026 (1936)). See generally 4 WIGMORE, EVIDENCE § 1086 (3d ed. 1940).

§ 1227. Statement of declarant in action for his wrongful injury or death

Comment. Under existing California law, an admission by a decedent is not admissible against his heirs or representatives in a wrongful death action brought by them. Hedge v. Williams, 131 Cal. 455, 64 Pac. 106 (1901); Carr v. Duncan, 90 Cal. App.2d 282, 202 P.2d 855 (1949); Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243 (1917). The reason is that the action is a new action, not merely a survival of the decedent's action.

This rule has been severely criticized and does not reflect the thinking of most American courts. Carr v. Duncan, 90 Cal. App.2d 282, 285, 202 P.2d 855, 856 (1949). Under Code of Civil Procedure Section 1851 (superseded by Evidence Code Section 1226), the admissions of a decedent are admissible to establish the liability of his executor. Similarly, when the executor brings an action for the decedent's death under Code of Civil Procedure Section 377, the defendant should be permitted to introduce the admissions of the decedent. Without such a rule, in an action between two executors arising out of an accident which was fatal to both participants, the plaintiff executor would be able to introduce admissions of the defendant's decedent, but the defending executor would be unable to introduce admissions of the plaintiff's decedent.

Section 1227 changes the rule announced in the California cases and makes the admissions of the decedent admissible in wrongful death actions. It provides a similar rule for the analogous cases arising under Code of Civil Procedure Section 376.

Section 1227 recognizes that, in an action brought under Code of Civil Procedure Section 377, the only reason for treating the admissions of a plaintiff's decedent differently from those of a defendant's decedent is a technical procedural rule. The plaintiff in a wrongful death action--and the parent of an injured child in an action under Code of Civil Procedure Section 376--stands in reality so completely on the right of the deceased or injured person that such person's admissions of nonliability of the defendant should be admitted against the plaintiff, even though (as a technical matter) the plaintiff is asserting an independent right.

Article 2. Declarations Against Interest

§ 1230. Declaration against interest

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

Section 1230 supersedes the partial and inaccurate statements of the exception for declarations against interest found in Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). See People v. Spriggs, 60 Cal 2d ___,

___, 36 Cal. Rptr. 841, 844-845, 389 P.2d 377, 380-381 (1964). Section 1230 is based in large part on Rule 63(10) of the Uniform Rules of Evidence. The requirement that the declarant have "sufficient knowledge of the subject" continues the similar common law requirement stated in Code of Civil Procedure Section 1853 that the declarant must have had some peculiar means--such as personal observation--for obtaining accurate knowledge of the matter stated. See 5 WIGMORE, EVIDENCE § 1471 (3d ed. 1940).

Article 3. Prior Statements of Witnesses

§ 1235. Inconsistent statement

Comment. Under existing California law, when a prior statement of a witness that is inconsistent with his testimony at the trial is admitted in evidence, it may not be used as evidence of the truth of the matters stated. Because of the hearsay rule, a witness' prior inconsistent statement may be used only to discredit his testimony given at the trial. Albert v. McKay & Co. 174 Cal. 451, 456, 163 Pac. 666, 668 (1917).

Because a witness' inconsistent statement is not substantive evidence, the courts do not permit a party--even when surprised by the testimony--to impeach his own witness with inconsistent statements if the witness' testimony at the trial has not damaged the party's case in any way. Evidence tending only to discredit the witness is irrelevant and immaterial when the witness has not given damaging testimony. People v. Crespi, 115 Cal. 50, 46 Pac. 863 (1896); People v. Mitchell, 94 Cal. 550, 29 Pac. 1106 (1892); People v. Brown, 81 Cal. App. 226, 253 Pac. 735 (1927).

Section 1235 permits an inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the

conditions specified in Section 769. Section 785 permits a party calling a witness to attack his credibility with evidence of inconsistent statements even though the party was not surprised by the testimony. Because Section 1235 provides that inconsistent statements are admissible as substantive evidence of the matters stated, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony. Such evidence is no longer irrelevant (and, hence, inadmissible), for Section 1235 permits the evidence to be considered as evidence of the matters stated and not merely as evidence casting discredit on a witness who has given innocuous testimony.

Section 1235 admits inconsistent statements of witnesses because the dangers which the hearsay rule is designed to limit are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies, or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection

against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

§ 1236. Prior consistent statement

Comment. Under existing law, a prior statement of a witness that is consistent with his testimony at the trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is admitted, however, only to rehabilitate the witness--to support his credibility--and not as evidence of the truth of the matters stated. People v. Kynette, 15 Cal.2d 731, 753-754, 104 P.2d 794, 805-806 (1940).

Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the rules relating to the rehabilitation of impeached witnesses. See EVIDENCE CODE § 791.

There is no reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true.

§ 1237. Past recollection recorded

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

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

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

§ 1238. Prior identification

Comment. Section 1238 permits evidence of a prior identification made by a trial witness to be admitted if the witness at the trial testifies that the prior identification was a true reflection of his opinion at that time. Section 1238 supplements Section 1235. Under Section 1235, evidence of a prior identification is admissible if the witness denies having made the prior identification or in any other way testifies inconsistently with the prior statement.

Sections 1235 and 1238 codify substantially the exception to the hearsay rule that was recognized in People v. Gould, 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 684 (1960). In the Gould case, evidence of a prior identification made by a witness who could not repeat the identification at the trial was held admissible "because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations omitted.] The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. [Moreover,] the principal danger of admitting hearsay evidence is not present since the witness is available

at the trial for cross-examination." 54 Cal.2d at 626, 7 Cal. Rptr. at 275, 354 P.2d at 686.

As there was no discussion in the Gould opinion of the preliminary showing necessary to warrant admission of evidence of a prior identification, it cannot be determined whether Sections 1235 and 1238 modify the law as declared in that case.

Sections 1235 and 1238 deal only with the admissibility of evidence; they do not determine what constitutes evidence sufficient to sustain a verdict or finding. Hence, these sections have no effect on the holding of the Gould case that evidence of an extrajudicial identification that cannot be confirmed by an identification at the trial is insufficient to sustain a criminal conviction in the absence of other evidence tending to connect the defendant with the crime.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

§ 1240. Spontaneous statement

Comment. Section 1240 is a codification of the existing exception to the hearsay rule for statements made spontaneously under the stress of excitement engendered by the event to which they relate. Showalter v. Western Pacific R.R., 16 Cal.2d 460, 106 P.2d 895 (1940). The section is based substantially on Rule 63 (4)(b) of the Uniform Rules of Evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 465-466 (1964). The rationale of this

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exception is that the spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness.

§ 1241. Contemporaneous statement

Comment. Section 1241, which provides a hearsay exception for contemporaneous statements, may go beyond existing law. No California case in point has been found. Elsewhere, the authorities are conflicting in their results and confused in their reasoning owing to the tendency to discuss the problem only in terms of res gestae. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence). 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 466-468 (1964). The section is based on Rule 63 (4)(a) of the Uniform Rules of Evidence.

The statements admissible under subdivision (b) are sufficiently trustworthy to be considered by the trier of fact for three reasons. First, there is no problem concerning the declarant's memory because the statement is simultaneous with the event. Second, there is little or no time for calculated misstatement. Third, the statement is usually made to one whose proximity provides an immediate opportunity to check the accuracy of the statement in the light of the physical facts. In applying this exception, the courts should insist on actual contemporaneousness; otherwise, the trustworthiness of the statement becomes questionable.

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§ 1242. Dying declaration

Comment. Section 1242 is a broadened form of the well-established exception to the hearsay rule for dying declarations relating to the immediate cause of the declarant's death. The existing law--Code of Civil Procedure Section 1870(4) as interpreted by the courts--makes such declarations admissible only in criminal homicide actions. People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 472-473 (1964). For the purpose of the admissibility of dying declarations, there is no rational basis for differentiating between civil and criminal actions or among various types of criminal actions. Hence, Section 1242 makes the exception applicable in all actions.

Under Section 1242, as under existing law, the dying declaration is admissible only if the declarant made the statement on personal knowledge. People v. Wasson, 65 Cal. 538, 4 Pac. 555 (1884); People v. Taylor, 59 Cal. 640 (1881).

Article 5. Statements of Mental or Physical State

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

Comment. Section 1250 provides an exception to the hearsay rule for statements of the declarant's then existing physical or mental condition. It codifies an exception that has been developed by the courts, but the language is based on Rule 63 (12)(a) of the Uniform Rules of Evidence.

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

A statement is not admissible under Section 1250 if the statement was made under circumstances indicating that the statement is not trustworthy. See EVIDENCE CODE § 1252 and the Comment thereto.

In light of the definition of "hearsay evidence" in Section 1200, a distinction should be noted between the use of a declarant's statements of his then existing mental state to prove such mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state.

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

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

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

A major exception to the principle expressed in Section 1250(b) was created in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that statements made by the victims of a double homicide relating threats by the defendant were admissible to show the victims' mental state--

their fear of the defendant. Their fear was not itself an issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct engendering the fear, i.e., that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. In People v. Purvis, 56 Cal.2d 93, 13 Cal. Rptr. 801, 362 P.2d 713 (1961), the doctrine of the Merkouris case was limited to cases where identity is an issue.

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

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

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

applies and the statement of the past mental state is inadmissible hearsay.

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

A statement is not admissible under Section 1251 if the statement was made under circumstances that indicate the statement is not trustworthy. See Section 1252 and the Comment thereto.

§ 1252 Limitation on admissibility of statement of mental or physical state

Comment. Section 1253 limits the admissibility of hearsay statements that would otherwise be admissible under Sections 1250 and 1251. If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence. The limitation expressed in Section 1252 has been held to be a condition of admissibility in some of the California cases. See, e.g., People v. Hamilton, 55 Cal.2d 881, 893, 895, 13 Cal. Rptr. 649, 656, 657, 362 P.2d 473,480,481(1961); People v. Alcalde, 24 Cal.2d 177, 187, 148 P.2d 627, 632(1944).

The Hamilton case mentions some further limitations on the admissibility of statements of mental state. These are not given express recognition in the Evidence Code. However, under Section 352, the judge may in a particular case exclude such evidence if he determines that its prejudicial effect will substantially outweigh its probative value. The specific limitations mentioned in the Hamilton case have not been codified because they are difficult to understand in the light of conflicting and inconsistent language in the case and because in a different case, prosecuted without the excessive prejudice present in the Hamilton case, a court might be warranted in receiving evidence of the kind involved there where its probative value is great. For example, the opinion states that statements of a homicide victim that are offered to prove his state of mind are inadmissible if they refer solely to alleged past conduct on the part of the accused. 55 Cal.2d at 893-894, 13 Cal. Rptr. at 656, 362 P.2d at 480. But the case also states, nonetheless, that statements of "threats . . . on the part of the accused" are admissible on the

issue. 55 Cal.2d at 893, 13 Cal. Rptr. at 656, 362 P.2d at 480. The opinion also states that the statements, to be admissible, must refer primarily to the state of mind of the declarant and not the state of mind of the accused. 55 Cal.2d at 893, 13 Cal. Rptr. at 656, 362 P.2d at 480. But the case also indicates that narrations of threats made by the accused--statements of his intent--are admissible, but statements of conduct by the accused having no relation to his intent or mental state are not admissible. 55 Cal.2d at 893, 895-896, 13 Cal. Rptr. at 656, 657-658, 362 P.2d at 480, 481-482.

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

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

§ 1260. Statement concerning declarant's will

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

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

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

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

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

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

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

Article 7. Business Records

§ 1270. "A business"

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

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

§ 1271. Business record

Comment. Section 1271 is the business records exception to the hearsay rule. It is stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e-1953h of the Code of Civil Procedure) and from Rule 63(13) of the Uniform Rules of Evidence.

Section 1271 requires the judge to find that the sources of information and the method and time of preparation of the record "were such as to indicate its trustworthiness." Under the language of Code of Civil Procedure Section 1953f, the judge must determine that the sources of information and method and time of preparation "were such as to justify its admission." The language of Section 1271 is a more accurate reflection of the holdings of the cases applying this exception, for the cases hold that admission of a business record is not justified when there is no preliminary showing that the record is reliable or trustworthy. E.g., People v. Grayson, 172 Cal. App.2d 372, 341 P.2d 820 (1959)(hotel register rejected because "not shown to be true and complete"). "The chief foundation of the special reliability of business records is the requirement that they must be based upon the first-hand observation of someone whose job it is to know the facts recorded. . . . But if the evidence in the particular case discloses that the record was not based upon the report of an

informant having the business duty to observe and report, then the record is not admissible under this exception, to show the truth of the matter reported to the recorder." McCORMICK, EVIDENCE § 286 at 602 (1954), as quoted in MacLean v. City & County of San Francisco, 151 Cal. App.2d 133, 143, 311 P.2d 158, 164 (1957).

Applying this standard, the cases have rejected a variety of business records on the ground that they are not based on the personal knowledge of the recorder or of someone with a business duty to report to the recorder. Police accident and arrest reports are usually held inadmissible because they are based on the descriptions of persons who have no business duty to report to the police. MacLean v. City & County of San Francisco, 151 Cal. App.2d 133, 311 P.2d 158 (1957); Hoel v. City of Los Angeles, 136 Cal. App.2d 295, 288 P.2d 989 (1957). They are admissible, however, to prove the fact of the arrest. Harris v. Alcoholic Bev. Con. Appeals Bd., 212 Cal. App.2d 106, 23 Cal. Rptr. 74 (1963). Similar investigative reports on the origin of fires have been held inadmissible because not based on personal knowledge. Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959); Harrigan v. Chaperon, 118 Cal. App.2d 167, 257 P.2d 716 (1953).

Section 1271 will continue the law developed in these cases that a business report is admissible only if the sources of information and the time and method of preparation are such as to indicate its trustworthiness.

§ 1272. Absence of entry in business records

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

Article 8. Official Reports and Other Official Writings

§ 1280. Report by public employee

Comment. Section 1280 restates in substance and supersedes Code of Civil Procedure Sections 1920 and 1926. Although Sections 1920 and 1926 declare unequivocally that entries in public records are prima facie evidence of the facts stated, "it has been held repeatedly that those sections cannot have universal literal application." Chandler v. Hibberd, 165 Cal. App.2d 39, 65, 332 P.2d 133, 149 (1958). In fact, the cases require the same showing of trustworthiness of the record offered that they require under the business records exception. Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959); Hoel v. City of Los Angeles, 136 Cal. App.2d 295, 288 P.2d 989 (1957). Section 1280 continues the law declared in these cases by explicitly requiring the same showing of trustworthiness that is required in Section 1271. See the Comment to Section 1271.

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

§ 1281. Record of vital statistic

Comment. Section 1281 provides a hearsay exception for official reports concerning birth, death, and marriage. Reports of such events occurring within

California are now admissible under the provisions of Section 10577 of the Health and Safety Code. Section 1281 provides a broader exception which includes similar reports from other jurisdictions.

§ 1282. Finding of presumed death by authorized federal employee

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

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

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

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

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

§ 1284. Statement of absence of public record.

Comment. Just as the existence and content of a public record may be proved under Section 1530 by a copy accompanied by the attestation or certificate of the custodian reciting that it is a copy, the absence of such a record from a particular public office may be proved under Section 1284 by a writing made by the custodian of the records in that office stating that no such record was found after a diligent search. The writing must, of course, be properly authenticated. See EVIDENCE CODE §§ 1401, 1453. The exception is justified by the likelihood that such statement made by the custodian of the records is accurate and by the necessity for providing a simple and inexpensive method of proving the absence of a public record.

Article 9. Former Testimony

§ 1290. "Former testimony"

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

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

§ 1291. Former testimony offered against party to former proceeding

Comment. Section 1291 provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given. For example, if a series of cases arise involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met. Section 1291 is based on Rule 63(3)(b) of the Uniform Rules of Evidence.

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

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. Since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine the declarant.

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

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

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

Subdivision (b) of Section 1291 makes it clear that objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given, but others indicate that competency and privilege are to be determined as of the time the former testimony is offered in evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 581-585 (1964).

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

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

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

Comment. Section 1292 provides a hearsay exception for former testimony given at the former proceeding by a person who is now unavailable as a witness when such former testimony is offered against a person who was not a party to the former proceeding but whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant when the former testimony was given. For example, if a series of cases arise involving one occurence and one defendant but several plaintiffs, Section 1292 permits testimony given against the plaintiff in the first trial to be used against a plaintiff in a later trial if the conditions of admissibility stated in the section are met. Section 1292 is based on Rule 63(3)(b) of the Uniform Rules of Evidence.

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

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

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

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

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

the former testimony is offered in evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 581-585 (1964)

Article 10. Judgments

§ 1300. Judgment of felony conviction

Comment. Analytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. UNIFORM RULES OF EVIDENCE, Rule 63(20) Comment (1953); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 539-541 (1964). It is in substance a statement of the court that determined the previous action ("a statement made other than by a witness while testifying at the hearing") that is offered "to prove the truth of the matter stated." EVIDENCE CODE § 1200. Therefore, unless an exception to the hearsay rule is provided, a judgment would be inadmissible if offered in a subsequent action to prove the matters determined. This article provides hearsay exceptions for certain kinds of judgments, and thus permits them to be used in subsequent actions as evidence despite the restrictions of the hearsay rule.

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

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

Section 1300 provides an exception to the hearsay rule for a final judgment adjudging a person guilty of a felony. The exception does not, however, apply in criminal actions. Hence, if a plaintiff sues to recover a reward offered by the defendant for the arrest and conviction of a person who committed a particular crime, Section 1300 permits the plaintiff to use a judgment of felony conviction as evidence that the person convicted committed the crime. But, Section 1300 does not permit the judgment to be used in a criminal action as evidence of the identity of the person who committed the crime or as evidence that the crime was committed. Section 1300 is based on Rule 63(20) of the Uniform Rules of Evidence.

Section 1300 will change the California law. Under existing California law, a conviction of a crime is inadmissible as evidence in a subsequent action. Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856 (1894) (evidence of a murder conviction held inadmissible to prove the insured was intentionally killed); Burke v. Wells, Fargo & Co., 34 Cal. 60 (1867)(evidence of a robbery conviction held inadmissible to prove the identity of robber in an action to recover reward). The change, however, is desirable for the evidence involved is peculiarly reliable. The seriousness of the charge assures that the facts will be thoroughly litigated, and the fact that the judgment must be based upon a determination that there was no reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered.

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

§ 1300

§ 1301. Judgment against person entitled to indemnity

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

Where a judgment against an indemnitee or person protected by a warranty is not made conclusive on the indemnitor or warrantor, Section 1301 permits the judgment to be used as hearsay evidence in an action to recover on the indemnity or warranty. Section 1301 reflects the existing law relating to indemnity agreements. CIVIL CODE § 2778(6). Section 1301 probably restates the law relating to warranties, too, but the law in that regard is not altogether clear. Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92 (1905). But see Peabody v. Phelps, 9 Cal. 213 (1858). Section 1301 is based on Rule 63(21) of the Uniform Rules of Evidence.

§ 1302. Judgment determining liability of third person

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

Article 11. Family History

§ 1310. Statement concerning declarant's own family history

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

supersedes Section 1870(4) of the Code of Civil Procedure. Section 1870(4), however, requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Section 240 makes the statement admissible under Section 1310. Section 1310 is based on Rule 63(23) of the Uniform Rules of Evidence.

The statement is not admissible unless it was made under circumstances such as to indicate its trustworthiness. The requirement is similar to the requirement of existing case law that the statement be made at a time when no controversy existed on the precise point concerning which the declaration was made. See, e.g., Estate of Walder, 166 Cal. 446, 137 Pac. 35 (1913); Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960). However, the language of Section 1310 permits the judge to consider the declarant's motives to tell the truth as well as his reasons to deviate therefrom in determining whether the statement is sufficiently trustworthy to be admitted as evidence.

§ 1311. Statement concerning family history of another

Comment. Section 1311 provides a hearsay exception for a statement concerning the family history of another. Paragraph (1) of subdivision (a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure, which it supersedes. Paragraph (2) is new to California law, but it is a sound extension of the present law to cover a situation where the declarant was a family housekeeper or doctor or so close a friend as to be included by the family in discussions of its family history. Section 1311 is based on Rule 63(24) of the Uniform Rules of Evidence.

There are two limitations on admissibility of a statement under Section 1311. First, a statement is admissible only if the declarant is unavailable

as a witness within the meaning of Section 240. (Section 1870(4) requires that the declarant be deceased in order for his statement to be admissible.) Second, a statement is not admissible unless it was made under circumstances such as to indicate its trustworthiness. For a discussion of this requirement, see the Comment to Section 1310.

§ 1312. Entries in family records and the like

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

§ 1313. Reputation in family concerning family history

Comment. Section 1313 restates in substance and supersedes the provisions of Code of Civil Procedure Sections 1852 and 1870(11). See Estate of Connors, 53 Cal. App.2d 484, 128 P.2d 200 (1942); Estate of Newman, 34 Cal. App.2d 706, 94 P.2d 356 (1939). However, Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." This qualification is not included in Section 1313 because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in Sections 1300 and 1311, might be. Section 1313 is based on Rule 63(26) of the Uniform Rules of Evidence.

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

Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 548 (1964).

§ 1314. Reputation in community concerning family history

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

§ 1315. Church records concerning family history

Comment. Church records generally are admissible as business records under the provisions of Section 1271. Under Section 1271, such records would be admissible to prove the occurrence of the church activity--the baptism, confirmation, or marriage--recorded in the writing. However, it is unlikely that Section 1271 would permit such records to be used as evidence of the age or relationship of the participants, for the business records act has been held to authorize business records to be used to prove only facts known personally to the recorder of the information or to other employees of the business. Patek & Co. v. Vineberg, 210 Cal. App.2d 20, 23, 26 Cal. Rptr. 293, 294 (1962)(hearing denied); People v. Williams, 187 Cal. App.2d 355, 9 Cal. Rptr. 722 (1960); Gough v. Security Trust & Sav. Bank, 162 Cal. App.2d 90, 327 P.2d 555 (1958).

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

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

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

§ 1316. Marriage, baptismal, and similar certificates

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

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

§ 1320. Reputation concerning community history

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

existing previously to the controversy, respecting facts of a public or general nature more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor is it necessary to include in Section 1320 the requirement that the reputation existed previous to controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy. Section 1320 is based on Rule 63(27)(b) of the Uniform Rules of Evidence.

§ 1321. Reputation concerning public interest in property

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

§ 1322. Reputation concerning boundary or custom affecting land

Comment. Section 1322 restates in substance existing law as found in Code of Civil Procedure Section 1870(11), which it supersedes in part. See Muller v. So. Pac. Ry. Co., 83 Cal. 240, 23 Pac. 265 (1890); Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950 (1931). Section 1322 is based on Rule 63(27)(a) of the Uniform Rules of Evidence.

§ 1323. Statement concerning boundary

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

§ 1324. Reputation concerning character

Comment. Section 1324 codifies a well-settled exception to the hearsay rule. See, e.g., People v. Cobb, 45 Cal.2d 158, 287 P.2d 752 (1955). Of course, character evidence is admissible only when the question of character is material to the matter being litigated. The only purpose of Section 1324 is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule. The language of the section is based on Rule 63(28) of the Uniform Rules of Evidence.

Article 13. Dispositive Instruments and Ancient Writings

§ 1330. Recitals in writings affecting property

Comment. Section 1330 restates in substance the existing California law relating to recitals in dispositive instruments. Although language in some cases appears to require that the dispositive instrument be ancient, cases may be found in which recitals in dispositive instruments have been admitted without regard to the age of the instrument. See Russell v. Langford, 135 Cal. 356, 67 Pac. 331 (1902)(recital in will); Pearson v. Pearson, 46 Cal. 609 (1873) (recital in will); Culver v. Newhart, 18 Cal. App. 614, 123 Pac. 975 (1912) (bill of sale). There is a sufficient likelihood that the statements made in a dispositive document, when related to the purpose of the document, will be true to warrant the admissibility of such documents without regard to their age. Section 1330 is based on Rule 63(29) of the Uniform Rules of Evidence.

§ 1331. Recitals in ancient writings

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

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

Article 14. Commercial, Scientific, and Similar Publications

§ 1340. Commercial lists and the like

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

Christiansen v. Hollings, 44 Cal. App.2d 332, 112 P.2d 723 (1941). The section is based on Rule 63(30) of the Uniform Rules of Evidence.

§ 1341. Publications concerning facts of general notoriety and interest

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