STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

proposing an

Evidence Code

January 1965

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

STATE OF CALIFORNIA

EDMUND G. BROWN, Governor

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January 1965

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits its recommendation on this subject. The legislation recommended by the Commission consists of (1) a proposed Evidence Code that includes the best features of the Uniform Rules and of the existing California law and (2) the necessary conforming adjustments in existing statutory law.

To assist the Commission in the formulation of this recommendation, Professor James H. Chadbourn (formerly of the School of Law, University of California at Los Angeles, now of the Harvard Law School) prepared comprehensive studies of the Uniform Rules of Evidence and the corresponding California law. In addition, the Commission considered other published materials relating to the Uniform Rules, including recent legislation and court rules adopted in other states. Several comprehensive reports of committees appointed by the New Jersey Supreme Court and by the New Jersey Legislature were particularly helpful.

Utilizing this research material, the Commission drafted preliminary revisions of the Uniform Rules and submitted them to a special committee of the State Bar of California appointed to work with the Commission on the evidence project. The Commission made further revisions in the Uniform Rules in response to the State Bar committee's analysis and criticism of the Commission's preliminary proposals. A revised version of each article of the Uniform Rules was then published as a tentative recommendation of the Commission in a report which also contained the related research study prepared by Professor Chadbourn. Nine tentative recommendations and research studies relating to the Uniform Rules of Evidence, now published in Volume 6 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES, were published in pamphlet form between August 1962 and June 1964:

Article I. General Provisions (April 1964)
Article II. Judicial Notice (April 1964)
Burden of Producing Evidence, Burden of Proof, and Presumptions (Replacing Article III) (June 1964)
Article IV. Witnesses (March 1964)
Article V. Privileges (February 1964)
Article VI. Extrinsic Policies Affecting Admissibility (March 1964)
Article VII. Expert and Other Opinion Testimony (March 1964)
Article VIII. Hearsay Evidence (August 1962)
Article IX. Authentication and Content of Writings (January 1964)

The nine pamphlets containing the tentative recommendations were widely distributed. Copies were sent to all organizations, officials, lawyers, judges, and law professors who had indicated that they would review and comment on the tentative recommendations. Numerous persons and organizations reviewed the tentative recommendations and furnished the Commission with suggested revisions, many of which are reflected in the proposed Evidence Code. Representatives of several organizations attended the Commission meetings at which the proposed code was considered.

The Commission also retained Professor Ronan E. Degnan (of the School of Law, University of California at Berkeley) to analyze and report on the statutory law contained in Part IV of the Code of Civil Procedure. His report enabled the Commission to integrate those portions of the Code of Civil Procedure relating to evidence with the substance of the revised tentative recommendations into a single, comprehensive Evidence Code.

In September 1964, a preliminary draft of the proposed Evidence Code was published as Preprint Senate Bill No. 1. Copies of the preprinted bill were distributed to interested persons and organizations and were made available to members of the bench and bar at the annual meeting of the State Bar in Santa Monica in October 1964.

While the Commission was reviewing and revising the preprinted bill prior to the 1965 legislative session, many of the groups that had commented on the tentative recommendations continued to provide the Commission with valuable suggestions concerning both the form and content of the proposed Evidence Code. Numerous other persons and organizations also reviewed the preprinted bill and many of their suggestions are incorporated in the proposed code.

Thus, although this recommendation is the responsibility of the Law Revision Commission, it reflects the contributions of many persons throughout the State whose efforts have contributed materially to the quality of the final product. The Commission's indebtedness to many of these persons is recorded in the list of acknowledgments that follows.

Respectfully submitted,

JOHN R. MCDONOUGH, JR.
Chairman

ACKNOWLEDGMENTS

A number of former members of the Law Revision Commission participated at the early stages in the formulation of this recommendation: John D. Babbage, Frank S. Balthis, Clark L. Bradley, Leonard J. Dieden, George G. Grover, Roy A. Gustafson, Bert W. Levit, Charles H. Matthews, Stanford C. Shaw, Vaino H. Spencer, Samuel D. Thurman, and Pearce Young.

Professor James H. Chadbourn (of the Harvard Law School) and Professor Ronan E. Degnan (of the School of Law, University of California at Berkeley), the Commission's research consultants, prepared the research studies that were used in formulating the recommendation.

Many other persons and organizations also assisted in this project, primarily by providing the Commission with critical evaluations of all or a portion of its tentative proposals. The following deserve special mention for their substantial contributions.

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The following local bar associations appointed committees or designated members to study the Commission's proposals. Some of them submitted comments for Commission consideration in formulating this recommendation.

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OUTLINE OF PROPOSED LEGISLATION

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3. Constitutionality.
4. Construction of code.
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CHAPTER 3. ORDER OF PROOF

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Section 164.5 (Added)
Section 193 (Repealed)
Section 194 (Repealed)
Section 195 (Repealed)
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Section 3546 (Added)
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Section 1918 (Repealed)
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Section 1919a (Repealed)
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Section 1928 (Repealed)

CODE OF CIVIL PROCEDURE—Continued

Sections 1928.1-1928.4 (Repealed)
- Section 1928.1 (Repealed)
- Section 1928.2 (Repealed)
- Section 1928.3 (Repealed)
- Section 1928.4 (Repealed)

Section 1936 (Repealed)
Section 1936.1 (Repealed)
Section 1937 (Repealed)
Section 1938 (Repealed)
Section 1939 (Repealed)
Section 1940 (Repealed)
Section 1941 (Repealed)
Section 1942 (Repealed)
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- Section 1953e (Repealed)
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- Section 1953g (Repealed)
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- Section 1953*l* (Repealed)

Section 1954 (Repealed)
Sections 1957-1963 (Repealed)
- Section 1957 (Repealed)
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Section 2016 (Amended)
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Section 2065 (Repealed)
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Sections 2101-2103 (Repealed)
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- Section 2103 (Repealed)

CORPORATIONS CODE

Section 6602 (Amended)
Section 25310 (Amended)

GOVERNMENT CODE

Section 11513 (Amended)
Section 19580 (Amended)

HEALTH AND SAFETY CODE

Section 3197 (Amended)

PENAL CODE

Section 270e (Amended)
Section 686 (Amended)
Section 688 (Amended)
Section 939.6 (Amended)
Section 961 (Amended)
Section 963 (Amended)
Section 1120 (Amended)
Section 1322 (Repealed)
Section 1323 (Repealed)
Section 1323.5 (Repealed)
Section 1345 (Amended)
Section 1362 (Amended)

PUBLIC UTILITIES CODE

Section 306 (Amended)

OPERATIVE DATE OF AMENDMENTS, ADDITIONS, AND REPEALS

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

proposing an

EVIDENCE CODE

BACKGROUND

The California Law Revision Commission was directed by the Legislature in 1956 to make a study to determine "whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

Pursuant to this directive, the Commission has made a study of the California law of evidence and the recommendations of the Commissioners on Uniform State Laws. The Commission has concluded that the Uniform Rules should not be adopted in the form in which they were proposed but that many features of the Uniform Rules should be incorporated into the law of California. The Commission has also concluded that California should have a new, separate Evidence Code which will include the best features of the Uniform Rules and the existing California law.

The Case for Recodification of the California Law of Evidence

In few, if any, areas of the law is there as great a need for immediate and accurate information as there is in the law of evidence. On most legal questions, the judge or lawyer has time to research the law before it is applied. But questions involving the admissibility of evidence arise suddenly during trial. Proper objections—stating the correct grounds—must be made immediately or the lawyer may find that his objection has been waived. The judge must rule immediately in order that the trial may progress in an orderly fashion. Frequently, evidence questions cannot be anticipated and, hence, necessary research often cannot be done beforehand.

There is, therefore, an acute need for a systematic, comprehensive, and authoritative statement of the law of evidence that is easy to use and convenient for immediate reference. The California codes provide such statements of the law in many fields—commercial transactions, corporations, finance, insurance—where the need for immediate information is not nearly as great as it is in regard to evidence. A similar statement of the law of evidence should be available to those who are required to have that law at their fingertips for immediate application to unanticipated problems. This can best be provided by a codification of the law of evidence which would provide practitioners with a systematic, comprehensive, and authoritative statement of the law.

An attempt at codification of the California law of evidence was made by the draftsmen of the 1872 Code of Civil Procedure. Part IV of that code, entitled "Of Evidence," was apparently intended to be a comprehensive codification of the subject. The existing statutory law of evidence still consists almost entirely of the 1872 codification. Iso-

lated additions to or amendments of Part IV have been made from time to time, but the original 1872 statute has remained as the fundamental statutory basis of the California law of evidence.

Although Part IV of the Code of Civil Procedure purports to be a comprehensive and systematic statement of the law of evidence, in fact it falls far short of that. Its draftsmanship does not meet the standards of the modern California codes. There are duplicating and inconsistent provisions. There are long and complex sections that are difficult to read and more difficult to understand. Important areas of the law of evidence are not mentioned at all in the code, and many that are mentioned are treated in the most cursory fashion. Many sections are based on an erroneous analysis of the common law of evidence upon which the code is based. Others preserve common law rules that experience has shown do more to inhibit than to enhance the search for truth at a trial. Necessarily, therefore, the courts have had to develop many, if not most, of the rules of evidence with but partial guidance from the statutes.

Illustrative of the deficiencies in the existing code is the treatment of the hearsay rule. Perhaps no rule of evidence is more important or more frequently applied; yet, there is no statutory statement of the hearsay rule in the code. On the other hand, several exceptions to the hearsay rule are given explicit statutory recognition in the code. But the list of exceptions is both incomplete and inaccurate. The Commission has identified and stated in the Evidence Code a number of exceptions to the hearsay rule that are recognized in case law but are not recognized in the existing code, including such important exceptions as the exception for spontaneous statements and the exception for statements of the declarant's state of mind.

Moreover, the exceptions that are mentioned in the existing code sometimes bear little relationship to the actual state of the law. For example, portions of the common law exception for declarations against interest may be found in several scattered sections—Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). Yet, all of these sections taken together do not express the entire common law rule, nor do they reflect the law of California. Each requires that the declarant be dead when the evidence is offered. Nonetheless, the courts have admitted declarations against interest when the declarant is neither dead nor otherwise unavailable. None of these sections permits an oral declaration against pecuniary interest, not relating to real property, to be admitted except against a successor of the declarant. The courts, however, follow the traditional common law rule and admit such declarations despite the limitations in the code. Recently, too, the Supreme Court decided that declarations against penal interest are admissible despite the fact that the code refers only to declarations against pecuniary interest.

In the area of privilege, the existing code is equally obscure. It does state in general terms the privileges that are recognized in California, but it does nothing more. It does not indicate, for example, that the attorney-client privilege may apply to communications made to persons other than the attorney himself or his secretary, stenographer, or clerk. It does not indicate that the privilege protects only confidential communications. The generally recognized exceptions to the privilege

—such as the exception for statements made in contemplation of crime —are nowhere mentioned. Nor does the code mention the fact that the privilege may be waived. Nonetheless, the courts have recognized such exceptions, have protected communications to intermediaries for transmittal to the attorney, have required the communication to have been in confidence, and have held that the privilege may be waived.

On the question of the termination of a privilege, however, the courts have deemed themselves strictly bound by the language of the code. One case, for example, held that a physician's lips are forever sealed by the physician-patient privilege upon the patient's death—even though it was the patient's personal representative that desired to use the evidence. This strange result was deemed compelled because the code provides that a physician may not be examined "without the consent of his patient," and a dead patient cannot consent. That decision was followed by an amendment permitting the personal representative or certain heirs of a decedent to waive the decedent's physician-patient privilege in a wrongful death action; but, apparently, the law stated in that case still applies in all other actions and to all of the other communication privileges.

Other important rules of evidence either have received similar cursory treatment in the existing code or have been totally neglected. Such important rules as the inadmissibility of evidence of liability insurance, the rules governing the admissibility and inadmissibility of various kinds of character evidence, and the requirement that documents be authenticated before reception in evidence are entirely nonstatutory. The best evidence rule, while covered by statute, is stated in three sections—Code of Civil Procedure Sections 1855, 1937, and 1938. The code states the judge's duty to determine all questions of fact upon which the admissibility of evidence depends, but there is no indication that, as to some of these facts, a party must persuade the judge of their existence while, as to others, a party need present merely enough evidence to sustain a finding of their existence.

These and similar deficiencies call for a thorough revision and recodification of the California law of evidence. It is true that the courts have filled in many of the gaps contained in the present code. They have also been able to remedy some of the anomalies and inconsistencies in the code by construction of the language used or by actual disregard of the statutory language. But there is a limit on the extent to which the courts can remedy the deficiencies in a statutory scheme. Reform of the California law of evidence can be achieved only by legislation thoroughly overhauling and recodifying the law.

Previous California Efforts to Reform the Law of Evidence

Efforts at legislative reform of the law of evidence in California have been made on several occasions. A substantial revision of Part IV of the Code of Civil Procedure—clarifying many sections and eliminating inconsistent and conflicting sections—was enacted in 1901; but the Supreme Court held the revision unconstitutional because the enactment embraced more than one subject and because of deficiencies in the title of the enactment. About 1932, the California Code Commission initiated a thoroughgoing revision of this field of law. The Code Commission placed the research and drafting in the hands of Dean William

G. Hale of the University of Southern California Law School, assisted by Professor James P. McBaine of the University of California Law School and Professor Clarke B. Whittier of the Stanford Law School. The Code Commission's study continued until the spring of 1939, when it was abandoned because the American Law Institute had appointed a committee to draft a Model Code of Evidence and the Code Commission thought it undesirable to duplicate the Institute's work.

National Efforts to Reform the Law of Evidence

Efforts at reform in the law of evidence have also been made at the national level, for California's law of evidence has been no more deficient than the law of most other states in the union. The widespread deficiencies in the state of the law of evidence caused the American Law Institute to abandon its customary practice of preparing restatements of the common law when it came to the subject of evidence. "[T]he principal reason for the [American Law Institute] Council's abandoning all idea of the Restatement of the present Law of Evidence was the belief that however much that law needs clarification in order to produce reasonable certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it. The Council of the Institute therefore felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification." MODEL CODE OF EVIDENCE, Introduction, p. viii (1942).

In 1942, after three years of careful study and formulation by some of the country's most distinguished judges, practicing lawyers, and professors of law, the Institute's Model Code of Evidence was promulgated. It was widely debated, in California and elsewhere. The State Bar of California referred it to the Bar's Committee on the Administration of Justice, which recommended that the Bar oppose the enactment of the Model Code into law. Reaction elsewhere was much the same, and by 1949 adoption of the Model Code was a dead issue.

But the need for revision of the law of evidence was as great as ever. The National Conference of Commissioners on Uniform State Laws began working on a revision of the law of evidence. The work of the Conference was based largely on the Model Code, but the Conference hoped both to simplify that code and to eliminate proposals that were objectionable. Four additional years of study and reformulation resulted in the promulgation of the Uniform Rules of Evidence.

In 1953, the Uniform Rules were approved by both the National Conference of Commissioners on Uniform State Laws and the American Bar Association. Since that time, many of the Uniform Rules have been followed and cited with approval by courts throughout the country, including the California courts. The Uniform Rules of Evidence, with only slight modification, have been adopted by statute in Kansas and the Virgin Islands. In other states, comprehensive studies of the Uniform Rules have been undertaken with a view to their adoption either by statute or in the form of court rules. In New Jersey, as a result of such a study, a revised form of the privileges article was adopted by statute and the remainder of the Uniform Rules, also substantially revised, was adopted by court rule.

RECOMMENDATIONS

The Uniform Rules of Evidence

The Uniform Rules of Evidence are the product of years of careful, scholarly work and merit careful consideration. Nonetheless, the Commission recommends against their enactment in the form in which they were approved by the National Conference of Commissioners on Uniform State Laws. Several considerations underlie this recommendation.

First, in certain important respects, the Uniform Rules would change the law of California to an extent that the Commission considers undesirable. For example, the Uniform Rules would admit any hearsay statement of a person who is present at the hearing and subject to cross-examination. In addition, they do not provide a married person with a privilege to refuse to testify against his spouse. In both respects —and in a number of other respects as well—the Commission has disagreed with the conclusions reached by the Commissioners on Uniform State Laws. Sometimes the disagreement has been upon matters of principle; in others, it has been upon matters of detail. In total, the disagreements have been substantial and numerous enough to persuade the Law Revision Commission that the Uniform Rules of Evidence should not be adopted in their present form.

Second, the existing California statutes contain many provisions that have served the State well and that should be continued but are not found in the Uniform Rules of Evidence. If the Uniform Rules of Evidence were approved in their present form, segregated from the remainder of the statutory law of evidence, California's statutory law of evidence would be seriously complicated. Yet, the contrasting formats of the Uniform Rules of Evidence and the California evidence statutes make it impossible to integrate these two bodies of evidence law into a single statute while preserving the Uniform Rules in the form in which they were approved by the Commissioners on Uniform State Laws.

Third, the draftsmanship of the Uniform Rules is in some respects defective by California standards. The Uniform Rules contain several rules of extreme length that are reminiscent of several of the cumbersome sections in the 1872 codification. For example, the hearsay rule and all of its exceptions are stated in one rule that has 31 subdivisions. Moreover, different language is sometimes used in the Uniform Rules to express the same idea. For example, various communication privileges (attorney-client, physician-patient, and husband-wife) are expressed in a variety of ways even though all are intended to provide protection for confidential communications made in the course of the specified relationships.

Fourth, the need for nationwide uniformity in the law of evidence is not of sufficient importance that it should outweigh these other considerations. The law of evidence—unlike the law relating to commercial transactions, for example—affects only procedures in this State and has no substantive significance insofar as the law of other states is concerned. Thus, although the adoption of the Uniform Rules elsewhere indicates that they are deserving of weighty consideration, such adoption is not in and of itself a reason to adopt the rules in California.

For all these reasons, the Commission has concluded that California's need for a thorough revision of the law of evidence cannot be met satisfactorily by adoption of the Uniform Rules of Evidence.

The Evidence Code

A new Evidence Code is recommended instead of a revision of Part IV of the Code of Civil Procedure for several reasons. Mechanically, it would be difficult to include a revision of the rules of evidence in Part IV of the Code of Civil Procedure because much of Part IV does not concern evidence at all.* Logically, the rules of evidence do not belong in the Code of Civil Procedure because these rules are concerned equally with criminal and civil procedure. But the most important consideration underlying the recommendation that a new code be enacted is the desirability of having the rules of evidence available in a separate volume that will be, in effect, an official handbook of the law of evidence—a kind of evidence bible for busy trial judges and lawyers.

The Evidence Code recommended by the Commission contains provisions relating to every area of the law of evidence. In this respect, it is more comprehensive than either the Uniform Rules of Evidence or Part IV of the Code of Civil Procedure. The code will not, however, stifle all court development of the law of evidence. In some instances—the *Privileges* division, for example—the code to a considerable extent precludes further development of the law except by legislation. But, in other instances, the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of the law. As a general rule, the code permits the courts to work toward greater *admissibility* of evidence but does not permit the courts to develop additional *exclusionary* rules. Of course, the code neither limits nor defines the extent of the exclusionary evidence rules contained in the California and United States Constitutions. The meaning and scope of the rules of evidence that are based on constitutional principles will continue to be developed by the courts.

The proposed Evidence Code is to a large extent a restatement of existing California statutory and decisional law. The code makes some significant changes in the law, but its principal effect will be to substitute a clear, authoritative, systematic, and internally consistent statement of the existing law for a mass of conflicting and inaccurate statutes and the myriad decisions attempting to make sense out of and to fill in the gaps in the existing statutory scheme.

The proposed Evidence Code is divided into 11 divisions, each of which deals comprehensively with a particular evidentiary subject. Several divisions are subdivided into chapters and articles where the complexity of the particular subject requires such further subdivision in the interest of clarity. Thus, for example, each individual privilege

* Part IV includes, for example, provisions relating to the safekeeping of official documents, provisions requiring public officials to furnish copies of official documents, provisions creating procedures for establishing the content of destroyed records, provisions on the substantive effect of seals, and the like. By placing the revision of the law of evidence in a new code, the immediate need to recodify these sections is obviated. Of course, the remainder of Part IV should be reorganized and recodified. But such a recodification is not a necessary part of a revision and recodification of the law of evidence.

is covered by a separate article. A *Comment* follows each provision of the proposed legislation set out herein to explain in some detail the reason for the inclusion of each section in the Evidence Code and the reasons underlying any recommended changes in the law of California. *Cross-References* are also included to facilitate the use of this recommendation. The references contained in these *Cross-References* are for convenience only; the inclusion or omission of a particular reference in no way reflects the Commission's intent in regard to the recommendation. References that are pertinent to all or nearly all of the sections in a division appear in the *Cross-References* at the head of the division instead of under each section. Both sectional and divisional *Cross-References* should be consulted to obtain a list of important references that pertain to a particular section. Where an existing code section is mentioned in the *Cross-References,* the portion of the proposed legislation containing amendments, additions, and repeals of existing statutes should be consulted to determine whether the section referred to is amended by the proposed legislation.

A summary of each division of the code and a discussion of its effect on existing law appear below.

Division 1—Preliminary Provisions and Construction. Division 1 contains certain preliminary provisions that are usually found at the beginning of the modern California codes. Its most significant provision is the one prescribing the effective date of the code—January 1, 1967. This delayed effective date will provide ample opportunity for the lawyers and judges of California to become familiar with the code before they are required to use it in practice.

Division 2—Words and Phrases Defined. Division 2 contains the definitions that are used throughout the code. Definitions that are used in only a single division, chapter, article, or section are defined in the particular part of the code where the definition is used.

Division 3—General Provisions. Division 3 contains certain general provisions governing the admissibility of evidence. It declares the admissibility of relevant evidence and the inadmissibility of irrelevant evidence. It sets forth in some detail the functions of the judge and jury. It states the power of the judge to exclude evidence because of its prejudicial effect or lack of substantial probative value. The division is, for the most part, a codification of existing law. Section 405 makes a significant change, however: It provides that the judge's rulings on the admissibility of confessions, dying declarations, and spontaneous statements are final, *i.e.,* the jury does not redetermine the question of admissibility after the judge has ruled.

Division 4—Judicial Notice. Division 4 covers the subject of judicial notice. It makes minor revisions in the matters that are subject to judicial notice. For example, city ordinances may be noticed under the code while, generally speaking, they may not be noticed under existing law. But the principal impact of Division 4 on the existing law is procedural. Thus, the division specifies some matters that the judge is required to judicially notice, whether re-

quested to or not—for example, California, sister-state, and federal law. It specifies other matters that the judge may notice; but he is not required to take judicial notice of any of these matters unless he is requested to do so and is provided with sufficient information to determine the matter. The division also guarantees the parties reasonable notice and an opportunity to be heard when judicial notice is to be taken of any matter that is of substantial consequence to the determination of the action.

Division 5—Burden of Proof; Burden of Producing Evidence; Presumptions and Inferences. Division 5 deals with the burden of proof, the burden of producing evidence, and presumptions and inferences. It makes one significant change: Section 600 abolishes the much criticized rule that a presumption is evidence. The division also provides that some presumptions affect the burden of proof while others affect only the burden of producing evidence. Under existing law, presumptions also have these effects; but Division 5 classifies a large number of presumptions as having one effect or the other and establishes certain criteria by which the courts may classify any presumptions not classified by statute.

Division 6—Witnesses. Division 6 relates to witnesses and makes several significant changes in the existing law. The dead man statute is not continued; instead, a hearsay exception (Section 1261) is created to equalize the position of the estate with that of the claimant. A party is permitted to attack the credibility of his own witness without showing either surprise or damage. The nature of a criminal conviction that may be shown to impeach a witness has been changed.

There are also several minor revisions of existing law that, while important, will have less effect on the manner in which cases are tried. For example, the conditions under which a judge or juror can testify have been revised, and the foundational requirements for the introduction of a witness' inconsistent statement have been modified.

Despite these changes, the bulk of Division 6 is a recodification of well-recognized rules and principles of existing law.

Division 7—Opinion Testimony and Scientific Evidence. Division 7 sets forth the conditions under which opinion testimony may be received from both lay and expert witnesses. The division restates existing law with but one significant change. If an expert witness has based his opinion in part upon a statement of some other person, Section 804 permits the adverse party to call the person whose statement was relied on and examine him as if under cross-examination concerning the statement.

Division 8—Privileges. Division 8 covers the subject of privileges and, unlike most of the other provisions of the code, applies to all proceedings where testimony can be compelled to be given—not just judicial proceedings. The division makes some major substantive changes in the law. For example, a new privilege is recognized for confidential communications made to psychotherapists; and, although the privilege of a married person not to testify

against his spouse is continued, the privilege of a spouse to prevent the other spouse from testifying against him is not. But the principal effect of the division is to clarify rather than to change existing law. The division spells out in five chapters, one of which is divided into 11 articles, a great many rules that can now be discovered, if at all, only after the most painstaking research. These provisions make clear for the first time in California law the extent to which doctrines that have developed in regard to one privilege are applicable to other privileges.

Division 9—Evidence Affected or Excluded by Extrinsic Policies. Division 9 codifies several exclusionary rules that are recognized in existing statutory or decisional law. These rules are based on considerations of public policy without regard to the reliability of the evidence involved. The division states, for example, the rules excluding evidence of liability insurance and evidence of subsequent repairs. The rules indicating when evidence of character may be used to prove conduct also are stated in this division. The division expands the existing rule excluding evidence of settlement offers to exclude also admissions made in the course of settlement negotiations.

Division 10—Hearsay Evidence. Division 10 sets forth the hearsay rule and its exceptions. The exceptions are, for the most part, recognized in existing law. A few existing exceptions, however, are substantially broadened. For example, the former testimony exception in the Evidence Code does not require identity of parties as does the existing exception. Dying declarations are made admissible in both civil and criminal proceedings. A few new exceptions are also created, such as an exception for a decedent's admissions in an action for his wrongful death and an exception for prior inconsistent statements of a witness. The division permits impeachment of a hearsay declarant by prior inconsistent statements without the foundational requirement of providing the declarant with an opportunity to explain. The division also permits a party to call a hearsay declarant to the stand (if he can find him) and treat him in effect as an adverse witness, *i.e.*, examine him as if under cross-examination.

Division 11—Writings. Division 11 collects a variety of rules relating to writings. It defines the process of authenticating documents and spells out the procedure for doing so. The division substantially simplifies the procedure for proving official records and authenticating copies, particularly for out-of-state records. The best evidence rule appears in this division; and there are collected here several statutes providing special procedures for proving the contents of certain writings with copies. For the most part, the division restates the existing California law.

Thus, the bulk of the Evidence Code is existing California law that has been drafted and organized so that it is easy to find and to understand. There are some major changes in the law, but in each case the change has been recommended only after a careful weighing of the need for the evidence against the policy to be served by its exclusion.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to establish an Evidence Code, thereby consolidating and revising the law relating to evidence; amending various sections of the Business and Professions Code, Civil Code, Code of Civil Procedure, Corporations Code, Government Code, Health and Safety Code, Penal Code, and Public Utilities Code to make them consistent therewith; adding Sections 164.5, 3544, 3545, 3546, 3547, and 3548 to the Civil Code; adding Sections 631.7 and 1908.5 to the Code of Civil Procedure; and repealing legislation inconsistent therewith.

The people of the State of California do enact as follows:

SECTION 1. The Evidence Code is enacted, to read:

EVIDENCE CODE

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

§ 1. Short title

1. This code shall be known as the Evidence Code.

Comment. This section is similar to comparable sections in recently enacted California codes. *E.g.*, VEHICLE CODE § 1. See also CODE CIV. PROC. §§ 1, 19.

§ 2. Common law rule construing code abrogated

2. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. This code establishes the law of this State respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

Comment. This section is substantially the same as Section 4 of the Code of Civil Procedure.

CROSS-REFERENCES

Similar provisions:
Civil Code § 4
Code of Civil Procedure § 4
Penal Code § 4

§ 3. Constitutionality

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

Comment. Section 3 is the same as Section 1108 of the Commercial Code. See also, *e.g.*, VEHICLE CODE § 5. This general "severability" provision permits the repeal of comparable provisions applicable to specific sections formerly compiled in the Code of Civil Procedure that are now compiled in the Evidence Code and makes it unnecessary to include similar provisions in future amendments to this code. See CODE CIV. PROC. § 1928.4 (superseded by the Evidence Code).

CROSS-REFERENCES

Definition:
Person, see § 175

§ 4. Construction of code

4. Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 6.

§ 5. Effect of headings

5. Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

Comment. Similar provisions appear in all the existing California codes except the Civil Code, the Commercial Code, and the Code of Civil Procedure. *E.g.*, VEHICLE CODE § 7.

§ 6. References to statutes

6. Whenever any reference is made to any portion of this code or of any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 10.

CROSS-REFERENCES

Definition:
Statute, see § 230

§ 7. "Division," "chapter," "article," "section," "subdivision," and "paragraph"

7. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Chapter" means a chapter of the division in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

(f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

Comment. Somewhat similar provisions appear in various California codes. *E.g.*, VEHICLE CODE § 11. See also CODE CIV. PROC. § 17(8).

§ 8. Construction of tenses

8. The present tense includes the past and future tenses; and the future, the present.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 12. See also CODE CIV. PROC. § 17.

§ 9. Construction of genders

9. The masculine gender includes the feminine and neuter.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 13. See also CODE CIV. PROC. § 17.

§ 10. Construction of singular and plural

10. The singular number includes the plural; and the plural, the singular.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 14. See also CODE CIV. PROC. § 17.

§ 11. "Shall" and "may"

11. "Shall" is mandatory and "may" is permissive.

Comment. This is a standard provision in various California codes. *E.g.*, VEHICLE CODE § 15.

§ 12. Code effective January 1, 1967

12. This code shall become operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date and also further proceedings in actions pending on that date. The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.

Comment. The delayed operative date provides time for California judges and attorneys to become familiar with the code before it goes into effect. Section 12 makes it clear that the Evidence Code governs all proceedings after December 31, 1966. Thus, if the trial court makes a ruling on the admission of evidence prior to January 1, 1967, such ruling is not affected by the enactment of the Evidence Code; if an appeal is taken from the ruling, Section 12 requires the appellate court to apply the law applicable at the time the ruling was made. On the other hand, any ruling made by the trial court on the admission of evidence after December 31, 1966, is governed by the Evidence Code, even if the trial of the particular action was commenced prior to that date.

CROSS-REFERENCES

Definition:
Action, see § 105
Privileges, scope of application of, see §§ 901, 910, 920

DIVISION 2. WORDS AND PHRASES DEFINED

Comment. Division 2 contains definitions of general application only. Words and phrases that have special significance only to a particular division or article are defined in the division or article in which the defined term is used. For example, Sections 900-905 define terms that are used only in Division 8 (Privileges), and Sections 950-953 define terms that are used in the article relating to the lawyer-client privilege. Some additional sections of general application that are of a definitional nature include Sections 7-11 in Division 1.

CROSS-REFERENCES

Construction of code generally:
- Gender, see § 9
- Plural number, see § 10
- Singular number, see § 10
- Tense, see § 8

Other definitions of general application:
- Article, see § 7
- Authentication of a writing, see § 1400
- Chapter, see § 7
- Cross-examination, see § 761
- Direct examination, see § 760
- Division, see § 7
- Inference, see § 600
- Leading question, see § 764
- May, see § 11
- Paragraph, see § 7
- Presumption, see § 600
- Presumption affecting the burden of producing evidence, see § 603
- Presumption affecting the burden of proof, see § 605
- Redirect examination, see § 762
- Recross-examination, see § 763
- Section, see § 7
- Shall, see § 11
- Subdivision, see § 7

§ 100. Application of definitions

100. Unless the provision or context otherwise requires, these definitions govern the construction of this code.

Comment. Section 100 is a standard provision found in the definitional portion of recently enacted California codes. See, *e.g.*, VEHICLE CODE § 100.

§ 105. "Action"

105. "Action" includes a civil action and a criminal action.

Comment. Defining the word "action" to include both a civil action or proceeding and a criminal action or proceeding eliminates the necessity of repeating "civil action and criminal action" in numerous code sections.

CROSS-REFERENCES

Definitions:
- Civil action, see § 120
- Criminal action, see § 130

§ 110. "Burden of producing evidence"

110. "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

Comment. The phrases defined in Sections 110 and 115 provide a convenient means for distinguishing between the burden of *proving a fact* and the burden of *going forward* with the evidence. They recognize a distinction that is well established in California. WITKIN, CALIFORNIA EVIDENCE §§ 53-60 (1958). The practical effect of the distinction is discussed in the *Comments* to Division 5 (commencing with Section 500), especially in the *Comments* to Sections 500 and 550.

The second paragraph of Section 115 makes it clear that "burden of proof" refers to the burden of proving the fact in question by a preponderance of the evidence unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, or decisional law. See the definition of "law" in EVIDENCE CODE § 160.

CROSS-REFERENCES

Assignment of burden of producing evidence, see § 550
Definition:
Evidence, see § 140
Presumptions affecting burden of producing evidence, see §§ 603, 604, 607, 630

§ 115. "Burden of proof"

115. "Burden of proof" means the obligation of a party to meet the requirement of a rule of law that he raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

Comment. See the *Comment* to Section 110.

CROSS-REFERENCES

Assignment of burden of proof, see §§ 500–522
Definitions:
Law, see § 160
Proof, see § 190
Presumptions affecting burden of proof, see §§ 605–607, 660

§ 120. "Civil action"

120. "Civil action" includes all actions and proceedings other than a criminal action.

Comment. Defining "civil action" to include civil proceedings eliminates the necessity of repeating "civil action or proceeding" in numerous code sections, and, together with the definition of "criminal action" in Section 130, it assures the applicability of the Evidence Code to all actions and proceedings. See EVIDENCE CODE § 300.

CROSS-REFERENCES

Definition:
Criminal action, see § 130

§ 125. "Conduct"

125. "Conduct" includes all active and passive behavior, both verbal and nonverbal.

Comment. This broad definition of "conduct" is self-explanatory.

CROSS-REFERENCES

Definition:
Verbal, see § 245

§ 130. "Criminal action"

130. "Criminal action" includes criminal proceedings.

Comment. See the *Comment* to Section 120.

§ 135. "Declarant"

135. "Declarant" is a person who makes a statement.

Comment. Ordinarily, the word "declarant" is used in the Evidence Code to refer to a person who makes a hearsay statement as distinguished from the witness who testifies to the content of the statement. See EVIDENCE CODE § 1200 and the *Comment* thereto.

CROSS-REFERENCES

Definition:
Statement, see § 225

§ 140. "Evidence"

140. "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Comment. "Evidence" is defined broadly to include the testimony of witnesses, tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof. The definition includes anything offered in evidence whether or not it is technically inadmissible and whether or not it is received. For example, Division 10 (commencing with Section 1200) uses "evidence" to refer to hearsay which may be excluded as inadmissible but which may be admitted if no proper objection is made. Thus, when inadmissible hearsay or opinion testimony is admitted without objection, this definition makes it clear that it constitutes evidence that may be considered by the trier of fact.

Section 140 is a better statement of existing law than Code of Civil Procedure Section 1823, which is superseded by Section 140. Although Section 1823 by its terms restricts "judicial evidence" to that "sanctioned by law," the general principle is well established that matter which is technically inadmissible under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if it is offered and received in evidence without proper objection or motion to strike. *E.g., People v. Alexander,* 212 Cal. App.2d 84, 98, 27 Cal. Rptr. 720, 727 (1963) ("illustrations of this principle are numerous and cover a wide range of evidentiary topics such as incompetent hearsay, secondary evidence violating the best evidence rule, inadmissible opinions, lack of foundation, incompetent, privileged or unqualified witnesses, and violations of the parol evidence rule"). See WITKIN, CALIFORNIA EVIDENCE §§ 723-724 (1958).

Under this definition, a presumption is not evidence. See also EVIDENCE CODE § 600 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Proof, see § 190
Writing, see § 250

Judicial notice as substitute for evidence, see § 457
Jury view:
Civil case, see Code of Civil Procedure § 610
Criminal case, see Penal Code § 1119
Presumption not evidence, see § 600

§ 145. "The hearing"

145. "The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.

Comment. "The hearing" is defined to mean the hearing at which the particular question under the Evidence Code arises and, unless a particular provision or its context otherwise indicates, not some earlier or later hearing. This definition is much broader than would be a reference to the trial itself; the definition includes, for example, preliminary hearings and post-trial proceedings.

§ 150. "Hearsay evidence"

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

Comment. Because of its special significance to Division 10, the substantive definition of "hearsay evidence" is contained in Section 1200. See the *Comment* to Section 1200.

§ 160. "Law"

160. "Law" includes constitutional, statutory, and decisional law.

Comment. This definition makes it clear that a reference to "law" includes the law established by judicial decisions as well as by constitutional and statutory provisions.

§ 165. "Oath"

165. "Oath" includes affirmation.

Comment. Similar definitions are found in other California codes. *E.g.*, VEHICLE CODE § 16.

§ 170. "Perceive"

170. "Perceive" means to acquire knowledge through one's senses.

Comment. This definition is self-explanatory.

§ 175. "Person"

175. "Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, or public entity.

Comment. This broad definition is similar to definitions found in other codes. *E.g.*, GOVT. CODE § 17; VEHICLE CODE § 470. See also CODE CIV. PROC. § 17.

CROSS-REFERENCES

Definition:
Public entity, see § 200

§ 180. "Personal property"

180. "Personal property" includes money, goods, chattels, things in action, and evidences of debt.

Comment. This definition is the same as the definition of "personal property" in Section 17(3) of the Code of Civil Procedure.

CROSS-REFERENCES

"Real property" defined, see § 205

§ 185. "Property"

185. "Property" includes both real and personal property.

Comment. This definition is the same as the definition of "property" in Section 17(1) of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
Personal property, see § 180
Real property, see § 205

§ 190. "Proof"

190. "Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Comment. This definition is more accurate than the definition of "proof" in Code of Civil Procedure Section 1824, which is superseded by Section 190. The disjunctive reference to "the trier of fact or the court" is needed because, even when the jury is the trier of fact, the court is required to determine preliminary questions of fact on the basis of proof.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Trier of fact, see § 235

§ 195. "Public employee"

195. "Public employee" means an officer, agent, or employee of a public entity.

Comment. This definition specifically includes public officers and agents, thereby eliminating any distinction between employees and officers and making it unnecessary to repeat the phrase "officer, agent, or employee" in numerous code sections.

CROSS-REFERENCES

Definition:
Public entity, see § 200

§ 200. "Public entity"

200. "Public entity" includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

Comment. The broad definition of "public entity" includes every form of public authority, both foreign and domestic. Occasionally, "public entity" is used in the Evidence Code with limiting language to

refer specifically to entities within this State or the United States. *E.g.*, EVIDENCE CODE § 452(b). *Cf.* EVIDENCE CODE § 452(f).

CROSS-REFERENCES

Definition:
State, see § 220

§ 205. "Real property"

205. "Real property" includes lands, tenements, and hereditaments.

Comment. This definition is substantially the same as the definition of "real property" in Section 17(2) of the Code of Civil Procedure.

CROSS-REFERENCES

"Personal property" defined, see § 180

§ 210. "Relevant evidence"

210. "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Comment. This definition restates existing law. *E.g., Larson v. Solbakken,* 221 Cal. App.2d 410, 419, 34 Cal. Rptr. 450, 455 (1963); *People v. Lint,* 182 Cal. App.2d 402, 415, 6 Cal. Rptr. 95, 102-103 (1960). Thus, under Section 210, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred. This retains existing law as found in subdivisions 1 and 15 of Code of Civil Procedure Section 1870, which are superseded by the Evidence Code. In addition, Section 210 makes it clear that evidence relating to the credibility of witnesses and hearsay declarants is "relevant evidence." This restates existing law. See CODE CIV. PROC. §§ 1868, 1870(16) (credibility of witnesses), which are superseded by the Evidence Code, and *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 339-340, 569-575 (1964) (credibility of hearsay declarants).

CROSS-REFERENCES

Definitions:
Action, see § 105
Declarant, see § 135
Evidence, see § 140
Proof, see § 190

§ 220. "State"

220. "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States.

Comment. This definition is more precise than the comparable definition found in Section 17(7) of the Code of Civil Procedure. For example, Section 220 makes it clear that "state" includes Puerto Rico,

even though Puerto Rico is now a "commonwealth" rather than a "territory."

§ 225. "Statement"

225. "Statement" means (a) a verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for a verbal expression.

Comment. The significance of this definition is explained in the *Comment* to Evidence Code Section 1200.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Verbal, see § 245

§ 230. "Statute"

230. "Statute" includes a provision of the Constitution.

Comment. In the Evidence Code, "statute" includes a constitutional provision. Thus, for example, when a particular section is subject to any exceptions "otherwise provided by statute," exceptions provided by the Constitution also are applicable.

§ 235. "Trier of fact"

235. "Trier of fact" includes (a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence.

Comment. "Trier of fact" is defined to include not only the jury but also the court when it is trying an issue of fact without a jury. The definition is not exclusive; a referee, court commissioner, or other officer conducting proceedings governed by the Evidence Code may be a trier of fact. See EVIDENCE CODE § 300.

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 240. "Unavailable as a witness"

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;

(2) Disqualified from testifying to the matter;

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;

(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement

or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

Comment. Usually, the phrase "unavailable as a witness" is used in the Evidence Code to state the condition that must be met whenever the admissibility of hearsay evidence is dependent upon the declarant's present unavailability to testify. See, *e.g.*, EVIDENCE CODE §§ 1241, 1251, 1291, 1292, 1310, 1311, 1323. See also CODE CIV. PROC. § 2016(c)(3) and PENAL CODE §§ 1345 and 1362, relating to depositions.

"Unavailable as a witness" includes, in addition to cases where the declarant is physically unavailable (*i.e.*, dead, insane, or beyond the reach of the court's process), situations in which the declarant is legally unavailable (*i.e.*, prevented from testifying by a claim of privilege or disqualified from testifying). Of course, if the declaration made out of court is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege does not make the declaration admissible. The exceptions to the hearsay rule that are set forth in Division 10 (commencing with Section 1200) of the Evidence Code do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law—such as privilege—which makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule. Accordingly, the hearsay exceptions permit the introduction of evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or is not inadmissible for some other reason.

Section 240 substitutes a uniform standard for the varying standards of unavailability provided by the superseded Code of Civil Procedure sections providing hearsay exceptions. *E.g.*, CODE CIV. PROC. § 1870 (4), (8). The conditions constituting unavailability under these superseded sections vary from exception to exception without apparent reason. Under some of these sections, the evidence is admissible if the declarant is dead; under others, the evidence is admissible if the declarant is dead or insane; under still others, the evidence is admissible if the declarant is absent from the jurisdiction. Despite the express language of these superseded sections, Section 240 may, to a considerable extent, restate existing law. *Compare People v. Spriggs*, 60 Cal.2d 868, 875, 36 Cal. Rptr. 841, 845, 389 P.2d 377, 381 (1964) (generally consistent with Section 240), *with* the older cases, some but not all of which are inconsistent with the *Spriggs* case and with Section 240. See the cases cited in *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 411 note 7 (1964).

CROSS-REFERENCES

Definitions:
Declarant, see § 135
Hearing, see § 145
Statement, see § 225
Disqualification of witness, see §§ 700–701
Privileges, see §§ 900–1073

§ 245. "Verbal"

245. "Verbal" includes both oral and written words.

Comment. The word "verbal" is defined to avoid the necessity of repeating "oral or written" in various sections of the code.

CROSS-REFERENCES

Definition:
Writing, see § 250

§ 250. "Writing"

250. "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

Comment. "Writing" is defined very broadly to include all forms of tangible expression, including pictures and sound recordings.

DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

§ 300. Applicability of code

300. Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a district court of appeal, superior court, municipal court, or justice court, including proceedings conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.

Comment. Section 300 makes the Evidence Code applicable to all proceedings conducted by California courts except those court proceedings to which it is made inapplicable by statute. The provisions of the code do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them.

Various code sections—in the Evidence Code as well as in other codes—make the provisions of the Evidence Code applicable to a certain extent in proceedings other than court proceedings. *E.g.*, GOVT. CODE § 11513 (a finding in a proceeding conducted under the Administrative Procedure Act may not be based on hearsay evidence unless the evidence would be admissible over objection in a civil action); PENAL CODE § 939.6 (a grand jury, in investigating a charge, may receive only evidence admissible over objection in a criminal action); EVIDENCE CODE § 910 (provisions of the Evidence Code relating to privileges are applicable in all proceedings of every kind in which testimony can be compelled to be given); and EVIDENCE CODE § 1566 (Sections 1560–1565 are applicable in nonjudicial proceedings).

Section 300 does not affect any other statute relaxing rules of evidence for specified purposes. See, *e.g.*, CODE CIV. PROC. § 117g (judge of small claims court may make informal investigation either in or out of court), § 1768 (hearing of conciliation proceeding to be conducted informally), § 2016(b) (inadmissibility of testimony at trial is not ground for objection to testimony sought from a deponent, provided that such testimony is reasonably calculated to lead to the discovery of admissible evidence); PENAL CODE § 1203 (judge must consider probation officer's investigative report on question of probation); WELF. & INST. CODE § 706 (juvenile court must consider probation officer's social study in determining disposition to be made of ward or dependent child).

CROSS-REFERENCES

Criminal action, applicability of rules of evidence, see Penal Code § 1102
Definitions:
Action, see § 105
Statute, see § 230
Grand jury proceedings, applicability of rules of evidence, see Penal Code § 939.6
See also the statutes cited in the *Comment*

CHAPTER 2. PROVINCE OF COURT AND JURY

§ 310. Questions of law for court

310. All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4.

Comment. Section 310 restates the substance of and supersedes the first sentence of Section 2102 of the Code of Civil Procedure.

CROSS-REFERENCES

Comment on evidence, see Constitution, Art. I, § 13; Art. VI, § 19; Penal Code § 1127
Criminal action, questions for court and jury, see Penal Code §§ 1124-1127
Definitions:
Evidence, see § 140
Law, see § 160
Statute, see § 230
Writing, see § 250
Issue of law, trial by court, see Code of Civil Procedure § 591
Judicial notice, see §§ 450-459
Office of judge in construing statute or instrument, see Code of Civil Procedure § 1858
Preliminary determinations on admissibility of evidence, see §§ 400-406

§ 311. Determination of foreign law

311. (a) Determination of the law of a foreign nation or a public entity in a foreign nation is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).

(b) If such law is applicable and the court is unable to determine it, the court may, as the ends of justice require, either:

(1) Apply the law of this State if the court can do so consistently with the Constitution of the United States and the Constitution of this State; or

(2) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

Comment. Section 311 restates the substance of and supersedes the last paragraph of Section 1875 of the Code of Civil Procedure.

The court may be unable to determine the foreign law because the parties have not provided the court with sufficient information to make such determination. If it appears that the parties may be able to obtain such information, the court may, of course, grant the parties additional time within which to obtain such information and make it available to the court. But when all sources of information as to the foreign law are exhausted and the court is unable to determine the foreign law, Section 311 provides the rule that governs the disposition of the case.

CROSS-REFERENCES

Definitions:
Action, see § 105
Law, see § 160
Public entity, see § 200
State, see § 220
Judicial notice of foreign law, see § 452

§ 312. Jury as trier of fact

312. Except as otherwise provided by law, where the trial is by jury:

(a) All questions of fact are to be decided by the jury.

(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

Comment. Section 312 restates the substance of and supersedes Section 2101 and the first sentence of Section 2061 of the Code of Civil Procedure. The rule stated in Section 312 is subject to such exceptions as are otherwise provided by statutory or decisional law. See, *e.g.*, EVIDENCE CODE §§ 310, 311, 457.

CROSS-REFERENCES

Actual fraud a question of fact, see Civil Code § 1574
Blood tests, conclusive effect, see §§ 892, 895, 896
Comment on evidence, see Constitution, Art. I, § 13; Art. VI, § 19; Penal Code § 1127
Criminal action, questions for jury, see Penal Code §§ 1125-1127
Definitions:
Declarant, see § 135
Evidence, see § 140
Law, see § 160
Instructions to jury on questions of fact, see Code of Civil Procedure § 608; Penal Code § 1127
Issues of fact, by whom tried, see Code of Civil Procedure § 592
Judicially noticed facts binding on jury, see § 457
Jurors as judges of credibility of witnesses, see Constitution, Art. VI, § 19; Penal Code § 1127
Jury to determine law and fact in libel prosecutions, see Constitution, Art. I, § 9; Penal Code §§ 251, 1125
Trial by jury, see Constitution, Art. I, § 7

CHAPTER 3. ORDER OF PROOF

§ 320. Power of court to regulate order of proof

320. Except as otherwise provided by law, the court in its discretion shall regulate the order of proof.

Comment. Section 320 restates the substance of and supersedes the first sentence of Section 2042 of the Code of Civil Procedure. Under Section 320, as under existing law, the trial judge has wide discretion to determine the order of proof. See CALIFORNIA CIVIL PROCEDURE DURING TRIAL, Parrish, *Order of Proof*, 205 (Cal. Cont. Ed. Bar 1960). Of course, the order of proof ordinarily should be as prescribed in Code of Civil Procedure Section 607 or 631.7 (added in this recommendation) or in Penal Code Sections 1093 and 1094.

Directions of the trial judge which control the order of proof should be distinguished from those which actually exclude evidence. Obviously, it is not permissible, through repeated directions of the order of proof, to prevent a party from presenting relevant evidence on a disputed fact. *Foster v. Keating*, 120 Cal. App.2d 435, 261 P.2d 529 (1953); CALIFORNIA CIVIL PROCEDURE DURING TRIAL, Parrish, *Order*

of Proof, 205, 210 (Cal. Cont. Ed. Bar 1960). See also *Murry v. Manley*, 170 Cal. App.2d 364, 338 P.2d 976 (1959).

CROSS-REFERENCES

Definition:
Law, see § 160
Order of proof:
Civil jury case, see Code of Civil Procedure § 607
Civil nonjury case, see Code of Civil Procedure § 631.7
Criminal action, see Penal Code §§ 1093, 1094
Facts preliminary to admission of evidence, see § 403(b)

CHAPTER 4. ADMITTING AND EXCLUDING EVIDENCE

Article 1. General Provisions

§ 350. Only relevant evidence admissible

350. No evidence is admissible except relevant evidence.

Comment. Section 350 restates and supersedes that portion of Code of Civil Procedure Section 1868 requiring the exclusion of irrelevant evidence.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Relevant evidence, see § 210
Determination of relevancy, see § 403

§ 351. Admissibility of relevant evidence

351. Except as otherwise provided by statute, all relevant evidence is admissible.

Comment. Section 351 abolishes all limitations on the admissibility of relevant evidence except those that are based on a statute, including a constitutional provision. See EVIDENCE CODE § 230. The Evidence Code contains a number of provisions that exclude relevant evidence either for reasons of public policy or because the evidence is too unreliable to be presented to the trier of fact. See, *e.g.*, EVIDENCE CODE § 352 (cumulative, unduly prejudicial, etc. evidence), §§ 900–1073 (privileges), §§ 1100–1156 (extrinsic policies), § 1200 (hearsay). Other codes also contain provisions that may in some cases result in the exclusion of relevant evidence. See, *e.g.*, CIVIL CODE §§ 79.06, 79.09, 227; CODE CIV. PROC. § 1747; EDUC. CODE § 14026; FIN. CODE § 8754; FISH & GAME CODE § 7923; GOVT. CODE §§ 15619, 18573, 18934, 18952, 20134, 31532; HEALTH & SAF. CODE §§ 211.5, 410; INS. CODE §§ 735, 855, 10381.5; LABOR CODE § 6319; PENAL CODE §§ 290, 938.1, 3046, 3107, 11105; PUB. RES. CODE § 3234; REV. & TAX. CODE §§ 16563, 19282–19289; UNEMPL. INS. CODE §§ 1094, 2111, 2714; VEHICLE CODE §§ 1808, 16005, 20012–20015, 40803, 40804, 40832, 40833; WATER CODE § 12516; WELF. & INST. CODE §§ 118, 827.

CROSS-REFERENCES

Authentication of writings, see §§ 1400-1421
Credibility of witness, see §§ 770, 780-791
Definitions:
Relevant evidence, see § 210
Statute, see § 230
Determination of relevancy, see § 403

Evidence excluded because of:
Best evidence rule, see §§ 1500-1510
Cumulative or prejudicial effect, see § 352
Extrinsic policies, see §§ 1100-1156
Hearsay rule, see §§ 1200-1341
Privileges, see §§ 900-1073
Judge as witness, see § 703
Juror as witness, see § 704
See also the statutes cited in the *Comment*

§ 352. Discretion of court to exclude evidence

352. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Comment. Section 352 expresses a rule recognized by statute and in several California decisions. CODE CIV. PROC. §§ 1868, 2044 (superseded by the Evidence Code); *Adkins v. Brett*, 184 Cal. 252, 258, 193 Pac. 251, 254 (1920) ("the matter [of excluding prejudicial evidence] is largely one of discretion on the part of the trial judge"); *Moody v. Peirano*, 4 Cal. App. 411, 418, 88 Pac. 380, 382 (1906) ("a wide discretion is left to the trial judge in determining whether [evidence of a collateral nature] is admissible or not").

CROSS-REFERENCES

Control of interrogation of witnesses, see § 765
Criminal action, excluding evidence, see Penal Code § 1044
Definition:
Evidence, see § 140
Expert witnesses, limiting number to be called, see § 723

§ 353. Effect of erroneous admission of evidence

353. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

Comment. Subdivision (a) of Section 353 codifies the well-settled California rule that a failure to make a timely objection to, or motion to exclude or to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See WITKIN, CALIFORNIA EVIDENCE §§ 700-702 (1958). Subdivision (a) also codifies the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. WITKIN, CALIFORNIA EVIDENCE §§ 703-709 (1958).

Subdivision (b) reiterates the requirement of Section 4½ of Article VI of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial.

Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson,* 61 Cal.2d ___, 39 Cal. Rptr. 1, 393 P.2d 161 (1964).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Disallowing claim of privilege as reversible error, see § 918
Formal finding of preliminary facts unnecessary, see § 402
Miscarriage of justice, see Constitution, Art. VI, § 4½

§ 354. Effect of erroneous exclusion of evidence

354. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;

(b) The rulings of the court made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination.

Comment. Section 354, like Section 353, reiterates the requirement of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial. CAL. CONST., Art. VI, § 4½.

The provisions of Section 354 that require an offer of proof or other disclosure of the evidence improperly excluded reflect existing law. See WITKIN, CALIFORNIA EVIDENCE § 713 (1958). The exceptions to this requirement that are stated in Section 354 also reflect existing law. Thus, an offer of proof is unnecessary where the judge has limited the issues so that an offer to prove matters related to excluded issues would be futile. *Lawless v. Calaway,* 24 Cal.2d 81, 91, 147 P.2d 604, 609 (1944). An offer of proof is also unnecessary when an objection is improperly sustained to a question on cross-examination. *Tossman v. Newman,* 37 Cal.2d 522, 525-526, 233 P.2d 1, 3 (1951) ("no offer of proof is necessary in order to obtain a review of rulings on cross-examination"); *People v. Jones,* 160 Cal. 358, 117 Pac. 176 (1911).

CROSS-REFERENCES

Definitions:
Cross-examination, see §§ 761, 772, 773
Evidence, see § 140
Formal finding of preliminary facts unnecessary, see § 402
Miscarriage of justice, see Constitution, Art. VI, § 4½

§ 355. Limited admissibility

355. When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

Comment. Section 355 codifies existing law which requires the court to instruct the jury as to the limited purpose for which evidence may be considered when such evidence is admissible for one purpose and inadmissible for another. See *Adkins v. Brett,* 184 Cal. 252, 193 Pac. 251 (1920).

Under Section 352, as under existing law, the judge is permitted to exclude such evidence if he deems it so prejudicial that a limiting instruction would not protect a party adequately and the matter in question can be proved sufficiently by other evidence. See discussion in *Adkins v. Brett,* 184 Cal. 252, 258, 193 Pac. 251, 254 (1920); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612, 639-640 (1964).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Exclusion of unduly prejudicial evidence, see § 352

§ 356. Entire act, declaration, conversation, or writing may be brought out to elucidate part offered

356. Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

Comment. Section 356 restates the substance of and supersedes Section 1854 of the Code of Civil Procedure.

CROSS-REFERENCES

Circumstances under which instrument was made, see Civil Code § 1647; Code of Civil Procedure § 1860
Definition:
Writing, see § 250
Exclusion of cumulative or unduly prejudicial evidence, see § 352

Article 2. Preliminary Determinations on Admissibility of Evidence

§ 400. "Preliminary fact"

400. As used in this article, "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.

Comment. "Preliminary fact" is defined to distinguish those facts upon which the admissibility of evidence depends from those facts sought to be proved by that evidence.

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 401. "Proffered evidence"

401. As used in this article, "proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.

Comment. "Proffered evidence" is defined to avoid confusion between evidence whose admissibility is in question and evidence offered on the preliminary fact issue. "Proffered evidence" includes such matters as the testimony to be elicited from a witness who is claimed to be disqualified, testimony or tangible evidence claimed to be privileged, and any other evidence to which objection is made.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Preliminary fact, see § 400

§ 402. Procedure for determining foundational and other preliminary facts

402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

Comment. Under Section 310, the court must decide preliminary questions of fact upon which the admissibility of evidence depends. Section 402 prescribes certain procedures that must be observed by the court when making such preliminary determinations.

Subdivision (a). Subdivision (a) requires the judge to observe the procedures specified in Article 2 (commencing with Section 400) when he is determining disputed factual questions preliminary to the admission or exclusion of evidence. The provisions of Article 2 are designed to distinguish clearly between (1) those situations where the judge must be persuaded of the existence of the preliminary fact upon which admissibility depends and (2) those situations where the judge must admit the proffered evidence merely upon the introduction of evidence sufficient to sustain a finding of the preliminary fact. Under the Evidence Code, as under existing law, the judge determines some preliminary fact questions on the basis of all of the evidence presented to him by both parties, resolving any conflicts in that evidence. EVIDENCE CODE § 405. See, *e.g.*, *People v. Glab*, 13 Cal. App.2d 528, 57 P.2d 588 (1936) (judge considered conflicting evidence and decided that a proposed witness was not married to the defendant and, therefore, was competent to testify). See also *Fairbank v. Hughson*, 58 Cal. 314 (1881) (error to permit jury to determine whether witness was an expert). On the other hand, the judge does not always resolve conflicts in the evidence submitted on preliminary fact questions; in some

cases, the proffered evidence must be admitted if there is evidence sufficient to sustain a finding of the preliminary fact. EVIDENCE CODE § 403. See, *e.g., Reed v. Clark,* 47 Cal. 194, 200 (1873); *Verzan v. McGregor,* 23 Cal. 339 (1863).

Subdivision (b). Subdivision (b) requires the judge to determine the admissibility of a confession or admission of a criminal defendant out of the presence and hearing of the jury. Under existing law, whether the preliminary hearing is held out of the presence of the jury is left to the judge's discretion. *People v. Gonzales,* 24 Cal.2d 870, 151 P.2d 251 (1944); *People v. Nelson,* 90 Cal. App. 27, 31, 265 Pac. 366, 367 (1928). The existing procedure permits the jury to hear evidence that may be extremely prejudicial. For example, in *People v. Black,* 73 Cal. App. 13, 238 Pac. 374 (1925), the alleged coercion consisted of threats to send the defendants to New Mexico to be prosecuted for murder. Subdivision (b) prevents this kind of prejudice. Nothing in subdivision (b) precludes a defendant from presenting to the jury evidence attacking the credibility of a confession that is admitted (EVIDENCE CODE § 406), and such evidence may include some of the same matters presented to the judge during the preliminary hearing.

Subdivision (c). Subdivision (c) codifies existing law. *Wilcox v. Berry,* 32 Cal.2d 189, 195 P.2d 414 (1948) (where evidence is properly received, the ground of the court's ruling is immaterial); *City & County of San Francisco v. Western Air Lines, Inc.,* 204 Cal. App.2d 105, 22 Cal. Rptr. 216 (1962) (where evidence is excluded, the ruling will be upheld if any ground exists for the exclusion).

CROSS-REFERENCES

Definitions:
Criminal action, see § 130
Evidence, see § 140
Preliminary fact, see § 400
Statute, see § 230
Determination of admissibility of evidence for court, see § 310
Exclusion of cumulative or unduly prejudicial evidence, see § 352

§ 403. Determination of foundational and other preliminary facts where relevancy, personal knowledge, or authenticity is disputed

403. (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or

(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evi-

dence of the preliminary fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court:

(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

Comment. As indicated in the *Comment* to Section 402, the judge does not determine in all instances whether a preliminary fact exists or does not exist. At times, the judge must admit the proffered evidence if there is evidence sufficient to sustain a finding of the preliminary fact, and the jury must finally decide whether the preliminary fact exists. See, *e.g., Verzan v. McGregor,* 23 Cal. 339 (1863). Section 403 covers those situations in which the judge is required to admit the proffered evidence upon the introduction of evidence sufficient to sustain a finding of the preliminary fact.

Subdivision (a)

Some writers have attempted to distinguish the kinds of questions to be decided under the standard prescribed in Section 403 from the kinds of questions to be decided under the standard described in Section 405 on the ground that the former questions involve the *relevancy* of the proffered evidence while the latter questions involve the *competency* of evidence that is relevant. Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence,* 40 HARV. L. REV. 392 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact,* 43 HARV. L. REV. 165 (1929). It is difficult, however, to distinguish all preliminary fact questions upon this principle. And eminent legal authorities sometimes differ over whether a particular preliminary fact question is one of relevancy or competency. For example, Wigmore classifies admissions with questions of relevancy (4 WIGMORE, EVIDENCE 1 (3d ed. 1940)) while Morgan classifies admissions with questions of competency to be decided under the standard prescribed in Section 405 (MORGAN, BASIC PROBLEMS OF EVIDENCE 244 (1957)).

To eliminate uncertainties of classification, subdivision (a) lists the kinds of preliminary fact questions that are to be determined under the standard prescribed in Section 403. And to eliminate any uncertainties that are not resolved by this listing, various Evidence Code sections state specifically that admissibility depends on "evidence sufficient to sustain a finding" of certain facts. See, *e.g.,* EVIDENCE CODE §§ 1222, 1223, 1400.

The preliminary fact questions listed in subdivision (a), or identified elsewhere as matters to be determined under the Section 403 standard, are not finally decided by the judge because they have been traditionally regarded as jury questions. The questions involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the jury's function to determine the effect and value of the evidence addressed to it. EVIDENCE CODE § 312. Hence,

the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question. The "question of admissibility . . . merges imperceptibly into the weight of the evidence, if admitted." *Di Carlo v. United States,* 6 F.2d 364, 367 (2d Cir. 1925). If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.

For example, if the question of *A*'s title to land is in issue, *A* may seek to prove his title by a deed from former owner *O*. Section 1401 requires that the deed be authenticated, and the judge, under Section 403, must rule on the question of authentication. If *A* introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the rule were otherwise and the judge, on the basis of the adverse party's evidence, were permitted to decide that the deed was spurious and not admissible, the judge would be resolving the basic factual issue in the case and *A* would be deprived of a jury finding on the issue, even though he is entitled to a jury decision and even though he has introduced evidence sufficient to warrant a jury finding in his favor.

Illustrative of the preliminary fact questions that should be decided under Section 403 are the following:

Section 350—Relevancy. Under existing law, as under Section 403, if the relevancy of proffered evidence depends on the existence of some preliminary fact, the evidence is admissible if there is evidence sufficient to warrant a jury finding of the preliminary fact. *Reed v. Clark,* 47 Cal. 194, 200 (1873). Thus, for example, if *P* sues *D* upon an alleged agreement, evidence of negotiations with *A* is inadmissible because irrelevant unless *A* is shown to be *D*'s agent; but the evidence of the negotiations with *A* is admissible if there is evidence sufficient to sustain a finding of the agency. *Brown v. Spencer,* 163 Cal. 589, 126 Pac. 493 (1912). The same rule is applicable when a person is charged with criminal responsibility for the acts of another because they are conspirators. See discussion in *People v. Steccone,* 36 Cal.2d 234, 238, 223 P.2d 17, 19 (1950).

Section 702—Requirement of personal knowledge. Evidence sufficient to sustain a finding of a witness' personal knowledge seems to be sufficient under the existing California practice. See, *e.g., People v. Avery,* 35 Cal.2d 487, 492, 218 P.2d 527, 530 (1950) ("Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under section 1845 of the Code of Civil Procedure."); *People v. McCarthy,* 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910). See also *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 711–713 (1964).

Section 788—Conviction of a crime when offered to attack credibility. In this situation, the preliminary fact issue to be decided under Section 403 is whether the witness is actually the person who was convicted. This involves the relevancy of the evidence (since, obviously, the conviction of another does not affect the witness' credibility) and should be a question to be resolved by the jury. The judge should not

be able to decide finally that it was the witness who was convicted and, thus, to prevent a contest on that issue before the jury. The existing law is uncertain in this regard; however, it seems likely that any evidence sufficient to identify the witness as the person convicted is sufficient to warrant admission of the conviction. See *People v. Theodore*, 121 Cal. App.2d 17, 28, 262 P.2d 630, 637 (1953) (relying on presumption of identity of person from identity of name). Section 403 does not affect the special procedural rule provided in Section 788 that requires the proponent of the evidence to make the preliminary showing out of the presence and hearing of the jury. See EVIDENCE CODE § 788 and the *Comment* thereto.

Section 800—Requirement that lay opinion be based on personal perception. The requirement specified in Section 800 is merely a specific application of the personal knowledge requirement in Section 702. See the discussion of Section 702 in this *Comment, supra.*

Sections 1200–1341—Identity of hearsay declarant. For most hearsay evidence, admissibility depends upon two preliminary determinations: (1) Did the declarant actually make the statement as claimed by the proponent of the evidence? (2) Does the statement meet certain standards of trustworthiness required by some exception to the hearsay rule?

The first determination involves the relevancy of the evidence. For example, if the issue is the state of mind of *X*, a person's statement as to *his* state of mind has no tendency to prove *X*'s state of mind unless the declarant was *X*. Relevancy depends on the fact that *X* made the statement. Accordingly, if otherwise competent, a hearsay statement is admitted upon evidence sufficient to sustain a finding that the claimed declarant made the statement.

The second determination involves the competency of the evidence. Unless the evidence meets the requisite standards of an exception to the hearsay rule, it must be kept from the trier of fact despite its relevancy either because it is too unreliable or because public policy requires its suppression. For example, if an admission was in fact made by a defendant to a criminal action, the admission is relevant. But public policy requires that the admission be held inadmissible if it was not given voluntarily.

The admissibility of some hearsay declarations is dependent solely upon the determination that a particular declarant made the statement. Some of these exceptions to the hearsay rule—such as inconsistent statements of trial witnesses and admissions—are mentioned specifically below. Since the only preliminary fact to be determined in regard to these declarations involves the relevancy of the evidence, they should be admitted upon the introduction of evidence sufficient to sustain a finding of the preliminary fact.

When the admissibility of hearsay depends both upon a determination that a particular declarant made the statement and upon a determination that the requisite standards of a hearsay exception have been met, the former determination is to be made upon evidence sufficient to sustain a finding of the preliminary fact. Paragraph (4) is included in subdivision (a) to make this clear.

Section 1220—Admissions of a party. The only preliminary fact that is subject to dispute is the identity of the declarant. Under Section 403(a)(4), an admission is admissible upon the introduction of evidence sufficient to sustain a finding that the party made the statement. Existing law appears to be in accord. *Eastman v. Means,* 75 Cal. App. 537, 242 Pac. 1089 (1925).

An admission is not admissible in a criminal case unless it was given voluntarily. The voluntariness of an admission by a criminal defendant is determined under Section 405, not Section 403.

Sections 1221, 1222—Authorized and adoptive admissions. Under existing law, both authorized admissions (by an agent of a party) and adoptive admissions are admitted upon the introduction of evidence sufficient to sustain a finding of the foundational fact. *Sample v. Round Mountain Citrus Farm Co.,* 29 Cal. App. 547, 156 Pac. 983 (1916) (authorized admission); *Southers v. Savage,* 191 Cal. App.2d 100, 12 Cal. Rptr. 470 (1961) (adoptive admission).

Section 1223—Admission of co-conspirator. The admission of a co-conspirator is another form of an authorized admission. Hence, the proffered evidence is admissible upon the introduction of evidence sufficient to sustain a finding of the conspiracy. Existing law is in accord. *People v. Robinson,* 43 Cal.2d 132, 137, 271 P.2d 865, 868 (1954).

Sections 1224–1227—Admission of third person whose liability, breach of duty, or right is in issue. The only preliminary fact subject to dispute is the identity of the declarant; and the preliminary showing required in regard to this class of admissions is the same as if the declarant were being sued directly. Any evidence of the making of the statement by the claimed declarant is sufficient to warrant its admission. Existing law is in accord. See *Langley v. Zurich General Acc. & Liab. Ins. Co.,* 219 Cal. 101, 25 P.2d 418 (1933). Although Sections 1226 and 1227 are new to California law, the same principles should be applicable.

Sections 1235, 1236—Previous statements of witnesses. Prior inconsistent statements and prior consistent statements made before bias or other improper motive arose are dealt with in Sections 1235 and 1236. In each case, the evidence is relevant and probative if the witnesses to the statements are credible. The credibility of the witnesses testifying to these statements should be decided finally by the jury. Moreover, the only preliminary fact subject to dispute insofar as alleged inconsistent statements are concerned is the identity of the declarant. Hence, evidence is admitted under these sections upon the introduction of evidence sufficient to sustain a finding of the preliminary fact. The existing practice seems to be consistent with Section 403. See *Schneider v. Market Street Ry.,* 134 Cal. 482, 492, 66 Pac. 734, 738 (1901) ("Whether the [prior inconsistent] statements made to Glassman and Hubbell were made by Meley, or by some other man, was a question for the jury. Both witnesses testified that they were made by him."); *People v. Neely,* 163 Cal. App.2d 289, 312, 329 P.2d 357, 371 (1958) (two prior consistent statements held admissible because the "jury could properly infer . . . the motive to fabricate did arise after the making of the two statements").

Sections 1400–1402—Authentication of writings. Under existing law, an otherwise competent writing is admissible upon the introduction of evidence sufficient to sustain a finding of the authenticity of the writing. *Verzan v. McGregor,* 23 Cal. 339 (1863). Section 403(a)(3) retains this existing law.

Sections 1410–1421—Means of authenticating writings. Sections 1410 through 1421 merely state several ways in which the requirements of Sections 1400 through 1402 may be met. Hence, to the extent that Sections 1410 through 1421 specify facts that may be shown to authenticate writings, the same principles apply: In each case, the judge must decide whether the evidence offered is sufficient to sustain a finding of the authenticity of the proffered writing and admit the writing if there is such evidence. Care should be exercised, however, to distinguish those cases where the disputed preliminary fact is the authenticity of an exemplar with which the proffered writing is to be compared (EVIDENCE CODE §§ 1417-1419) or the qualification of a witness to give an opinion concerning the authenticity of a writing (EVIDENCE CODE §§ 1416, 1418); the judge is required to determine such questions under the the provisions of Section 405.

Subdivision (b)

Subdivision (b) restates the apparent meaning of Section 1834 of the Code of Civil Procedure. Under this subdivision, the judge may receive evidence that is conditionally admissible under Section 403, subject to the presentation of evidence of the preliminary fact later in the course of the trial. See *Brea v. McGlashan,* 3 Cal. App.2d 454, 465, 39 P.2d 877, 882 (1934).

Subdivision (c)

Subdivision (c) relates to the instructions to be given the jury when evidence is admitted whose admissibility depends on the existence of a preliminary fact determined under Section 403. When such evidence is admitted, the jury is required to make the ultimate determination of the existence of the preliminary fact. Unless the jury is persuaded that the preliminary fact exists, it is not permitted to consider the evidence.

For example, if *P* offers evidence of his negotiations with *A* in his contract action against *D,* the judge must admit the evidence if there is other evidence sufficient to sustain a finding that *A* was *D*'s agent. If the jury is not persuaded that *A* was in fact *D*'s agent, then it is not permitted to consider the evidence of the negotiations with *A* in determining *D*'s liability.

Frequently, the jury's duty to disregard conditionally admissible evidence when it is not persuaded of the existence of the preliminary fact on which relevancy is conditioned is so clear that an instruction to this effect is unnecessary. For example, if the disputed preliminary fact is the authenticity of a deed, it hardly seems necessary to instruct the jury to disregard the deed if it should find that the deed is not genuine. No rational jury could find the deed to be spurious and, yet, to be still effective to transfer title from the purported grantor.

At times, however, it is not quite so clear that conditionally admissible evidence should be disregarded unless the preliminary fact is

found to exist. In such cases, the jury should be appropriately instructed. For example, the theory upon which agent's and co-conspirator's statements are admissible is that the party is vicariously responsible for the acts and statements of agents and co-conspirators within the scope of the agency or conspiracy. Yet, it is not always clear that statements made by a purported agent or co-conspirator should be disregarded if not made in furtherance of the agency or conspiracy. Hence, the jury should be instructed to disregard such statements unless it is persuaded that the statements were made within the scope of the agency or conspiracy. *People v. Geiger,* 49 Cal. 643, 649 (1875); *People v. Talbott,* 65 Cal. App.2d 654, 663, 151 P.2d 317, 322 (1944). Subdivision (c), therefore, permits the judge in any case to instruct the jury to disregard conditionally admissible evidence unless it is persuaded of the existence of the preliminary fact; further, subdivision (c) requires the judge to give such an instruction whenever he is requested by a party to do so.

CROSS-REFERENCES

Definitions:
Burden of producing evidence, see § 110
Conduct, see § 125
Evidence, see § 140
Preliminary fact, see § 400
Proffered evidence, see § 401
Statement, see § 225
Writing, see § 250
See also the statutes cited in the *Comment*

§ 404. Determination of whether proffered evidence is incriminatory

404. Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Comment. Section 404 provides a special procedure to be followed by the judge when an objection is made in reliance upon the privilege against self-incrimination. Under Section 404, the objecting party has the burden of showing that the testimony sought might incriminate him. However, the party is not required to produce evidence as such. In addition to considering evidence, the judge must consider the matters disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors. See *Cohen v. Superior Court,* 173 Cal. App.2d 61, 70, 343 P.2d 286, 291 (1959). Nonetheless, the burden is on the objector to present to the judge information of this sort sufficient to indicate that the proffered evidence might incriminate him. If he presents information of this sort, Section 404 requires the judge to sustain the claim of privilege unless it clearly appears that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Section 404 is consistent with existing law: The party claiming the privilege "has the burden of showing that the testimony which was being required might be used in a prosecution to help establish his

guilt''; the court may require testimony to be given only if it clearly appears to the court that the claim of privilege is mistaken and that any answer '' '*cannot possibly*' '' have a tendency to incriminate the witness. *Cohen v. Superior Court*, 173 Cal. App.2d 61, 68, 70-72, 343 P.2d 286, 290, 291-292 (1959) (italics in original).

CROSS-REFERENCES

Definition:
Proffered evidence, see § 401
Privilege against self-incrimination, see § 940

§ 405. Determination of foundational and other preliminary facts in other cases

405. With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

Comment. Section 405 requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations covered by Sections 403 and 404. Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion.

Under Section 405, the judge first indicates to the parties who has the burden of proof and the burden of producing evidence on the disputed issue as implied by the rule of law under which the question arises. For example, Section 1200 indicates that the burden of proof is usually on the proponent of the evidence to show that the proffered evidence is within a hearsay exception. Thus, if the disputed preliminary fact is whether the proffered statement was spontaneous, as required by Section 1240, the proponent would have the burden of persuading the judge as to the spontaneity of the statement. On the other hand, the privilege rules usually place the burden of proof on the objecting party to show that a privilege is applicable. Thus, if the disputed preliminary fact is whether a person is married to a party and, hence, whether their confidential communications are privileged under Section 980, the burden of proof is on the party asserting the privilege to persuade the judge of the existence of the marriage.

After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is per-

suaded by the party with the burden of proof, he finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by such finding.

Section 405 is generally consistent with existing law. CODE CIV. PROC. § 2102 ("All questions of law, including the admissibility of testimony, [and] the facts preliminary to such admission, . . . are to be decided by the Court") (superseded by EVIDENCE CODE § 310).

Examples of preliminary fact issues to be decided under Section 405

Illustrative of the preliminary fact questions that should be decided under Section 405 are the following:

Section 701—Disqualification of a witness for lack of mental capacity. Under existing law, as under this code, the party objecting to a proffered witness has the burden of proving the witness' lack of capacity. *People v. Craig,* 111 Cal. 460, 469, 44 Pac. 186, 188 (1896); *People v. Tyree,* 21 Cal. App. 701, 706, 132 Pac. 784, 786 (1913) (disapproved on other grounds in *People v. McCaughan,* 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957)).

Section 720—Qualifications of an expert witness. Under Section 720, as under existing law, the proponent must persuade the judge that his expert is qualified, and it is error for the judge to submit the qualifications of the expert to the jury. *Fairbank v. Hughson,* 58 Cal. 314 (1881); *Eble v. Peluso,* 80 Cal. App.2d 154, 181 P.2d 680 (1947).

Section 788—Conviction of a crime when offered to attack credibility. If the disputed preliminary fact is whether a pardon or some similar relief has been granted to a witness convicted of a crime, the judge's determination is made under Section 405. *Cf. Comment* to Section 403.

Section 870—Opinion evidence on sanity. Whether a witness is sufficiently acquainted with a person whose sanity is in question to be qualified to express an opinion on the matter involves, in effect, the expertise of the witness on that limited subject. The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this *Comment, supra.* Under existing law, too, determination of whether a witness is an "intimate acquaintance" is a question addressed to the court. *Estate of Budan,* 156 Cal. 230, 104 Pac. 442 (1909).

Sections 900–1073—Privileges. Under this code, as under existing law, the party claiming a privilege has the burden of proof on the preliminary facts. *San Diego Professional Ass'n v. Superior Court,* 58 Cal.2d 194, 199, 23 Cal. Rptr. 384, 387, 373 P.2d 448, 451 (1962) ("The burden of establishing that a particular matter is privileged is on the party asserting that privilege."); *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 117, 354 P.2d 637, 645 (1960). The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary to show that an

exception to the privilege is applicable. *But see Abbott v. Superior Court,* 78 Cal. App.2d 19, 21, 177 P.2d 317, 318 (1947) (suggesting that a prima facie showing by the proponent is sufficient where the issue is whether a communication between attorney and client was made in contemplation of crime).

Sections 1152, 1154—Admissions made during compromise negotiations. With respect to admissions made during compromise negotiations, the disputed preliminary fact to be decided by the judge is whether the admission occurred during compromise negotiations or at some other time. This code places the burden on the objecting party to satisfy the judge that the admission occurred during such negotiations.

Sections 1200–1341—Hearsay evidence. When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration—was the statement actually made by the person alleged to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence—*e.g.,* was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under this code, questions relating to the authenticity of the proffered declaration are decided under Section 403. See the *Comment* to Section 403. But other preliminary fact questions are decided under Section 405.

For example, the court must decide whether a statement offered as a dying declaration was made under a sense of impending death, and the proponent of the evidence has the burden of proof on this issue. *People v. Keelin,* 136 Cal. App.2d 860, 873, 289 P.2d 520, 528 (1955); *People v. Pollock,* 31 Cal. App.2d 747, 753-754, 89 P.2d 128, 131 (1939). Under this code, the proponent of a hearsay declaration has the burden of proof on the unavailability of the declarant as a witness under Section 1291 or 1310; but the party objecting to the evidence has the burden of proving that the unavailability of the declarant was procured by the proponent in order to prevent the declarant from testifying. See EVIDENCE CODE § 240.

Section 1416—Opinion evidence on handwriting. Whether a witness is sufficiently acquainted with the handwriting of a person to give an opinion on whether a questioned writing is in that person's handwriting involves, in effect, the expertise of the witness on the limited subject of the supposed writer's handwriting. The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this *Comment, supra.*

Sections 1417–1419—Comparison of writing with exemplar. Under Sections 1417 through 1419, as under existing law, the judge must be satisfied that a writing is genuine before he may admit it for comparison with other writings whose authenticity is in dispute. *People v. Creegan,* 121 Cal. 554, 53 Pac. 1082 (1898); *Marshall v. Hancock,* 80 Cal. 82, 22 Pac. 61 (1889).

Sections 1500-1510—Best evidence rule. Under Section 405, as under existing law, the trial judge is required to determine the preliminary fact necessary to warrant reception of secondary evidence of a writing, and the burden of proof on the issue is on the proponent of the secondary evidence. *Cotton v. Hudson,* 42 Cal. App.2d 812, 110 P.2d 70 (1941).

Sections 1550, 1551—Photographic copy of writing. Sections 1550 and 1551 are special exceptions to the best evidence rule; hence, Section 405 governs the determination of any disputed preliminary fact under these sections just as it governs the determination of disputed preliminary facts under Sections 1500 through 1510. See the discussion of Sections 1500-1510 in this *Comment, supra.*

Confessions, dying declarations, and spontaneous statements

Section 405 is generally consistent with existing law. It will, however, substantially change the law relating to confessions, dying declarations, and spontaneous statements. Under existing law, the judge considers all of the evidence and decides whether evidence of this sort is admissible, as indicated in Section 405. But if he decides the proffered evidence is admissible, he submits the preliminary question to the jury for a final determination whether the confession was voluntary, whether the dying declaration was made in realization of impending doom, or whether the spontaneous statement was in fact spontaneous; and the jury is instructed to disregard the statement if it does not believe that the condition of admissibility has been satisfied. *People v. Baldwin,* 42 Cal.2d 858, 866–867, 270 P.2d 1028, 1033–1034 (1954) (confession—see the court's instruction, *id.* at 866, 270 P.2d at 1033); *People v. Gonzales,* 24 Cal.2d 870, 876–877, 151 P.2d 251, 254 (1944) (confession); *People v. Singh,* 182 Cal. 457, 476, 188 Pac. 987, 995 (1920) (dying declaration); *People v. Keelin,* 136 Cal. App.2d 860, 871, 289 P.2d 520, 527 (1955) (spontaneous declaration).

Under Section 405, the judge's rulings on these questions are final; the jury does not have an opportunity to redetermine the issue.

Section 405 will have no effect on the admissibility of confessions where the uncontradicted evidence shows that the confession was not voluntary. Under existing law, as under the Evidence Code, such a confession may not be admitted for consideration by the jury. *People v. Trout,* 54 Cal.2d 576, 6 Cal. Rptr. 759, 354 P.2d 231 (1960); *People v. Jones,* 24 Cal.2d 601, 150 P.2d 801 (1944). Section 405 will also have no effect on the admissibility of confessions in those instances where, despite a conflict in the evidence, the court is persuaded that the confession was not voluntary; for, under existing law (as under the Evidence Code), "if the court concludes that the confession was not free and voluntary it . . . is in duty bound to withhold it from the jury's consideration." *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944).

Hence, Section 405 changes the law relating to confessions only where there is a substantial conflict in the evidence over voluntariness and the court is not persuaded that the confession was involuntary. Under existing law, a court that is in doubt may "pass the buck" concerning such a confession to the jury when there is a difficult factual question to resolve; for "if there is evidence that the confession was free and

voluntary, it is within the court's discretion to permit it to be read to the jury, and to submit to the jury for its determination the question whether under all the circumstances the confession was made freely and voluntarily." *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944). Under the Evidence Code, however, the court is required to withhold a confession from the jury unless the court is persuaded that the confession was made freely and voluntarily. The court has no "discretion" to avoid difficult decisions by shifting the responsibility to the jury. If the court is in doubt, if the prosecution has not persuaded it of the voluntary nature of the confession, Section 405 requires the court to exclude the confession. Thus, Section 405 makes the procedure for determining the admissibility of a confession the same as the procedure for determining the admissibility of physical evidence claimed to have been seized in violation of constitutional guarantees. See *People v. Gorg,* 45 Cal.2d 776, 291 P.2d 469 (1955); *People v. Chavez,* 208 Cal. App.2d 248, 24 Cal. Rptr. 895 (1962).

The existing law is based on the belief that a jury, in determining the defendant's guilt or innocence, can and will refuse to consider a confession that it has determined was involuntary even though it believes that the confession is true. Section 405, on the other hand, proceeds upon the belief that it is unrealistic to expect a jury to perform such a feat. Corroborating facts stated in a confession cannot but assist the jury in resolving other conflicts in the evidence. The question of voluntariness will inevitably become merged with the question of guilt and the truth of the confession; and, as a result of this merger, the admitted confession will inevitably be considered on the issue of guilt. The defendant will receive a greater degree of protection if the court is deprived of the power to shift its fact-determining responsibility to the jury and is required to exclude a confession whenever it is not persuaded that the confession was voluntary.

The foregoing discussion has focused on confessions because the case law is well developed there. But the "second crack" doctrine is equally unsatisfactory when applied to dying declarations and spontaneous statements. Hence, Section 405 requires the court to rule finally on the admissibility of these statements as well.

Of course, Section 405 does not prevent the presentation of any evidence to the jury that is relevant to the reliability of the hearsay statement. See EVIDENCE CODE § 406. Thus, a party may present evidence of the circumstances under which a confession, dying declaration, or spontaneous statement was made where such evidence is relevant to the credibility of the statement, even though such evidence may duplicate to some degree the evidence presented to the court on the issue of admissibility. But the jury's sole concern is the truth or falsity of the facts stated, not the admissibility of the statement.

CROSS-REFERENCES

Definitions:
Action, see § 105
Burden of producing evidence, see § 110
Burden of proof, see § 115
Evidence, see § 140
Law, see § 160
Preliminary fact, see § 400
Proffered evidence, see § 401
Requiring disclosure of information claimed to be privileged, see § 915
See also the statutes cited in the *Comment*

§ 406. Evidence affecting weight or credibility

406. This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

Comment. Other sections in this article provide that the judge determines whether proffered evidence is admissible, *i.e.*, whether it may be considered by the trier of fact. Section 406 simply makes it clear that the judge's decision on a question of admissibility does not preclude the parties from introducing before the trier of fact evidence relevant to weight and credibility.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Trier of fact, see § 235

CHAPTER 5. WEIGHT OF EVIDENCE GENERALLY

§ 410. "Direct evidence"

410. As used in this chapter, "direct evidence" means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Comment. Section 410 restates the substance of and supersedes Section 1831 of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Inference, see § 600
Presumption, see § 600
Proof, see § 190

§ 411. Direct evidence of one witness sufficient

411. Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.

Comment. Section 411 restates the substance of and supersedes Section 1844 of the Code of Civil Procedure. The phrase "except where additional evidence is required by statute" has been substituted for the phrase "except perjury and treason" in Section 1844 because the "perjury and treason" exception to Section 1844 is too limited: Corroboration is required by Section 20 of Article I of the California Constitution (treason) and by Penal Code Sections 653f (solicitation to commit felonies), 1103a (perjury), 1108 (abortion and prostitution cases), 1110 (obtaining property by oral false pretenses), and 1111 (testimony of accomplices); in addition, Civil Code Section 130 provides that divorces cannot be granted on the uncorroborated testimony of the parties.

CROSS-REFERENCES

Corroboration, when required:
Abortion, see Penal Code § 1108
Accomplice testimony, see Penal Code § 1111
Divorce, see Civil Code § 130
False pretenses, see Penal Code § 1110
Lost or destroyed will, see Probate Code §§ 74, 350

Nuncupative will, see Probate Code § 54
Perjury, see Penal Code § 1103a
Prostitution, procuring female under 18 for, see Penal Code § 1108
Soliciting commission of certain crimes, see Penal Code § 653f
Treason, see Constitution, Art. I, § 20; Penal Code § 1103
Definitions:
Direct evidence, see § 410
Evidence, see § 140
Proof, see § 190
Statute, see § 230

§ 412. Party having power to produce better evidence

412. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

Comment. Section 412 restates the substance of and supersedes subdivisions 6 and 7 of Section 2061 of the Code of Civil Procedure.

Section 413, taken together with Section 412, restates in substance the meaning that has been given to the presumptions appearing in subdivisions 5 and 6 of Code of Civil Procedure Section 1963.

Evidence Code Section 913 provides that "no presumption shall arise because of the exercise of [a] privilege, and the trier of fact may not draw any inference therefrom," and the trial judge is required to give such an instruction if he is requested to do so. However, there is no inconsistency between Section 913 and Sections 412 and 413. Section 913 deals only with the inferences that may be drawn from the exercise of a privilege; it does not purport to deal with the inferences that may be drawn from the evidence in the case. Sections 412 and 413, on the other hand, deal with the inferences to be drawn from the evidence in the case; and the fact that a privilege has been relied on is irrelevant to the application of these sections. *Cf. People v. Adamson,* 27 Cal.2d 478, 165 P.2d 3 (1946).

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 413. Party's failure to explain or deny evidence

413. In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his wilful suppression of evidence relating thereto, if such be the case.

Comment. See the *Comment* to Section 412.

CROSS-REFERENCES

Comment on defendant's failure to explain or deny case against him, see Constitution, Art. I, § 13; Penal Code § 1127
Definitions:
Evidence, see § 140
Inference, see § 600
Trier of fact, see § 235

DIVISION 4. JUDICIAL NOTICE

Comment. The statutory scheme in Division 4 is based on Article 2 (Rules 9-12) of the Uniform Rules of Evidence. The court is required to take judicial notice of the matters listed in Section 451. It may take judicial notice of the matters listed in Section 452 even when not requested to do so; it is required to notice them, however, if a party requests it and satisfies the requirements of Section 453.

There is some overlap between the matters listed in the mandatory notice provisions of Section 451 and the matters listed in the permissive-unless-a-request-is-made provisions of Section 452. Thus, when a matter falls within Section 451, judicial notice is mandatory even though the matter would otherwise fall within Section 452. The introductory clause of Section 452 makes this clear. For example, public statutory law is required to be noticed under subdivision (a) of Section 451 even though it would also be included under official acts of the legislative department under subdivision (c) of Section 452. Certain regulations are required to be noticed under subdivision (b) of Section 451 even though they might also be included under subdivisions (b) and (c) of Section 452. And indisputable matters of universal knowledge are required to be noticed under subdivision (f) of Section 451 even though such matters might be included under subdivisions (g) and (h) of Section 452.

There is also some overlap between the various categories listed in Section 452. However, this overlap will cause no difficulty because all of the matters listed in Section 452 are treated alike.

§ 450. Judicial notice may be taken only as authorized by law

450. Judicial notice may not be taken of any matter unless authorized or required by law.

Comment. Section 450 provides that judicial notice may not be taken of any matter unless authorized or required by law. See EVIDENCE CODE § 160, defining "law." Sections 451 and 452 state a number of matters which must or may be judicially noticed. Judicial notice of other matters is authorized or required by other statutes or by decisional law. *E.g.*, CIVIL CODE § 53; CORP. CODE § 6602. In this respect, the Evidence Code is consistent with existing law, for the principal judicial notice provision found in existing law—Code of Civil Procedure Section 1875 (superseded by this division of the Evidence Code)—does not limit judicial notice to those matters specified by statute. Judicial notice has been taken of various matters not so specified, principally of those matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and sim-

ilar materials is inherent in the requirement that it take judicial notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. *Cf. People v. Sterling Refining Co.*, 86 Cal. App. 558, 564, 261 Pac. 1080, 1083 (1927) (statutory authority to notice "public and private acts" of legislature held to authorize examination of legislative history of certain acts). See also *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948) (texts and authorities used by court in opinions determining constitutionality of statute prohibiting interracial marriages). Section 450 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining the rules of law that it is required to notice. Nor will Section 450 broaden or limit the extent to which a court may take judicial notice of any other matter not specified in Section 451 or 452.

CROSS-REFERENCES

Blood tests, conclusive effect of, see § 895
Definition:
Law, see § 160
Judicial notice of:
Administrative regulations of California state agencies, see Government Code §§ 11383, 11384
Another proceeding pending between same parties on same cause, see Code of Civil Procedure § 433
California Administrative Code and Administrative Register, contents of, see Government Code §§ 11383, 11384
Cities, organization and existence of, see Government Code § 34330.
City and city and county charters, see Constitution, Art. XI, § 8.
County charters, see Constitution, Art. XI, § 7½
Federal Register, certain material published in, see United States Code, Title 44, § 307
Foreign corporations, judicial notice of official acts concerning, see Corporations Code § 6602
Ordinances, judicial notice of in criminal actions, see Penal Code § 963
Recorded instruments containing restrictive racial covenants and the like, see Civil Code § 53
State Personnel Board rules and amendments, see Government Code § 18576
See also the *Cross-References* under Section 453

§ 451. Matters which must be judicially noticed

451. Judicial notice shall be taken of:

(a) The decisional, constitutional, and public statutory law of the United States and of every state of the United States and of the provisions of any charter described in Section 7½ or 8 of Article XI of the California Constitution.

(b) Any matter made a subject of judicial notice by Section 11383, 11384, or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.

(c) Rules of practice and procedure for the courts of this State adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

Comment. Judicial notice of the matters specified in Section 451 is *mandatory,* whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by this section.

Section 451 includes matters both of law and of fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations, and rules. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign nations and certain regulations and ordinances) are included under Section 452, rather than under Section 451, primarily because of the difficulty of ascertaining such matters. Subdivision (e) of Section 451 requires the court to judicially notice "the true signification of all English words and phrases and of all legal expressions." These are facts that must be judicially noticed in order to conduct meaningful proceedings. Similarly, subdivision (f) of Section 451 covers "universally known" facts.

Listed below are the matters that must be judicially noticed under Section 451.

California and federal law. The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (a). This requirement states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875 (superseded by the Evidence Code).

Law of sister states. The decisional, constitutional, and public statutory law in force in sister states must be judicially noticed under subdivision (a). California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section 451 requires notice of relevant decisions of *all* sister-state courts. If this be an extension of existing law, it is a desirable one, for the intermediate-appellate courts of sister states are as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On the necessity for a request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On

whether judicial notice is mandatory, see *In re Bartges,* 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in *Estate of Moore,* 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935). Section 451 requires such notice to be taken without a request being made.

Law of territories and possessions of the United States. The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States must be judicially noticed under subdivision (a). See the broad definition of "state" in EVIDENCE CODE § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

Charter provisions of California cities and counties. Judicial notice must be taken under subdivision (a) of the provisions of charters adopted pursuant to Section 7½ or 8 of Article XI of the California Constitution. Notice of these provisions is mandatory under the State Constitution. CAL. CONST., Art. XI, § 7½ (county charter), § 8 (charter of city or city and county).

Regulations of California and federal agencies. Judicial notice must be taken under subdivision (b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing law as found in Government Code Sections 11383 and 11384. Under subdivision (b), judicial notice must also be taken of the rules of the State Personnel Board. This, too, is existing law under Government Code Section 18576.

Subdivision (b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although Section 307 of Title 44 of the United States Code provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this *requires* notice by state courts. See *Broadway Fed. etc. Loan Ass'n v. Howard,* 133 Cal. App.2d 382, 386 note 4, 285 P.2d 61, 64 note 4 (1955) (referring to 44 U.S.C.A. §§ 301-314). *Compare* Note, 59 HARV. L. REV. 1137, 1141 (1946) (doubt expressed that notice is required), *with* Knowlton, *Judicial Notice,* 10 RUTGERS L. REV. 501, 504 (1956) ("it would seem that this provision is binding upon the state courts"). *Livermore v. Beal,* 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. *E.g., Pacific Solvents Co. v. Superior Court,* 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948) (orders and regulations); *People v. Mason,* 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (presidential and executive proclamations) (disapproved on other grounds in *People v. Friend,* 50

Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); *Downer v. Grizzly Livestock & Land Co.*, 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (rules and regulations). Section 451 makes the California law clear.

Rules of court. Judicial notice of the California Rules of Court is required under subdivision (c). These rules, adopted by the Judicial Council, are as binding on the parties as procedural statutes. *Cantillon v. Superior Court,* 150 Cal. App.2d 184, 309 P.2d 890 (1957). See *Albermont Petroleum, Ltd. v. Cunningham,* 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Likewise, the rules of pleading, practice, and procedure promulgated by the United States Supreme Court are required to be judicially noticed under subdivision (d).

The rules of the California and federal courts which are required to be judicially noticed under subdivisions (c) and (d) are, or should be, familiar to the court or easily discoverable from materials readily available to the court. However, this may not be true of the court rules of sister states or other jurisdictions nor, for example, of the rules of the various United States Courts of Appeals or local rules of a particular superior court. See *Albermont Petroleum, Ltd. v. Cunningham,* 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Judicial notice of these rules is permitted under subdivision (e) of Section 452 but is not required unless there is compliance with the provisions of Section 453.

Words, phrases, and legal expressions. Subdivision (e) requires the court to take judicial notice of "the true signification of all English words and phrases and of all legal expressions." This restates the same matter covered in subdivision 1 of Code of Civil Procedure Section 1875. Under existing law, however, it is not clear that judicial notice of these matters is mandatory.

"Universally known" facts. Subdivision (f) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. *Cf. People v. Tossetti,* 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (f) should be contrasted with subdivisions (g) and (h) of Section 452, which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Subdivisions (g) and (h) permit notice of facts and propositions that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. The facts must fulfill the requirements of subdivision (f) of Section 451 or subdivision (g) or (h) of Section 452. If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under this division, he may not "notice" it.

It is clear under existing law that the court may judicially notice the matters specified in subdivision (f); it is doubtful, however, that the court *must* notice them. See *Varcoe v. Lee,* 180 Cal. 338, 347, 181 Pac. 223, 227 (1919) (dictum). Since subdivision (f) covers universally

known facts, the parties ordinarily will expect the court to take judicial notice of them; the court should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

CROSS-REFERENCES

Definition:
State, see § 220

§ 452. Matters which may be judicially noticed

452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) Resolutions and private acts of the Congress of the United States and of the legislature of any state of the United States.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(f) The law of foreign nations and public entities in foreign nations.

(g) Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Specific facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Comment. Section 452 includes matters both of law and of fact. The court *may* take judicial notice of these matters, even when not requested to do so; it is *required* to notice them if a party requests it and satisfies the requirements of Section 453.

The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. However, if a party requests it and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. See EVIDENCE CODE § 453. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations.

Although Section 452 extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing

law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court. Under Section 453, this burden falls upon the party requesting that judicial notice be taken. In addition, the parties are entitled under Section 455 to a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that may be judicially noticed under Section 452 (and must be noticed if the conditions specified in Section 453 are met).

Resolutions and private acts. Subdivision (a) provides for judicial notice of resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Penal Code Section 963 is mandatory, whereas judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

Although no case in point has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. *Ellis v. Eastman,* 32 Cal. 447 (1867).

Regulations, ordinances, and similar legislative enactments. Subdivision (b) provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States or of any state, territory, or possession of the United States, including public entities therein. See the broad definition of "public entity" in EVIDENCE CODE § 200. The words "regulations and legislative enactments" include such matters as "ordinances" and other similar legislative enactments. Not all public entities legislate by ordinance.

This subdivision changes existing law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. *People v. Cowles,* 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956); *People v. Crittenden,* 93 Cal. App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. *Thompson v. Guyer-Hays,* 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); *County of Los Angeles v. Bartlett,* 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); *Becerra v. Hochberg,* 193 Cal.

App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Judicial notice of certain regulations of California and federal agencies is mandatory under subdivision (b) of Section 451. Subdivision (b) of Section 452 provides for judicial notice of California and federal regulations that are not included under subdivision (b) of Section 451 and, also, for judicial notice of regulations of other states and territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 CAL. JUR.2d *Evidence* § 24. Although no case in point has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

Official acts of the legislative, executive, and judicial departments. Subdivision (c) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. Subdivision (c) states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, the California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission. See WITKIN, CALIFORNIA EVIDENCE § 49 (1958), and 1963 Supplement thereto.

Court records and rules of court. Subdivisions (d) and (e) provide for judicial notice of the court records and rules of court of (1) any court of this State or (2) any court of record of the United States or of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. So far as court records are concerned, subdivision (d) states existing law. *Flores v. Arroyo*, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of subdivision (c) of Section 452 are broad enough to include court records, specific mention of these records in subdivision (d) is desirable in order to eliminate any uncertainty in the law on this point. See the *Flores* case, *supra.*

Subdivision (e) may change existing law so far as judicial notice of rules of court is concerned, but the provision is consistent with the modern philosophy of judicial notice as indicated by the holding in *Flores v. Arroyo, supra.* To the extent that subdivision (e) overlaps with subdivisions (c) and (d) of Section 451, notice is, of course, mandatory under Section 451.

Law of foreign nations. Subdivision (f) provides for judicial notice of the law of foreign nations and public entities in foreign nations. See the broad definition of "public entity" in EVIDENCE CODE § 200. Subdivision (f) should be read in connection with Sections 311, 453, and 454. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California

Law Revision Commission. CODE CIV. PROC. § 1875. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries* at I-1 (1957).

Subdivision (f) refers to "the law" of foreign nations and public entities in foreign nations. This makes all law, in whatever form, subject to judicial notice.

Matters of "common knowledge" and verifiable facts. Subdivision (g) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This subdivision states existing case law. *Varcoe v. Lee,* 180 Cal. 338, 181 Pac. 223 (1919); 18 CAL. JUR.2d *Evidence* § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and determining the tenor of the matter to be noticed.

Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world." To the extent that subdivisions (g) and (h) overlap subdivision (f) of Section 451, notice is, of course, mandatory under Section 451.

The matters covered by subdivisions (g) and (h) are included in Section 452, rather than Section 451, because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice of these matters is to be mandatory. See EVIDENCE CODE § 453 and the *Comment* thereto.

Under existing law, courts take judicial notice of the matters that are included under subdivisions (g) and (h), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

CROSS-REFERENCES

Definitions:
Public entity, see § 200
State, see § 220
Judicial notice of certain matters required, see § 451
See also the *Cross-References* under Section 453

§ 453. Compulsory judicial notice upon request

453. Judicial notice shall be taken of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Comment. Section 453 provides that the court must take judicial notice of any matter specified in Section 452 if a party requests that such notice be taken, furnishes the court with sufficient information to enable it to take judicial notice of the matter, and gives each adverse party sufficient notice of the request to prepare to meet it.

Section 453 is intended as a safeguard and not as a rigid limitation on the court's power to take judicial notice. The section does not affect the discretionary power of the court to take judicial notice under Section 452 where the party requesting that judicial notice be taken fails to give the requisite notice to each adverse party or fails to furnish sufficient information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. Hence, when he considers it appropriate, the judge may take judicial notice under Section 452 and may consult and use any source of pertinent information, whether or not furnished by the parties. However, where the matter noticed under Section 452 is one that is of substantial consequence to the action—even though the court may take judicial notice under Section 452 when the requirements of Section 453 have not been satisfied—the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. See EVIDENCE CODE § 455 and the *Comment* thereto.

The "notice" requirement. The party requesting the court to judicially notice a matter under Section 453 must give each adverse party sufficient notice, through the pleadings or otherwise, to enable him to prepare to meet the request. In cases where the notice given does not satisfy this requirement, the court may decline to take judicial notice. A somewhat similar notice to the adverse parties is required under subdivision 4 of Section 1875 of the Code of Civil Procedure when a request for judicial notice of the law of a foreign country is made. Section 453 broadens this existing requirement to cover all matters specified in Section 452.

The notice requirement is an important one since judicial notice is binding on the jury under Section 457. Accordingly, the adverse parties should be given ample notice so that they will have an opportunity to prepare to oppose the taking of judicial notice and to obtain information relevant to the tenor of the matter to be noticed.

Since Section 452 relates to a wide variety of facts and law, the notice requirement should be administered with flexibility in order to insure that the policy behind the judicial notice rules is properly implemented. In many cases, it will be reasonable to expect the notice to be given at or before the time of the pretrial conference. In other cases, matters of fact or law of which the court should take judicial

notice may come up at the trial. Section 453 merely requires reasonable notice, and the reasonableness of the notice given will depend upon the circumstances of the particular case.

The "sufficient information" requirement. Under Section 453, the court is not required to resort to any sources of information not provided by the parties. If the party requesting that judicial notice be taken under Section 453 fails to provide the court with "sufficient information," the judge may decline to take judicial notice. For example, if the party requests the court to take judicial notice of the specific gravity of gold, the party requesting that notice be taken must furnish the judge with definitive information as to the specific gravity of gold. The judge is not required to undertake the necessary research to determine the fact, though, of course, he is not precluded from doing such research if he so desires.

Section 453 does not define "sufficient information"; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. The court justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems.

Burden on party requesting that judicial notice be taken. Where a request is made to take judicial notice under Section 453, the court may decline to take judicial notice unless the party requesting that notice be taken persuades the judge that the matter is one that properly may be noticed under Section 452 and also persuades the judge as to the tenor of the matter to be noticed. The degree of the judge's persuasion regarding a particular matter is determined by the subdivision of Section 452 which authorizes judicial notice of the matter. For example, if the matter is claimed to be a fact of common knowledge under paragraph (g) of Section 452, the party must persuade the judge that the fact is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, *i.e.*, that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under paragraph (b) of Section 452, the party must persuade the judge that a valid ordinance exists and also as to its tenor; but the judge need not believe that no reasonable person could conclude otherwise.

Without regard to the evidence supplied by the party requesting that judicial notice be taken, the judge's determination to take judicial notice of a matter specified in Section 452 will be upheld on appeal if the matter was properly noticed. The reviewing court may resort to any information, whether or not available at the trial, in order to sustain the proper taking of judicial notice. See EVIDENCE CODE § 459. On the other hand, even though a party requested that judicial notice be taken under Section 453 and gave notice to each adverse party in compliance with subdivision (a) of Section 453, the decision of the judge not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to

the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter.

CROSS-REFERENCES

Accusatory pleading not required to state matters judicially noticed, see Penal Code § 961
Pleading ordinance:
Civil action, see Code of Civil Procedure § 459
Criminal action, see Penal Code § 963

§ 454. Information that may be used in taking judicial notice

454. In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

(a) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(b) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

Comment. Since one of the purposes of judicial notice is to simplify the process of proofmaking, the judge should be given considerable latitude in deciding what sources are trustworthy. This section permits the court to use any source of pertinent information, including the advice of persons learned in the subject matter. It probably restates existing law as found in Section 1875 of the Code of Civil Procedure. See *Estate of McNamara,* 181 Cal. 82, 89-91, 183 Pac. 552, 555 (1919); *Rogers v. Cady,* 104 Cal. 288, 290, 38 Pac. 81 (1894) (dictum); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article II. Judicial Notice),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 850-851 (1964).

CROSS-REFERENCES

Exclusion of cumulative or unduly prejudicial evidence, see § 352
Privileges, see §§ 900-1073

§ 455. Opportunity to present information to court

455. With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action:

(a) If the court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Comment. Section 455 provides procedural safeguards designed to afford the parties reasonable opportunity to be heard both as to the propriety of taking judicial notice of a matter and as to the tenor of the matter to be noticed.

Subdivision (a). This subdivision guarantees to the parties a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. In a jury case, the subdivision provides the parties with an opportunity to present their information to the judge before a jury instruction based on a matter judicially noticed is given. Where the matter subject to judicial notice relates to a cause tried by the court, the subdivision guarantees the parties an opportunity to dispute the taking of judicial notice of the matter before the cause is submitted for decision. If the judge does not discover that a matter should be judicially noticed until after the cause is submitted for decision, he may, of course, order the cause to be reopened for the purpose of permitting the parties to provide him with information concerning the matter.

Subdivision (a) is limited in its application to those matters specified in subdivision (f) of Section 451 or in Section 452 that are of substantial consequence to the determination of the action, for it would not be practicable to make the subdivision applicable to the other matters listed in Section 451 or to matters that are of inconsequential significance.

What constitutes a "reasonable opportunity" to "present . . . information" will depend upon the complexity of the matter and its importance to the case. For example, in a case where there is no dispute as to the existence and validity of a city ordinance, no formal hearing would be necessary to determine the propriety of taking judicial notice of the ordinance and of its tenor. But, where there is a complex question as to the tenor of foreign law applicable to the case, the granting of a hearing under subdivision (a) would be mandatory. The New York courts have so construed their judicial notice statute, saying that an opportunity for a litigant to know what the deciding tribunal is considering and to be heard with respect to both law and fact is guaranteed by due process of law. *Arams v. Arams,* 182 Misc. 328, 182 Misc. 336, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

Subdivision (b). If the court resorts to sources of information not previously known to the parties, this subdivision requires that such information and its source be made a part of the record when it relates to taking judicial notice of a matter specified in subdivision (f) of Section 451 or in Section 452 that is of substantial consequence to the determination of the action. This requirement is based on a somewhat similar requirement found in Code of Civil Procedure Section 1875 regarding the law of a foreign nation. Making the information and its source a part of the record assures its availability for examination by the parties and by a reviewing court. In addition, subdivision (b) requires the court to give the parties a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken.

CROSS-REFERENCES

Definition:
Action, see § 105

§ 456. Noting for record denial of request to take judicial notice

456. If the court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.

Comment. Section 456 requires the judge to advise the parties and indicate for the record at the earliest practicable time any denial of a request to take judicial notice of a matter. The requirement is imposed in order to provide the parties with an adequate opportunity to submit evidence on any matter as to which judicial notice was anticipated but not taken. No comparable requirement is found in existing law. Compare EVIDENCE CODE § 455 and the *Comment* thereto.

§ 457. Instructing jury on matter judicially noticed

457. If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the court may, and upon request shall, instruct the jury to accept as a fact the matter so noticed.

Comment. Section 457 makes matters judicially noticed binding on the jury and thereby eliminates any possibility of presenting to the jury evidence disputing the fact as noticed by the court. The section is limited to instruction on a matter that would otherwise have been for determination by the jury; instruction of juries on matters of law is not a matter of evidence and is covered by the general provisions of law governing instruction of juries. The section states the substance of the existing law as found in Code of Civil Procedure Section 2102. See *People v. Mayes,* 113 Cal. 618, 625-626, 45 Pac. 860, 862 (1896); *Gallegos v. Union-Tribune Publishing Co.,* 195 Cal. App.2d 791, 797-798, 16 Cal. Rptr. 185, 189-190 (1961).

§ 458. Judicial notice by trial court in subsequent proceedings

458. The failure or refusal of the trial court to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division.

Comment. This section provides that the failure or even the refusal of the court to take judicial notice of a matter at the trial does not bar the trial judge, or another trial judge, from taking judicial notice of that matter in a subsequent proceeding, such as a hearing on a motion for new trial or the like. Although no California case in point has been found, it seems safe to assume that the trial judge has the power to take judicial notice of a matter in subsequent proceedings, since the appellate court can properly take judicial notice of any matter that the trial court could properly notice. See *People v. Tossetti,* 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

CROSS-REFERENCES

Definition:
Action, see § 105

§ 459. Judicial notice by reviewing court

459. (a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Comment. Section 459 sets forth a separate set of rules for the taking of judicial notice by a reviewing court.

Subdivision (a). Subdivision (a) requires that a reviewing court take judicial notice of any matter that the trial court properly noticed or was obliged to notice. This means that the matters specified in Section 451 must be judicially noticed by the reviewing court even though the trial court failed to take judicial notice of such matters. A matter specified in Section 452 also must be judicially noticed by the reviewing court if such matter was properly noticed by the trial court in the exercise of its discretion or an appropriate request was made at the trial level and the party making the request satisfied the conditions specified in Section 453. However, if the trial court erred, the reviewing court is not bound by the tenor of the notice taken by the trial court.

Having taken judicial notice of such a matter, the reviewing court may or may not apply it in the particular case on appeal. The effect to be given to matters judicially noticed on appeal, where the question has not been raised below, depends on factors that are not evidentiary in character and are not mentioned in this code. For example, the appellate court is required to notice the matters of law mentioned in Section 451, but it may hold that an error which the appellant has "invited" is not reversible error or that points not urged in the trial court may not be advanced on appeal, and refuse, therefore, to apply the law to the pending case. These principles do not mean that the appellate court does not take judicial notice of the applicable law;

they merely mean that, for reasons of policy governing appellate review, the appellate court may refuse to apply the law to the case before it.

In addition to requiring the reviewing court to judicially notice those matters which the trial court properly noticed or was required to notice, the subdivision also provides authority for the reviewing court to exercise the same discretionary power to take judicial notice as is possessed by the trial court.

Subdivision (b). The reviewing court may consult any source of pertinent information for the purpose of determining the propriety of taking judicial notice or the tenor of the matter to be noticed. This includes, of course, the power to consult such sources for the purpose of sustaining or reversing the taking of judicial notice by the trial court. As to the rights of the parties when the reviewing court consults such materials, see subdivision (d) and the *Comment* thereto.

Subdivision (c). This subdivision provides the parties with the same procedural protection when judicial notice is taken by the reviewing court as is provided by Section 455(a).

Subdivision (d). This subdivision assures the parties the same procedural safeguard at the appellate level that they have in the trial court: If the appellate court resorts to sources of information not included in the record in the action or proceeding, or not received in open court at the appellate level, either to sustain the tenor of the notice taken by the trial court or to notice a matter in a tenor different from that noticed by the trial court, the parties must be given a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken. See EVIDENCE CODE § 455(b) and the *Comment* thereto.

CROSS-REFERENCES

Definition:
Action, see § 105

DIVISION 5. BURDEN OF PROOF; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS AND INFERENCES

CHAPTER 1. BURDEN OF PROOF

Article 1. General

§ 500. Party who has the burden of proof

500. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

Comment. As used in Section 500, the burden of proof means the obligation of a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or nonexistence of a fact. See EVIDENCE CODE §§ 115, 190. If this requisite degree of conviction is not achieved as to the existence of a particular fact, the trier of fact must assume that the fact does not exist. MORGAN, BASIC PROBLEMS OF EVIDENCE 19 (1957); 9 WIGMORE, EVIDENCE § 2485 (3d ed. 1940). Usually, the burden of proof requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence—a degree of proof usually described as proof by a preponderance of the evidence. EVIDENCE CODE § 115; WITKIN, CALIFORNIA EVIDENCE § 59 (1958). However, in some instances, the burden of proof requires a party to produce a substantially greater degree of belief in the mind of the trier of fact concerning the existence of the fact—a burden usually described by stating that the party must introduce clear and convincing proof (WITKIN, CALIFORNIA EVIDENCE § 60 (1958)) or, with respect to the prosecution in a criminal case, proof beyond a reasonable doubt (PENAL CODE § 1096).

The defendant in a criminal case sometimes has the burden of proof in regard to a fact essential to negate his guilt. However, in such cases, he usually is not required to persuade the trier of fact as to the existence of such fact; he is merely required to raise a reasonable doubt in the mind of the trier of fact as to his guilt. EVIDENCE CODE § 501; *People v. Bushton,* 80 Cal. 160, 22 Pac. 127 (1889). If the defendant produces no evidence concerning the fact, there is no issue on the matter to be decided by the jury; hence, the jury may be instructed that the nonexistence of the fact must be assumed. See, *e.g., People v. Harmon,* 89 Cal. App.2d 55, 58, 200 P.2d 32, 34 (1948) (prosecution for narcotics possession; jury instructed "that the burden of proof is upon the defendant that he possessed a written prescription and that in the absence of such evidence it must be assumed that he had no such prescription"). See also *People v. Boo Doo Hong,* 122 Cal. 606, 607, 55 Pac. 402, 403 (1898).

Section 1981 of the Code of Civil Procedure (superseded by Evidence Code Section 500) provides that the party holding the affirmative of the issue must produce the evidence to prove it and that the burden of proof lies on the party who would be defeated if no evidence were given on either side. This section has been criticized as establishing a meaningless standard:

> The "affirmative of the issue" lacks any substantial objective meaning, and the allocation of the burden actually requires the application of several rules of practice and policy, not entirely consistent and not wholly reliable. [WITKIN, CALIFORNIA EVIDENCE § 56 at 72-73 (1958).]
>
> That the burden is on the party having the affirmative [or] that a party is not required to prove a negative . . . is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form. Thus a plaintiff's exercise of ordinary care equals absence of contributory negligence, in the minority of jurisdictions which place this element in plaintiff's case. In any event, the proposition seems simply not to be so. [Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 11 (1959).]

"The basic rule, which covers most situations, is that whatever facts a party must affirmatively plead he also has the burden of proving." WITKIN, CALIFORNIA EVIDENCE § 56 at 73 (1958). Section 500 follows this basic rule. However, Section 500 is broader, applying to issues not necessarily raised in the pleadings.

Under Section 500, the burden of proof as to a particular fact is normally on the party to whose case the fact is essential. "[W]hen a party seeks relief the burden is upon him to prove his case, and he cannot depend wholly upon the failure of the defendant to prove his defenses." *Cal. Employment Comm'n v. Malm,* 59 Cal. App.2d 322, 323, 138 P.2d 744, 745 (1943). And, "as a general rule, the burden is on the defendant to prove new matter alleged as a defense . . . , even though it requires the proof of a negative." *Wilson v. California Cent. R.R.,* 94 Cal. 166, 172, 29 Pac. 861, 864 (1892).

Section 500 does not attempt to indicate what facts may be essential to a particular party's claim for relief or defense. The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence.

The general rule allocating the burden of proof applies "except as otherwise provided by law." The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. In determining the incidence of the burden of proof, "the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." 9 WIGMORE, EVIDENCE § 2486 at 275 (3d ed. 1940).

Under existing California law, certain matters have been called "presumptions" even though they do not fall within the definition contained in Code of Civil Procedure Section 1959 (superseded by Evidence Code Section 600). Both Section 1959 and Evidence Code Section 600 define a presumption to be an assumption or conclusion of fact

that the law requires to be drawn from the proof or establishment of some other fact. Despite the statutory definition, subdivisions 1 and 4 of Code of Civil Procedure Section 1963 (superseded by Sections 520 and 521 of the Evidence Code) provide presumptions that a person is innocent of crime or wrong and that a person exercises ordinary care for his own concerns. Similarly, some cases refer to a presumption of sanity. It is apparent that these so-called presumptions do not arise from the establishment or proof of a fact in the action. In fact, they are not presumptions at all but are preliminary allocations of the burden of proof in regard to the particular issue. This preliminary allocation of the burden of proof may be satisfied in particular cases by proof of a fact giving rise to a presumption that does affect the burden of proof. For example, the initial burden of proving negligence may be satisfied in a particular case by proof that undamaged goods were delivered to a bailee and that such goods were lost or damaged while in the bailee's possession. Upon such proof, the bailee would have the burden of proof as to his lack of negligence. *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 205 P.2d 1037 (1949). *Cf.* COM. CODE § 7403.

Because the assumptions referred to above do not meet the definition of a presumption contained in Section 600, they are not continued in this code as presumptions. Instead, they appear in the next article in several sections allocating the burden of proof on specific issues. See Article 2 (Sections 520-522).

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Law, see § 160
Proof of guilt beyond reasonable doubt, see § 501; Penal Code § 1096

§ 501. Burden of proof in criminal action generally

501. Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096.

Comment. A statute assigning the burden of proof may require the party to whom the burden is assigned to raise a reasonable doubt in the mind of the trier of fact or to persuade the trier of fact by a preponderance of evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. See EVIDENCE CODE § 115.

Sections 520–522 (which assign the burden of proof on specific issues) may, at times, assign the burden of proof to the defendant in a criminal action. Elsewhere in the codes are other sections that either specifically allocate the burden of proof to the defendant in a criminal action or have been construed to allocate the burden of proof to the defense. For example, Health and Safety Code Section 11721 provides specifically that, in a prosecution for the use of narcotics, it is the burden of the defense to show that the narcotics were administered by or under the direction of a person licensed to prescribe and administer narcotics. Health and Safety Code Section 11500, on the other hand, prohibits the possession of narcotics but provides an exception for narcotics possessed pursuant to a prescription. The courts have construed this section to place the burden of proof on the defense to show that the exception applies and that the narcotics were possessed pursuant to a pre-

scription. *People v. Marschalk*, 206 Cal. App.2d 346, 23 Cal. Rptr. 743 (1962); *People v. Bill*, 140 Cal. App. 389, 392-394, 35 P.2d 645, 647-648 (1934).

Section 501 is intended to make it clear that the statutory allocations of the burden of proof appearing in this chapter and elsewhere in the codes are subject to Penal Code Section 1096, which requires that a criminal defendant be proved guilty beyond a reasonable doubt, *i.e.*, that the statutory allocations do not (except on the issue of insanity) require the defendant to persuade the trier of fact of his innocence. Under Evidence Code Section 522, as under existing law, the defendant must prove his insanity by a preponderance of the evidence. *People v. Daugherty*, 40 Cal.2d 876, 256 P.2d 911 (1953). However, where a statute allocates the burden of proof to the defendant on any other issue relating to the defendant's guilt, the defendant's burden, as under existing law, is merely to raise a reasonable doubt as to his guilt. *People v. Bushton*, 80 Cal. 160, 22 Pac. 127 (1889). Section 501 also makes it clear that, when a statute assigns the burden of proof to the prosecution in a criminal action, the prosecution must discharge that burden by proof beyond a reasonable doubt.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Criminal action, see § 130
Statute, see § 230
Proof of guilt beyond reasonable doubt, see Penal Code § 1096

§ 502. Instructions on burden of proof

502. The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Comment. Section 502 supersedes subdivision 5 of Code of Civil Procedure Section 2061.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Proof, see § 190

Article 2. Burden of Proof on Specific Issues

§ 520. Claim that person guilty of crime or wrongdoing

520. The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

Comment. Section 520 restates the substance of and supersedes subdivision 1 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Person, see § 175
Proof of guilt beyond reasonable doubt, see § 501; Penal Code § 1096

§ 521. Claim that person did not exercise care

521. The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

Comment. Section 521 supersedes the presumption in subdivision 4 of Code of Civil Procedure Section 1963. Under existing law, the presumption is considered "evidence"; while under the Evidence Code, it is not. See EVIDENCE CODE § 600 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Person, see § 175

§ 522. Claim that person is or was insane

522. The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

Comment. Section 522 codifies an allocation of the burden of proof that is frequently referred to in the cases as a presumption. See, *e.g.*, *People v. Daugherty*, 40 Cal.2d 876, 899, 256 P.2d 911, 925-926 (1953).

CROSS-REFERENCES

Definition:
Burden of proof, see § 115

CHAPTER 2. BURDEN OF PRODUCING EVIDENCE

§ 550. Party who has the burden of producing evidence

550. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof. Thereafter, the burden of producing evidence as to a particular fact is on the party who would suffer a finding against him on that fact in the absence of further evidence.

Comment. Section 550 deals with the allocation of the burden of producing evidence. At the outset of the case, this burden will coincide with the burden of proof. 9 WIGMORE, EVIDENCE § 2487 at 279 (3d ed. 1940). However, during the course of the trial, the burden may shift from one party to another, irrespective of the incidence of the burden of proof. For example, if the party with the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party, whether or not the presumption is one that affects the burden of proof. In addition, a party may introduce evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence, in which case the burden of producing evidence would shift to the opposing party to produce some evidence. These principles are in accord with well-settled California law. See discussion in WITKIN, CALIFORNIA EVIDENCE §§ 53-56 (1958). See also 9 WIGMORE, EVIDENCE § 2487 (3d ed. 1940).

CROSS-REFERENCES

Definitions:
Burden of producing evidence, see § 110
Burden of proof, see § 115
Evidence, see § 140

CHAPTER 3. PRESUMPTIONS AND INFERENCES

Article 1. General

§ 600. Presumption and inference defined

600. (a) Subject to Section 607, a presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

(b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

Comment. Except for the limitation at the beginning of the section, the definition of a presumption in Section 600 is substantially the same as that contained in Code of Civil Procedure Section 1959: "A presumption is a deduction which the law expressly directs to be made from particular facts." Section 600 was derived from Rule 13 of the Uniform Rules of Evidence and supersedes Code of Civil Procedure Section 1959.

The reference to Section 607 appears in this section because, under the Evidence Code, a rebuttable presumption cannot require the jury to find a fact essential to the guilt of a defendant in a criminal case; it can merely authorize such a finding. See EVIDENCE CODE § 607 and the *Comment* thereto.

The second sentence of subdivision (a) may be unnecessary in light of the definition of "evidence" in Section 140—"testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Presumptions, then, are not "evidence" but are conclusions that the law requires to be drawn (in the absence of a sufficient contrary showing) when some other fact is proved or otherwise established in the action.

Nonetheless, the second sentence has been added here to repudiate specifically the rule of *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931). That case held that a presumption is evidence that must be weighed against conflicting evidence; and in *Scott v. Burke*, 39 Cal.2d 388, 247 P.2d 313 (1952), the Supreme Court held that conflicting presumptions must be weighed against each other. These decisions require the jury to perform an intellectually impossible task. The jury is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and to determine which "evidence" is of greater probative force. Or else, the jury is required to accept the fact that the law requires two opposing conclusions and to determine which required conclusion is of greater probative force.

Moreover, the doctrine that a presumption is evidence imposes upon the party with the burden of proof a much higher burden of proof than is warranted. For example, if a party with the burden of proof has a presumption invoked against him and if the presumption remains in the case as evidence even though the jury believes that he has produced a preponderance of the evidence, the effect is that he must produce some additional but unascertainable quantum of proof in order to dispel the effect of the presumption. See *Scott v. Burke*, 39 Cal.2d 388, 405-406,

247 P.2d 313, 323-324 (1952) (dissenting opinion). The doctrine that a presumption is evidence gives no guidance to the jury or to the parties as to the amount of this additional proof. The most that should be expected of a party in a civil case is that he prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence). The most that should be expected of the prosecution in a criminal case is that it establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.

To avoid the confusion engendered by the doctrine that a presumption is evidence, this code describes "evidence" as the matters presented in judicial proceedings and uses presumptions solely as devices to aid in determining the facts from the evidence presented.

The definition of "inference" in subdivision (b) restates in substance the definition contained in Code of Civil Procedure Sections 1958 and 1960. Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence.

CROSS-REFERENCES

Definitions:
Action, see § 105
Evidence, see § 140
Law, see § 160
Effect of presumption establishing element of crime, see § 607
Prima facie evidence, see § 602
See also the *Cross-References* under Sections 601, 602, 630, 660

§ 601. Classification of presumptions

601. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

Comment. Under existing law, some presumptions are conclusive. The court or jury is required to find the existence of the presumed fact regardless of the strength of the opposing evidence. The conclusive presumptions are specified in Section 1962 of the Code of Civil Procedure (superseded by Article 2 (Sections 620-624) of this chapter).

Under existing law, too, all presumptions that are not conclusive are rebuttable presumptions. CODE CIV. PROC. § 1961 (superseded by EVIDENCE CODE § 601). However, the existing statutes make no attempt to classify the rebuttable presumptions.

For several decades, courts and legal scholars have wrangled over the purpose and function of presumptions. The view espoused by Professors Thayer (THAYER, PRELIMINARY TREATISE ON EVIDENCE 313-352 (1898)) and Wigmore (9 WIGMORE, EVIDENCE §§ 2485-2491 (3d ed. 1940)), accepted by most courts (see Morgan, *Presumptions,* 10 RUTGERS L. REV. 512, 516 (1956)), and adopted by the American Law Institute's Model Code of Evidence, is that a presumption is a preliminary assumption of fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. In Professor Thayer's view, a presumption

merely reflects the judicial determination that the same conclusionary fact exists so frequently when the preliminary fact exists that, once the preliminary fact is established, proof of the conclusionary fact may be dispensed with unless there is actually some contrary evidence:

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. [THAYER, PRELIMINARY TREATISE ON EVIDENCE 326 (1898).]

Professors Morgan and McCormick argue that a presumption should shift the burden of proof to the adverse party. MORGAN, SOME PROBLEMS OF PROOF 81 (1956); MCCORMICK, EVIDENCE § 317 at 671-672 (1954). They believe that presumptions are created for reasons of policy and argue that, if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium, and, *a fortiori*, it should be of sufficient weight to require a finding if the trier of fact does not believe the contrary evidence.

The classification of presumptions in the Evidence Code is based on a third view suggested by Professor Bohlen in 1920. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920). Underlying the presumptions provisions of the Evidence Code is the conclusion that the Thayer view is correct as to some presumptions, but that the Morgan view is right as to others. The fact is that presumptions are created for a variety of reasons, and no single theory or rationale of presumptions can deal adequately with all of them. Hence, the Evidence Code classifies all rebuttable presumptions as either (1) presumptions affecting the burden of producing evidence (essentially Thayer presumptions), or (2) presumptions affecting the burden of proof (essentially Morgan presumptions).

Sections 603 and 605 set forth the criteria by which the two classes of rebuttable presumptions may be distinguished, and Sections 604, 606, and 607 prescribe their effect. Articles 3 and 4 (Sections 630-667) classify many presumptions found in California law; but many other presumptions, both statutory and common law, must await classification by the courts in accordance with the criteria contained in Sections 603 and 605.

The classification scheme contained in the Evidence Code follows a distinction that appears in the California cases. Thus, for example, the courts have at times held that presumptions do not affect the burden of proof. *Estate of Eakle*, 33 Cal. App.2d 379, 91 P.2d 954 (1939) (presumption of undue influence); *Valentine v. Provident Mut. Life Ins. Co.*, 12 Cal. App.2d 616, 55 P.2d 1243 (1936) (presumption of death from seven years' absence). And at other times the courts have held that certain presumptions do affect the burden of proof. *Estate of Nickson*, 187 Cal. 603, 203 Pac. 106 (1921) ("clear and convincing

proof" required to overcome presumption of community property); *Estate of Walker,* 180 Cal. 478, 181 Pac. 792 (1919) ("clear and satisfactory proof" required to overcome presumption of legitimacy). The cases have not, however, explicitly recognized the distinction, nor have they applied it consistently. *Compare Estate of Eakle, supra* (presumption of undue influence does not affect burden of proof), *with Estate of Witt,* 198 Cal. 407, 245 Pac. 197 (1926) (presumption of undue influence must be overcome with "the clearest and most satisfactory evidence"). The Evidence Code clarifies the law relating to presumptions by identifying the distinguishing factors, and it provides a measure of certainty by classifying a number of specific presumptions.

CROSS-REFERENCES

Conclusive presumptions, see §§ 620–624
Definition:
Presumption, see § 600
Presumptions affecting the burden of producing evidence, see §§ 603, 604, 607, 630–645
Presumptions affecting the burden of proof, see §§ 605–607, 660–667
Prima facie evidence, see § 602

§ 602. Statute making one fact prima facie evidence of another fact

602. A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

Comment. Section 602 indicates the construction to be given to the large number of statutes scattered through the codes that state that one fact or group of facts is prima facie evidence of another fact. See, *e.g.,* AGRIC. CODE § 18, COM. CODE § 1202, REV. & TAX. CODE § 6714. In some instances, these statutes have been enacted for reasons of public policy that require them to be treated as presumptions affecting the burden of proof. See *People v. Schwartz,* 31 Cal.2d 59, 63, 187 P.2d 12, 14 (1947); *People v. Mahoney,* 13 Cal.2d 729, 732-733, 91 P.2d 1029, 1030-1031 (1939). It seems likely, however, that in many instances such statutes are not intended to affect the burden of proof but only the burden of producing evidence. Section 602 provides that these statutes are to be regarded as rebuttable presumptions. Hence, unless some specific language applicable to the particular statute in question indicates whether it affects the burden of proof or only the burden of producing evidence, the courts will be required to classify these statutes as presumptions affecting the burden of proof or the burden of producing evidence in accordance with the criteria set forth in Sections 603 and 605.

CROSS-REFERENCES

Copies of Spanish title papers as prima facie evidence, see § 1605
Deed pursuant to court process as prima facie evidence, see § 1603
Definitions:
Rebuttable presumption, see § 601
Statute, see § 230
Official certificate of purchase as prima facie evidence, see § 1604
Official record as prima facie evidence, see § 1600
Patent for mineral lands as prima facie evidence, see § 1602
See also the *Cross-References* under Sections 630, 660

§ 603. Presumption affecting the burden of producing evidence defined

603. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

Comment. Sections 603 and 605 set forth the criteria for determining whether a particular presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. Many presumptions are classified in Articles 3 and 4 (Sections 630-667) of this chapter. In the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof by applying the standards contained in Sections 603 and 605.

Section 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases. *Cf.* BOHLEN, STUDIES IN THE LAW OF TORTS 644 (1926). Typical of such presumptions are the presumption that a mailed letter was received (Section 641) and presumptions relating to the authenticity of documents (Sections 643-645).

The presumptions described in Section 603 are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact.

CROSS-REFERENCES

Definitions:
Action, see § 105
Burden of producing evidence, see § 110
Presumption, see § 600
Presumptions affecting the burden of producing evidence, see §§ 630–645
See also the *Cross-References* under Section 630

§ 604. Effect of presumption affecting burden of producing evidence

604. Subject to Section 607, the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall

determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

Comment. Section 604 describes the manner in which a presumption affecting the burden of producing evidence operates. Such a presumption is merely a preliminary assumption in the absence of contrary evidence, *i.e.,* evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. For example, if a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions. If there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge should instruct the jury concerning the presumption. If the basic fact from which the presumption arises is established (by the pleadings, by stipulation, by judicial notice, etc.) so that the existence of the basic fact is not a question of fact for the jury, the jury should be instructed that the presumed fact is also established. If the basic fact is a question of fact for the jury, the judge should charge the jury that, if it finds the basic fact, the jury must also find the presumed fact. MORGAN, BASIC PROBLEMS OF EVIDENCE 36-38 (1957).

If the prosecution in a criminal action relies on a presumption affecting the burden of producing evidence to establish an element of the crime with which the defendant is charged and if there is no evidence as to the nonexistence of the presumed fact, the jury should be instructed that it is permitted to find the presumed fact but is not required to do so. See EVIDENCE CODE § 607 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Burden of producing evidence, see § 110
Evidence, see § 140
Inference, see § 600
Presumption, see § 600
Trier of fact, see § 235
Effect of presumption that establishes element of crime, see § 607

§ 605. Presumption affecting the burden of proof defined

605. A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the

stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

Comment. Section 605 describes a presumption affecting the burden of proof. Such presumptions are established in order to carry out or to effectuate some public policy other than or in addition to the policy of facilitating the trial of actions.

Frequently, presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence. For example, the presumption of death from seven years' absence (Section 667) exists in part to facilitate the disposition of actions by supplying a rule of thumb to govern certain cases in which there is likely to be no direct evidence of the presumed fact. But the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy (perhaps 30 or 40 years) that underlies the presumption indicates that it should be a presumption affecting the burden of proof.

Frequently, too, a presumption affecting the burden of proof will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on the probability that most marriages are valid. However, an underlying logical inference is not essential. In fact, the lack of an underlying inference is a strong indication that the presumption affects the burden of proof. Only the needs of public policy can justify the direction of a particular assumption that is not warranted by the application of probability and common experience to the known facts. Thus, the total lack of any inference underlying the presumption of the negligence of an employer that arises from his failure to secure the payment of workmen's compensation (LABOR CODE § 3708) is a clear indication that the presumption is based on public policy and affects the burden of proof. Similarly, the fact that the presumption of death from seven years' absence may conflict directly with the logical inference that life continues for its normal expectancy is an indication that the presumption is based on public policy and, hence, affects the burden of proof.

CROSS-REFERENCES

Definitions:
Action, see § 105
Burden of proof, see § 115
Presumption, see § 600
Presumptions affecting the burden of proof, see §§ 660–667

§ 606. Effect of presumption affecting burden of proof

606. Subject to Section 607, the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

Comment. Section 606 describes the manner in which a presumption affecting the burden of proof operates. In the ordinary case, the party against whom it is invoked will have the burden of proving the nonexistence of the presumed fact by a preponderance of the evidence. Certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof. When such a presumption is relied on, the party against whom the presumption operates will have a heavier burden of proof and will be required to persuade the trier of fact of the nonexistence of the presumed fact by proof " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " *Sheehan v. Sullivan,* 126 Cal. 189, 193, 58 Pac. 543, 544 (1899).

If the party against whom the presumption operates already has the same burden of proof as to the nonexistence of the presumed fact that is assigned by the presumption, the presumption can have no effect on the case and no instruction in regard to the presumption should be given. See *Speck v. Sarver,* 20 Cal.2d 585, 590, 128 P.2d 16, 19 (1942) (dissenting opinion by Traynor, J.); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof,* 47 HARV. L. REV. 59, 69 (1933). If the evidence is not sufficient to sustain a finding of the nonexistence of the presumed fact, the judge's instructions will be the same as if the presumption were merely a presumption affecting the burden of producing evidence. See the *Comment* to Section 604. If there is evidence of the nonexistence of the presumed fact, the judge should instruct the jury on the manner in which the presumption affects the factfinding process. If the basic fact from which the presumption arises is so established that the existence of the basic fact is not a question of fact for the jury (as, for example, by the pleadings, by judicial notice, or by stipulation of the parties), the judge should instruct the jury that the existence of the presumed fact is to be assumed until the jury is persuaded to the contrary by the requisite degree of proof (proof by a preponderance of the evidence, clear and convincing proof, etc.). See MCCORMICK, EVIDENCE § 317 at 672 (1954). If the basic fact is a question of fact for the jury, the judge should instruct the jury that, if it finds the basic fact, it must also find the presumed fact unless persuaded of the nonexistence of the presumed fact by the requisite degree of proof. MORGAN, BASIC PROBLEMS OF EVIDENCE 38 (1957).

In a criminal case, a presumption affecting the burden of proof may be relied upon by the prosecution *to establish an element of the crime* with which the defendant is charged. But, in such a case, the effect of the presumption on the factfinding process and the nature of the instructions differ substantially from those described in Section 606 and this *Comment.* See EVIDENCE CODE § 607 and the *Comment* thereto. On other issues, a presumption affecting the burden of proof will have the same effect in a criminal case as it does in a civil case, and the instructions will be the same.

CROSS-REFERENCES

Definition:
Burden of proof, see § 115
Effect of presumption that establishes element of crime, see § 607

§ 607. Effect of presumption that establishes an element of a crime

607. When a rebuttable presumption operates in a criminal action to establish an element of the crime with which the defendant is charged, neither the burden of producing evidence nor the burden of proof is imposed upon the defendant; but, if the trier of fact finds that the facts that give rise to the presumption have been proved beyond a reasonable doubt, the trier of fact may but is not required to find that the presumed fact has also been proved beyond a reasonable doubt.

Comment. Under Section 607, rebuttable presumptions apply somewhat differently when invoked to establish a fact essential to the guilt of a criminal defendant than they do when invoked to establish some other fact.

If a presumption affecting the burden of producing evidence is invoked to establish a fact essential to a defendant's guilt, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears from the case (see EVIDENCE CODE § 604) and the jury should be given no instruction on the effect of the presumption. If there is no contrary evidence, however, the judge should instruct the jury that, if it finds that the facts giving rise to the presumption have been proved beyond a reasonable doubt, it is *permitted* to find that the presumed fact has been proved beyond a reasonable doubt.

If a presumption affecting the burden of proof is invoked to establish a fact essential to a defendant's guilt, whether or not there is contrary evidence, the judge should instruct the jury that, if it finds that the facts giving rise to the presumption have been proved beyond a reasonable doubt, it is permitted—but not required—to find that the presumed fact has also been proved beyond a reasonable doubt.

Thus, under the Evidence Code, a rebuttable presumption cannot place either the burden of producing evidence or the burden of proof on the defendant concerning a fact constituting an element of the crime with which he is charged. Those burdens may be placed on a defendant only by statutes so providing. *Cf.* Sections 500, 501, and 550 and the *Comments* thereto. See also the comment on affirmative defenses in MODEL PENAL CODE, TENTATIVE DRAFT No. 4 at 110-112 (1955).

Effect on existing law. Section 607 changes existing California law and practice in two respects. However, because of the confusion engendered by conflicting instructions that are now given in criminal cases, it is uncertain whether the change will have any practical significance in the trial of criminal cases.

First, Section 607 may change the California law by providing that a presumption cannot *require* a jury in a criminal case to find a fact constituting an element of the crime charged. Whether or not Section 607 changes the law in this respect, it will modify existing practice, for juries have been instructed that they are bound to find in accordance with applicable presumptions.

Code of Civil Procedure Section 1959 defines a presumption as "a deduction which the law expressly directs to be made from particular facts." Code of Civil Procedure Section 1961 provides that the jury "are bound to find according to the presumption" if it is not "controverted by other evidence." Although "the rules of evidence in civil actions are also applicable to criminal actions" as a general rule (PENAL CODE § 1102; on presumptions, *cf. People v. Hewlett,* 108 Cal. App.2d 358, 239 P.2d 150 (1951)), the applicability of these sections to criminal cases cannot be regarded as settled, for there appears to be no appellate decision in which the propriety of instructing a jury in a criminal case in their terms has been considered. Nevertheless, there are cases in which juries have been instructed on presumptions in the terms of *California Jury Instructions, Criminal* (2d ed. 1958) Numbers 25 and 40, both of which, after reciting the statutory definition, state: "Unless declared by law to be conclusive, it [a presumption] may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption." See, *e.g., People v. Masters,* 219 Cal. App.2d 672, 33 Cal. Rptr. 383 (1963); *People v. Porter,* 217 Cal. App.2d 824, 31 Cal. Rptr. 841 (1963); *People v. Perez,* 128 Cal. App.2d 750, 276 P.2d 72 (1954); *People v. Candiotto,* 128 Cal. App.2d 347, 275 P.2d 500 (1954) (opinions indicate, without discussion, that the quoted instruction was given).

Under Section 607, it is clear that a presumption which operates to establish the guilt of a criminal defendant is not a "deduction which the law expressly directs to be made"; it is only a conclusion that the trier of fact is *permitted*—but is not required—to draw. Hence, a jury cannot be instructed that, unless a presumption is controverted, "the jury is bound to find in accordance with the presumption." Instead, the judge should instruct the jury that it is permitted, but is not required, to find in accordance with the presumption. An instruction similar to Instruction Number 25 contained in *California Jury Instructions, Criminal* (2d ed. 1958) may be given only if the statute defining the crime explicitly places the burden of proof on the defendant or provides that the fact in question creates an exception to the defined crime. See, *e.g., People v. Harmon,* 89 Cal. App.2d 55, 58, 200 P.2d 32, 34 (1948) (crime defined as possession of narcotics *except* upon prescription; instruction approved stating "that the burden of proof is upon the defendant that he possessed a written prescription and that in the absence of such evidence it must be assumed that he had no such prescription"). See also *People v. Boo Doo Hong,* 122 Cal. 606, 607, 55 Pac. 402, 403 (1898). *Cf. Comments* to Sections 500 and 501.

Second, Section 607 will change the California law by providing that neither the burden of proof nor the burden of producing evidence is placed on a criminal defendant by a presumption. The California courts have held that a presumption that operates to establish a fact essential to the guilt of a criminal defendant " 'places upon the defendant the burden of producing such evidence thereon as will . . . create a reasonable doubt in the minds of the jury as to' " the existence of the presumed fact. *People v. Martina,* 140 Cal. App.2d 17, 25, 294 P.2d 1015, 1019 (1956). See also *People v. Hardy,* 33 Cal.2d

52, 64, 198 P.2d 865, 872 (1948) ("the defendant . . . is . . . required . . . only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury"); *People v. Scott,* 24 Cal.2d 774, 783, 151 P.2d 517, 521 (1944) ("he [the defendant] must . . . go forward with evidence to the extent of raising a reasonable doubt that he tampered with the identification marks [of a firearm in violation of Penal Code Section 12091]"); *People v. Agnew,* 16 Cal.2d 655, 666, 107 P.2d 601, 606 (1940) ("the burden thus placed upon the defendant [by a common law presumption] could be met by evidence which produced in their [the jury's] minds a reasonable doubt . . ."). And, under existing law, an instruction stating that the defendant has such a burden may be given. *People v. Martina,* 140 Cal. App.2d 17, 294 P.2d 1015 (1956). Thus, under existing law, a presumption has been held to place upon the defendant a burden similar to that which he has under a statute specifically placing the burden of proof upon him. *People v. Agnew,* 16 Cal.2d 655, 107 P.2d 601 (1940); *People v. Bushton,* 80 Cal. 160, 22 Pac. 127 (1889).

However, under existing law, a criminal defendant is entitled to an instruction in every case that he "is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal . . . ." PENAL CODE § 1096. In presumptions cases, juries have been instructed that a presumption relied on by the prosecution does "not relieve the prosecution of the burden of proving every element of the offense charged . . . ." *People v. Hewlett,* 108 Cal. App.2d 358, 373, 239 P.2d 150, 159 (1951). *California Jury Instructions, Criminal* (2d ed. 1958) Number 51, which relates to the defendant's right to refuse to testify, refers to the prosecution's "burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt" and goes on to say that "the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." Thus, where a crime is defined to include certain specified elements and a presumption is relied on to prove one of the elements, juries have been given instructions that both require the prosecution to prove the crucial element beyond a reasonable doubt and require the defendant to raise a reasonable doubt on the question.

Under Section 607, it is clear that neither the burden of producing evidence nor the burden of proof—even to the extent of raising a reasonable doubt—is placed on a criminal defendant by a presumption. It is also clear that an instruction that so states—such as the instruction approved in *People v. Martina,* 140 Cal. App.2d 17, 294 P.2d 1015 (1956)—is improper. But it is uncertain whether this change will have much practical significance in the trial of criminal cases. Section 607 merely precludes the giving of an instruction that conflicts with other required instructions and, therefore, avoids the present confusion concerning the proper allocation of the burden of proof. It seems likely that the practical effect of these instructions has been to require the jury to weigh the effect of a presumption in determining whether the prosecution has proved each element of the crime beyond a reason-

able doubt. Thus, as a practical matter, a presumption may be considered much the same as other evidence in the case is considered. There is language in some cases indicating that this is the actual function of a presumption. For example, in *People v. Hardy,* 33 Cal.2d 52, 64, 198 P.2d 865, 872 (1948), the court said that "the rule [relating to the defendant's burden] is the same whether the People rely on testimonial evidence or on presumptions, except where the presumption is conclusive." See also *People v. Hewlett,* 108 Cal. App.2d 358, 373, 239 P.2d 150, 159 (1951) ("it seems quite clear that any of the disputable presumptions set forth by law . . . may be considered by the jury in weighing the presumption of innocence and in determining whether the prosecution has sustained the burden of showing that the defendant is guilty . . . beyond a reasonable doubt").

Section 607 provides specifically that a presumption is a matter that *may* be relied on by the trier of fact, and in so providing it achieves directly a result that now is probably achieved in practice as a result of the contradictory instructions that are given.

Policy underlying Section 607. The treatment of presumptions and the burden of proof in this code is similar to that proposed in the Model Penal Code. Like Section 607, the presumptions contained in the Model Penal Code permit a jury finding of the presumed fact but do not require such a finding. MODEL PENAL CODE § 1.12(5) (Proposed Official Draft 1962). However, under the Model Penal Code, the prosecution is relieved of producing any evidence as to a matter that is made an affirmative defense. MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962). "Unless there is evidence supporting the defense, there is no issue on the point to be submitted to the jury." MODEL PENAL CODE, TENTATIVE DRAFT No. 4 at 110 (1955). The prosecution is required to prove beyond a reasonable doubt a fact that is made an affirmative defense only when "the defendant shows enough to justify such doubt upon the issue." *Ibid.* Similarly, under Evidence Code Section 501, the defendant may be foreclosed from obtaining a jury decision as to the existence of a particular fact when there is no evidence thereof if the existence of that fact is made an affirmative defense either by a statute specifically assigning to the defendant the burden of proof as to the existence of the fact or by a statute describing the existence of the fact as an exception to the defined crime. Section 607 thus does not preclude the Legislature from placing the burden of proof on a criminal defendant. It merely forbids the Legislature from using a presumption for that purpose. The burden of proof on the essential elements of a crime must remain on the prosecution; it cannot be shifted to the defendant by presumptions. If the defendant is to be given the burden of proof, the statute defining the crime must clearly indicate that a defense, not an element of the crime, is involved.

The Commission recognizes that in some instances, as a practical matter, it will be difficult or virtually impossible for the prosecution to produce evidence of an essential element of an offense. That is especially so when the element involves proof of a negative fact (*e.g.,* a possessor of narcotics did not have a doctor's prescription therefor) or a fact solely or peculiarly within the defendant's knowledge (*e.g.,* that he defaced the identification marks on a pistol or revolver). Nonetheless, it is and has been the prosecution's burden on all of the evidence

to persuade the trier of fact beyond a reasonable doubt of the defendant's guilt of the offense charged. The Commission's purpose has been to reconcile these two policies so that an undue burden of producing evidence is not imposed on the prosecution while, at the same time, maintaining and not relaxing its burden of persuasion; it is believed that Section 607 accomplishes this purpose.

CROSS-REFERENCES

Definitions:
Burden of producing evidence, see § 110
Burden of proof, see § 115
Criminal action, see § 130
Reasonable doubt, see Penal Code § 1096
Rebuttable presumption, see § 601
Trier of fact, see § 235

Article 2. Conclusive Presumptions

§ 620. Conclusive presumptions

620. The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.

Comment. This article supersedes and continues in effect without substantive change the provisions of subdivisions 2, 3, 4, and 5 of Section 1962 of the Code of Civil Procedure. Other statutes not listed in this article also provide conclusive presumptions. See, *e.g.*, CIVIL CODE § 3440. There may also be a few nonstatutory conclusive presumptions. See WITKIN, CALIFORNIA EVIDENCE § 63 (1958).

Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law. Hence, the Commission has not recommended any substantive revision of the conclusive presumptions contained in this article.

CROSS-REFERENCES

Definitions:
Law, see § 160
Presumption, see § 600

§ 621. Legitimacy

621. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate.

Comment. Section 621 restates and supersedes subdivision 5 of Code of Civil Procedure Section 1962.

CROSS-REFERENCES

Definition:
Law, see § 140
Rebuttable presumption of legitimacy, see § 661

§ 622. Facts recited in written instrument

622. The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

Comment. Section 622 restates and supersedes subdivision 2 of Code of Civil Procedure Section 1962.

§ 623. Estoppel by own statement or conduct

623. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Comment. Section 623 restates and supersedes subdivision 3 of Code of Civil Procedure Section 1962.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Statement, see § 225

§ 624. Estoppel of tenant to deny title of landlord

624. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

Comment. Section 624 restates and supersedes subdivision 4 of Code of Civil Procedure Section 1962.

Article 3. Presumptions Affecting the Burden of Producing Evidence

§ 630. Presumptions affecting the burden of producing evidence

630. The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 603, are presumptions affecting the burden of producing evidence.

Comment. Article 3 sets forth a list of presumptions, recognized in existing law, that are classified here as presumptions affecting the burden of producing evidence. The list is not exhaustive. Other presumptions affecting the burden of producing evidence may be found in other codes. Others will be found in the common law. Specific statutes will classify some of these, but some must await classification by the courts. The list here, however, will eliminate any uncertainty as to the proper classification for the presumptions in this article.

CROSS-REFERENCES

Acknowledged writings and official writings presumed genuine, see §§ 1450-1454
Copy of official writing as prima facie evidence, see § 1530
Definitions:
Law, see § 160
Presumption, see § 600
Effect of presumption affecting burden of producing evidence, see § 604
Official record of writing as prima facie evidence, see § 1532
Prima facie evidence, see § 602

§ 631. Money delivered by one to another

631. Money delivered by one to another is presumed to have been due to the latter.

Comment. Section 631 restates and supersedes the presumption in subdivision 7 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 632. Thing delivered by one to another

632. A thing delivered by one to another is presumed to have belonged to the latter.

Comment. Section 632 restates and supersedes the presumption in subdivision 8 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 633. Obligation delivered up to the debtor

633. An obligation delivered up to the debtor is presumed to have been paid.

Comment. Section 633 restates and supersedes the presumption in subdivision 9 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 634. Person in possession of order on himself

634. A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.

Comment. Section 634 restates and supersedes the presumption found in subdivision 13 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
Person, see § 175

§ 635. Obligation possessed by creditor

635. An obligation possessed by the creditor is presumed not to have been paid.

Comment. The presumption in Section 635 is a common law presumption recognized in the California cases. *E.g., Light v. Stevens,* 159 Cal. 288, 113 Pac. 659 (1911).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 636. Payment of earlier rent or installments

636. The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

Comment. Section 636 restates and supersedes the presumption in subdivision 10 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 637. Ownership of things possessed

637. The things which a person possesses are presumed to be owned by him.

Comment. Section 637 restates and supersedes the presumption found in subdivision 11 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
Person, see § 175

§ 638. Ownership of property by person who exercises acts of ownership

638. A person who exercises acts of ownership over property is presumed to be the owner of it.

Comment. Section 638 restates and supersedes the presumption found in subdivision 12 of Code of Civil Procedure Section 1963. Subdivision 12 of Code of Civil Procedure Section 1963 provides that a presumption of ownership arises from common reputation of ownership. This is inaccurate, however, for common reputation is not admissible to prove private title to property. *Berniaud v. Beecher,* 76 Cal. 394, 18 Pac. 598 (1888); *Simons v. Inyo Cerro Gordo Co.,* 48 Cal. App. 524, 192 Pac. 144 (1920).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definitions:
Person, see § 175
Property, see § 185

§ 639. Judgment correctly determines rights of parties

639. A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.

Comment. Section 639 restates and supersedes the presumption found in subdivision 17 of Code of Civil Procedure Section 1963. The presumption involved here is that the judgment correctly determines that one party owes another money, or that the parties are divorced, or their marriage has been annulled, or any similar rights of the parties. The presumption does not apply to the facts underlying the judgment. For example, a judgment of annulment is presumed to determine correctly that the marriage is void. *Clark v. City of Los Angeles,* 187 Cal. App.2d 792, 9 Cal. Rptr. 913 (1960). However, the judgment may not be used to establish presumptively that one of the parties was guilty of fraud as against some third party who is not bound by the judgment.

In a few cases, a judgment may be used as evidence of the facts necessarily determined by the judgment. See, *e.g.,* EVIDENCE CODE §§ 1300-1302. But, even in those cases, the judgments do not presumptively establish the facts determined; they are merely evidence.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Judgment as hearsay evidence, see §§ 1300–1302

§ 640. Writing truly dated

640. A writing is presumed to have been truly dated.

Comment. Section 640 restates and supersedes the presumption in subdivision 23 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
Writing, see § 250

§ 641. Letter received in ordinary course of mail

641. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

Comment. Section 641 restates and supersedes the presumption in subdivision 24 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 642. Conveyance by person having duty to convey real property

642. A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest.

Comment. Section 642 restates and supersedes the presumption in subdivision 37 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definitions:
Person, see § 175
Real property, see § 205

§ 643. Authenticity of ancient document

643. A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

(a) Is at least 30 years old;

(b) Is in such condition as to create no suspicion concerning its authenticity;

(c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and

(d) Has been generally acted upon as authentic by persons having an interest in the matter.

Comment. Section 643 restates and supersedes the presumption found in subdivision 34 of Code of Civil Procedure Section 1963. Although the statement of the ancient documents rule in Section 1963 requires the document to have been acted upon as if genuine before the presumption applies, some recent cases have not insisted upon this requirement. *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). The requirement that the document be acted upon as genuine is, in substance, a requirement of the possession of property

by those persons who would be entitled to such possession under the document if it were genuine. See 7 WIGMORE, EVIDENCE §§ 2141, 2146 (3d ed. 1940); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 101, 135-137 (1964). Giving the ancient documents rule a presumptive effect—*i.e., requiring* a finding of the authenticity of an ancient document—seems justified when it is a dispositive instrument and the persons interested in the matter have acted upon the instrument for a period of at least 30 years as if it were genuine. Evidence which is not of this strength may be sufficient in particular cases to warrant an inference of genuineness and thus justify the admission of the document into evidence, but the presumption should be confined to those cases where the evidence of genuineness is not likely to be disputed. See 7 WIGMORE, EVIDENCE § 2146 (3d ed. 1940). Accordingly, Section 643 limits the presumptive application of the ancient documents rule to dispositive instruments.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definitions:
Person, see § 175
Personal property, see § 180
Real property, see § 205
Writing, see § 250

§ 644. Book purporting to be published by public authority

644. A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

Comment. Section 644 restates and supersedes the presumption in subdivision 35 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630

§ 645. Book purporting to contain reports of cases

645. A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases.

Comment. Section 645 restates and supersedes the presumption found in subdivision 36 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 604, 630
Definition:
State, see § 220

Article 4. Presumptions Affecting the Burden of Proof

§ 660. Presumptions affecting the burden of proof

660. The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting the burden of proof.

Comment. In some cases it may be difficult to determine whether a particular presumption is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. To avoid uncertainty, it is desirable to classify as many presumptions as possible. Article 4 (§§ 660-667), therefore, lists several presumptions that are to be regarded as presumptions affecting the burden of proof. The list is not exclusive. Other statutory and common law presumptions that affect the burden of proof must await classification by the courts.

CROSS-REFERENCES

Definition:
Law, see § 160
Effect of presumption affecting the burden of proof, see § 606
Hospital records, affidavit attached to copy presumed true, see § 1562
Privileged communications, presumption of confidentiality, see § 917

§ 661. Legitimacy

661. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof.

Comment. Section 661 restates and supersedes the presumption found in Sections 193, 194, and 195 of the Civil Code and subdivision 31 of Code of Civil Procedure Section 1963 as these sections have been interpreted by the courts.

Civil Code Section 194 provides a presumption of legitimacy for children born within ten months after the dissolution of a marriage. The courts have said that the ten-month period referred to is actually 300 days. *Estate of McNamara,* 181 Cal. 82, 183 Pac. 552 (1919). Hence, the more accurate time period has been substituted for the ten-month period referred to in Section 194.

As under existing law, the presumption may be overcome only by clear and convincing proof. *Kusior v. Silver,* 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

Of course, this presumption can be applied only when the conclusive presumption of legitimacy stated in Section 621 is inapplicable. *Kusior v. Silver,* 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

CROSS-REFERENCES

Blood tests to determine paternity, see §§ 890-897
Classification and effect of presumption, see §§ 606, 660
Conclusive presumption of legitimacy, see § 621
Definitions:
Civil action, see § 120
Criminal action, see § 130
Proof, see § 190

§ 662. Owner of legal title to property is owner of beneficial title

662. The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

Comment. Section 662 codifies a common law presumption recognized in the California cases. The presumption may be overcome only by clear and convincing proof. *Olson v. Olson,* 4 Cal.2d 434, 437, 49 P.2d 827, 828 (1935); *Rench v. McMullen,* 82 Cal. App.2d 872, 187 P.2d 111 (1947).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660
Definitions:
Proof, see § 190
Property, see § 185

§ 663. Ceremonial marriage

663. A ceremonial marriage is presumed to be valid.

Comment. Section 663 codifies a common law presumption recognized in the California cases. *Estate of Hughson,* 173 Cal. 448, 160 Pac. 548 (1916); *Wilcox v. Wilcox,* 171 Cal. 770, 155 Pac. 95 (1916); *Freeman S.S. Co. v. Pillsbury,* 172 F.2d 321 (9th Cir. 1949).

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

§ 664. Official duty regularly performed

664. It is presumed that official duty has been regularly performed.

Comment. Section 664 restates and supersedes subdivision 15 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

§ 665. Arrest without warrant

665. An arrest without a warrant is presumed to be unlawful.

Comment. Section 665 codifies a common law presumption recognized in the California cases. *People v. Agnew,* 16 Cal.2d 655, 107 P.2d 601 (1940). Under this presumption, if a person arrests another without the color of legality provided by a warrant, the person making the arrest must prove the circumstances that justified the arrest without a warrant. *Badillo v. Superior Court,* 46 Cal.2d 269, 294 P.2d 23 (1956); *Dragna v. White,* 45 Cal.2d 469, 471, 289 P.2d 428, 430 (1955) ("Upon proof of [arrest without process] the burden is on the defendants to prove justification for the arrest.").

Of course, this presumption is applicable only when the legality of an arrest is in issue, as, for example, in false arrest cases or in cases where evidence is offered that was seized in a search incident to an arrest. In these situations, the presumption has no effect other than to require that the party relying on the legality of an arrest prove its legality. Under Section 600, the presumption is not evidence of the illegality of an arrest, and it would be improper to so argue.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

§ 666. Judicial action lawful exercise of jurisdiction

666. Any court of this State or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

Comment. Section 666 restates and supersedes the presumption in subdivision 16 of Code of Civil Procedure Section 1963. Under existing law, the presumption applies only to courts of general jurisdiction; the presumption has been held inapplicable to a superior court in California when acting in a special or limited jurisdiction. *Estate of Sharon,* 179 Cal. 447, 177 Pac. 283 (1918). The presumption also has been held inapplicable to courts of inferior jurisdiction. *Santos v. Dondero,* 11 Cal. App.2d 720, 54 P.2d 764 (1936). There is no reason to perpetuate this distinction insofar as the courts of California and of the United States are concerned. California's municipal and justice courts are served by able and conscientious judges and are no more likely to act beyond their jurisdiction than are the superior courts. Moreover, there is no reason to suppose that a superior court or a federal court is less respectful of its jurisdiction when acting in a limited capacity (for example, as a juvenile court) than it is when acting in any other capacity. Section 666, therefore, applies to any court or judge of any court of California or of the United States. So far as other states are concerned, the distinction is still applicable, and the presumption applies only to courts of general jurisdiction.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660
Definition:
State, see § 220

§ 667. Death of person not heard from in seven years

667. A person not heard from in seven years is presumed to be dead.

Comment. Section 667 restates and supersedes the presumption in subdivision 26 of Code of Civil Procedure Section 1963.

CROSS-REFERENCES

Classification and effect of presumption, see §§ 606, 660

DIVISION 6. WITNESSES

CROSS-REFERENCES

Accomplice as witness, see Penal Code § 1111
Attendance of witnesses, compelled by subpoena, see Code of Civil Procedure § 1985 *et seq.*; Penal Code § 1326 *et seq.*
Co-defendant in criminal action, discharge to testify, see Penal Code §§ 1099-1101
Convicts as witnesses, see Penal Code § 2603
Crimes:
  Falsifying, destroying, or concealing evidence, see Penal Code §§ 132-138
  Perjury and subornation thereof, see Penal Code §§ 118-129
Expert and other opinion testimony, see §§ 800-897
Number of witnesses to prove fact, see § 411
Preliminary determinations on admissibility of evidence, see §§ 400-406
Prisoners as witnesses, see Code of Civil Procedure §§ 1995-1997; Penal Code §§ 1567, 2620-2623
Privileges, see §§ 900-1073

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.

Comment. Section 700 makes it clear that all grounds for disqualification of witnesses must be based on statute. There can be no nonstatutory grounds for disqualification. The section is similar to and supersedes Section 1879 of the Code of Civil Procedure, which provides that "all persons . . . who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses."

Just as Code of Civil Procedure Section 1879 is limited by various statutory restrictions on the competency of witnesses, the broad rule stated in Section 700 is also substantially qualified by statutory restrictions appearing in the Evidence Code and in other California codes. See, *e.g.*, EVIDENCE CODE § 701 (mental or physical capacity to be a witness), § 702 (requirement of personal knowledge), § 703 (judge as a witness), § 704 (juror as a witness), §§ 900-1073 (privileges), § 1150 (continuing existing law limiting use of juror's evidence concerning jury misconduct); VEHICLE CODE § 40804 (speed trap evidence).

CROSS-REFERENCES

Criminal action, competency of witnesses, see Penal Code § 1321
Defendant in criminal case, privilege not to be called as a witness and not to testify, see § 930; Constitution, Art. I, § 13
Definition:
  Statute, see § 230
Judge as witness, see § 703
Juror as witness, see §§ 704, 1150; Penal Code § 1120
Mental or physical incapacity to be witness, see § 701
Personal knowledge requirement, see § 702
Religious qualifications, see Constitution, Art. I, § 4
Speed trap, competency of witness, see Vehicle Code § 40804
Spouse, privilege not to be called as witness and not to testify, see §§ 970-973

§ 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.

Comment. Under existing law, the competency of a person to be a witness is a question to be determined by the court and depends upon his capacity to understand the oath and to perceive, recollect, and communicate that which he is offered to relate. "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).

Under the Evidence Code, too, the competency of a person to be a witness is a question to be determined by the court. See EVIDENCE CODE § 405 and the *Comment* thereto. However, Section 701 requires the court to determine only the prospective witness' capacity to communicate and his understanding of the duty to tell the truth. The missing qualifications—the capacity to perceive and to recollect—are determined in a different manner. Because a witness, qualified under Section 701, must have personal knowledge of the facts to which he testifies (Section 702), he must, of course, have the capacity to perceive and to recollect those facts. But the court may exclude the testimony of a witness for lack of personal knowledge only if no jury could reasonably find that he has such knowledge. See EVIDENCE CODE § 403 and the *Comment* thereto. Thus, the Evidence Code has made a person's capacity to perceive and to recollect a condition for the admission of his testimony concerning a particular matter instead of a condition for his competency to be a witness. And, under the Evidence Code, if there is evidence that the witness has those capacities, the determination whether he in fact perceived and does recollect is left to the trier of fact. See EVIDENCE CODE §§ 403 and 702 and the *Comments* thereto.

Although Section 701 modifies the existing law with respect to determining the competency of witnesses, it seems unlikely that the change will have much practical significance. Theoretically, Section 701 may permit children and persons suffering from mental impairment to testify in some instances where they are now disqualified from testifying; in practice, however, the California courts have permitted children of very tender years and persons with mental impairment to testify. See WITKIN, CALIFORNIA EVIDENCE §§ 389, 390 (1958). See also *Bradburn v. Peacock*, 135 Cal. App.2d 161, 164-165, 286 P.2d 972, 974 (1955) (reversible error to preclude a child from testifying without conducting a *voir dire* examination to determine his competency: "We cannot say that *no* child of 3 years and 3 months is capable of 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.)); *People*

v. McCaughan, 49 Cal.2d 409, 317 P.2d 974 (1957) (indicating that committed mental patients may be competent witnesses). For further discussion, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 709-710 (1964).

CROSS-REFERENCES

Criminal actions, competency of witnesses, see Penal Code § 1321
Determination of whether witness disqualified, see § 405
See also the *Cross-References* under Section 700

§ 702. Personal knowledge of witness

702. (a) Subject to Section 801, 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 before the witness may testify concerning the matter.

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

Comment. Section 702 states the general requirement that a witness must have personal knowledge of the facts to which he testifies. "Personal knowledge" means a present recollection of an impression derived from the exercise of the witness' own senses. 2 WIGMORE, EVIDENCE § 657 at 762 (3d ed. 1940). *Cf.* EVIDENCE CODE § 170, defining "perceive." Section 702 restates the substance of and supersedes Code of Civil Procedure Section 1845.

Except to the extent that experts may give opinion testimony not based on personal knowledge (see EVIDENCE CODE § 801), the requirement of Section 702 is applicable to all witnesses, whether expert or not. Certain additional qualifications that an expert witness must possess are set forth in Article 1 (commencing with Section 720) of Chapter 3.

Under existing law, as under Section 702, an objection must be made to the testimony of a witness who does not have personal knowledge; but, if there is no reasonable opportunity to object before the testimony is given, a motion to strike is appropriate after lack of knowledge has been shown. *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).

If a timely objection is made that a witness lacks personal knowledge, the court may not receive his testimony subject to the condition that evidence of personal knowledge be supplied later in the trial. Section 702 thus limits the ordinary power of the court with respect to the order of proof. See EVIDENCE CODE § 403(b). See also EVIDENCE CODE § 320.

CROSS-REFERENCES

Definition:
Evidence, see § 140
Determination of whether witness has personal knowledge, see § 403
Opinion testimony as to sanity, see § 870
Opinion testimony generally, see §§ 800-805
Past memory recorded, see §§ 1237, 1238
Refreshing memory, see § 771

§ 703. Judge as witness

703. (a) Before the judge presiding at the trial of an action may be called to 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 will be called 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, the judge presiding at the trial of an action may testify in that trial as a witness.

Comment. Under existing law, a judge may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). *But see 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 to important and necessary facts).

Section 703, however, precludes the judge from testifying if a party objects. Before the judge may be called to testify in a civil or criminal action, he must disclose to the parties out of the presence and hearing of the jury the information he has concerning the case. After such disclosure, if no party objects, the judge is permitted—but not required—to testify.

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 questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally. For these and other reasons, Section 703 is preferable to Code of Civil Procedure Section 1883.

CROSS-REFERENCES

Definition:
Action, see § 105

§ 704. Juror as witness

704. (a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the

court 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 will be called to testify.

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

(c) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.

Comment. Under existing law, a juror may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). Section 704, on the other hand, prevents a juror from testifying before the jury if any party objects.

A juror-witness is in an anomalous position. He manifestly cannot weigh his own testimony impartially. A party affected adversely by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror—and perhaps his fellow jurors as well. And, if he does not attack the juror's testimony, the other jurors may give his testimony undue weight. For these and other reasons, Section 704 forbids jurors to testify over the objection of any party.

Before a juror may be called to testify before the jury in a civil or criminal action, he is required to disclose to the parties out of the presence and hearing of the remaining jurors the information he has concerning the case. After such disclosure, if no party objects, the juror is required to testify. If a party objects, the objection is deemed a motion for mistrial and the judge is required to declare a mistrial and order the action assigned for trial before another jury.

Section 704 is concerned only with the problem of a juror who is called to testify before the jury. Section 704 does not deal with *voir dire* examinations of jurors, with testimony of jurors in post-verdict proceedings (such as on motions for new trial), or with the testimony of jurors on any other matter that is to be decided by the court. *Cf.* EVIDENCE CODE § 1150 and the *Comment* thereto.

CROSS-REFERENCES

Criminal action, duty of juror to disclose knowledge, see Penal Code § 1120
Definition:
Action, see § 105
Misconduct by jury, evidence of, see § 1150; Code of Civil Procedure § 657

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 IV of the Code of Civil Procedure.

Comment. Sections 710 and 711 restate the substance of and supersede Section 1846 of the Code of Civil Procedure.

CROSS-REFERENCES

Oath required of interpreter or translator, see § 751

§ 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.

Comment. See the *Comment* to Section 710.

CROSS-REFERENCES

Defendant in criminal case, right to confront adverse witnesses, see Penal Code § 686
Definition:
Action, see § 105
Examination of witnesses, see §§ 760-778

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 before the witness may testify as an expert.

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

Comment. This section states existing law as declared in subdivision 9 (last clause) of Code of Civil Procedure Section 1870, which is superseded by Sections 720 and 801.

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. 504, 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. With the consent of the parties, the judge may receive a witness' testimony conditionally, subject to the necessary foundation being supplied later in the trial. See EVIDENCE CODE § 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 EVIDENCE CODE §§ 405 and 406 and the *Comments* thereto.

CROSS-REFERENCES

Blood test experts, qualifications, see § 893
Court may limit number of experts, see § 723
Cross-examination concerning qualifications, see § 721
Definition:
Evidence, see § 140
Determination of whether witness is an expert, see § 405
Handwriting, opinion as to, see § 1416
Interpreters, see §§ 750-754
Opinion testimony generally, see §§ 801-805
Sanity, opinion as to, see § 870
Translators, see §§ 750-754
Writing, authenticity of, see § 1418

§ 721. Cross-examination of expert witness

721. (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 (1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the matter upon which his opinion is based and the reasons for his opinion.

(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.

Comment. Under Section 721, a witness who testifies as an expert may, of course, be cross-examined to the same extent as any other witness. See Chapter 5 (commencing with Section 760). But, under subdivision (a) of Section 721, as under existing law, the expert witness is also subject to a somewhat broader cross-examination: "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). The cross-examination rule stated in subdivision (a) is based in part on the last clause of Code of Civil Procedure Section 1872.

Subdivision (b) 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 those books on which he relied 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). Dicta in some decisions indicate that the cross-examiner is strictly limited to the books relied on by the expert witness. See, *e.g.*, *Baily v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104 (1904). Other cases, however, suggest that an expert witness

may be cross-examined in regard to any book of the same character as the books on which he relied 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). (Possibly, the cross-examiner is restricted under this view 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 could use books to test the competency of an expert witness, whether or not the expert relied on 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 on 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).

If an expert witness has relied on a particular publication in forming his opinion, it is necessary to permit cross-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him even though not specifically relied on by him in forming his opinion. An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing upon the credibility of his testimony. However, a rule permitting cross-examination on technical treatises not considered by the expert witness would permit the cross-examiner to utilize this opportunity not for its ostensible purpose—to test the expert's opinion—but to bring before the trier of fact the opinions of absentee authors 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 text might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable to 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, subdivision (b) does not permit cross-examination of an expert witness on scientific, technical, or professional works not referred to, considered, or relied on by him.

If a particular publication has already been admitted in evidence, however, the reason for subdivision (b)—to prevent inadmissible evidence from being brought before the jury—is inapplicable. Hence, the subdivision permits an expert witness to be examined concerning such a publication without regard to whether he referred to, considered,

or relied on it in forming his opinion. *Cf. Laird v. T. W. Mather, Inc.*, 51 Cal.2d 210, 331 P.2d 617 (1958).

The rule stated in subdivision (b) thus provides a fair and workable solution to this conflict of competing interests with respect to the permissible use of scientific, technical, or professional publications by the cross-examiner.

CROSS-REFERENCES

Commercial, scientific, and similar publications as hearsay evidence, see §§ 1340, 1341
Cross-examination generally, see §§ 760-778
Definition:
Cross-examination, see § 761
Instruction on expert opinion testimony, see Penal Code § 1127b
Opinion testimony generally, see §§ 801-805

§ 722. Credibility of expert witness

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

(b) The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony.

Comment. Subdivision (a) of Section 722 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 722 restates the substance of Section 1256.2 of the Code of Civil Procedure. Section 1256.2, however, applies only in condemnation cases, while Section 722 is not so limited. It is uncertain whether the California law in other fields of litigation is as stated in Section 722. At least one California case has held that an expert could be asked whether he was being compensated but that he 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 722 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 of the amount of his fee—and, hence, the extent of his possible feeling of obligation to the party calling him.

CROSS-REFERENCES

Credibility of witnesses generally, see §§ 780, 785-791
Definition:
Trier of fact, see § 235

§ 723. Limit on number of expert witnesses

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

Comment. Section 723 restates the substance of and supersedes the last sentence of Section 1871 of the Code of Civil Procedure.

CROSS-REFERENCES

Cumulative evidence, exclusion, see § 352
Definition:
Action, see § 105

Article 2. Appointment of Expert Witness by Court

§ 730. Appointment of expert by court

730. When it appears to the court, 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 court on its own motion or on motion of any party may appoint one or more experts 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 court 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 court.

Comment. Section 730 restates the substance of and supersedes the first paragraph of Section 1871 of the Code of Civil Procedure.

CROSS-REFERENCES

Appointment of blood test experts, see §§ 890-897
Appointment of expert may be revealed to trier of fact, see § 722
Appointment of interpreter or translator, see §§ 750-754
Criminal cases:
Appointment of alienists to determine sanity, see Penal Code § 1027
Skilled persons as witnesses to prove forgery, see Penal Code § 1107
Definitions:
Action, see § 105
Evidence, see § 140
Opinion testimony by expert, see §§ 801-805
Qualification of expert, see § 720

§ 731. Payment of court-appointed expert

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

(b) In any county in which the procedure prescribed in this subdivision has been authorized by the board of supervisors, the compensation fixed under Section 730 for medical experts in civil actions in such county shall be a charge against and paid out of the treasury of such county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

Comment. Section 731 restates the substance of and supersedes the second paragraph of Section 1871 of the Code of Civil Procedure.

CROSS-REFERENCES

Compensation of:
Alienists appointed in criminal action, see Penal Code § 1027
Blood test experts, see §§ 894, 896
Interpreters and translators, see §§ 752-754
Definitions:
Civil action, see § 120
Criminal action, see § 130

§ 732. Calling and examining court-appointed expert

732. Any expert appointed by the court under Section 730 may be called and examined by the court or by any party to the action. 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.

Comment. Section 732 restates the substance of and supersedes the fourth paragraph of Section 1871 of the Code of Civil Procedure. Section 732 refers to Section 775, which is based on language originally contained in Section 1871. Section 775 permits each party to the action to object to questions asked and evidence adduced and, also, 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.

CROSS-REFERENCES

Appointment by court, disclosure of, see § 722
Cross-examination of expert witnesses generally, see § 721
Definitions:
Action, see § 105
Cross-examination, see § 761
Evidence, see § 140
Examination of alienists appointed in criminal action, see Penal Code § 1027
Examination of witnesses generally, see §§ 760-778
Opinion testimony by expert, see §§ 801-805

§ 733. Right to produce other expert 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.

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

CROSS-REFERENCES

Court may limit number of expert witnesses, see § 723
Definitions:
Action, see § 105
Evidence, see § 140
Similar provision:
Blood test experts, see § 897

CHAPTER 4. INTERPRETERS AND TRANSLATORS

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

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

Comment. Section 750 codifies 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).

CROSS-REFERENCES

Credibility of witnesses, see §§ 722, 780, 785-791
Cross-examination of expert witnesses, see § 721
Definitions:
Action, see § 105
Law, see § 160
Examination of witnesses generally, see §§ 760-778
Qualification as expert witness, see § 720
Qualification as interpreter, see Code of Civil Procedure § 264
See also the *Cross-References* under Section 700

§ 751. Oath 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 make a true interpretation of the witness' answers to questions to counsel, court, 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.

Comment. Section 751 is based on language presently contained in subdivision (c) of Section 1885 of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
Oath, see § 165
Writing, see § 250

§ 752. Interpreters for witnesses

752. (a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself in the English language so as to be understood directly by counsel, court, and jury, 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.

Comment. Section 752 restates the substance of and supersedes Section 1884 of the Code of Civil Procedure. It is drawn broadly enough to authorize the use of an interpreter for a person whose inability to be understood directly stems from physical disability as well as from lack of understanding of the English language. See discussion in *People v. Walker,* 69 Cal. App. 475, 231 Pac. 572 (1924). Under Section 752, as under existing law, whether an interpreter should be

appointed is largely within the discretion of the trial judge. *People v. Holtzclaw,* 76 Cal. App. 168, 243 Pac. 894 (1926).

Subdivision (b) of Section 752 substitutes for the detailed language in Code of Civil Procedure Section 1884 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. The existing procedure provided by Code of Civil Procedure Section 1884 does not insure that an interpreter who is required to testify will be paid reasonable compensation for his services. Section 752 corrects this deficiency in the existing law.

CROSS-REFERENCES

Appointment of expert witness by court, see §§ 730-733
Interpreter for deaf person in certain actions, see § 754
Interpreter subject to rules applicable to witnesses, see § 750
Interpreter's oath, see § 751
See also the *Cross-References* under Section 750

§ 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.

Comment. Section 753 restates the substance of and supersedes Section 1863 of the Code of Civil Procedure, but the language of Section 753 is new. The same principles that require 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 EVIDENCE CODE § 752 and the *Comment* thereto.

CROSS-REFERENCES

Appointment of expert witness by court, see §§ 730-733
Definitions:
  Evidence, see § 140
  Writing, see § 250
Translator subject to rules applicable to witnesses, see § 750
Translator's oath, see § 751
See also the *Cross-References* under Section 750

§ 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 court, which shall be a charge against the county in which such action is pending and shall be paid out of the treasury of such county on order of the court.

Comment. Section 754 restates the substance of and supersedes Section 1885 of the Code of Civil Procedure. Subdivision (c) of Section 1885 is not continued in Section 754 but is restated in substance in Section 751.

The phrase "with or without a hearing aid" has been deleted from the definition of "deaf person" as unnecessary. The court's inquiry should be directed towards the ability of the person to hear; the court should not be concerned with the means by which he might be enabled to hear.

CROSS-REFERENCES

Definitions:
Action, see § 105
Criminal action, see § 130
See also the *Cross-References* under Sections 750 and 752

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions

§ 760. "Direct examination"

760. "Direct examination" is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.

Comment. Section 760 restates the substance of and supersedes the first clause of Code of Civil Procedure Section 2045 and the last clause of Code of Civil Procedure Section 2048. Under Section 760, an examination of a witness called by another party is direct examination if the examination relates to a matter that is not within the scope of the previous examination of the witness.

CROSS-REFERENCES

Examination of:
Adverse party, see § 776
Alienist appointed to determine sanity, see Penal Code § 1027
Blood test expert, see § 893
Hearsay declarant, see § 1203
Person upon whose statement expert bases opinion, see § 804
Witness called by court, see § 775
Leading questions on direct examination, see § 767
Opinion testimony, giving supporting matter on direct examination, see § 802
Order of examination, see § 772

§ 761. "Cross-examination"

761. "Cross-examination" is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.

Comment. Section 761 restates the substance of and supersedes the definition of "cross-examination" found in Section 2045 of the Code of Civil Procedure. In accordance with existing law, it limits cross-exam-

ination of a witness to the scope of the witness' direct examination. See generally WITKIN, CALIFORNIA EVIDENCE §§ 622-638 (1958).

Section 761, together with Section 773, retains the cross-examination rule now applicable to a defendant in a criminal action who testifies as a witness in that action. See *People v. McCarthy*, 88 Cal. App.2d 883, 200 P.2d 69 (1948). See also *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591 (1898); *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695 (1885); WITKIN, CALIFORNIA EVIDENCE § 629 (1958). See also EVIDENCE CODE § 772(d).

CROSS-REFERENCES

Definition:
Direct examination, see § 760
Order of examination, see § 772
Scope of cross-examination, see § 773
See also the *Cross-References* under Sections 760 and 773

§ 762. "Redirect examination"

762. "Redirect examination" is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.

Comment. "Redirect examination" and "recross-examination" are not defined in existing statutes, but the terms are recognized in practice. See WITKIN, CALIFORNIA EVIDENCE §§ 697, 698 (1958). The scope of redirect and recross-examination is limited by Section 774.

The definition of "redirect examination" embraces not only the examination immediately following cross-examination of the witness but also any subsequent re-examination of the witness by the direct examiner.

CROSS-REFERENCES

Definition:
Cross-examination, see § 761
Leading questions on redirect examination, see § 767
Order of examination, see § 772
Re-examination generally, see § 774

§ 763. "Recross-examination"

763. "Recross-examination" is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.

Comment. See the *Comment* to Section 762. The definition of "recross-examination" embraces not only the examination immediately following the first redirect examination of the witness but also any subsequent re-examination of the witness by a cross-examiner.

CROSS-REFERENCES

Definition:
Redirect examination, see § 762
Leading questions on recross-examination, see § 767
Order of examination, see § 772
Re-examination generally, see § 774

§ 764. "Leading question"

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

Comment. Section 764 restates the substance of and supersedes the first sentence of Section 2046 of the Code of Civil Procedure. For

restrictions on the use of leading questions in the examination of a witness, see EVIDENCE CODE § 767 and the *Comment* thereto.

CROSS-REFERENCES

Leading questions, when permitted, see § 767

Article 2. Examination of Witnesses

§ 765. Court to control mode of interrogation

765. The court shall exercise reasonable control over the mode of interrogation of a witness so as (a) to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and (b) to protect the witness from undue harassment or embarrassment.

Comment. Section 765 restates the substance of and supersedes Section 2044 of the Code of Civil Procedure. As to the latitude permitted the judge in controlling the examination of witnesses under existing law, which is 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).

CROSS-REFERENCES

Criminal action, control of proceedings by judge, see Penal Code § 1044

§ 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.

Comment. Section 766 restates the substance of and supersedes Section 2056 of the Code of Civil Procedure.

§ 767. Leading questions

767. Except under special circumstances where the interests of justice otherwise require:

(a) A leading question may not be asked of a witness on direct or redirect examination.

(b) A leading question may be asked of a witness on cross-examination or recross-examination.

Comment. Subdivision (a) restates the substance of and supersedes the last sentence of Section 2046 of the Code of Civil Procedure. Subdivision (b) is based on and supersedes a phrase that appears in Code of Civil Procedure Section 2048.

CROSS-REFERENCES

Cross-examination by party whose interest is not adverse to party calling witness, see § 773

Definitions:

- Cross-examination, see § 761
- Direct examination, see § 760
- Leading question, see § 764
- Recross-examination, see § 763
- Redirect examination, see § 762

See also the *Cross-References* under Section 760

§ 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.

Comment. Section 768 deals with a subject now covered in Sections 2052 and 2054 of the Code of Civil Procedure. Under the existing sections, a party 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). However, 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 and permits a witness to be asked questions concerning a prior inconsistent statement, whether written or oral, 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 disclosure of inconsistent written statements that is required under existing law limits the effectiveness of cross-examination by removing the element of surprise. The forewarning gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement. The existing rule is based on an English common law rule that has been abandoned in England for 100 years. See MCCORMICK, EVIDENCE § 28 at 53 (1954).

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), there apparently is no requirement that they be shown to a witness before he can be examined concerning them. Section 2054 of the Code of Civil Procedure requires only that the adverse party be given an opportunity to inspect any writing that is *actually shown* to a witness before the witness can be examined concerning the writing. 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. 1096 (1930) (hearing denied); *People v. De Angelli,* 34 Cal. App. 716, 168 Pac. 699 (1917). Section 768 clarifies whatever doubt may exist in this regard by declaring that such a writing need not be shown to the witness before he can be examined concerning it. Of course, the best evidence rule may in some cases preclude eliciting testimony concerning the content of a writing. See EVIDENCE CODE § 1500 and the *Comment* thereto.

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.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Action, see § 105
Hearing, see § 145
Statement, see § 225
Writing, see § 250
Disclosing information concerning inconsistent statement, see § 769
Evidence of inconsistent statement, when permitted, see § 770
Inconsistent statement as hearsay evidence, see § 1235

§ 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.

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 EVIDENCE CODE §§ 225 and 125, respectively), see the *Comment* to Section 768.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Hearing, see § 145
Statement, see § 225
Evidence of inconsistent statement, when permitted, see § 770
See also the *Cross-References* under Section 770

§ 770. Evidence of inconsistent statement of witness

770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a 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 explain or to deny the statement; or

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

Comment. Under Section 2052 of the Code of Civil Procedure, extrinsic evidence of a witness' inconsistent statement may be admitted only if the witness was given the opportunity, while testifying, to explain or deny the contradictory statement. Permitting a witness to explain or deny an alleged inconsistent statement is desirable, but there is no compelling reason to provide the opportunity for explanation *before* the inconsistent statement is introduced in evidence. Accordingly, unless the interests of justice otherwise require, Section 770 permits the judge to exclude evidence of an inconsistent statement only if the witness during his examination was not given an opportunity to explain or deny the statement *and* he has been unconditionally ex-

cused and is not subject to being recalled as a witness. Among other things, Section 770 will permit more effective cross-examination and impeachment of several collusive witnesses, since there need be no disclosure of prior inconsistency before all such witnesses have been examined.

Where the interests of justice require it, the court 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 where the specified conditions are not 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 to testify. For the foundational requirements for the admission of a hearsay declarant's inconsistent statement, see EVIDENCE CODE § 1202 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Action, see § 105
Evidence, see § 140
Hearing, see § 145
Statement, see § 225
Disclosure not required when examining witness, see §§ 768, 769
Hearsay exception for inconsistent statement, see § 1235
Inconsistent statement of hearsay declarant, see § 1202

§ 771. Refreshing recollection with a writing

771. If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, 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.

Comment. Section 771 grants to an adverse party the right to inspect any writing used to refresh a witness' recollection, whether the writing is used by the witness while testifying or prior thereto. The right of inspection granted by Section 771 may be broader than the similar right of inspection granted by Section 2047 of the Code of Civil Procedure, for Section 2047 has been interpreted by the courts to grant a right of inspection of only those writings used by the witness while he is testifying. *People v. Gallardo,* 41 Cal.2d 57, 257 P.2d 29 (1953); *People v. Grayson,* 172 Cal. App.2d 372, 341 P.2d 820 (1959); *Smith v. Smith,* 135 Cal. App.2d 100, 286 P.2d 1009 (1955). In a criminal case, however, the defendant can compel the prosecution to produce any written statement of a prosecution witness relating to matters covered in the witness' testimony. *People v. Estrada,* 54 Cal.2d 713, 7 Cal. Rptr. 897, 355 P.2d 641 (1960). The extent to which the public policy reflected in criminal discovery practice overrides the restrictive interpretation of Code of Civil Procedure Section 2047 is not clear. See WITKIN, CALIFORNIA EVIDENCE § 602 (Supp. 1963). In any event, Section 771 follows the lead of the criminal cases, such as *People v. Silberstein,* 159 Cal. App.2d Supp. 848, 323 P.2d 591 (1958) (defendant entitled to inspect police report used by police officer to refresh his recollection *before* testifying), and grants a right of inspection without

regard to when the writing is used to refresh recollection. If a witness' testimony depends upon the use of a writing to refresh his recollection, the adverse party's right to inspect the writing should not be made to depend upon the happenstance of when the writing is used.

CROSS-REFERENCES

Cross-examination, see § 773
Definitions:
Cross-examination, see § 761
Writing, see § 250
Inspection of writing shown to witness, see § 768
Past memory recorded, see § 1237
Prior identification, see § 1238

§ 772. Order of examination

772. (a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) Subject to subdivision (d), a party may, in the discretion of the court, during his cross-examination, redirect examination, or recross-examination of a witness, examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not be examined under direct examination by another party.

Comment. Subdivision (a) codifies existing but nonstatutory California law. See WITKIN, CALIFORNIA EVIDENCE § 576 at 631 (1958).

Subdivision (b) is based on and supersedes the second sentence of Section 2045 of the Code of Civil Procedure. The language of the existing section has been expanded, however, to require completion of each phase of examination of the witness, not merely the direct examination.

Under subdivision (c), as under existing law, a party examining a witness under cross-examination, redirect examination, or recross-examination may go beyond the scope of the initial direct examination if the court permits. See CODE CIV. PROC. §§ 2048 (last clause), 2050; WITKIN, CALIFORNIA EVIDENCE §§ 627, 697 (1958). Under the definition in Section 760, such an extended examination is direct examination. *Cf.* CODE CIV. PROC. § 2048 ("such examination is to be subject to the same rules as a direct examination").

Subdivision (d) states an exception for the defendant-witness in a criminal action that reflects existing law. See WITKIN, CALIFORNIA EVIDENCE § 629 at 676 (1958).

CROSS-REFERENCES

Control of mode of interrogation, see § 765
Cross-examination, see § 773
Definitions:
Criminal action, see § 130
Cross-examination, see § 761
Direct examination, see § 760
Recross-examination, see § 763
Redirect examination, see § 762

Expert witness, cross-examination of, see § 721
Expert witness, examination of, see §§ 801-805
Recall of witnesses, see § 778
Re-examination, see § 774
See also the *Cross-References* under Section 760

§ 773. Cross-examination

773. (a) A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.

(b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the same rules that are applicable to the direct examination.

Comment. Subdivision (a) restates the substance of Sections 2045 (part) and 2048 of the Code of Civil Procedure and Section 1323 of the Penal Code.

Subdivision (b) is based on the holding in *Atchison, T. & S.F. Ry. v. Southern Pac. Co.*, 13 Cal. App.2d 505, 57 P.2d 575 (1936). That case held that a party not adverse to the direct examiner of a witness did not have the right to cross-examine the witness. Under subdivision (a), such a party would have the right to cross-examine the witness upon any matter within the scope of the direct examination, but he would be prohibited by Section 767 from asking leading questions during such examination. If the witness testifies on direct examination to matters that are, in fact, antagonistic to a party's position, he may be permitted to cross-examine with leading questions even though from a technical point of view the interest of the cross-examiner is not adverse to that of the direct examiner. *Cf. McCarthy v. Mobile Cranes, Inc.*, 199 Cal. App.2d 500, 18 Cal. Rptr. 750 (1962).

CROSS-REFERENCES

Control of mode of interrogation, see § 765
Definitions:
  Action, see § 105
  Cross-examination, see § 761
  Direct examination, see § 760
Expert witness, cross-examination of, see § 721
Expert witness, examination of, see §§ 801-805
Leading questions on direct and cross-examination, see § 767
Offer of proof unnecessary on cross-examination, see § 354
Part of transaction covered, admissibility of whole, see § 356
Witness called by court, cross-examination of, see §§ 732, 775
See also the *Cross-References* under Section 760

§ 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 another party to the action. Leave may be granted or withheld in the court's discretion.

Comment. Section 774 is based on and supersedes the first and third sentences of Section 2050 of the Code of Civil Procedure. The nature of a re-examination is to be determined in accordance with the definitions in Sections 760-763.

CROSS-REFERENCES

Definition:
Action, see § 105
Phases of examination, see § 772
Recall of witness, see § 778

§ 775. Court may call witnesses

775. The court on its 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 court directs.

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 723 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. §§ 1884 and 1885 (interpreters), continued in substance by Chapter 4 (commencing with Section 750).

The power of the judge to call other witnesses is also recognized by case law. *Travis v. Southern Pac. Co.,* 210 Cal. App.2d 410, 425, 26 Cal. Rptr. 700, 707-708 (1962) ("[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.").

CROSS-REFERENCES

Definitions:
Action, see § 105
Cross-examination, see § 761
Evidence, see § 140
Examination of expert called by court, see § 732
Leading questions, see § 767
Objections to evidence, see § 353
Order of examination, see § 772

§ 776. Examination of adverse party or witness

776. (a) A party to the record of any civil action, or a person identified with such a party, 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) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

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

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

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

Subdivision (a). Subdivision (a) restates the provisions of Section 2055 that permit a party to call and examine as if under cross-examination an adverse party and certain adverse witnesses. However, Section 776 substitutes the phrase "or a person identified with such a party" for the confusing enumeration of persons listed in the first sentence of Section 2055. This phrase is defined in subdivision (d) of Section 776 to include all of the persons presently named in Section 2055. See the *Comment* to subdivision (d), *infra.*

Subdivision (b). Subdivision (b) is based in part on similar provisions contained in Code of Civil Procedure Section 2055. Unlike Section 2055, however, this subdivision is drafted in recognition of the problems involved in multiple party litigation. Thus, the introductory portion of subdivision (b) states the general rule that a witness examined under this section may be cross-examined by all other parties to the action in such order as the court directs. For example, a party whose interest in the action is identical with that of the party who called the witness for examination under this section has a right to cross-examine the witness fully because he, too, has the right to call the witness for examination under this section. Similarly, a party whose interest in the action is adverse to the party who calls the witness for examination under this section has the right to cross-examine the witness fully unless he is identified with the witness as described in paragraphs (1) and (2) of this subdivision. Paragraphs (1) and (2) restrict the nature of the cross-examination permitted of a witness by a party with whom the witness is identified and by parties whose

interest in the action is not adverse to the party with whom the witness is identified. These parties are limited to examination of the witness as if under redirect examination. In essence, this means that leading questions cannot be asked of the witness by these parties. See EVIDENCE CODE § 767. Although the examination must proceed as if it were a redirect examination, under Section 761 it is in fact a cross-examination and limited to the scope of the direct. See also EVIDENCE CODE §§ 760, 773.

Subdivision (c). Subdivision (c) codifies a principle that has been recognized in the California cases even though not explicitly stated in Code of Civil Procedure Section 2055. See *Gates v. Pendleton,* 71 Cal. App. 752, 236 Pac. 365 (1925); *Goehring v. Rogers,* 67 Cal. App. 260, 227 Pac. 689 (1924).

Subdivision (d). Subdivision (d) lists the classes of persons who are "identified with a party" as that phrase and variations of it are used in subdivisions (a) and (b) of Section 776. The persons named in paragraphs (1) and (2) are those described in the first sentence of Code of Civil Procedure Section 2055 as being subject to examination pursuant to the section because of a particular relationship to a party. See the definitions of "person," "public employee," and "public entity" in EVIDENCE CODE §§ 175, 195, and 200, respectively. In addition, paragraph (3) of this subdivision describes persons who were in any of the requisite relationships at the time of the act or omission giving rise to the cause of action. This states existing case law. *Scott v. Del Monte Properties, Inc.,* 140 Cal. App.2d 756, 295 P.2d 947 (1956); *Wells v. Lloyd,* 35 Cal. App.2d 6, 94 P.2d 373 (1939). Similarly, paragraph (4) extends this principle to include any person who obtained relevant knowledge as a result of such a relationship but who does not fit the precise descriptions contained in paragraphs (1) through (3). For example, a person whose employment by a party began after the cause of action arose and terminated prior to the time of his examination at the trial would be included in the description contained in paragraph (4) if he obtained relevant knowledge of the incident as a result of his employment. It is not clear whether this states existing law, for no California decision has been found that decides this question. The paragraph is necessary, however, to preclude a party from preventing examination of his employee pursuant to this section by the simple expedient of discharging the employee prior to trial and reinstating him afterwards. *Cf. Wells v. Lloyd,* 35 Cal. App.2d 6, 12, 94 P.2d 373, 376-377 (1939).

CROSS-REFERENCES

Cross-examination generally, see § 773
Definitions:
- Civil action, see § 120
- Cross-examination, see § 761
- Evidence, see § 140
- Person, see § 175
- Public employee, see § 195
- Public entity, see § 200
- Redirect examination, see § 762

Leading questions, see § 767
Offer of proof unnecessary on cross-examination, see § 354
Order of examination, see § 772
Re-examination generally, see § 774

§ 777. Exclusion of witness

777. (a) Subject to subdivisions (b) and (c), the court 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.

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. Lariscy,* 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 may not exclude a party to an action. If the party is a corporation, an officer designated by its attorney is entitled to be present. Section 777 permits the right of presence to be exercised by an employee as well as an officer. Also, because there is little practical distinction between corporations and other artificial entities and organizations, Section 777 extends the right of presence to all artificial parties.

CROSS-REFERENCES

Defendant in criminal action, presence of, see Penal Code § 1043
Definitions:
Action, see § 105
Person, see § 175
Divorce or seduction cases, private hearing, see Code of Civil Procedure § 125
Magistrates authorized to exclude and separate witnesses, see Penal Code § 867

§ 778. Recall of witness

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

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

CROSS-REFERENCES

Definition:
Action, see § 105
Re-examination of witness, see § 774

CHAPTER 6. CREDIBILITY OF WITNESSES

Article 1. Credibility Generally

§ 780. General rule as to credibility

780. Except as otherwise provided by law, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or dis-

prove 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 matter about which he testifies.

(d) The extent of his opportunity to perceive any 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 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 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.

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. See, *e.g.*, CODE CIV. PROC. §§ 1847, 2049, 2051, 2052, 2053.

Section 780 is a general catalog of 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, Section 780 is technically unnecessary because Section 351 declares that "all relevant evidence is admissible." However, this section makes it clear that matters that may not be "evidence" in a technical sense can affect the credibility of a witness, and it provides a convenient list of the most common factors that bear on the question of credibility. See *Davis v. Judson,* 159 Cal. 121, 128, 113 Pac. 147, 150 (1910); *La Jolla Casa de Manana v. Hopkins,* 98 Cal. App.2d 339, 346, 219 P.2d 871, 876 (1950). See generally WITKIN, CALIFORNIA EVIDENCE §§ 480-485 (1958). Limitations on the admissibility of evidence offered to attack or support the credibility of a witness are stated in Article 2 (commencing with Section 785).

There is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is "collateral". The so-called "collateral matter" limitation on attacking the credibility of a witness excludes evidence relevant to credibility unless such evidence is independently relevant to the issue being tried. It is based on the sensible notion that trials should be confined to settling those disputes between the parties upon which their rights in the litigation depend. 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 780 (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 court has substantial discretion to exclude collateral evidence. The effect of Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

There is no limitation in the Evidence Code on the use of opinion evidence to prove the character of a witness for honesty, veracity, or the lack thereof. Hence, under Sections 780 and 1100, such evidence is admissible. This represents a change in the present law. See *People v. Methvin*, 53 Cal. 68 (1878). However, the opinion evidence that may be offered by those persons intimately familiar with the witness is likely to be of more probative value than the generally admissible evidence of reputation. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

CROSS-REFERENCES

Attacking and supporting credibility, limitations on, see §§ 785-791
Character evidence as affecting credibility, see §§ 786-790, 1100
Comment on credibility by court, see Constitution, Art. VI, § 19; Penal Code § 1127
Consistent statements, see §§ 791, 1236, 1238
Definitions:
- Action, see § 105
- Hearing, see § 145
- Law, see § 160
- Proof, see § 190
- Statement, see § 225

Exclusion of evidence of little probative value, see § 352
Expert witnesses, credibility of, see §§ 721, 722
Hearsay declarant, credibility of, see § 1202
Inconsistent statements, see §§ 768-770, 1235
Jurors as judges of credibility, see § 312; Constitution, Art. VI, § 19; Penal Code § 1127
Witnesses protected from undue harassment or embarrassment, see § 765

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.

Comment. Section 785 eliminates the present restriction on attacking the credibility of one's own witness. Under the existing 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 and should be permitted to attack the credibility of the witness without anachronistic limitations. Denial of the right to attack credibility may often 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).

CROSS-REFERENCES

Evidence affecting credibility generally, see § 780
See also the *Cross-References* under Section 780

§ 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.

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 are not sufficiently probative of a witness' honesty or veracity to warrant their consideration on the issue of credibility.

Section 786 is substantially in accord with the present California law. CODE CIV. PROC. § 2051 (superseded by EVIDENCE CODE §§ 780, 785-788); *People v. Yslas,* 27 Cal. 630, 633 (1865).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Evidence of good character to support credibility, see § 790
Kinds of character evidence admissible to support or attack credibility, see §§ 787-789, 1100

§ 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.

Comment. Under Section 787, as under existing law, evidence of specific instances of a witness' conduct is inadmissible to prove a trait of his character for the purpose of attacking or supporting his credibility. See *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 Chapter 6). Section 787 is subject, however, to Section 788, which permits certain kinds of criminal convictions to be used for the purpose of attacking a witness' credibility.

CROSS-REFERENCES

Conviction of crime, when admissible to attack credibility, see § 788
Definitions:
Conduct, see § 125
Evidence, see § 140

§ 788. Conviction of witness for a crime

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

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

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

(b) Evidence of a witness' conviction of a felony 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.

(4) 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) or (3).

(5) A period of more than 10 years has elapsed since the date of his release from confinement, or the expiration of the period of his parole, probation, or sentence, whichever is the later date.

Comment. Under Section 787, evidence of specific instances of a witness' conduct is inadmissible for the purpose of attacking or supporting his credibility. Section 788 states an exception to this general rule where the evidence of the witness' misconduct consists of his conviction of a felony of a kind described in this section. A judgment of conviction that is offered to prove that the person adjudged guilty committed the crime is hearsay. See EVIDENCE CODE §§ 1200 and 1300 and the *Comments* thereto. But the hearsay objection to the evidence specified in Section 788 is overcome by the declaration in the section that such evidence "is admissible" when offered on the issue of credibility.

Subdivision (a). Under subdivision (a), as under existing law, only felony convictions may be used for impeachment purposes. See CODE CIV. PROC. § 2051. Criminal convictions are admitted for the purpose of showing that the witness, by the serious nature of his previous criminal conduct, has demonstrated such a lack of honesty or veracity that now he cannot be trusted to testify truthfully. See EVIDENCE CODE § 786; CODE CIV. PROC. § 2051; WITKIN, CALIFORNIA EVIDENCE § 651 (1958). Hence, subdivision (a) limits the convictions that may be shown for impeachment purposes to those felonies that necessarily indicate the witness' dishonesty or lack of veracity. Other convictions cannot be shown because they have little or no tendency to prove the witness is not trustworthy and because they frequently have an unduly prejudicial effect. To preclude any necessity for retrying the previous crime to determine whether the conviction is admissible under Section 788, the minimum elements essential to conviction must necessarily involve dishonesty or false statement, or the conviction cannot be shown. *Cf. In re Hallinan,* 43 Cal.2d 243, 272 P.2d 768 (1954).

Subdivision (a) modifies existing law, for under existing law any felony conviction may be used for impeachment purposes even though the crime involved has no bearing on the witness' honesty or veracity. See CODE CIV. PROC. § 2051. Section 788 substitutes for this undiscriminating treatment of felony convictions the requirement that the convictions be relevant to the purpose for which they are admitted, *i.e.*, that the convictions tend to prove the witness' dishonesty or lack of veracity.

"Dishonesty" as used in Section 788 means "any breach of honesty or trust, as lying, deceiving, cheating, stealing, or defrauding." MERRIAM-WEBSTER, NEW INTERNATIONAL DICTIONARY (3d ed. 1961). "[T]he measure of [the] meaning [of dishonesty] is . . . an infirmity of purpose so opprobrious or furtive as to be fairly characterized as dishonest in the common speech of men." Cardozo, C. J., in *World Exchange Bank v. Commercial Casualty Ins. Co.*, 255 N.Y. 1, 173 N.E. 902, 903 (1930). Thus, convictions of felonies involving fraud, deception, and lying may, of course, be shown under Section 788. *Cf. Hogg v. Real Estate Commissioner*, 54 Cal. App.2d 712, 129 P.2d 709 (1942). All forms of larceny may also be shown. *Cf. Brecheen v. Riley,* 187 Cal. 121, 200 Pac. 1042 (1921). Similarly, other crimes involving the wrongful deprivation of another of his property and furtive, stealthy crimes (such as burglary) may be shown.

On the other hand, such crimes as felony drunk driving, manslaughter, arson (except for fraudulent purposes), assault, and possession of a deadly weapon do not involve dishonesty or false statement and may not be shown under Section 788.

Under subdivision (a), evidence of the conviction of a witness for a crime is inadmissible unless the appropriate showing has first been made to the court in proceedings out of the presence and hearing of the jury. Thus, for the purpose of impeaching the credibility of a witness, a party may not ask the witness whether he has been convicted of a crime unless the party has first made the requisite showing to the court.

The procedure provided by subdivision (a) is necessary to avoid unfair imputations of crimes that either are inadmissible for impeachment or are nonexistent. In the hearing held out of the presence of the jury, the party seeking to impeach the witness may ask the witness whether he has been convicted of a crime that is admissible for impeachment purposes. If the witness denies any prior conviction, the party seeking to impeach is precluded from asking the witness any questions on the matter before the jury unless he can produce competent evidence of the conviction. Of course, if the witness admits a prior conviction of the proper kind, the witness may be asked concerning the conviction before the jury and his admission of the conviction can be shown if he then denies it. This is substantially in accord with existing law as declared in *People v. Perez,* 58 Cal.2d 229, 23 Cal. Rptr. 569, 373 P.2d 617 (1962).

The procedure specified in Section 788 is applicable to all witnesses; hence, it is applicable to a defendant in a criminal action if he chooses to testify as a witness. Of course, a criminal defendant who does not choose to testify is not subject to impeachment and his prior convictions are not admissible for such a purpose.

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. See also CODE CIV. PROC. § 2065. Section 2051 is too limited, however, because it does not exclude convictions in analogous situations.

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 granted probation. PENAL CODE § 4852.01. Section 1203.4 of the Penal Code provides a procedure for setting aside the convictions of rehabilitated probationers. Yet, under Section 2051 of the Code of Civil Procedure, a conviction that has been set aside under Penal Code Section 1203.4 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).

Subdivision (b) eliminates these anachronisms by prohibiting the use of a 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.

Paragraph (5) of subdivision (b) is new to California law. The fact that a person may have committed a crime at some remote time is of little probative value in determining his present character. Therefore, paragraph (5) excludes evidence of remote convictions, for it is the witness' character at the time of the hearing that the trier of fact must determine.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Law, see § 160
Determination of whether pardon granted or the like, see § 405
Determination of whether witness was convicted, see § 403
Judgments as hearsay evidence, see §§ 1300-1302

§ 789. Religious belief

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

Comment. Section 789 codifies existing 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.

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 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.

Comment. Section 790 restates without substantive change a rule that is well recognized by statutory and case law in California. CODE CIV. PROC. § 2053 (superseded by EVIDENCE CODE §§ 790, 1101); *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).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Evidence admissible to support credibility, see § 780
Proof of character, see § 1100

§ 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.

Comment. Section 791 sets forth the conditions for admitting a witness' prior consistent statements for the purpose of supporting his credibility as a witness. For a discussion of the effect to be given to the evidence admitted under this section, see EVIDENCE CODE § 1236 and the *Comment* thereto.

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

Under existing California law, evidence of a prior consistent statement is admissible to rebut a charge of bias, interest, recent fabrication, or other improper motive. See the *Comment* to subdivision (b), *infra*. 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). However, recent cases indicate that the offering of a prior inconsistent statement necessarily is an implied charge that the witness has fabricated his testimony since the time the inconsistent statement was made and justifies the admission of a consistent statement made prior to the alleged inconsistent statement. *People v. Bias,* 170 Cal. App.2d 502, 511-512, 339 P.2d 204, 210-211 (1959). Subdivision (a) makes it clear that evidence of a previous consistent statement is admissible under these circumstances to show that no such fabrication took place. Subdivision (a), thus, is no more than a logical extension of the general rule that evidence of a prior consistent statement is admissible to rehabilitate a witness following an express or implied charge of recent fabrication.

Subdivision (b). This subdivision codifies existing law. See *People v. Kynette,* 15 Cal.2d 731, 104 P.2d 794 (1940) (overruled on other grounds in *People v. Snyder,* 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958)). Of course, if the consistent statement was 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).

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Hearing, see § 145
Statement, see § 225
Hearsay exception for:
Consistent statement, see § 1236
Inconsistent statement, see § 1235
Prior identification, see § 1238
Inconsistent statements, see §§ 768-770

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

Comment. Two matters concerning the terminology used in this division should be noted: (1) The word "opinion" is used to include all opinions, inferences, conclusions, and other subjective statements made by a witness. (2) The word "matter" is used to encompass facts, data, and such matters as a witness' knowledge, experience, and other intangibles upon which an opinion may be based. Thus, every conceivable basis for an opinion is included within this term.

CROSS-REFERENCES

Competency of witnesses, see §§ 700-704
Control of mode of interrogation, see § 765
Credibility of witnesses, see §§ 780, 785-791
Examination of witnesses generally, see §§ 760-778
Exclusion of cumulative or unduly prejudicial evidence, see § 352
Expert witnesses generally, see §§ 720-754
Preliminary determinations on admissibility of evidence, see §§ 400-406

CHAPTER 1. EXPERT AND OTHER OPINION TESTIMONY

Article 1. Expert and Other Opinion Testimony Generally

§ 800. Opinion testimony by lay witness

800. If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

(a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of his testimony.

Comment. This section codifies existing law. A witness who is not testifying as an expert may testify in the form of an opinion only if the opinion is based on his own perception. *Stuart v. Dotts,* 89 Cal. App.2d 683, 201 P.2d 820 (1949). See discussion in *Manney v. Housing Authority,* 79 Cal. App.2d 453, 459-460, 180 P.2d 69, 73 (1947). And, in addition, the opinion must be "helpful to a clear understanding of his testimony." See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901, 931-935 (1964).

Section 800 does not make inadmissible an opinion that is admissible under existing law, even though the requirements of subdivisions (a) and (b) are not satisfied. Thus, the section does not affect the existing rule that a nonexpert witness may give his opinion as to the value of his property or the value of his own services. See WITKIN, CALIFORNIA EVIDENCE § 179 (1958). The words "such an opinion as is permitted by law" in Section 800 make this clear.

CROSS-REFERENCES

Definitions:
Law, see § 160
Perceive, see § 170
Handwriting, opinion as to, see § 1416
Sanity, opinion as to, see § 870

§ 801. Opinion testimony by expert witness

801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Comment. Section 801 deals with opinion testimony of a witness testifying as an expert; it sets the standard for admissibility of such testimony.

Subdivision (a), which states *when* an expert may give his opinion upon a subject that is within the scope of his expertise, codifies the existing rule that expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training, and education. *People v. Cole,* 47 Cal.2d 99, 103, 301 P.2d 854, 856 (1956). For examples of the variety of subjects upon which expert testimony is admitted, see WITKIN, CALIFORNIA EVIDENCE §§ 190–195 (1958).

Subdivision (b) states a general rule in regard to the permissible bases upon which the opinion of an expert may be founded. The California courts have made it clear that the nature of the matter upon which an expert may base his opinion varies from case to case. In some fields of expert knowledge, an expert may rely on statements made by and information received from other persons; in some other fields of expert knowledge, an expert may not do so. For example, a physician may rely on statements made to him by the patient concerning the history of his condition. *People v. Wilson,* 25 Cal.2d 341, 153 P.2d 720 (1944). A physician may also rely on reports and opinions of other physicians. *Kelley v. Bailey,* 189 Cal. App.2d 728, 11 Cal. Rptr. 448 (1961); *Hope v. Arrowhead & Puritas Waters, Inc.,* 174 Cal. App.2d 222, 344 P.2d 428 (1959). An expert on the valuation of real or personal property, too, may rely on inquiries made of others, commercial reports, market quotations, and relevant sales known to the witness. *Betts v. Southern Cal. Fruit Exchange,* 144 Cal. 402, 77 Pac. 993 (1904); *Hammond Lumber Co. v. County of Los Angeles,* 104 Cal. App. 235, 285 Pac. 896 (1930); *Glantz v. Freedman,* 100 Cal. App. 611, 280 Pac. 704 (1929). On the other hand, an expert on automobile accidents may not rely on extrajudicial statements of others as a partial basis for an opinion as to the point of impact, whether or not the statements would be admissible evidence. *Hodges v. Severns,* 201 Cal. App.2d 99, 20 Cal. Rptr. 129 (1962); *Ribble v. Cook,* 111 Cal. App.2d 903, 245 P.2d 593 (1952). See also *Behr v. County of Santa Cruz,* 172 Cal. App.2d 697, 342 P.2d 987 (1959) (report of fire ranger as to cause of fire held inadmissible because it was based primarily upon statements made to him by other persons).

Likewise, under existing law, irrelevant or speculative matters are not a proper basis for an expert's opinion. See *Roscoe Moss Co. v. Jenkins,* 55 Cal. App.2d 369, 130 P.2d 477 (1942) (expert may not base opinion upon a comparison if the matters compared are not reasonably comparable); *People v. Luis,* 158 Cal. 185, 110 Pac. 580 (1910) (physician may not base opinion as to person's feeblemindedness merely upon the person's exterior appearance); *Long v. Cal.-Western States Life Ins. Co.,* 43 Cal.2d 871, 279 P.2d 43 (1955) (speculative or conjectural data); *Eisenmayer v. Leonardt,* 148 Cal. 596, 84 Pac. 43 (1906) (speculative or conjectural data). *Compare People v. Wochnick,* 98 Cal. App.2d 124, 219 P.2d 70 (1950) (expert may not give opinion as to the truth or falsity of certain statements on basis of lie detector test), *with People v. Jones,* 42 Cal.2d 219, 266 P.2d 38 (1954) (psychiatrist may consider an examination given under the influence of sodium pentothal —the so-called "truth serum"—in forming an opinion as to the mental state of the person examined).

The variation in the permissible bases of expert opinion is unavoidable in light of the wide variety of subjects upon which such opinion can be offered. In regard to some matters of expert opinion, an expert *must,* if he is going to give an opinion that will be helpful to the jury, rely on reports, statements, and other information that might not be admissible evidence. A physician in many instances cannot make a diagnosis without relying on the case history recited by the patient or on reports from various technicians or other physicians. Similarly, an appraiser must rely on reports of sales and other market data if he is to give an opinion that will be of value to the jury. In the usual case where a physician's or an appraiser's opinion is required, the adverse party also will have its expert who will be able to check the data relied upon by the adverse expert. On the other hand, a police officer can analyze skid marks, debris, and the condition of vehicles that have been involved in an accident without relying on the statements of bystanders; and it seems likely that the jury would be as able to evaluate the statements of others in the light of the physical facts, as interpreted by the officer, as would the officer himself. It is apparent that the extent to which an expert may base his opinion upon the statements of others is far from clear. It is at least clear, however, that it is permitted in a number of instances. See *Young v. Bates Valve Bag Corp.,* 52 Cal. App.2d 86, 96-97, 125 P.2d 840, 846 (1942), and cases therein cited. *Cf. People v. Alexander,* 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963).

It is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible; the subjects upon which expert opinion may be received are too numerous to make statutory prescription of applicable rules a feasible venture. It is possible, however, to formulate a general rule that specifies the minimum requisites that must be met in every case, leaving to the courts the task of determining particular detail within this general framework. This standard is expressed in subdivision (b) which states a general rule that is applicable whenever expert opinion is offered on a given subject.

Under subdivision (b), the matter upon which an expert's opinion is based must meet each of three separate but related tests. ***First,*** the mat-

ter must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion is expressed. This requirement assures the expert's acquaintance with the facts of a particular case either by his personal perception or observation or by means of assuming facts not personally known to the witness. *Second,* and without regard to the means by which an expert familiarizes himself with the matter upon which his opinion is based, the matter relied upon by the expert in forming his opinion must be of a type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates. In large measure, this assures the reliability and trustworthiness of the information used by experts in forming their opinions. *Third,* an expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper basis for an opinion. For example, the statements of bystanders as to the cause of a fire may be considered reliable for some purposes by an investigator of the fire, particularly when coupled with physical evidence found at the scene, but the courts have determined this to be an improper basis for an opinion since the trier of fact is as capable as the expert of evaluating such statements in light of the physical facts as interpreted by the expert. *Behr v. County of Santa Cruz,* 172 Cal. App.2d 697, 342 P.2d 987 (1959).

The rule stated in subdivision (b) thus permits an expert to base his opinion upon reliable matter, *whether or not admissible,* of a type that may reasonably be used in forming an opinion upon the subject to which his expert testimony relates. In addition, it provides assurance that the courts and the Legislature are free to continue to develop specific rules regarding the proper bases for particular kinds of expert opinion in specific fields. See, *e.g.,* 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings* at A-1 (1961). Subdivision (b) thus provides a sensible standard of admissibility while, at the same time, it continues in effect the discretionary power of the courts to regulate abuses, thereby retaining in large measure the existing California law.

CROSS-REFERENCES

Blood test experts, see §§ 890-897
Definitions:
  Hearing, see § 145
  Law, see § 160
  Perceive, see § 170
  Trier of fact, see § 235
Expert witnesses, appointment by court, see §§ 730-733
Expert witnesses generally, see §§ 720-723
Interpreters, see §§ 750-754
Judicial notice, use of expert testimony, see § 454
Translators, see §§ 750-754
Writing, expert testimony concerning authenticity of, see § 1418

§ 802. Statement of basis of opinion

802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its

discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

Comment. Section 802 restates the substance of and supersedes a portion of Section 1872 of the Code of Civil Procedure. Section 802, however, relates to all witnesses who testify in the form of opinion, while Section 1872 relates only to experts.

Although Section 802 (like its predecessor, Code of Civil Procedure Section 1872) provides that a witness *may* state the basis for his opinion on direct examination, it is clear that, in some cases, a witness is *required* to do so in order to show that his opinion is applicable to the action before the court. Under existing law, where a witness testifies in the form of opinion not based upon his personal observation, the assumed facts upon which his opinion is based must be stated in order to show that the witness has some basis for forming an intelligent opinion and to permit the trier of fact to determine the applicability of the opinion in light of the existence or nonexistence of such facts. *Eisenmayer v. Leonardt,* 148 Cal. 596, 84 Pac. 43 (1906); *Lemley v. Doak Gas Engine Co.,* 40 Cal. App. 146, 180 Pac. 671 (1919) (hearing denied). Evidence Code Section 802 will not affect the rule set forth in these cases, for it is based essentially on the requirement that all evidence must be shown to be applicable—or relevant—to the action. EVIDENCE CODE §§ 350, 403. But under Section 802, as under existing law, a witness testifying from his personal observation of the facts upon which his opinion is based need not be examined concerning such facts before testifying in the form of opinion; his personal observation is a sufficient basis upon which to found his opinion. *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm'n,* 29 Cal.2d 492, 175 P.2d 823 (1946); *Hart v. Olson,* 68 Cal. App.2d 657, 157 P.2d 385 (1945); *Lemley v. Doak Gas Engine Co., supra.* However, the court may require a witness to state the facts observed before stating his opinion. In this respect, Section 802 codifies the existing rule concerning lay witnesses and, although the existing law is unclear, probably states the existing rule as to expert witnesses. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901, 934 (lay witness), 939 (expert witness) (1964).

CROSS-REFERENCES

Definitions:
Direct examination, see § 760
Law, see § 160

§ 803. Opinion based on improper matter

803. The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

Comment. Under Section 803, as under existing law, an opinion may be held inadmissible or may be stricken if it is based wholly or in substantial part upon improper considerations. Whether or not the opinion should be held inadmissible or stricken will depend in a particular case on the extent to which the improper considerations have influenced the opinion. "The question is addressed to the discretion of the trial court." *People v. Lipari,* 213 Cal. App.2d 485, 493, 28 Cal. Rptr. 808, 813-814 (1963). See discussion in *City of Gilroy v. Filice,* 221 Cal. App.2d 259, 271-272, 34 Cal. Rptr. 368, 375-376 (1963), and cases cited therein. If a witness' opinion is stricken because of reliance upon improper considerations, the second sentence of Section 803 assures the witness the opportunity to express his opinion after excluding from his consideration the matter determined to be improper.

CROSS-REFERENCES

Handwriting, basis of opinion as to, see §§ 1416, 1418, 1419
Matter upon which opinion may be based, see §§ 800, 801
Sanity, opinion as to, see § 870

§ 804. Opinion based on opinion or statement of another

804. (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

Comment. Section 804 is designed to provide protection to a party who is confronted with an expert witness who relies on the opinion or statement of some other person. (See the *Comment* to Section 801 for examples of opinions that may be based on the statements and opinions of others.) In such a situation, a party may find that cross-examination of the witness will not reveal the weakness in his opinion, for the crucial parts are based on the observations or opinions of someone else. Under existing law, if that other person is called as a witness, he is the witness of the party calling him and, therefore, that party may not subject him to cross-examination.

The existing law operates unfairly, for it unnecessarily restricts meaningful cross-examination. Hence, Section 804 permits a party to extend his cross-examination into the underlying bases of the opinion testimony introduced against him by calling the authors of opinions

and statements relied on by adverse witnesses and examining them as if under cross-examination concerning the subject matter of their opinions and statements. See the *Comment* to EVIDENCE CODE § 1203.

CROSS-REFERENCES

Cross-examination of expert witness, see § 721
Definitions:
Action, see § 105
Statement, see § 225
Examination of witnesses, method and scope, see §§ 760-778
Similar provision:
Hearsay declarant, examination as if under cross-examination, see § 1203

§ 805. Opinion on ultimate issue

805. Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

Comment. Although several older cases indicated that an opinion could not be received on an ultimate issue, more recent cases have repudiated this rule. Hence, this section is declarative of existing law. *People v. Wilson,* 25 Cal.2d 341, 349-350, 153 P.2d 720, 725 (1944); *Wells Truckways, Ltd. v. Cebrian,* 122 Cal. App.2d 666, 265 P.2d 557 (1954); *People v. King,* 104 Cal. App.2d 298, 231 P.2d 156 (1951).

CROSS-REFERENCES

Definition:
Trier of fact, see § 235

Article 2. Opinion Testimony on Particular Subjects

§ 870. Opinion as to sanity

870. A witness may state his opinion as to the sanity of a person when:

(a) The witness is an intimate acquaintance of the person whose sanity is in question;

(b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or

(c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

Comment. Subdivisions (a) and (b) restate the substance of and supersede subdivision 10 of Section 1870 of the Code of Civil Procedure. Subdivision (c) merely makes it clear that a witness who meets the requirements of Section 800 or Section 801 is qualified to testify in the form of an opinion as to the sanity of a person. Section 870 does not disturb the present rule that permits a witness to testify to a person's rational or irrational appearance or conduct, even though the witness is not qualified under Section 870 to express an opinion on the person's sanity. See *Pfingst v. Goetting,* 96 Cal. App.2d 293, 215 P.2d 93 (1950).

CROSS-REFERENCES

Definition:
Writing, see § 250
Opinion testimony generally, see §§ 800-805

CHAPTER 2. BLOOD TESTS TO DETERMINE PATERNITY

§ 890. Short title

890. This chapter may be cited as the Uniform Act on Blood Tests to Determine Paternity.

Comment. Section 890 is identical with and supersedes Section 1980.1 of the Code of Civil Procedure.

§ 891. Interpretation

891. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Comment. Section 891 is identical with and supersedes Section 1980.2 of the Code of Civil Procedure.

§ 892. Order for blood tests in civil actions involving paternity

892. In a civil action in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, and shall upon motion of any party to the action made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

Comment. Section 892 restates the substance of and supersedes Section 1980.3 of the Code of Civil Procedure.

CROSS-REFERENCES

Appointment of expert witnesses generally, see §§ 730-733
Court order for blood test, see Code of Civil Procedure § 2032
Definition:
Civil action, see § 120

§ 893. Tests made by experts

893. The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

Comment. Section 893 is identical with and supersedes Section 1980.4 of the Code of Civil Procedure.

CROSS-REFERENCES

Examination of expert witnesses, see §§ 721, 722, 801-805
Examination of witnesses generally, see §§ 760-778

§ 894. Compensation of experts

894. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by the county, and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action.

Comment. Section 894 restates the substance of and supersedes all of Code of Civil Procedure Section 1980.5 except the last sentence, which is superseded by Evidence Code Section 897.

CROSS-REFERENCES

Definition:
Action, see § 105

§ 895. Determination of paternity

895. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.

Comment. Section 895 is identical with and supersedes Section 1980.6 of the Code of Civil Procedure.

CROSS-REFERENCES

Definition:
Evidence, see § 140

§ 896. Limitation on application in criminal matters

896. This chapter applies to criminal actions subject to the following limitations and provisions:

(a) An order for the tests shall be made only upon application of a party or on the court's initiative.

(b) The compensation of the experts shall be paid by the county under order of court.

(c) The court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 895; otherwise, the case shall be submitted for determination upon all the evidence.

Comment. Section 896 restates the substance of and supersedes Section 1980.7 of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
Criminal action, see § 130
Evidence, see § 140
Effect of expert testimony, instruction on, see Penal Code § 1127b

§ 897. Right to produce other expert evidence

897. Nothing contained in this chapter shall be deemed or construed to prevent any party to any action from producing other expert evidence on the matter covered by this chapter; 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.

Comment. Section 897 supersedes the last sentence of Section 1980.5 of the Code of Civil Procedure. Insofar as Section 897 permits a party to produce other expert evidence, it makes no change in existing law. However, Section 897 permits a party to recover ordinary witness fees for expert witnesses called by him, whereas Section 1980.5 does not permit him to do so. In this respect, Section 897 is consistent with the general provision on recovery of witness fees for expert witnesses called by a party in a case where other experts are appointed by the court. See CODE CIV. PROC. § 1871 (third paragraph) (recodified as EVIDENCE CODE § 733).

CROSS-REFERENCES

Court may limit number of expert witnesses, see § 723
Definitions:
Action, see § 105
Evidence, see § 140
Similar provision:
Court-appointed experts generally, see § 733

DIVISION 8. PRIVILEGES

CHAPTER 1. DEFINITIONS

§ 900. Application of definitions

900. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division. They do not govern the construction of any other division.

Comment. Section 900 makes it clear that the definitions in Sections 901 through 905 apply only to Division 8 (Privileges) and that these definitions are not applicable where the context or language of a particular section in Division 8 requires that a word or phrase used in that section be given a different meaning. The definitions contained in Division 2 (commencing with Section 100) apply to the entire code, including Division 8. Definitions applicable only to a particular article are found in that article.

CROSS-REFERENCES

See Division 2 and the *Cross-References* under that division for definitions of general application

§ 901. "Proceeding"

901. "Proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.

Comment. "Proceeding" is defined to mean all proceedings of whatever kind in which testimony can be compelled by law to be given. It includes civil and criminal actions and proceedings, administrative proceedings, legislative hearings, grand jury proceedings, coroners' inquests, arbitration proceedings, and any other kind of proceeding in which a person can be compelled by law to appear and give evidence. This broad definition is necessary in order that Division 8 may be made applicable to all situations where a person can be compelled to testify. The reasons for giving this broad scope to Division 8 are stated in the *Comment* to Section 910.

CROSS-REFERENCES

Definitions:
Action, see § 105
Law, see § 160

§ 902. "Civil proceeding"

902. "Civil proceeding" means any proceeding except a criminal proceeding.

Comment. "Civil proceeding" includes not only a civil action or proceeding, but also any nonjudicial proceeding in which, pursuant to law, testimony can be compelled to be given. See EVIDENCE CODE §§ 901 and 903.

CROSS-REFERENCES

Definitions:
Criminal proceeding, see § 903
Proceeding, see § 901

§ 903. "Criminal proceeding"

903. "Criminal proceeding" means:

(a) A criminal action; and

(b) A proceeding pursuant to Article 3 (commencing with Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code to determine whether a public officer should be removed from office for wilful or corrupt misconduct in office.

Comment. This division treats a proceeding by accusation for the removal of a public officer under Government Code Sections 3060-3073 the same as a criminal action. Proceedings by accusation and criminal actions are so nearly alike in their basic nature that, so far as privileges are concerned, this similar treatment is justified.

CROSS-REFERENCES

Definition:
Criminal action, see § 130

§ 904. "Disciplinary proceeding"

904. "Disciplinary proceeding" means a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned, but does not include a criminal proceeding.

Comment. The definition of "disciplinary proceeding" generally follows the definition in Government Code Section 11503 of the kind of proceeding initiated by accusation. The Government Code definition has been modified, however, to make it clear that Section 904 covers not only license revocation and suspension proceedings, but also personnel disciplinary proceedings. "Disciplinary proceeding" does not include, however, a proceeding by accusation for the removal of a public officer under Government Code Section 3060 *et seq.*

CROSS-REFERENCES

Definitions:
Criminal proceeding, see § 903
Proceeding, see § 901
Public entity, see § 200

§ 905. "Presiding officer"

905. "Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

Comment. "Presiding officer" is defined so that reference may be made in Division 8 to the person who makes rulings on questions of privilege in nonjudicial proceedings. The term includes arbitrators, hearing officers, referees, and any other person who is authorized to make rulings on claims of privilege. It, of course, includes the judge or other person presiding in a judicial proceeding.

CROSS-REFERENCES

Definition:
Proceeding, see § 901

CHAPTER 2. APPLICABILITY OF DIVISION

§ 910. Applicability of division

910. Except as otherwise provided by statute, the provisions of this division apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings.

Comment. Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact. Privileges are granted, however, for reasons of policy unrelated to the reliability of the information involved. A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding. Thus, for example, to protect the attorney-client relationship, it is necessary to prevent disclosure of confidential communications made in the course of that relationship.

If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in proceedings other than judicial proceedings. The protection afforded by a privilege would be insufficient if a court were the only place where the privilege could be invoked. Every officer with power to issue subpoenas for investigative purposes, every administrative agency, every local governing board, and many more persons could pry into the protected information if the privilege rules were applicable only in judicial proceedings.

Therefore, the policy underlying the privilege rules requires their recognition in all proceedings of any nature in which testimony can be compelled by law to be given. Section 910 makes the privilege rules applicable to all such proceedings. In this respect, it follows the precedent set in New Jersey when privilege rules, based in part on the Uniform Rules of Evidence, were enacted. See N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A:84A-1 to 2A:84A-49).

Statutes that relax the rules of evidence in particular proceedings do not have the effect of making privileges inapplicable in such proceedings. For example, Labor Code Section 5708, which provides that the officer conducting an Industrial Accident Commission proceeding "shall not be bound by the common law or statutory rules of evidence," does not make privileges inapplicable in such proceedings. Thus, the lawyer-client privilege must be recognized in an Industrial Accident Commission proceeding. On the other hand, Division 8 and other statutes provide exceptions to particular privileges for particular types of proceedings. *E.g.*, EVIDENCE CODE § 998 (physician-patient privilege inapplicable in criminal proceeding or disciplinary proceeding); LABOR CODE §§ 4055, 6407, 6408 (testimony by physician and certain reports of physicians admissible as evidence in Industrial Accident Commission proceedings).

Whether Section 910 is declarative of existing law is uncertain. No California case has squarely decided whether the privileges which are recognized in judicial proceedings are also applicable in nonjudicial

proceedings. By statute, however, they have been made applicable in all adjudicatory proceedings conducted under the terms of the Administrative Procedure Act. GOVT. CODE § 11513. The reported decisions indicate that, as a general rule, privileges are assumed to be applicable in nonjudicial proceedings. See, *e.g.*, *McKnew v. Superior Court*, 23 Cal.2d 58, 142 P.2d 1 (1943); *Ex parte McDonough*, 170 Cal. 230, 149 Pac. 566 (1915); *Board of Educ. v. Wilkinson*, 125 Cal. App.2d 100, 270 P.2d 82 (1954); *In re Bruns*, 15 Cal. App.2d 1, 58 P.2d 1318 (1936). Thus, Section 910 appears to be declarative of existing practice, but there is no authority as to whether it is declarative of existing law. Its enactment will remove the existing uncertainty concerning the right to claim a privilege in a nonjudicial proceeding. See generally *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 309-327 (1964).

CROSS-REFERENCES

Definitions:
Proceeding, see § 901
Statute, see § 230
Discovery proceedings, privileges recognized, see Code of Civil Procedure § 2016(b)
State administrative proceedings, privileges recognized, see Government Code § 11513

CHAPTER 3. GENERAL PROVISIONS RELATING TO PRIVILEGES

§ 911. General rule as to privileges

911. Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

Comment. This section codifies the existing law that privileges are not recognized in the absence of statute. See *Chronicle Pub. Co. v. Superior Court*, 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 117, 354 P.2d 637, 645 (1960); *Tatkin v. Superior Court*, 160 Cal. App.2d 745, 753, 326 P.2d 201, 205-206 (1958); *Whitlow v. Superior Court*, 87 Cal. App.2d 175, 196 P.2d 590 (1948). See also 8 WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961); WITKIN, CALIFORNIA EVIDENCE § 396 at 446 (1958). This is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme. Even with respect to privileges, however, the courts to a limited extent are permitted to develop the details of declared principles. See, *e.g.*, Section 1060 (trade secret).

CROSS-REFERENCES

Definitions:
Person, see § 175
Statute, see § 230
Writing, see § 250
Work product of attorney, discovery of, see Code of Civil Procedure § 2016(b)

§ 912. Waiver of privilege

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged under this division is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege.

Comment. This section covers in some detail the matter of waiver of those privileges that protect confidential communications.

Subdivision (a). Subdivision (a) states the general rule with respect to the manner in which a privilege is waived. Failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the privilege constitutes a waiver. This seems to be the existing law. See *City & County of San Francisco v. Superior Court,* 37 Cal.2d 227, 233, 231 P.2d 26, 29 (1951); *Lissak v. Crocker Estate Co.,* 119 Cal. 442, 51 Pac. 688 (1897). There is, however, at least one case that is out of harmony with this rule. *People v. Kor,* 129 Cal. App.2d 436, 277 P.2d 94 (1954) (defendant's failure to claim privilege to prevent a witness from testifying to a communication between the defendant and his attorney held not to waive the privilege to prevent the attorney from similarly testifying).

Subdivision (b). A waiver of the privilege by a joint holder of the privilege does not operate to waive the privilege for any of the other

joint holders of the privilege. This codifies existing law. See *People v. Kor,* 129 Cal. App.2d 436, 277 P.2d 94 (1954); *People v. Abair,* 102 Cal. App.2d 765, 228 P.2d 336 (1951).

Subdivision (c). A privilege is not waived when a revelation of the privileged matter takes place in another privileged communication. Thus, for example, a person does not waive his lawyer-client privilege by telling his wife in confidence what it was that he told his attorney. Nor does a person waive the marital communication privilege by telling his attorney in confidence in the course of the attorney-client relationship what it was that he told his wife. And a person does not waive the lawyer-client privilege as to a communication by relating it to another attorney in the course of a separate relationship. A privileged communication should not cease to be privileged merely because it has been related in the course of another privileged communication. The theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege. Where the revelation of the privileged matter takes place in another privileged communication, there has not been such an abandonment. Of course, this rule does not apply unless the revelation was within the scope of the relationship in which it was made; a client consulting his lawyer on a contract matter who blurts out that he told his doctor that he had a venereal disease has waived the privilege, even though he intended the revelation to be confidential, because the revelation was not necessary to the contract business at hand.

Subdivision (d). Subdivision (d) is designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the lawyer, physician, or psychotherapist was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege, even though the disclosure is made with the client's knowledge and consent. Nor would a physician's or psychotherapist's keeping of confidential records necessary to diagnose or treat a patient, such as confidential hospital records, be a waiver of the privilege, even though other authorized persons have access to the records. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure.

Subdivision (d) may change California law. *Himmelfarb v. United States,* 175 F.2d 924 (9th Cir. 1949), applying the California law of privileges, held that a lawyer's revelation to an accountant of a client's communication to the lawyer waived the client's privilege if such revelation was authorized by the client. However, no California case precisely in point has been found.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Person, see § 175
Proceeding, see § 901
Statement, see § 225
Physical or mental examination for discovery, when privilege waived, see Code of Civil Procedure § 2032

§ 913. Comment on, and inferences from, exercise of privilege

913. (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Comment. Section 913 prohibits any comment on the exercise of a privilege and provides that the trier of fact may not draw any inference therefrom. Except as noted below, this probably states existing law. See *People v. Wilkes*, 44 Cal.2d 679, 284 P.2d 481 (1955). In addition, the court is required, upon request of a party who may be adversely affected, to instruct the jury that no presumption arises and that no inference is to be drawn from the exercise of a privilege. If comment could be made on the exercise of a privilege and adverse inferences drawn therefrom, a litigant would be under great pressure to forgo his claim of privilege and the protection sought to be afforded by the privilege would be largely negated. Moreover, the inferences which might be drawn would, in many instances, be quite unwarranted.

It should be noted that Section 913 deals only with comment upon, and the drawing of adverse inferences from, the exercise of a privilege. Section 913 does not purport to deal with the inferences that may be drawn from, or the comment that may be made upon, the evidence in the case.

Section 13 of Article I of the California Constitution provides that, in a criminal case, the failure of the defendant to explain or to deny by his testimony the evidence in the case against him may be commented upon. The courts, in reliance on this provision, have held that the failure of a party in either a civil or criminal case to explain or to deny the evidence against him may be considered in determining what inferences should be drawn from that evidence. *People v. Adamson*, 27 Cal.2d 478, 165 P.2d 3 (1946); *Fross v. Wotton*, 3 Cal.2d 384, 44 P.2d 350 (1935). However, the cases have emphasized that this right of comment and consideration does not extend in criminal cases to the drawing of inferences from the claim of privilege itself. Inferences may be drawn only from the evidence in the case and the defendant's

failure to explain or deny such evidence. *People v. Ashley,* 42 Cal.2d 246, 267 P.2d 271 (1954); *People v. Adamson, supra,* 27 Cal.2d 478, 165 P.2d 3 (1946). Section 413 of the Evidence Code expresses the principle underlying this constitutional provision; nothing in Section 913 affects the application of Section 413 in either criminal or civil cases. See the *Comment* to EVIDENCE CODE § 413. Thus, for example, it is perfectly proper under the Evidence Code for counsel to point out that the evidence against the other party is uncontradicted.

People v. Adamson, supra, sustained the validity of Article I, Section 13, of the California Constitution against an attack based upon the United States Constitution. The *Adamson* decision was affirmed by the United States Supreme Court in *Adamson v. California,* 332 U.S. 46 (1947), on the ground that the federal privilege arising under the Fifth Amendment to the United States Constitution did not apply in state proceedings. This basis for the decision in *Adamson v. California, supra,* was recently repudiated in *Malloy v. Hogan,* 378 U.S. 1 (1964), which held that the privilege against self-incrimination is made applicable to state proceedings by the Fourteenth Amendment. In neither case, however, did the United States Supreme Court decide whether the right of comment and inference permissible under California law is consistent with the guarantees of the federal constitution. Nonetheless, the *Malloy* decision has at least cast doubt on the validity of the California rule—reflected in Article I, Section 13, of the California Constitution and Evidence Code Section 413—when a federal constitutional privilege is involved.

Section 913 may modify existing California law as it applies in civil cases. In *Nelson v. Southern Pacific Co.,* 8 Cal.2d 648, 67 P.2d 682 (1937), the Supreme Court held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he testifies in a self-exculpatory manner in a subsequent proceeding. The Supreme Court within recent years has overruled statements in certain criminal cases declaring a similar rule. *People v. Snyder,* 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958) (overruling or disapproving several cases there cited). See also *People v. Sharer,* 61 Cal.2d ___, 40 Cal. Rptr. 851, 395 P.2d 899 (1964). Section 913 will, in effect, overrule the holding in the *Nelson* case, for it declares that no inference may be drawn from an exercise of a privilege either on the issue of credibility or on any other issue, whether the privilege was exercised in the instant proceeding or on a prior occasion. The status of the rule in the *Nelson* case has been in doubt because of the recent holdings in criminal cases; Section 913 eliminates any remaining basis for applying a different rule in civil cases.

There is some language in *Fross v. Wotton,* 3 Cal.2d 384, 44 P.2d 350 (1935), that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it does indicate California law, that law is changed by Evidence Code Sections 413 and 913. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege.

CROSS-REFERENCES

Comment on failure of criminal defendant to explain or deny evidence against him, see Constitution, Art. I, § 13; Penal Code § 1127
Definitions:
Inference, see § 600
Presiding officer, see § 905
Presumption, see § 600
Proceeding, see § 901
Trier of fact, see § 235
Failure to explain or deny evidence in case, see § 413

§ 914. Determination of claim of privilege; limitation on punishment for contempt

914. (a) The presiding officer shall determine a claim of privilege in any proceeding in the same manner as a court determines such a claim under Article 2 (commencing with Section 400) of Chapter 4 of Division 3.

(b) No person may be held in contempt for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a court that he disclose such information. This subdivision does not apply to any governmental agency that has constitutional contempt power, nor does it impliedly repeal Chapter 4 (commencing with Section 9400) of Part 1 of Division 2 of Title 2 of the Government Code. If no other statutory procedure is applicable, the procedure prescribed by Section 1991 of the Code of Civil Procedure shall be followed in seeking an order of a court that the person disclose the information claimed to be privileged.

Comment. Subdivision (a) makes the general provisions concerning preliminary determinations on admissibility of evidence (Sections 400-406) applicable when a presiding officer who is not a judge is called upon to determine whether or not a privilege exists. Subdivision (a) is necessary because Sections 400-406, by their terms, apply only to determinations by a court.

Subdivision (b) is needed to protect persons claiming privileges in nonjudicial proceedings. Because such proceedings are often conducted by persons untrained in law, it is desirable to have a judicial determination of whether a person is required to disclose information claimed to be privileged before he can be held in contempt for failing to disclose such information. What is contemplated is that, if a claim of privilege is made in a nonjudicial proceeding and is overruled, application must be made to a court for an order compelling the witness to answer. Only if such order is made and is disobeyed may a witness be held in contempt. That the determination of privilege in a judicial proceeding is a question for the judge is well-established California law. See, *e.g.*, *Holm v. Superior Court,* 42 Cal.2d 500, 507, 267 P.2d 1025, 1029 (1954).

Subdivision (b), of course, does not apply to any body—such as the Public Utilities Commission—that has constitutional power to impose punishment for contempt. See, *e.g.*, CAL. CONST., Art. XII, § 22. Nor does this subdivision apply to witnesses before the State Legislature or its committees. See GOVT. CODE §§ 9400-9414.

CROSS-REFERENCES

Definitions:
Presiding officer, see § 905
Proceeding, see § 901
Statute, see § 230
Procedure for compelling testimony in out-of-court proceedings, see Code of Civil Procedure § 1991
Procedure for determining questions of fact on claims of privilege, see §§ 404, 405
Public Utilities Commission, power to punish for contempt, see Constitution, Art. XII, § 22
State Legislature or its committees compelling testimony, see Government Code §§ 9400-9414

§ 915. Disclosure of privileged information in ruling on claim of privilege

915. (a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

Comment. Subdivision (a) states the general rule that revelation of the information asserted to be privileged may not be compelled in order to determine whether or not it is privileged. This codifies existing law. See *Collette v. Sarrasin,* 184 Cal. 283, 288-289, 193 Pac. 571, 573 (1920); *People v. Glen Arms Estate, Inc.,* 230 Cal. App.2d ___, ___ note 1, 41 Cal. Rptr. 303, 305 note 1 (1964).

Subdivision (b) provides an exception to this general rule for information claimed to be privileged under Section 1040 (official information), Section 1041 (identity of an informer), or Section 1060 (trade secret). These privileges exist only if the interest in maintaining the secrecy of the information outweighs the interest in seeing that justice is done in the particular case. In at least some cases, it will be necessary for the judge to examine the information claimed to be privileged in order to balance these competing considerations intelligently. See *People v. Glen Arms Estate, Inc.,* 230 Cal. App.2d ___, ___ note 1, 41 Cal. Rptr. 303, 305 note 1 (1964), and the cases cited in 8 WIGMORE, EVIDENCE § 2379 at 812 note 6 (McNaughton rev. 1961). And see *United States v. Reynolds,* 345 U.S. 1, 7-11 (1953), and pertinent discussion thereof in 8 WIGMORE, EVIDENCE § 2379 (McNaughton rev. 1961). Even in these cases, Section 915 undertakes to give adequate protection to the person claiming the privilege by providing that the infor-

mation be disclosed in confidence to the judge and requiring that it be kept in confidence if it is found to be privileged.

The exception in subdivision (b) applies only when a court is ruling on the claim of privilege. Thus, in view of subdivision (a), disclosure of the information cannot be required, for example, in an administrative proceeding.

CROSS-REFERENCES

Definitions:
Person, see § 175
Presiding officer, see § 905
Procedure for determining claims of privilege, see §§ 404, 405, 914

§ 916. Exclusion of privileged information where persons authorized to claim privilege are not present

916. (a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if:

(1) The person from whom the information is sought is not a person authorized to claim the privilege; and

(2) There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if:

(1) He is otherwise instructed by a person authorized to permit disclosure; or

(2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

Comment. Section 916 is needed to protect the holder of a privilege when he is not available to protect his own interest. For example, a third party—perhaps the lawyer's secretary—may have been present when a confidential communication to a lawyer was made. In the absence of both the holder himself and the lawyer, the secretary could be compelled to testify concerning the communication if there were no provision such as Section 916 which requires the presiding officer to recognize the privilege.

The erroneous exclusion of information pursuant to Section 916 on the ground that it is privileged might amount to prejudicial error. On the other hand, the erroneous failure to exclude information pursuant to Section 916 could *not* amount to prejudicial error. See EVIDENCE CODE § 918.

Section 916 may be declarative of the existing law. No case in point has been found, but see the language in *People v. Atkinson*, 40 Cal. 284, 285 (1870) (attorney-client privilege).

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Person, see § 175
Presiding officer, see § 905
Proceeding, see § 901

§ 917. Presumption that certain communications are confidential

917. Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient,

psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Comment. A number of sections provide privileges for communications made "in confidence" in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that a communication made in the course of such a relationship is presumed to be confidential and the party objecting to the claim of privilege has the burden of showing that it was not. See generally, with respect to the marital communication privilege, 8 WIGMORE, EVIDENCE § 2336 (McNaughton rev. 1961). See also *Blau v. United States,* 340 U.S. 332, 333-335 (1951) (holding that marital communications are presumed to be confidential). In adopting by statute a revised version of the privileges article of the Uniform Rules of Evidence, New Jersey included such a provision in its statement of the lawyer-client privilege. N.J. REV. STAT. § 2A:84A-20(3), added by N.J. Laws 1960, Ch. 52, p. 452.

If the privilege claimant were required to show that the communication was made in confidence, he would be compelled, in many cases, to reveal the subject matter of the communication in order to establish his right to the privilege. Hence, Section 917 is included to establish a presumption of confidentiality, if this is not already the existing law in California. See *Sharon v. Sharon,* 79 Cal. 633, 678, 22 Pac. 26, 40 (1889) (attorney-client privilege); *Hager v. Shindler,* 29 Cal. 47, 63 (1865) ("*Prima facie,* all communications made by a client to his attorney or counsel [in the course of that relationship] must be regarded as confidential.").

CROSS-REFERENCES

Definitions:
Burden of proof, see § 115
Presumption, see § 600

§ 918. Effect of error in overruling claim of privilege

918. A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.

Comment. This section is consistent with existing law. See *People v. Gonzales,* 56 Cal. App. 330, 204 Pac. 1088 (1922), and discussion of similar cases cited in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 525 note 5 (1964).

§ 919. Admissibility where disclosure erroneously compelled

919. Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

(a) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

(b) The presiding officer did not exclude the privileged information as required by Section 916.

Comment. Section 919 protects a holder of a privilege from the detriment he would otherwise suffer in a later proceeding when, in a prior proceeding, the presiding officer erroneously overruled a claim of privilege and compelled revelation of the privileged information. Although Section 912 provides that such a coerced disclosure does not waive a privilege, it does not provide specifically that evidence of the prior disclosure is inadmissible; Section 919 assures the inadmissibility of such evidence in the subsequent proceeding.

Section 919 probably states existing law. See *People v. Abair,* 102 Cal. App.2d 765, 228 P.2d 336 (1951) (prior disclosure by an attorney held inadmissible in a later proceeding where the holder of the privilege had first opportunity to object to attorney's testifying). See also *People v. Kor,* 129 Cal. App.2d 436, 277 P.2d 94 (1954). However, there is little case authority upon the proposition.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Person, see § 175
Presiding officer, see § 905

§ 920. No implied repeal

920. Nothing in this division shall be construed to repeal by implication any other statute relating to privileges.

Comment. Some of the statutes relating to privileges are found in other codes and are continued in force. See, *e.g.,* PENAL CODE §§ 266h and 266i (making the marital communications privilege inapplicable in prosecutions for pimping and pandering, respectively). Section 920 assures that nothing in this division makes privileged any information declared by statute to be unprivileged or makes unprivileged any information declared by statute to be privileged.

CROSS-REFERENCES

Definition:
Statute, see § 230

CHAPTER 4. PARTICULAR PRIVILEGES

Article 1. Privilege of Defendant in Criminal Case

§ 930. Privilege not to be called as a witness and not to testify

930. To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.

Comment. Section 930 recognizes that the defendant in a criminal case has a constitutional privilege not to be called as a witness and not to testify. CAL. CONST., Art. I, § 13. See *Killpatrick v. Superior Court,* 153 Cal. App.2d 146, 314 P.2d 164 (1957); *People v. Talle,* 111 Cal. App.2d 650, 245 P.2d 633 (1952). Section 930 also recognizes that the defendant may have a similar privilege under the United States Constitution. See *Malloy v. Hogan,* 378 U.S. 1 (1964).

CROSS-REFERENCES

Constitutional provisions:
Cal. Constitution, Art. I, § 13
U.S. Constitution, Fifth Amendment

Article 2. Privilege Against Self-Incrimination

§ 940. Privilege against self-incrimination

940. To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.

Comment. Section 940 recognizes the privilege (derived from the California and United States Constitutions) of a person to refuse, when testifying, to give information that might tend to incriminate him. See *Fross v. Wotton*, 3 Cal.2d 384, 44 P.2d 350 (1935); *In re Leavitt*, 174 Cal. App.2d 535, 345 P.2d 75 (1959). This privilege should be distinguished from the privilege stated in Section 930 (privilege of defendant in a criminal case to refuse to testify at all).

Section 940 does not determine the scope of the privilege against self-incrimination; the scope of the privilege is determined by the pertinent provisions of the California and United States Constitutions as interpreted by the courts. See CAL. CONST., Art. I, § 13. See also *Malloy v. Hogan*, 378 U.S. 1 (1964). Nor does Section 940 prescribe the exceptions to the privilege or indicate when it has been waived. This, too, is determined by the cases interpreting the pertinent provisions of the California and United States Constitutions. For a statement of the scope of the constitutional privilege and some of its exceptions, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 215-218, 343-377 (1964).

CROSS-REFERENCES

Constitutional provisions:
Cal. Constitution, Art. I, § 13
U.S. Constitution, Fifth Amendment
Determination of whether evidence may tend to incriminate, see § 404

Article 3. Lawyer-Client Privilege

§ 950. "Lawyer"

950. As used in this article, "lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

Comment. "Lawyer" is defined to include a person "reasonably believed by the client to be authorized" to practice law. Since the privilege is intended to encourage full disclosure, the client's reasonable belief that the person he is consulting is an attorney is sufficient to justify application of the privilege. See 8 WIGMORE, EVIDENCE § 2302 (McNaughton rev. 1961), and cases there cited in note 1. See also MCCORMICK, EVIDENCE § 92 (1954).

There is no requirement that the lawyer be licensed to practice in a jurisdiction that recognizes the lawyer-client privilege. Legal transactions frequently cross state and national boundaries and require consultation with attorneys from many different jurisdictions. When a California resident travels outside the State and has occasion to con-

sult a lawyer during such travel, or when a lawyer from another state or nation participates in a transaction involving a California client, the client should be entitled to assume that his communications will be given as much protection as they would be if he consulted a California lawyer in California. A client should not be forced to inquire about the jurisdictions where the lawyer is authorized to practice and whether such jurisdictions recognize the lawyer-client privilege before he may safely communicate with the lawyer.

CROSS-REFERENCES

Definitions:
Client, see § 951
State, see § 220
Similar provisions:
Physician-patient privilege, see § 990
Psychotherapist-patient privilege, see § 1010

§ 951. "Client"

951. As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

Comment. Under Section 951, public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned. This codifies existing law. See *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954). Likewise, such unincorporated organizations as labor unions, social clubs, and fraternal societies have a lawyer-client privilege when the organization (rather than its individual members) is the client. See EVIDENCE CODE § 175 (defining "person") and § 200 (defining "public entity").

CROSS-REFERENCES

Definitions:
Lawyer, see § 950
Person, see § 175
Similar provisions:
Physician-patient privilege, see § 991
Psychotherapist-patient privilege, see § 1011

§ 952. "Confidential communication between client and lawyer"

952. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes advice given by the lawyer in the course of that relationship.

Comment. The requirement that the communication be made in the course of the lawyer-client relationship and be confidential is in accord

with existing law. See *City & County of San Francisco v. Superior Court,* 37 Cal.2d 227, 234-235, 231 P.2d 26, 29-30 (1951).

Confidential communications also include those made to third parties —such as the lawyer's secretary, a physician, or similar expert—for the purpose of transmitting such information to the lawyer because they are "reasonably necessary for the transmission of the information." This codifies existing law. See, *e.g., City & County of San Francisco v. Superior Court, supra* (communication to a physician); *Loftin v. Glaser,* Civil No. 789604 (L.A. Super. Ct., July 23, 1964) (communication to an accountant), as reported in Los Angeles Daily Journal Report Section, August 25, 1964 (memorandum opinion of Judge Philbrick McCoy).

A lawyer at times may desire to have a client reveal information to an expert consultant in order that the lawyer may adequately advise his client. The inclusion of the words "or the accomplishment of the purpose for which the lawyer is consulted" assures that these communications, too, are within the scope of the privilege. This part of the definition may change existing law. *Himmelfarb v. United States,* 175 F.2d 924, 938-939 (9th Cir. 1949), applying California law, held that the presence of an accountant during a lawyer-client consultation destroyed the privilege, but no California case directly in point has been found. Of course, if the expert consultant is acting merely as a conduit for communications from the client to the attorney, the doctrine of *City & County of San Francisco v. Superior Court, supra,* applies and the communication would be privileged under existing law as well as under this section. See also EVIDENCE CODE § 912(d) and the *Comment* thereto.

The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person—such as a spouse, parent, business associate, or joint client—who is present to further the interest of the client in the consultation. These words refer, too, to another person and his attorney who may meet with the client and his attorney in regard to a matter of joint concern. This may change existing law, for the presence of a third person sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client. See *Attorney-Client Privilege in California,* 10 STAN. L. REV. 297, 308 (1958), and authorities there cited in notes 67-71. See also *Himmelfarb v. United States, supra.*

CROSS-REFERENCES

Definitions:
Client, see § 951
Lawyer, see § 950
Person, see § 175
Disclosure to third person, when privileged, see § 912
Presumption that communication is confidential, see § 917
Similar provisions:
Physician-patient privilege, see § 992
Psychotherapist-patient privilege, see § 1012

§ 953. "Holder of the privilege"

953. As used in this article, "holder of the privilege" means:

(a) The client when he has no guardian or conservator.

(b) A guardian or conservator of the client when the client has a guardian or conservator.

(c) The personal representative of the client if the client is dead.

(d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

Comment. Under subdivisions (a) and (b), the guardian of a client is the holder of the privilege if the client has a guardian, and the client becomes the holder of the privilege when he no longer has a guardian. For example, if an underage client or his guardian consults a lawyer, the guardian is the holder of the privilege under subdivision (b) until the guardianship is terminated; thereafter, the client himself is the holder of the privilege. The present California law is uncertain. The statutes do not deal with the problem, and no appellate decision has discussed it.

Under subdivision (c), the personal representative of a client is the holder of the privilege when the client is dead. He may either claim or waive the privilege on behalf of the deceased client. This may be a change in California law. Under existing law, it seems probable that the privilege survives the death of the client and that no one can waive it after the client's death. See *Collette v. Sarrasin,* 184 Cal. 283, 289, 193 Pac. 571, 573 (1920). Hence, the privilege apparently is recognized even when it would be clearly to the interest of the estate of the deceased client to waive it. Under Section 953, however, the personal representative of a deceased client may waive the privilege. The purpose underlying the privilege—to provide a client with the assurance of confidentiality—does not require the recognition of the privilege when to do so is detrimental to his interest or to the interests of his estate.

CROSS-REFERENCES

Definitions:
Client, see § 951
Public entity, see § 200
Similar provisions:
Physician-patient privilege, see § 993
Psychotherapist-patient privilege, see § 1013

§ 954. Lawyer-client privilege

954. Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

Comment. Section 954 is the basic statement of the lawyer-client privilege. Exceptions to this privilege are stated in Sections 956-962.

Persons entitled to claim the privilege. The persons entitled to claim the privilege are specified in subdivisions (a), (b), and (c). See EVIDENCE CODE § 953 for the definition of "holder of the privilege."

Eavesdroppers. Under Section 954, the lawyer-client privilege can be asserted to prevent *anyone* from testifying to a confidential communication. Thus, clients are protected against the risk of disclosure by eavesdroppers and other wrongful interceptors of confidential communications between lawyer and client. Probably no such protection was provided prior to the enactment of Penal Code Sections 653i and 653j. See *People v. Castiel*, 153 Cal. App.2d 653, 315 P.2d 79 (1957). See also *Attorney-Client Privilege in California*, 10 STAN. L. REV. 297, 310-312 (1958), and cases there cited in note 84.

Penal Code Section 653j makes evidence obtained by *electronic* eavesdropping or recording in violation of the section inadmissible in "any judicial, administrative, legislative, or other proceeding." The section also provides a criminal penalty and contains definitions and exceptions. Penal Code Section 653i makes it a felony to eavesdrop by an electronic or other device upon a conversation between a person in custody of a public officer or on public property and that person's lawyer, religious advisor, or physician.

Section 954 is consistent with Penal Code Sections 653i and 653j but provides broader protection, for it protects against disclosure of confidential communications by anyone who obtained knowledge of the communication without the client's consent. See also EVIDENCE CODE § 912 (when disclosure with client's consent constitutes a waiver of the privilege). The use of the privilege to prevent testimony by eavesdroppers and those to whom the communication was wrongfully disclosed does not, however, affect the rule that the making of the communication under circumstances where others could easily overhear it is evidence that the client did not intend the communication to be confidential. See *Sharon v. Sharon*, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889).

Termination of privilege. The privilege may be claimed by a person listed in Section 954, or the privileged information excluded by the presiding officer under Section 916, only if there is a holder of the privilege in existence. Hence, the privilege ceases to exist when the client's estate is finally distributed and his personal representative is discharged. This is apparently a change in California law. Under the existing law, it seems likely that the privilege continues to exist indefinitely after the client's death and that no one has authority to waive the privilege. See *Collette v. Sarrasin*, 184 Cal. 283, 193 Pac. 571 (1920). See generally *Paley v. Superior Court*, 137 Cal. App.2d 450, 290 P.2d 617 (1955), and discussion of the analogous situation in connection with the physician-patient privilege in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence*

(Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 408-410 (1964). Although there is good reason for maintaining the privilege while the estate is being administered—particularly if the estate is involved in litigation—there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged.

CROSS-REFERENCES

Definitions:
Client, see § 951
Confidential communication between client and lawyer, see § 952
Holder of the privilege, see § 953
Lawyer, see § 950
Person, see § 175
Eavesdropping on privileged communications prohibited, see Penal Code §§ 653i, 653j
General provisions relating to privileges, see §§ 910-920
Similar provisions:
Physician-patient privilege, see § 994
Psychotherapist-patient privilege, see § 1014

§ 955. When lawyer required to claim privilege

955. The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

Comment. The obligation of the lawyer to claim the privilege on behalf of the client, unless otherwise instructed by a person authorized to permit disclosure, is consistent with Section 6068(e) of the Business and Professions Code.

CROSS-REFERENCES

Definition:
Lawyer, see § 950
Duty of lawyer to maintain confidence, see Business and Professions Code § 6068(e)
Similar provisions:
Physician-patient privilege, see § 995
Psychotherapist-patient privilege, see § 1015

§ 956. Exception: Crime or fraud

956. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

Comment. California now recognizes this exception. *Abbott v. Superior Court*, 78 Cal. App.2d 19, 177 P.2d 317 (1947). *Cf. Nowell v. Superior Court*, 223 Cal. App.2d 652, 36 Cal. Rptr. 21 (1963).

CROSS-REFERENCES

Definition:
Lawyer, see § 950
Similar provisions:
Marital communications privilege, see § 981
Physician-patient privilege, see § 997
Psychotherapist-patient privilege, see § 1018

§ 957. Exception: Parties claiming through deceased client

957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the

claims are by testate or intestate succession or by inter vivos transaction.

Comment. The lawyer-client privilege does not apply to a communication relevant to an issue between parties all of whom claim through a deceased client. Under existing law, all must claim through the client by testate or intestate succession in order for this exception to be applicable; a claim by inter vivos transaction apparently is not within the exception. *Paley v. Superior Court,* 137 Cal. App.2d 450, 457-460, 290 P.2d 617, 621-623 (1955). Section 957 extends this exception to include inter vivos transactions.

The traditional exception for litigation between claimants by testate or intestate succession is based on the theory that claimants in privity with the estate claim *through* the client, not adversely, and the deceased client presumably would want his communications disclosed in litigation between such claimants so that his desires in regard to the disposition of his estate might be correctly ascertained and carried out. This rationale is equally applicable where one or more of the parties is claiming by inter vivos transaction as, for example, in an action between a party who claims under a deed (executed by a client in full possession of his faculties) and a party who claims under a will executed while the client's mental stability was dubious. See the discussion in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 392-396 (1964).

CROSS-REFERENCES

Definition:
Client, see § 951
Similar provisions:
Marital communications privilege, see § 984
Physician-patient privilege, see § 1000
Psychotherapist-patient privilege, see § 1019

§ 958. Exception: Breach of duty arising out of lawyer-client relationship

958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

Comment. This exception has not been recognized by a holding in any California case, although dicta in several opinions indicate that it would be recognized if the question were presented in a proper case. *People v. Tucker,* 61 Cal.2d ___, 40 Cal. Rptr. 609, 395 P.2d 449 (1964); *Henshall v. Coburn,* 177 Cal. 50, 169 Pac. 1014 (1917); *Pacific Tel. & Tel. Co. v. Fink,* 141 Cal. App.2d 332, 335, 296 P.2d 843, 845 (1956); *Fleschler v. Strauss,* 15 Cal. App.2d 735, 60 P.2d 193 (1936). See generally WITKIN, CALIFORNIA EVIDENCE § 419 (1958).

It would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim. Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged. See *People v. Tucker,* 61 Cal.2d ___, 40 Cal. Rptr. 609, 395 P.2d 449 (1964). The duty involved must, of course, be one aris-

ing out of the lawyer-client relationship, *e.g.*, the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client's property, or the client's duty to pay for the lawyer's services.

CROSS-REFERENCES

Definitions:
Client, see § 951
Lawyer, see § 950
Similar provisions:
Physician-patient privilege, see § 1001
Psychotherapist-patient privilege, see § 1020

§ 959. Exception: Lawyer as attesting witness

959. There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.

Comment. This exception relates to the type of communication about which an attesting witness would testify. The mere fact that an attorney acts as an attesting witness should not destroy the lawyer-client privilege as to all statements made concerning the document attested; but the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness. Under existing law, the attesting witness exception is broader, having been used as a device to obtain information which the lawyer who is an attesting witness received in his capacity as a lawyer rather than as an attesting witness. See *In re Mullin,* 110 Cal. 252, 42 Pac. 645 (1895).

CROSS-REFERENCES

Authentication of writing by subscribing witness, see §§ 1411-1413
Definitions:
Client, see § 951
Lawyer, see § 950
Opinion as to sanity by subscribing witness, see § 870

§ 960. Exception: Intention of deceased client concerning writing affecting property interest

960. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

Comment. Although the attesting witness exception stated in Section 959 is limited to information of the kind to which one would expect an attesting witness to testify, there is merit to having an exception that applies to all dispositive instruments. A client ordinarily would desire his lawyer to communicate his true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased. Likewise, the client ordinarily would desire his attorney to testify to communications relevant to the validity of such instruments after the client dies. Accordingly, two additional exceptions—Sections 960 and 961—are provided for this purpose. These exceptions have been recognized by the California decisions only in

cases where the lawyer is an attesting witness. See the *Comment* to EVIDENCE CODE § 959.

CROSS-REFERENCES

Definitions:
Client, see § 951
Property, see § 185
Writing, see § 250
Similar provisions:
Physician-patient privilege, see § 1002
Psychotherapist-patient privilege, see § 1021

§ 961. Exception: Validity of writing affecting property interest

961. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

Comment. See the *Comment* to Section 960.

CROSS-REFERENCES

Definitions:
Client, see § 951
Property, see § 185
Writing, see § 250
Similar provisions:
Physician-patient privilege, see § 1003
Psychotherapist-patient privilege, see § 1022

§ 962. Exception: Joint clients

962. Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between such clients.

Comment. This section states existing law. *Clyne v. Brock*, 82 Cal. App.2d 958, 965, 188 P.2d 263, 267 (1947); *Croce v. Superior Court*, 21 Cal. App.2d 18, 68 P.2d 369 (1937). See also *Harris v. Harris*, 136 Cal. 379, 69 Pac. 23 (1902).

CROSS-REFERENCES

Definitions:
Civil proceeding, see § 902
Client, see § 951
Lawyer, see § 950
Waiver of privilege by joint holder, see § 912

Article 4. Privilege Not to Testify Against Spouse

§ 970. Privilege not to testify against spouse

970. Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.

Comment. Under this article, a married person has two privileges: (1) a privilege not to testify against his spouse in any proceeding (Section 970) and (2) a privilege not to be called as a witness in any proceeding to which his spouse is a party (Section 971).

The privileges under this article are not as broad as the privilege provided by existing law. Under existing law, a married person has a privilege to prevent his spouse from testifying against him, but only

the witness spouse has a privilege under this article. Under the existing law, a married person may refuse to testify *for* the other spouse, but no such privilege exists under this article. For a discussion of the reasons for these changes in existing law, see the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1881 (superseded by the Evidence Code).

The rationale of the privilege provided by Section 970 not to testify against one's spouse is that such testimony would seriously disturb or disrupt the marital relationship. Society stands to lose more from such disruption than it stands to gain from the testimony which would be available if the privilege did not exist. The privilege is based in part on a previous recommendation and study of the California Law Revision Commission. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to the Marital "For and Against" Testimonial Privilege* at F-1 (1957).

CROSS-REFERENCES

Definition:
Proceeding, see § 901
General provisions relating to privileges, see §§ 910-920
Privilege inapplicable in prosecutions for:
Abandonment or nonsupport of wife or child, see Penal Code § 270e
Pandering, see Penal Code § 266i
Pimping, see Penal Code § 266h
Prostitution, placing wife in house of, see Penal Code § 266g
Venereal disease control violations, see Health and Safety Code § 3197
Support proceedings, privilege inapplicable, see Civil Code § 250; Code of Civil Procedure § 1688

§ 971. Privilege not to be called as a witness against spouse

971. Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Comment. The privilege of a married person not to be called as a witness against his spouse is somewhat similar to the privilege given the defendant in a criminal case not to be called as a witness (Section 930). This privilege is necessary to avoid the prejudicial effect, for example, of the prosecution's calling the defendant's wife as a witness, thus forcing her to object before the jury. The privilege not to be called as a witness does not apply, however, in a proceeding where the other spouse is not a party. Thus, a married person may be called as a witness in a grand jury proceeding because his spouse is not a party to that proceeding, but the witness in the grand jury proceeding may claim the privilege under Section 970 to refuse to answer a question that would compel him to testify *against* his spouse.

CROSS-REFERENCES

Definition:
Proceeding, see § 901
See also the *Cross-References* under Section 970

§ 972. When privilege not applicable

972. A married person does not have a privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding to commit or otherwise place his spouse or his spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.

(c) A proceeding brought by or on behalf of a spouse to establish his competence.

(d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

(e) A criminal proceeding in which one spouse is charged with:

(1) A crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage.

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy or adultery.

(4) A crime defined by Section 270 or 270a of the Penal Code.

Comment. The exceptions to the privileges under this article are similar to those contained in Code of Civil Procedure Section 1881(1) and Penal Code Section 1322, both of which are superseded by the Evidence Code. However, the exceptions in this section have been drafted so that they are consistent with those provided in Article 5 (commencing with Section 980) of this chapter (the privilege for confidential marital communications).

A discussion of comparable exceptions may be found in the *Comments* to the sections in Article 5 of this chapter.

CROSS-REFERENCES

Definitions:
Criminal proceeding, see § 903
Person, see § 175
Proceeding, see § 901
Property, see § 185
Similar provisions:
Marital communications privilege, see §§ 982-986
Physician-patient privilege, see §§ 1004, 1005
Psychotherapist-patient privilege, see §§ 1024, 1025
See also the *Cross-References* under Section 970

§ 973. Waiver of privilege

973. (a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Comment. Section 973 contains special waiver provisions for the privileges provided by this article.

Subdivision (a). Under subdivision (a), a married person who testifies in a proceeding to which his spouse is *a party* waives both privileges provided for in this article. Thus, for example, a married person cannot call his spouse as a witness to give favorable testimony and have that spouse invoke the privilege provided in Section 970 to keep from testifying on cross-examination to unfavorable matters; nor can a married person testify for an adverse party as to particular matters and then invoke the privilege not to testify against his spouse as to other matters.

In any proceeding where a married person's spouse is *not a party,* the privilege not to be called as a witness is not available, and a married person may testify like any other witness without waiving the privilege provided under Section 970 so long as he does not testify *against* his spouse. However, under subdivision (a), the privilege not to testify against his spouse in that proceeding is waived as to all matters if he *testifies against* his spouse as to any matter.

Subdivision (b). This subdivision precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony under Section 776, which supersedes Code of Civil Procedure Section 2055. It recognizes a doctrine of waiver that has been developed in the California cases. Thus, for example, when suit is brought to set aside a conveyance from husband to wife allegedly in fraud of the husband's creditors, both spouses being named as defendants, it has been held that setting up the conveyance in the answer as a defense waives the privilege. *Tobias v. Adams,* 201 Cal. 689, 258 Pac. 588 (1927); *Schwartz v. Brandon,* 97 Cal. App. 30, 275 Pac. 448 (1929). *But cf. Marple v. Jackson,* 184 Cal. 411, 193 Pac. 940 (1920). Also, when husband and wife are joined as defendants in a quiet title action and assert a claim to the property, they have been held to have waived the privilege. *Hagen v. Silva,* 139 Cal. App.2d 199, 293 P.2d 143 (1956). And when both spouses joined as plaintiffs in an action to recover damages to one of them, each was held to have waived the privilege as to the testimony of the other. *In re Strand,* 123 Cal. App. 170, 11 P.2d 89 (1932). (It should be noted that, with respect to damages for personal injuries, Civil Code Section 163.5 (added by Cal. Stats. 1957, Ch. 2334, § 1, p. 4066) provides that all damages awarded to a married person in a civil action for personal injuries are the separate property of such married person.) This principle of waiver has seemingly been developed by the case law to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse. It has been held, however, that a spouse does not waive the privilege by making the other spouse his agent, even as to transactions involving the agency. *Ayres v. Wright,* 103 Cal. App. 610, 284 Pac. 1077 (1930).

CROSS-REFERENCES

Definitions:
Civil proceeding, see § 902
Proceeding, see § 901

Article 5. Privilege for Confidential Marital Communications

§ 980. Privilege for confidential marital communications

980. Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

Comment. Section 980 is the basic statement of the privilege for confidential marital communications. Exceptions to this privilege are stated in Sections 981-987.

Who can claim the privilege. Under Section 980, both spouses are the holders of the privilege and either spouse may claim it. Under existing law, the privilege *may* belong only to the nontestifying spouse inasmuch as Code of Civil Procedure Section 1881(1), superseded by the Evidence Code, provides: "[N]or can either . . . be, *without the consent of the other,* examined as to any communication made by one to the other during the marriage." (Emphasis added.) It is likely, however, that Section 1881(1) would be construed to grant the privilege to both spouses. See *In re De Neef,* 42 Cal. App.2d 691, 109 P.2d 741 (1941). *But see People v. Keller,* 165 Cal. App.2d 419, 423-424, 332 P.2d 174, 176 (1958) (dictum).

A guardian of an incompetent spouse may claim the privilege on behalf of that spouse. However, when a spouse is dead, no one can claim the privilege for him; the privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse.

Termination of marriage. The privilege may be claimed as to confidential communications made during a marriage even though the marriage has been terminated at the time the privilege is claimed. This states existing law. CODE CIV. PROC. § 1881(1) (superseded by the Evidence Code); *People v. Mullings,* 83 Cal. 138, 23 Pac. 229 (1890). Free and open communication between spouses would be unduly inhibited if one of the spouses could be compelled to testify as to the nature of such communications after the termination of the marriage.

Eavesdroppers. The privilege may be asserted to prevent testimony by anyone, including eavesdroppers. To a limited extent, this constitutes a change in California law. See the *Comment* to EVIDENCE CODE § 954. See generally *People v. Peak,* 66 Cal. App.2d 894, 153 P.2d 464 (1944); *People v. Morhar,* 78 Cal. App. 380, 248 Pac. 975 (1926); *People v. Mitchell,* 61 Cal. App. 569, 215 Pac. 117 (1923). Section 980 also changes the existing law which permits a third party, to whom one of the spouses had revealed a confidential communication, to testify concerning it. *People v. Swaile,* 12 Cal. App. 192, 195-196, 107 Pac. 134, 137 (1909); *People v. Chadwick,* 4 Cal. App. 63, 72, 87 Pac. 384, 387-388 (1906). See also *Wolfle v. United States,* 291 U.S. 7 (1934). Under Section 912, such conduct would constitute a waiver of the privilege only as to the spouse who makes the disclosure.

CROSS-REFERENCES

General provisions relating to privileges, see §§ 910-920
Overhearing and recording confidential communication, see Penal Code § 653j
Presumption that communication confidential, see § 917
Privilege inapplicable in prosecutions for:
Abandonment or nonsupport of wife or child, see Penal Code § 270e
Pandering, see Penal Code § 266i
Pimping, see Penal Code § 266h
Venereal disease control, see Health and Safety Code § 3197
Privilege of spouse not to be called as witness, see § 971
Privilege of spouse not to testify, see § 970
Support proceedings, see Civil Code § 250; Code of Civil Procedure § 1688

§ 981. Exception: Crime or fraud

981. There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud.

Comment. California recognizes this as an exception to the lawyer-client privilege, but it does not appear to have been recognized in the California cases dealing with the confidential marital communications privilege. Nonetheless, the exception does not seem so broad that it would impair the values that the privilege is intended to preserve; in many cases, the evidence which would be admissible under this exception will be vital in order to do justice between the parties to a lawsuit. This exception would not, of course, infringe on the privileges accorded to a married person under Sections 970 and 971.

It is important to note that the exception provided by Section 981 is quite limited. It does not permit disclosure of communications that merely reveal a plan to commit a crime or fraud; it permits disclosure only of communications made to *enable* or *aid* anyone to commit or plan to commit a crime or fraud. Thus, unless the communication is for the purpose of obtaining assistance in the commission of the crime or fraud or in furtherance thereof, it is not made admissible by the exception provided in this section. *Cf. People v. Pierce,* 61 Cal.2d ___, 40 Cal. Rptr. 845, 395 P.2d 893 (1964) (husband and wife who conspire only between themselves against others cannot claim immunity from prosecution for conspiracy on the basis of their marital status).

CROSS-REFERENCES

Similar provisions:
Lawyer-client privilege, see § 956
Physician-patient privilege, see § 997
Psychotherapist-patient privilege, see § 1018

§ 982. Exception: Commitment or similar proceeding

982. There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

Comment. Sections 982 and 983 express existing law. CODE CIV. PROC. § 1881(1) (superseded by the Evidence Code). Commitment and competency proceedings are undertaken for the benefit of the subject person. Frequently, much or all of the evidence bearing on a spouse's competency or lack of competency will consist of communications to the other spouse. It would be undesirable to permit either spouse to invoke a privilege to prevent the presentation of this vital information inasmuch as these proceedings are of such vital importance both to society and to the spouse who is the subject of the proceedings.

CROSS-REFERENCES

Definition:
Proceeding, see § 901
Similar provisions:
Marital testimonial privilege, see § 972(b)
Physician-patient privilege, see § 1004
Psychotherapist-patient privilege, see § 1024

§ 983. Exception: Proceeding to establish competence

983. There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence.

Comment. See the *Comment* to Section 982.

CROSS-REFERENCES

Definition:
Proceeding, see § 901
Similar provisions:
Marital testimonial privilege, see § 972(c)
Physician-patient privilege, see § 1005
Psychotherapist-patient privilege, see § 1025

§ 984. Exception: Proceeding between spouses

984. There is no privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.

Comment. The exception to the marital communications privilege for litigation between the spouses states existing law. CODE CIV. PROC. § 1881(1) (superseded by the Evidence Code). Section 984 extends the principle to cases where one of the spouses is dead and the litigation is between his successor and the surviving spouse. See generally *Estate of Gillett,* 73 Cal. App.2d 588, 166 P.2d 870 (1946).

CROSS-REFERENCES

Definition:
Proceeding, see § 901
Similar provisions:
Lawyer-client privilege, see § 957
Marital testimonial privilege, see § 972(a)
Physician-patient privilege, see § 1000
Psychotherapist-patient privilege, see § 1019

§ 985. Exception: Certain criminal proceedings

985. There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

(a) A crime committed at any time against the person or property of the other spouse or of a child of either.

(b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.

(c) Bigamy or adultery.

(d) A crime defined by Section 270 or 270a of the Penal Code.

Comment. This exception restates with minor variations an exception that is recognized under existing law. CODE CIV. PROC. § 1881(1) (superseded by the Evidence Code). Sections 985 and 986 together create an exception for all the proceedings mentioned in Section 1322 of the Penal Code (superseded by the Evidence Code).

CROSS-REFERENCES

Definitions:
Criminal proceeding, see § 903
Person, see § 175
Property, see § 185
Similar provision:
Marital testimonial privilege, see § 972(e)

§ 986. Exception: Juvenile court proceeding

986. There is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

Comment. See the *Comment* to Section 985.

CROSS-REFERENCES

Similar provision:
Marital testimonial privilege, see § 972(d)

§ 987. Exception: Communication offered by spouse who is criminal defendant

987. There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

Comment. This exception does not appear to have been recognized in any California case. Nonetheless, it is a desirable exception. When a married person is the defendant in a criminal proceeding and seeks to introduce evidence which is material to his defense, his spouse (or his former spouse) should not be privileged to withhold the information.

CROSS-REFERENCES

Definition:
Criminal proceeding, see § 903

Article 6. Physician-Patient Privilege

§ 990. "Physician"

990. As used in this article, "physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.

Comment. Defining "physician" to include a person "reasonably believed by the patient to be authorized" to practice medicine changes the existing law which requires that the physician be licensed. See CODE CIV. PROC. § 1881(4) (superseded by the Evidence Code). But, if this privilege is to be recognized, it should protect the patient from reasonable mistakes as to unlicensed practitioners. The privilege also should be applicable to communications made to a physician authorized to

practice in any state or nation. When a California resident travels outside the State and has occasion to visit a physician during such travel, or when a physician from another state or nation participates in the treatment of a person in California, the patient should be entitled to assume that his communications will be given as much protection as they would be if he consulted a California physician in California. A patient should not be forced to inquire about the jurisdictions where the physician is authorized to practice medicine and whether such jurisdictions recognize the physician-patient privilege before he may safely communicate with the physician.

CROSS-REFERENCES

Definitions:
Patient, see § 991
State, see § 220
Similar provisions:
Lawyer-client privilege, see § 950
Psychotherapist-patient privilege, see § 1010

§ 991. "Patient"

991. As used in this article, "patient" means a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition.

Comment. "Patient" means a person who consults a physician for the purpose of diagnosis *or* treatment. This definition conforms with existing California law. See *McRae v. Erickson*, 1 Cal. App. 326, 332-333, 82 Pac. 209, 212 (1905).

CROSS-REFERENCES

Definition:
Physician, see § 990
Similar provisions:
Lawyer-client privilege, see § 951
Psychotherapist-patient privilege, see § 1011

§ 992. "Confidential communication between patient and physician"

992. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes advice given by the physician in the course of that relationship.

Comment. This section generally restates existing law, except that it is uncertain whether a doctor's statement to a patient giving his diagnosis is presently covered by the privilege. See CODE CIV. PROC. § 1881(4) (superseded by the Evidence Code). See also the *Comment* to EVIDENCE CODE § 952.

CROSS-REFERENCES

Definitions:
Patient, see § 991
Physician, see § 990
Disclosure to third person, when privileged, see § 912
Presumption that communication was confidential, see § 917
Similar provisions:
Lawyer-client privilege, see § 952
Psychotherapist-patient privilege, see § 1012

§ 993. "Holder of the privilege"

993. As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

Comment. A guardian of the patient is the holder of the privilege if the patient has a guardian. If the patient has separate guardians of his estate and of his person, either guardian may claim the privilege. The provision making the personal representative of the patient the holder of the privilege when the patient is dead may change California law. The existing law may be that the privilege survives the death of the patient in some cases and that no one can waive it on behalf of the patient. See the discussion in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 408-410 (1964). Sections 993 and 994 enable the personal representative to protect the interest of the patient's estate in the confidentiality of these statements and to waive the privilege when the estate would benefit by waiver. When the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete access to information relevant to a particular proceeding should prevail over whatever remaining interest the decedent may have had in secrecy.

CROSS-REFERENCES

Definition:
Patient, see § 991
Similar provisions:
Lawyer-client privilege, see § 953
Psychotherapist-patient privilege, see § 1013

§ 994. Physician-patient privilege

994. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence

or if he is otherwise instructed by a person authorized to permit disclosure.

Comment. This section, like Section 954 (lawyer-client privilege), is based on the premise that the privilege must be claimed by a person who is authorized to claim the privilege. If there is no claim of privilege by a person with authority to make the claim, the evidence is admissible. See the *Comments* to EVIDENCE CODE §§ 993 and 954.

For the reasons indicated in the *Comment* to Section 954, an eavesdropper or other interceptor of a communication privileged under this section is not permitted to testify to the communication.

CROSS-REFERENCES

Definitions:
Confidential communication between patient and physician, see § 992
Holder of the privilege, see § 993
Patient, see § 991
Physician, see § 990
Eavesdropping on privileged communications prohibited, see Penal Code §§ 653i, 653j
General provisions relating to privileges, see §§ 910-920
Similar provisions:
Lawyer-client privilege, see § 954
Psychotherapist-patient privilege, see § 1014
Venereal disease control prosecutions, privilege inapplicable, see Health and Safety Code § 3197

§ 995. When physician required to claim privilege

995. The physician who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994.

Comment. The obligation of the physician to claim the privilege on behalf of the patient, unless otherwise instructed by a person authorized to permit disclosure, is consistent with Section 2379 of the Business and Professions Code.

CROSS-REFERENCES

Definition:
Physician, see § 990
Duty to maintain confidence, see Business and Professions Code § 2379
Similar provisions:
Lawyer-client privilege, see § 955
Psychotherapist-patient privilege, see § 1015

§ 996. Exception: Patient-litigant exception

996. There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

Comment. Section 996 provides that the physician-patient privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. If the patient

himself tenders the issue of his condition, he should not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege.

A limited form of this exception is recognized by Code of Civil Procedure Section 1881(4) (superseded by the Evidence Code) which makes the privilege inapplicable in personal injury actions. This exception is also recognized in various types of administrative proceedings where the patient tenders the issue of his condition. *E.g.*, LABOR CODE §§ 4055, 5701, 5703, 6407, 6408 (proceedings before the Industrial Accident Commission). The exception provided by Section 996 applies not only to proceedings before the Industrial Accident Commission but also to any other proceeding where the patient tenders the issue of his condition. The exception in Section 996 also states existing law in applying the exception to other situations where the patient himself has raised the issue of his condition. *In re Cathey*, 55 Cal.2d 679, 690-692, 12 Cal. Rptr. 762, 768, 361 P.2d 426, 432 (1961) (prisoner in state medical facility waived physician-patient privilege by putting his mental condition in issue by application for habeas corpus); see also *City & County of San Francisco v. Superior Court*, 37 Cal.2d 227, 232, 231 P.2d 26, 28 (1951) (personal injury case).

Section 996 also provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (wrongful death). Under Code of Civil Procedure Section 1881(4) (superseded by the Evidence Code), a person authorized to bring the wrongful death action may consent to the testimony by the physician. As far as testimony by the physician is concerned, there is no reason why the rules of evidence should be different in a case where the patient brings the action and a case where someone else sues for the patient's wrongful death.

Section 996 also provides that there is no privilege in an action brought under Section 376 of the Code of Civil Procedure (parent's action for injury to child). In this case, as in a case under the wrongful death statute, the same rule of evidence should apply when the parent brings the action as applies when the child is the plaintiff.

CROSS-REFERENCES

Definition:
Patient, see § 991
Medical examination, order for, see Code of Civil Procedure § 2032
Similar provision:
Psychotherapist-patient privilege, see § 1016

§ 997. Exception: Crime or tort

997. There is no privilege under this article if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

Comment. This section is considerably broader in scope than Section 956 which provides that the lawyer-client privilege does not apply when the communication was made to enable anyone to commit or plan to commit a crime or a *fraud*. Section 997 creates an exception to the physician-patient privilege where the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a *tort*, or to escape detection or apprehension after commis-

sion of a crime or a *tort*. People seldom, if ever, consult their physicians in regard to matters which might subsequently be determined to be a tort, and there is no desirable end to be served by encouraging such communications. On the other hand, people often consult lawyers about matters which may later turn out to be torts and it is desirable to encourage discussion of such matters with lawyers. Whether the exception provided by Section 997 now exists in California has not been determined in any decided case, but it probably would be recognized in an appropriate case in view of the similar court-created exception to the lawyer-client privilege. See the *Comment* to EVIDENCE CODE § 956.

CROSS-REFERENCES

Definition:
Physician, see § 990
Similar provisions:
Lawyer-client privilege, see § 956
Marital communications privilege, see § 981
Psychotherapist-patient privilege, see § 1018

§ 998. Exception: Criminal or disciplinary proceeding

998. There is no privilege under this article in a criminal proceeding or in a disciplinary proceeding.

Comment. The physician-patient privilege is not now applicable in a criminal proceeding. CODE CIV. PROC. § 1881(4) (superseded by the Evidence Code). See also *People v. Griffith*, 146 Cal. 339, 80 Pac. 68 (1905). Section 998 also provides that the privilege may not be claimed in those administrative proceedings that are comparable to criminal proceedings, *i.e.*, proceedings brought for the purpose of imposing discipline of some sort. Under existing law, the physician-patient privilege is available in all administrative proceedings conducted under the Administrative Procedure Act because it has been incorporated by reference in Government Code Section 11513(c); but it is not specifically made available in administrative proceedings not conducted under the Administrative Procedure Act because the statute granting the privilege in terms applies only to civil actions. Section 998 sweeps away this distinction which has no basis in reason.

CROSS-REFERENCES

Definitions:
Criminal proceeding, see § 903
Disciplinary proceeding, see § 904

§ 999. Exception: Proceeding to recover damages for criminal conduct

999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.

Comment. Section 999 makes the physician-patient privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. Under Sections 1290-1292 (hearsay), the evidence admitted in the criminal trial would be admissible in a subsequent civil trial as former testimony. Thus, if the exception provided by Section 999 did not exist, the evidence subject to the privilege would be available in a civil trial only if a criminal trial were conducted first; it would not be available if the civil trial were conducted first. The admissibility of evidence should not depend on the order in which civil and criminal matters are tried.

This exception is provided, therefore, so that the same evidence is available in the civil case without regard to when the criminal case is tried.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Patient, see § 991
Proceeding, see § 901

§ 1000. Exception: Parties claiming through deceased patient

1000. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

Comment. See the *Comment* to Section 957.

CROSS-REFERENCES

Definition:
Patient, see § 991
Similar provisions:
Lawyer-client privilege, see § 957
Marital communications privilege, see § 984
Psychotherapist-patient privilege, see § 1019

§ 1001. Exception: Breach of duty arising out of physician-patient relationship

1001. There is no privilege under this article as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

Comment. See the *Comment* to Section 958.

CROSS-REFERENCES

Definitions:
Patient, see § 991
Physician, see § 990
Similar provisions:
Lawyer-client privilege, see § 958
Psychotherapist-patient privilege, see § 1020

§ 1002. Exception: Intention of deceased patient concerning writing affecting property interest

1002. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

Comment. Existing law provides exceptions virtually coextensive with those provided in Sections 1002 and 1003. CODE CIV. PROC. § 1881(4) (superseded by the Evidence Code). See the *Comment* to Section 960.

CROSS-REFERENCES

Definitions:
Patient, see § 991
Property, see § 185
Writing, see § 250
Similar provisions:
Lawyer-client privilege, see § 960
Psychotherapist-patient privilege, see § 1021

§ 1003. Exception: Validity of writing affecting property interest

1003. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

Comment. See the *Comment* to Section 1002.

CROSS-REFERENCES

Definitions:
Patient, see § 991
Property, see § 185
Writing, see § 250
Similar provisions:
Lawyer-client privilege, see § 961
Psychotherapist-patient privilege, see § 1022

§ 1004. Exception: Commitment or similar proceeding

1004. There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

Comment. This exception covers not only commitments of mentally ill persons but also such cases as the appointment of a conservator under Probate Code Section 1751. In these cases, the proceedings are being conducted for the benefit of the patient and he should not have a privilege to withhold evidence that the court needs in order to act properly for his welfare. There is no similar exception in existing law. *McClenahan v. Keyes,* 188 Cal. 574, 584, 206 Pac. 454, 458 (1922) (dictum). *But see* 35 OPS. CAL. ATTY. GEN. 226 (1960), regarding the unavailability of the present physician-patient privilege where the physician acts pursuant to court appointment for the explicit purpose of giving testimony.

CROSS-REFERENCES

Definitions:
Patient, see § 991
Proceeding, see § 901
Property, see § 185
Similar provisions:
Marital communications privilege, see § 982
Marital testimonial privilege, see § 972(b)
Psychotherapist-patient privilege, see § 1024

§ 1005. Exception: Proceeding to establish competence

1005. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

Comment. This exception is new to California law. When a patient has placed his mental condition in issue by instituting a proceeding to establish his competence, he should not be permitted to withhold the most vital evidence relating thereto.

CROSS-REFERENCES

Definitions:
Patient, see § 991
Proceeding, see § 901
Similar provisions:
Marital communications privilege, see § 983
Marital testimonial privilege, see § 972(c)
Psychotherapist-patient privilege, see § 1025

§ 1006. Exception: Required report

1006. There is no privilege under this article as to information that the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.

Comment. This exception is not recognized by existing law. However, no valid purpose is served by preventing the use of relevant information when the law requiring the information to be reported to a public office does not restrict disclosure.

CROSS-REFERENCES

Definitions:
Patient, see § 991
Physician, see § 990
Proceeding, see § 901
Public employee, see § 195
Statute, see § 230
Similar provision:
Psychotherapist-patient privilege, see § 1026

Article 7. Psychotherapist-Patient Privilege

§ 1010. "Psychotherapist"

1010. As used in this article, "psychotherapist" means:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his time to the practice of psychiatry; or

(b) A person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

Comment. A "psychotherapist" is defined to include only a person who is or who is reasonably believed to be a psychiatrist or who is a California certified psychologist (see BUS. & PROF. CODE § 2900 *et seq.*). See the *Comment* to Section 990.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
State, see § 220
Similar provisions:
Lawyer-client privilege, see § 950
Physician-patient privilege, see § 990

§ 1011. "Patient"

1011. As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition.

Comment. See the *Comment* to Section 991. Section 1011 is comparable to Section 991 (physician-patient privilege) except that Sec-

tion 1011 is limited to cases in which diagnosis or treatment of the patient's mental or emotional condition is sought.

CROSS-REFERENCES

Definition:
Psychotherapist, see § 1010
Similar provisions:
Lawyer-client privilege, see § 951
Physician-patient privilege, see § 991

§ 1012. "Confidential communication between patient and psychotherapist"

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes advice given by the psychotherapist in the course of that relationship.

Comment. See the *Comment* to Section 992.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
Psychotherapist, see § 1010
Disclosure to third person, when privileged, see § 912
Presumption that communication was confidential, see § 917
Similar provisions:
Lawyer-client privilege, see § 952
Physician-patient privilege, see § 992

§ 1013. "Holder of the privilege"

1013. As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

Comment. See the *Comment* to Section 993.

CROSS-REFERENCES

Definition:
Patient, see § 1011
Similar provisions:
Lawyer-client privilege, see § 953
Physician-patient privilege, see § 993

§ 1014. Psychotherapist-patient privilege

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

Comment. This article creates a psychotherapist-patient privilege that provides much broader protection than the physician-patient privilege.

Psychiatrists now have only the physician-patient privilege which is enjoyed by physicians generally. On the other hand, persons who consult certified psychologists have a much broader privilege under Business and Professions Code Section 2904 (superseded by the Evidence Code). There is no rational basis for this distinction.

A broad privilege should apply to both psychiatrists and certified psychologists. Even rudimentary psychoanalysis and psychotherapy is dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Unless a patient is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment depend. The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

The privilege also applies to psychologists and supersedes the psychologist-patient privilege provided in Section 2904 of the Business and Professions Code. The new privilege is one for psychotherapists generally.

Generally, the privilege provided by this article follows the physician-patient privilege, and the *Comments* to Sections 990 through 1006 are pertinent. The following differences, however, should be noted:

(1) The psychotherapist-patient privilege applies in all proceedings. The physician-patient privilege does not apply in criminal or disciplinary proceedings. This difference in the scope of the two privileges is based on the fact that the Law Revision Commission has been advised that proper psychotherapy often is denied a patient solely because he will not talk freely to a psychotherapist for fear that the latter may be compelled in a criminal proceeding to reveal what he has been told.

Although the psychotherapist-patient privilege applies in a criminal proceeding, the privilege is not available to a defendant who puts his mental or emotional condition in issue, as, for example, by a plea of

insanity or a claim of diminished responsibility. See EVIDENCE CODE §§ 1016 and 1023. In such a proceeding, the trier of fact should have available to it all information that can be obtained in regard to the defendant's mental or emotional condition. That evidence can often be furnished by the psychotherapist who examined or treated the patient-defendant.

(2) There is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient. EVIDENCE CODE § 1004. Section 1024 provides a considerably narrower exception in the psychotherapist-patient privilege.

(3) The physician-patient privilege does not apply in civil actions for damages arising out of the patient's criminal conduct. EVIDENCE CODE § 999. Nor does it apply in disciplinary proceedings. EVIDENCE CODE § 998. No similar exceptions are provided in the psychotherapist-patient privilege. These exceptions appear in the physician-patient privilege because that privilege does not apply in criminal proceedings. See EVIDENCE CODE § 998. Therefore, an exception is also created for comparable civil and administrative cases. The psychotherapist-patient privilege, however, does apply in criminal cases; hence, there is no similar exception in disciplinary proceedings or civil actions involving the patient's criminal conduct.

CROSS-REFERENCES

Definitions:
Confidential communication between patient and psychotherapist, see § 1012
Holder of the privilege, see § 1013
Patient, see § 1011
Psychotherapist, see § 1010
Similar provisions:
Lawyer-client privilege, see § 954
Physician-patient privilege, see § 994
See also the *Cross-References* to Section 994

§ 1015. When psychotherapist required to claim privilege

1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

Comment. See the *Comment* to Section 995.

CROSS-REFERENCES

Definition:
Psychotherapist, see § 1010
Duty to maintain confidence:
Certified psychologist, see Business and Professions Code § 2960(g)
Physician, see Business and Professions Code § 2379
Similar provisions:
Lawyer-client privilege, see § 955
Physician-patient privilege, see § 995

§ 1016. Exception: Patient-litigant exception

1016. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

Comment. See the *Comment* to Section 996.

CROSS-REFERENCES

Definition:
Patient, see § 1011
Mental examination, order for, see Code of Civil Procedure § 2032
Similar provision:
Physician-patient privilege, see § 996

§ 1017. Exception: Court-appointed psychotherapist

1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter a plea based on insanity or to present a defense based on his mental or emotional condition.

Comment. Section 1017 provides an exception to the psychotherapist-patient privilege if the psychotherapist is appointed by order of a court to examine the patient. Generally, where the relationship of psychotherapist and patient is created by court order, there is not a sufficiently confidential relationship to warrant extending the privilege to communications made in the course of that relationship. Moreover, when the psychotherapist is appointed by the court, it is most often for the purpose of having the psychotherapist testify concerning his conclusions as to the patient's condition. It would be inappropriate to have the privilege apply in this situation. See generally 35 OPS. CAL. ATTY. GEN. 226 (1960), regarding the unavailability of the present physician-patient privilege under these circumstances.

On the other hand, it is essential that the privilege apply where the psychotherapist is appointed by order of the court to provide the defendant's lawyer with information needed so that he may advise the defendant whether to enter a plea based on insanity or to present a defense based on his mental or emotional condition. If the defendant determines not to tender the issue of his mental or emotional condition, the privilege will protect the confidentiality of the communication between him and his court-appointed psychotherapist. If, however, the defendant determines to tender this issue—by a plea of not guilty by reason of insanity, by presenting a defense based on his mental or emotional condition, or by raising the question of his sanity at the time of the trial—the exceptions provided in Sections 1016 and 1023 make the privilege unavailable to prevent disclosure of the communications between the defendant and the psychotherapist.

CROSS-REFERENCES

Definitions:
Criminal proceeding, see § 903
Patient, see § 1011
Psychotherapist, see § 1010

§ 1018. Exception: Crime or tort

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

Comment. See the *Comment* to Section 997.

CROSS-REFERENCES

Definition:
Psychotherapist, see § 1010
Similar provisions:
Lawyer-client privilege, see § 956
Marital communications privilege, see § 981
Physician-patient privilege, see § 997

§ 1019. Exception: Parties claiming through deceased patient

1019. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

Comment. See the *Comment* to Section 957.

CROSS-REFERENCES

Definition:
Patient, see § 1011
Similar provisions:
Lawyer-client privilege, see § 957
Marital communications privilege, see § 984
Physician-patient privilege, see § 1000

§ 1020. Exception: Breach of duty arising out of psychotherapist-patient relationship

1020. There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

Comment. See the *Comment* to Section 958.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
Psychotherapist, see § 1010
Similar provisions:
Lawyer-client privilege, see § 958
Physician-patient privilege, see § 1001

§ 1021. Exception: Intention of deceased patient concerning writing affecting property interest

1021. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

Comment. See the *Comment* to Section 1002.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
Property, see § 185
Writing, see § 250
Similar provisions:
Lawyer-client privilege, see § 960
Physician-patient privilege, see § 1002

§ 1022. Exception: Validity of writing affecting property interest

1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

Comment. See the *Comment* to Section 1002.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
Property, see § 185
Writing, see § 250
Similar provisions:
Lawyer-client privilege, see § 961
Physician-patient privilege, see § 1003

§ 1023. Exception: Proceeding to determine sanity of criminal defendant

1023. There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

Comment. Section 1023 is included to make it clear that the psychotherapist-patient privilege does not apply when the defendant raises the issue of his sanity at the time of trial. The section probably is unnecessary because the exception provided by Section 1016 is broad enough to cover this situation.

CROSS-REFERENCES

Definition:
Criminal action, see § 130

§ 1024. Exception: Patient dangerous to himself or others

1024. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

Comment. This section provides a narrower exception to the psychotherapist-patient privilege than the comparable exceptions provided by Section 982 (privilege for confidential marital communications) and Section 1004 (physician-patient privilege). Although this exception might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is a menace to himself or others and the patient refuses to permit the psychotherapist to make the disclosure necessary to prevent the threatened danger.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
Property, see § 185
Psychotherapist, see § 1010
Similar provisions:
Marital communications privilege, see § 982
Marital testimonial privilege, see § 972(b)
Physician-patient privilege, see § 1004

§ 1025. Exception: Proceeding to establish competence

1025. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

Comment. See the *Comment* to Section 1005.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
Proceeding, see § 901
Similar provisions:
Marital communications privilege, see § 983
Marital testimonial privilege, see § 972(c)
Physician-patient privilege, see § 1005

§ 1026. Exception: Required report

1026. There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.

Comment. See the *Comment* to Section 1006.

CROSS-REFERENCES

Definitions:
Patient, see § 1011
Proceeding, see § 901
Psychotherapist, see § 1010
Public employee, see § 195
Statute, see § 230
Similar provision:
Physician-patient privilege, see § 1006

Article 8. Clergyman-Penitent Privileges

§ 1030. "Clergyman"

1030. As used in this article, "clergyman" means a priest, minister, or similar functionary of a church or of a religious denomination or religious organization.

Comment. "Clergyman" is broadly defined in this section.

§ 1031. "Penitent"

1031. As used in this article, "penitent" means a person who has made a penitential communication to a clergyman.

Comment. This section defines "penitent" by incorporating the definitions in Sections 1030 and 1032.

CROSS-REFERENCES

Definitions:
Clergyman, see § 1030
Penitential communication, see § 1032

§ 1032. "Penitential communication"

1032. As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and has a duty to keep them secret.

Comment. Under existing law, the communication must be a "confession." CODE CIV. PROC. § 1881(3) (superseded by the Evidence Code). Section 1032 extends the protection that traditionally has been provided only to those persons whose religious practice involves "confessions."

CROSS-REFERENCES

Definitions:
Clergyman, see § 1030
Penitent, see § 1031
Presumption that communication was confidential, see § 917

§ 1033. Privilege of penitent

1033. Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege.

Comment. This section provides the penitent with a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication. Because of the definition of "penitential communication," Section 1033 provides a broader privilege than the existing law.

Section 1033 differs from Code of Civil Procedure Section 1881(3) (superseded by the Evidence Code) in that Section 1881(3) gives a penitent a privilege only to prevent a clergyman from disclosing the communication. Literally, Section 1881(3) does not give the penitent himself the right to refuse disclosure. However, similar privilege statutes have been held to grant a privilege both to refuse to disclose and to prevent the other communicant from disclosing the privileged statement. See *City & County of San Francisco v. Superior Court*, 37 Cal.2d 227, 236, 231 P.2d 26, 31 (1951) (attorney-client privilege); *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517, 525-526, 47 Pac. 364, 366 (1897) ("a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose"). Hence, it is likely that Section 1881(3) would be similarly construed.

Section 1033 also protects against disclosure by eavesdroppers. In this respect, the section provides the same scope of protection that is provided by the other confidential communication privileges. See the *Comment* to Section 954.

CROSS-REFERENCES

Definitions:
Penitent, see § 1031
Penitential communication, see § 1032

Eavesdropping on confidential communications prohibited, see Penal Code §§ 653i, 653j
General provisions relating to privileges, see §§ 910-920

§ 1034. Privilege of clergyman

1034. Subject to Section 912, a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

Comment. This section provides the clergyman with a privilege in his own right. Moreover, he may claim this privilege even if the penitent has waived the privilege granted him by Section 1033.

There may be several reasons for granting clergymen the traditional priest-penitent privilege. At least one underlying reason seems to be that the law will not compel a clergyman to violate—nor punish him for refusing to violate—the tenets of his church which require him to maintain secrecy as to confidential statements made to him in the course of his religious duties. See generally 8 WIGMORE, EVIDENCE §§ 2394-2396 (McNaughton rev. 1961).

The clergyman is under no legal compulsion to claim the privilege. Hence, a penitential communication will be admitted if the clergyman fails to claim the privilege and the penitent is deceased, incompetent, absent, or fails to claim the privilege. This probably changes existing law; but, if so, the change is desirable. For example, if a murderer had confessed the crime to a clergyman, the clergyman might under some circumstances (*e.g.*, if the murderer has died) decline to claim the privilege and, instead, give the evidence on behalf of an innocent third party who had been indicted for the crime. The extent to which a clergyman should keep secret or reveal penitential communications is not an appropriate subject for legislation; the matter is better left to the discretion of the individual clergyman involved and the discipline of the religious body of which he is a member.

CROSS-REFERENCES

Definitions:
Clergyman, see § 1030
Penitential communication, see § 1032
See also the *Cross-References* under Section 1033

Article 9. Official Information and Identity of Informer

§ 1040. Privilege for official information

1040. (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confi-

dentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

Comment. Under existing law, official information is protected either by subdivision 5 of Code of Civil Procedure Section 1881 (which, like Section 1040, prohibits disclosure when the interest of the public would suffer thereby) or by specific statutes such as the provisions of the Revenue and Taxation Code prohibiting disclosure of information reported in tax returns. See, *e.g.*, REV. & TAX. CODE §§ 19281-19289. Section 1881 is superseded by the Evidence Code, but the specific statutes protecting official information remain in effect. EVIDENCE CODE § 1040(b)(1).

Section 1040 permits the official information privilege to be invoked by the public entity or its authorized representative. Since the privilege is granted to enable the government to protect its secrets, no reason exists for permitting the privilege to be exercised by persons who are not concerned with the public interest. It should be noted, however, that another statute may provide a person with a privilege not to disclose a report he made to the government; the Evidence Code has no effect on that privilege. See the *Comment* to EVIDENCE CODE § 920.

The privilege may be asserted to prevent testimony by anyone who has official information. This provides the public entity with more protection than existing law. See the *Comment* to EVIDENCE CODE § 954 (attorney-client privilege).

Official information is absolutely privileged if its disclosure is forbidden by either a federal or state statute. Other official information is subject to a conditional privilege: The judge must determine in each instance the consequences to the public of disclosure and the consequences to the litigant of nondisclosure and then decide which outweighs the other. He should, of course, be aware that the public has an interest in seeing that justice is done in the particular cause as well as an interest in the secrecy of the information.

CROSS-REFERENCES

Communications from parties in conciliation proceedings deemed to be official information, see Code of Civil Procedure § 1747
Definitions:
Proceeding, see § 901
Public employee, see § 195
Public entity, see § 200
State, see § 220
Statute, see § 230
Disclosure of information to court, see § 915
General provisions relating to privileges, see §§ 910-920
Overhearing and recording confidential communication, see Penal Code § 653j

§ 1041. Privilege for identity of informer

1041. (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United

States or of this State or of a public entity in this State, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity.

Comment. Under existing law, the identity of an informer is protected by subdivision 5 of Code of Civil Procedure Section 1881 (which, like Section 1041, prohibits disclosure when the interest of the public would suffer thereby). Section 1881 is superseded by the Evidence Code.

This privilege may be claimed under the same conditions as the official information privilege may be claimed, except that it does not apply if a person is called as a witness and asked if he is the informer.

CROSS-REFERENCES

Definitions:
Proceeding, see § 901
Public entity, see § 200
State, see § 220
Statute, see § 230
Disclosure of identity of informer to court, see § 915
General provisions relating to privileges, see §§ 910-920
Overhearing and recording confidential communication, see Penal Code § 653j

§ 1042. Adverse order or finding in certain cases

1042. (a) Except where disclosure is forbidden by an Act of the Congress of the United States, if a claim of privilege under this article by the State or a public entity in this State is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding or a disciplinary proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

Comment. Section 1042 provides special rules regarding the consequences of invocation of the privileges provided in this article by the prosecution in a criminal proceeding or a disciplinary proceeding.

Subdivision (a). This subdivision recognizes the existing California rule in a criminal case. As was stated by the United States Supreme Court in *United States v. Reynolds,* 345 U.S. 1, 12 (1953), "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." This policy applies if either the official information privilege (Section 1040) or the informer privilege (Section 1041) is exercised in a criminal proceeding or a disciplinary proceeding.

In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence; in such cases, the law requires that the court dismiss the case if the public entity does not reveal the information. *People v. McShann,* 50 Cal.2d 802, 330 P.2d 33 (1958). In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant; in those cases, the law requires that the court strike the testimony of a particular witness or make some other order appropriate under the circumstances if the public entity insists upon its privilege. *Priestly v. Superior Court,* 50 Cal.2d 812, 330 P.2d 39 (1958).

Subdivision (a) applies only if the privilege is asserted by the State of California or a public entity in the State of California. Subdivision (a) does not require the imposition of its sanction if the privilege is invoked in an action prosecuted by the State and the information is withheld by the federal government or another state. Nor may the sanction be imposed where disclosure is forbidden by federal statute. In these respects, subdivision (a) states existing California law. *People v. Parham,* 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

Subdivision (b). This subdivision codifies the rule declared in *People v. Keener,* 55 Cal.2d 714, 723, 12 Cal. Rptr. 859, 864, 361 P.2d 587, 592 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Subdivision (b), however, applies to all official information, not merely to the identity of an informer.

CROSS-REFERENCES

Definitions:
Criminal proceeding, see § 903
Disciplinary proceeding, see § 904
Evidence, see § 140
Law, see § 160
Presiding officer, see § 905
Proceeding, see § 901
Public entity, see § 200
State, see § 220
Identity of informer, see § 1041
Official information, see § 1040

Article 10. Political Vote

§ 1050. Privilege to protect secrecy of vote

1050. If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot unless he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.

Comment. Section 1050 declares existing law. The California cases declaring such a privilege have relied upon the provision of the Constitution that "secrecy in voting be preserved." CAL. CONST., Art. II, § 5. See *Bush v. Head*, 154 Cal. 277, 97 Pac. 512 (1908); *Smith v. Thomas*, 121 Cal. 533, 54 Pac. 71 (1898). Since the policy of ballot secrecy extends only to legally cast ballots, the California cases—as well as Section 1050—recognize that there is no privilege as to the tenor of an illegal vote. *Patterson v. Hanley*, 136 Cal. 265, 68 Pac. 821 (1902).

Article 11. Trade Secret

§ 1060. Privilege to protect trade secret

1060. If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Comment. This privilege is granted so that secret information essential to the continued operation of a business or industry may be afforded some measure of protection against unnecessary disclosure. Thus, the privilege prevents the use of the witness' duty to testify as the means for injuring an otherwise profitable business where more important interests will not be jeopardized. See generally 8 WIGMORE, EVIDENCE § 2212(3) (McNaughton rev. 1961). Nevertheless, there are dangers in the recognition of such a privilege. Copyright and patent laws provide adequate protection for many of the matters that might otherwise be classified as trade secrets. Recognizing the privilege as to such information would serve only to hinder the courts in determining the truth without providing the owner of the secret any needed protection. Again, disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer

would be privileged to withhold his wrongful conduct from legal scrutiny.

Therefore, the privilege exists under this section only if its application will not tend to conceal fraud or otherwise work injustice. The limits of the privilege are necessarily uncertain and will have to be worked out through judicial decisions.

Although no California case has been found holding evidence of a trade secret to be privileged, at least one California case has recognized that such a privilege may exist unless its holder has injured another and the disclosure of the secret is indispensable to the ascertainment of the truth and the ultimate determination of the rights of the parties. *Willson v. Superior Court,* 66 Cal. App. 275, 225 Pac. 881 (1924) (trade secret held not subject to privilege because of plaintiff's need for information to establish case against the person asserting the privilege). Indirect recognition of such a privilege has also been given in Code of Civil Procedure Section 2019, which provides that in discovery proceedings the court may make protective orders prohibiting inquiry into "secret processes, developments or research."

CROSS-REFERENCES

Disclosure of secret to court, see § 915
General provisions relating to privileges, see §§ 910-920
Overhearing and recording confidential communication, see Penal Code § 653j
Protective orders in discovery proceedings, see Code of Civil Procedure § 2019(b)(1)

CHAPTER 5. IMMUNITY OF NEWSMAN FROM CITATION FOR CONTEMPT

§ 1070. "Newsman"

1070. As used in this chapter, "newsman" means a person directly engaged in the procurement of news for publication, or in the publication of news, by news media.

Comment. See the *Comment* to Section 1072.

CROSS-REFERENCES

Definition:
News media, see § 1071

§ 1071. "News media"

1071. As used in this chapter, "news media" means newspapers, press associations, wire services, radio, and television.

Comment. See the *Comment* to Section 1072.

§ 1072. Newsman's immunity

1072. A newsman may not be adjudged in contempt for refusing to disclose the source of news procured for publication and published by news media, unless the source has been disclosed previously or the disclosure of the source is required in the public interest or otherwise required to prevent injustice.

Comment. This chapter permits certain newsmen to maintain secrecy as to the source of their news where more important interests will not be unduly jeopardized. Because of the basic similarity between the governmental informer privilege and the protection afforded newsmen

under this chapter—that is, both are permitted to maintain secrecy concerning the identity of a person who has furnished information in the interest of promoting disclosure of such information—the protection given newsmen is substantially the same as that granted to public officials concerning the identity of their informers. See EVIDENCE CODE § 1041. The Commission recommends adoption of this chapter because newsmen are given somewhat similar protection under existing law. CODE CIV. PROC. § 1881(6) (superseded by this chapter).

The definition of "news media" in Section 1071 is consistent with existing law. CODE CIV. PROC. § 1881(6).

Section 1072 provides protection to the *newsman;* it does not protect the *informer* from being required to disclose that he is the news source. This is consistent with the existing California statute and with the treatment afforded governmental informers under Section 1041.

Both Section 1072 and the existing statute require the information to have been disseminated. See CODE CIV. PROC. § 1881(6).

Just as a judge may require disclosure of a governmental informer's identity when such disclosure is required in the interest of justice, Section 1072 also permits the judge to require disclosure when such disclosure is required in the interest of justice. This changes existing law. However, the newsman's need for protection seems to be no greater than the public entity's need for protection in the case of a governmental informer.

It should be noted that Section 1072 provides an immunity from being adjudged in contempt; it does not create a privilege. Thus, the section will not prevent the use of the sanctions provided by the discovery act when the newsman is a party to a civil proceeding. In this respect, Section 1072 retains existing law. *Bramson v. Wilkerson,* Civil No. 760973 (L.A. Super. Ct., January 4, 1962), as reported in 3 Cal. Disc. Proc. 72 (Metropolitan News Review Section, January 30, 1962) (memorandum opinion of Judge Philbrick McCoy). This limitation on the protection provided by Section 1072 is consistent with Section 1042 which limits the protection afforded to a public entity to refuse to disclose the identity of an informer.

CROSS-REFERENCES

Definitions:
Newsman, see § 1070
News media, see § 1071

§ 1073. Determination of newsman's claim

1073. The procedure specified in subdivisions (a) and (b) of Section 914 and in subdivisions (a) and (b) of Section 915 applies to the determination of a newsman's claim for protection under Section 1072.

Comment. A claim for protection under Section 1072 is to be determined in accordance with the procedure for determination of a public entity's claim for protection against having to disclose the identity of a governmental informer. Section 1073 makes this clear.

CROSS-REFERENCES

Definition:
Newsman, see § 1070

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CROSS-REFERENCES

Admissibility of relevant evidence generally, see § 351
Exclusion of cumulative or unduly prejudicial evidence, see § 352
Opinion testimony generally, see §§ 800-805
Preliminary determinations on admissibility of evidence, see §§ 400-406
Privileges, see §§ 900-1073

CHAPTER 1. EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

§ 1100. Manner of proof of character

1100. Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

Comment. Section 1100 states the *kinds* of evidence that may be used to prove a person's character or a trait of his character. The section makes it clear that reputation evidence, opinion evidence, and evidence of specific instances of conduct are admissible for this purpose.

Section 1100 is technically unnecessary because Section 351 declares that all relevant evidence is admissible. Hence, all of the evidence declared to be admissible by Section 1100 would be admissible anyway under the general provisions of Section 351. Section 1100 is included in the Evidence Code, however, to forestall the argument that Section 351 does not remove all judicially created restrictions on the kinds of evidence that may be used to prove character or a trait of character.

Subject to certain statutory restrictions, the character evidence described in Section 1100 is admissible under Section 351 whenever it is relevant. Evidence of a person's character or a trait of his character is relevant in three situations: (1) when offered on the issue of his credibility as a witness, (2) when offered as circumstantial evidence of his conduct in conformity with such character or trait of character, and (3) when his character or a trait of his character is an ultimate fact in dispute in the action.

Sections 786-790 establish restrictions that are applicable when character evidence is offered to attack or to support the *credibility of a witness.* See the *Comments* to Sections 787 and 788 for a discussion of the restrictions on the kinds of evidence admissible for this purpose.

Sections 1101-1104 substantially restrict the extent to which character evidence may be used as *circumstantial evidence of conduct.* See the *Comments* to those sections for a discussion of the restrictions on the kinds of evidence admissible for this purpose.

Section 1100 applies without restriction only when character or a trait of character is an *ultimate fact in dispute* in the action. As applied to this situation, Section 1100 is generally consistent with existing law, although the existing law is uncertain in some respects. Cases involving character as an ultimate issue have admitted opinion evidence (*People v. Wade,* 118 Cal. 672, 50 Pac. 841 (1897); *People v. Samonset,* 97 Cal. 448, 450, 32 Pac. 520, 521 (1893)), reputation evidence (*Estate of Akers,* 184 Cal. 514, 519-520, 194 Pac. 706, 708-709 (1920); *People v.*

Samonset, supra), and evidence of specific acts (*Guardianship of Wisdom,* 146 Cal. App.2d 635, 304 P.2d 221 (1956); *Currin v. Currin,* 125 Cal. App.2d 644, 271 P.2d 61 (1954); *Guardianship of Casad,* 106 Cal. App.2d 134, 234 P.2d 647 (1951)). However, there are cases which exclude some kinds of evidence where particular traits are involved. For example, in cases involving the unfitness or incompetency of an employee, evidence of specific acts is admissible to prove such unfitness or incompetency, while evidence of reputation is not. *E.g., Gier v. Los Angeles Consol. Elec. Ry.,* 108 Cal. 129, 41 Pac. 22 (1895). Section 1100 eliminates the uncertainties in existing law and makes admissible any evidence that is relevant to prove the character in issue.

CROSS-REFERENCES

Character as affecting credibility, see §§ 786-790
Character evidence to prove conduct, see §§ 1101-1104
Definitions:
Conduct, see § 125
Evidence, see § 140
Statute, see § 230

§ 1101. Evidence of character to prove conduct

1101. (a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Comment. Section 1101 is concerned with evidence of a person's character (*i.e.,* his propensity or disposition to engage in a certain type of conduct) that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion. Section 1101 is not concerned with evidence offered to prove a person's character when that character is itself in issue; the admissibility of character evidence offered for this purpose is determined under Sections 351 and 1100. Nor is Section 1101 concerned with evidence of character offered on the issue of the credibility of a witness; the admissibility of such evidence is determined under Sections 786-790. See EVIDENCE CODE § 1101(c).

Civil cases. Section 1101 excludes evidence of character to prove conduct in a civil case for the following reasons. *First,* character evidence is of slight probative value and may be very prejudicial. *Second,* character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third,* introduction of char-

acter evidence may result in confusion of issues and require extended collateral inquiry.

Section 1101 states the general rule recognized under existing law. CODE CIV. PROC. § 2053 ("Evidence of the good character of a party is not admissible in a civil action . . . ." (Section 2053 is superseded by various Evidence Code sections.)); *Deevy v. Tassi,* 21 Cal.2d 109, 130 P.2d 389 (1942) (assault; evidence of defendant's bad character for peace and quiet held inadmissible); *Vance v. Richardson,* 110 Cal. 414, 42 Pac. 909 (1895) (assault; evidence of defendant's good character for peace and quiet held inadmissible); *Van Horn v. Van Horn,* 5 Cal. App. 719, 91 Pac. 260 (1907) (divorce for adultery; evidence of defendant's and the nonparty-corespondent's good character held inadmissible). Under existing law, however, there *may* be an exception to this general rule. Existing law may permit evidence to be introduced of the unchaste character of a plaintiff to show the likelihood of her consent to an alleged rape. *Valencia v. Milliken,* 31 Cal. App. 533, 160 Pac. 1086 (1916) (civil action for rape; error, but nonprejudicial, to limit evidence of unchaste character of plaintiff to issue of damages). The Evidence Code has no such exception for civil cases. *But see* EVIDENCE CODE § 1103 (criminal cases).

Criminal cases. Section 1101 states the general rule that evidence of character to prove conduct is inadmissible in a criminal case. Sections 1102 and 1103 state exceptions to this general principle. See the *Comment* to Section 1102.

Evidence of misconduct to show fact other than character. Section 1101 does not prohibit the admission of evidence of misconduct when it is offered as evidence of some other fact in issue, such as motive, common scheme or plan, preparation, intent, knowledge, identity, or absence of mistake or accident. Subdivision (b) of Section 1101 makes this clear. This codifies existing law. *People v. Lisenba,* 14 Cal.2d 403, 94 P.2d 569 (1939) (prior crime admissible to show general criminal plan and absence of accident); *People v. David,* 12 Cal.2d 639, 86 P.2d 811 (1939) (prior robbery admissible to show defendant's sanity and ability to devise and execute deliberate plan); *People v. Morani,* 196 Cal. 154, 236 Pac. 135 (1925) (prior abortion admissible to show that operation was not performed in ignorance of effect and, hence, to show necessary intent). See discussion in CALIFORNIA CRIMINAL LAW PRACTICE 491-498 (Cal. Cont. Ed. Bar 1964).

CROSS-REFERENCES

Character as affecting credibility, see §§ 786-790
Definitions:
Conduct, see § 125
Evidence, see § 140
Evidence of prior conviction of witness, see § 788

§ 1102. Opinion and reputation evidence of character of criminal defendant to prove conduct

1102. In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

Comment. Sections 1102 and 1103 state exceptions (applicable only in criminal cases) to the general rule of Section 1101 that character evidence is not admissible to prove conduct in conformity with that character.

Sections 1102 and 1103 generally

Under Section 1102, the accused in a criminal case may introduce evidence of his good character to show his innocence of the alleged crime—provided that the character or trait of character to be shown is relevant to the charge made against him. This codifies existing law. *People v. Chrisman,* 135 Cal. 282, 67 Pac. 136 (1901). Sections 1101 and 1102 make it clear that the prosecution may not, on its own initiative, use character evidence to prove that the defendant had the disposition to commit the crime charged; but, if the defendant first introduces evidence of his good character to show the likelihood of innocence, the prosecution may meet his evidence by introducing evidence of the defendant's bad character to show the likelihood of guilt. This also codifies existing law. *People v. Jones,* 42 Cal.2d 219, 266 P.2d 38 (1954) (prosecution for sexual molestation of child; error to exclude expert psychiatric opinion that defendant was not a sexual psychopath); *People v. Stewart,* 28 Cal. 395 (1865) (murder prosecution; error to exclude evidence of defendant's good character for peace and quiet); *People v. Hughes,* 123 Cal. App.2d 767, 267 P.2d 376 (1954) (assault prosecution; evidence of defendant's violent nature held admissible after introduction of evidence showing his good character for peace and quiet). See CALIFORNIA CRIMINAL LAW PRACTICE 489-490 (Cal. Cont. Ed. Bar 1964).

Likewise, under Section 1103, the defendant may introduce evidence of the character of the victim of the crime where the conduct of the victim in conformity with his character would tend to exculpate the defendant; and, if the defendant introduces evidence of the bad character of the victim, the prosecution may introduce evidence of the victim's good character. This codifies existing law. *People v. Hoffman,* 195 Cal. 295, 311-312, 232 Pac. 974, 980 (1925) (murder prosecution; evidence of victim's good reputation for peace and quiet held inadmissible when defendant had not attacked reputation of victim); *People v. Lamar,* 148 Cal. 564, 83 Pac. 993 (1906) (murder prosecution; error to exclude evidence of victim's bad character for violence offered to prove victim was aggressor and defendant acted in self-defense); *People v. Shea,* 125 Cal. 151, 57 Pac. 885 (1899) (rape prosecution; error to exclude evidence of the prosecutrix's unchaste character offered to prove the likelihood of consent); *People v. Fitch,* 28 Cal. App.2d 31, 81 P.2d 1019 (1938) (murder prosecution; evidence of victim's good character for peace and quiet held admissible after defendant introduced evidence of victim's violent nature). See also Comment, 25 CAL. L. REV. 459 (1937).

Thus, under Sections 1102 and 1103, the defendant in a criminal case is given the right to introduce character evidence that would be

inadmissible in a civil case. However, evidence of the character of the defendant or the victim—though weak—may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt. And, since his life or liberty is at stake, the defendant should not be deprived of the right to introduce evidence even of such slight probative value.

Kinds of character evidence admissible to prove conduct under Sections 1102 and 1103.

The three kinds of evidence that might be offered to prove character as circumstantial evidence of conduct are: (1) evidence as to reputation, (2) opinion evidence as to character, and (3) evidence of specific acts indicating character. The admissibility of each of these kinds of evidence when character is sought to be proved as circumstantial evidence of conduct under Sections 1102 and 1103 is discussed below.

Reputation evidence. Reputation evidence is the ordinary means sanctioned by the cases for proving character as circumstantial evidence of conduct. WITKIN, CALIFORNIA EVIDENCE § 125 (1958). See *People v. Fair,* 43 Cal. 137 (1872). Both Sections 1102 and 1103 codify the existing law permitting character to be proved by reputation.

Opinion evidence. There is recent authority for the admission of opinion evidence to prove character as circumstantial evidence of conduct. *People v. Jones,* 42 Cal.2d 219, 266 P.2d 38 (1954) (error to exclude expert psychiatric opinion that the defendant was not a sexual psychopath and, hence, unlikely to have violated Penal Code Section 288). However, opinion evidence generally has been held inadmissible. See *People v. Spigno,* 156 Cal. App.2d 279, 319 P.2d 458 (1957) (full discussion of the *Jones* case); CALIFORNIA CRIMINAL LAW PRACTICE 489-490 (Cal. Cont. Ed. Bar 1964).

The general rule under existing law excludes the most reliable form of character evidence and admits the least reliable. The opinions of those whose personal intimacy with a person gives them firsthand knowledge of that person's character are a far more reliable indication of that character than is reputation, which is little more than accumulated hearsay. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940). The danger of collateral issues seems no greater than that inherent in reputation evidence. Accordingly, both Section 1102 and Section 1103 permit character to be proved by opinion evidence.

Evidence of specific acts. Under existing law, the admissibility of evidence of specific acts to prove character as circumstantial evidence of conduct depends upon the nature of the conduct sought to be proved. Evidence of specific acts of the accused is excluded as a general rule in order to avoid the possibility of prejudice, undue confusion of the issues with collateral matters, unfair surprise, and the like. Thus, it is usually held that evidence of specific acts by the defendant is inadmissible to prove his guilt even though the defendant has opened the question by introducing evidence of his good character. See discussion in *People v. Gin Shue,* 58 Cal. App.2d 625, 634, 137 P.2d 742, 747-748 (1943). On the other hand, it is well settled that in a rape case the defendant may show the unchaste character of the prosecutrix by

evidence of prior voluntary intercourse in order to indicate the unlikelihood of resistance on the occasion in question. *People v. Shea*, 125 Cal. 151, 57 Pac. 885 (1899); *People v. Benson*, 6 Cal. 221 (1856); *People v. Battilana*, 52 Cal. App.2d 685, 126 P.2d 923 (1942). However, in a homicide or assault case where the defense is self-defense, evidence of specific acts of violence by the victim is inadmissible to prove his violent nature (and, hence, that the victim was the aggressor) unless the prior acts were directed against the defendant himself. *People v. Yokum*, 145 Cal. App.2d 245, 302 P.2d 406 (1956); *People v. Soules*, 41 Cal. App.2d 298, 106 P.2d 639 (1940). *But see People v. Carmichael*, 198 Cal. 534, 548, 246 Pac. 62, 68 (1926) (if defendant had knowledge of victim's statement evidencing violent nature, the "statement was material and might have had an important bearing upon his plea of self-defense"); *People v. Swigart*, 80 Cal. App. 31, 251 Pac. 343 (1926). See also Comment, 25 CAL. L. REV. 459, 466-469 (1937).

Section 1102 codifies the general rule under existing law which precludes evidence of specific acts of the defendant to prove character as circumstantial evidence of his innocence or of his disposition to commit the crime with which he is charged.

Section 1103 permits both the defendant and the prosecution to use evidence of specific acts of the victim of the crime to prove the victim's character as circumstantial evidence of his conduct. In this respect, the section harmonizes conflicting rules found in existing law.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Criminal action, see § 130
Evidence, see § 140

§ 1103. Evidence of character of victim of crime to prove conduct

1103. In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

Comment. See the *Comment* to Section 1102.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Criminal action, see § 130
Evidence, see § 140

§ 1104. Character trait for care or skill

1104. Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

Comment. Section 1104 places a further limitation on the use of character evidence. Under Section 1104, character evidence with respect to care or skill is inadmissible to prove that conduct on a specific occasion was either careless or careful, skilled or unskilled, except to the extent permitted by Sections 1102 and 1103.

Section 1104 codifies well-settled California law. *Towle v. Pacific Improvement Co.*, 98 Cal. 342, 33 Pac. 207 (1893). The purpose of the rule is to prevent collateral issues from consuming too much time and distracting the attention of the trier of fact from what was actually done on the particular occasion. Here, the slight probative value of the evidence balanced against the danger of confusion of issues, collateral inquiry, prejudice, and the like, warrants a fixed exclusionary rule.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Evidence, see § 140
Habit or custom, evidence of, see § 1105

§ 1105. Habit or custom to prove specific behavior

1105. Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

Comment. Section 1105, like Section 1100, declares that certain evidence is admissible. Hence, Section 1105 is technically unnecessary because Section 351 declares that all relevant evidence is admissible. Nonetheless, Section 1105 is desirable to assure that evidence of custom or habit (a regular response to a repeated specific situation) is admissible even where evidence of a person's character (his general disposition or propensity to engage in a certain type of conduct) is inadmissible.

The admissibility of habit evidence to prove conduct in conformity with the habit has long been established in California. *Wallis v. Southern Pac. Co.*, 184 Cal. 662, 195 Pac. 408 (1921) (distinguishing cases holding character evidence as to care or skill inadmissible); *Craven v. Central Pac. R.R.*, 72 Cal. 345, 13 Pac. 878 (1887). The admissibility of evidence of the custom of a business or occupation is also well established. *Hughes v. Pacific Wharf & Storage Co.*, 188 Cal. 210, 205 Pac. 105 (1922) (mailing letter). However, under existing law, evidence of habit is admissible only if there are no eyewitnesses. *Boone v. Bank of America*, 220 Cal. 93, 29 P.2d 409 (1934). In earlier cases, the Supreme Court criticized the "no eyewitness" limitation:

> This limitation upon the introduction of such testimony seems rather illogical. If the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eye-witnesses; and if the testimony of the eye-witnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit. [*Wallis v. Southern Pac. Co.*, 184 Cal. 662, 665, 195 Pac. 408, 409 (1921).]

The "no eyewitness" limitation is undesirable. Eyewitnesses frequently are mistaken, and some are dishonest. The trier of fact should be entitled to weigh the habit evidence against the eyewitness testimony as well as all of the other evidence in the case. Hence, Section 1105 does not contain the "no eyewitness" limitation.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Evidence, see § 140
Character for care or skill, evidence of, see § 1104
Mining claims, evidence of custom or usage, see Code of Civil Procedure § 748

CHAPTER 2. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

§ 1150. Evidence to test a verdict

1150. Except as otherwise provided by law, upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Comment. Section 1150 codifies existing law which permits evidence of misconduct by a trial juror to be received but forbids the reception of evidence as to the effect of such misconduct on the minds of the jurors. *People v. Stokes,* 103 Cal. 193, 196-197, 37 Pac. 207, 208-209 (1894).

Section 1150 excludes only evidence of the *effect* of various occurrences on a juror's mind; it does not affect the existing rules concerning admissibility of evidence of the *fact* of such occurrences. Hence, Section 1150 makes no change in the rules concerning when testimony or affidavits of jurors may be received to impeach or support a verdict. 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). And 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* or was mentally incompetent to serve as a juror. *E.g., Williams v. Bridges,* 140 Cal. App. 537, 35 P.2d 407 (1934) (false answer on *voir dire*); *Noll v. Lee,* 221 Cal. App.2d 81, 34 Cal. Rptr. 223 (1963) (hearing denied) (false answer on *voir dire*); *Church v. Capital Freight Lines,* 141 Cal. App.2d 246, 296 P.2d 563 (1956) (mental competence of juror).

Section 1150 also makes no change in the existing law concerning the *grounds* upon which a verdict may be set aside, *i.e.*, what constitutes jury misconduct. See CODE CIV. PROC. § 657 (civil case); PENAL CODE § 1181 (criminal case).

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Evidence, see § 140
Statement, see § 225

§ 1151. Subsequent remedial conduct

1151. When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

Comment. Section 1151 codifies well-settled law. *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710 (1904); *Sappenfield v. Main Street etc. R.R.*, 91 Cal. 48, 27 Pac. 590 (1891). The admission of evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs after the occurrence of an accident.

Section 1151 does not prevent the use of evidence of subsequent remedial conduct for the purpose of impeachment in appropriate cases. This is in accord with *Pierce v. J. C. Penney Co.*, 167 Cal. App.2d 3, 334 P.2d 117 (1959).

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Evidence, see § 140
Proof, see § 190

§ 1152. Offer to compromise and the like

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or claims to have sustained loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his pre-existing debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty.

Comment. Section 1152, like Section 2078 of the Code of Civil Procedure which it supersedes, declares that compromise offers are inadmissible to prove liability. Because of the particular wording of Section 2078, an offer of compromise probably may not be considered

as an admission even though admitted without objection. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 675-676 (1964). See also *Scott v. Wood*, 81 Cal. 398, 405-406, 22 Pac. 871, 873 (1889). Under Section 1152, however, nothing prohibits the consideration of an offer of settlement on the issue of liability if the evidence is received without objection. This modest change in the law is desirable. An offer of compromise, like other incompetent evidence, should be considered to the extent that it is relevant when it is presented to the trier of fact without objection.

The words "as well as any conduct or statements made in negotiation thereof" make it clear that statements made by parties during negotiations for the settlement of a claim may not be used as admissions in later litigation. This language will change the existing law under which certain statements made during settlement negotiations may be used as admissions. *People v. Forster*, 58 Cal.2d 257, 23 Cal. Rptr. 582, 373 P.2d 630 (1962). The rule excluding offers is based upon the public policy in favor of the settlement of disputes without litigation. The same public policy requires that admissions made during settlement negotiations also be excluded. The rule of the *Forster* case that permits such statements to be admitted places a premium on the form of the statement. The statement "Assuming, for the purposes of these negotiations, that I was negligent . . ." is inadmissible; but the statement "All right, I was negligent! Let's talk about damages . . ." may be admissible. See the discussion in *People v. Glen Arms Estate, Inc.*, 230 Cal. App.2d ___, ___, 41 Cal. Rptr. 303, 316 (1964). The rule of the *Forster* case is changed by Section 1152 because that rule prevents the complete candor between the parties that is most conducive to settlement.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Evidence, see § 140
Person, see § 175
Proof, see § 190
Statement, see § 225

§ 1153. Offer to plead guilty or withdrawn plea of guilty by criminal defendant

1153. Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

Comment. Section 1153 is consistent with existing law. Under existing law, evidence of a rejected *offer* to plead guilty to the crime charged or to a lesser crime is inadmissible. PENAL CODE § 1192.4; *People v. Wilson*, 60 Cal.2d 139, 155-156, 32 Cal. Rptr. 44, 54-55, 383 P.2d 452, 462-463 (1963); *People v. Hamilton*, 60 Cal.2d 105, 113-114, 32 Cal. Rptr. 4, 8-9, 383 P.2d 412, 416-417 (1963). Likewise, a plea of guilty, later withdrawn, is inadmissible. *People v. Quinn*, 61 Cal. 2d ___, 39 Cal. Rptr. 393, 393 P.2d 705 (1964).

CROSS-REFERENCES

Compromising certain public offenses by leave of the court, see Penal Code §§ 1377–1379
Definitions:
Action, see § 105
Criminal action, see § 130
Evidence, see § 140
Rejected offer to plead guilty, inadmissible, see Penal Code § 1192.4

§ 1154. Offer to discount a claim

1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

Comment. Section 1154 stems from the same policy of encouraging settlement and compromise that is reflected in Section 1152. Except for the language "as well as any conduct or statements made in negotiation thereof," this section codifies existing law. *Dennis v. Belt,* 30 Cal. 247 (1866); *Anderson v. Yousem,* 177 Cal. App.2d 135, 1 Cal. Rptr. 889 (1960); *Cramer v. Lee Wa Corp.,* 109 Cal. App.2d 691, 241 P.2d 550 (1952). The significance of the quoted language is indicated in the *Comment* to Section 1152.

CROSS-REFERENCES

Definitions:
Conduct, see § 125
Evidence, see § 140
Person, see § 175
Proof, see § 190
Statement, see § 225
Offer of defendant to compromise, see Code of Civil Procedure § 997

§ 1155. Liability insurance

1155. Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

Comment. Section 1155 codifies existing law. *Roche v. Llewellyn Iron Works Co.,* 140 Cal. 563, 74 Pac. 147 (1903). Evidence of liability insurance might be inadmissible in the absence of Section 1155 because it is not relevant; Section 1155 assures its inadmissibility.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Person, see § 175
Proof, see § 190

§ 1156. Records of medical study of in-hospital staff committee

1156. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. The written records of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to Sections 2016 and 2036 of the Code of Civil Procedure (relating to discovery

proceedings) but, subject to subdivisions (b) and (c), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) This section does not affect the admissibility in evidence of the original medical records of any patient.

(c) This section does not exclude evidence which is relevant evidence in a criminal action.

Comment. Section 1156 restates the substance of and supersedes Code of Civil Procedure Section 1936.1 (added by Cal. Stats. 1963, Ch. 1558, § 1, p. 3142).

CROSS-REFERENCES

Definitions:
Action, see § 105
Criminal action, see § 130
Evidence, see § 140
Statement, see § 225

DIVISION 10. HEARSAY EVIDENCE

Comment. Division 10 contains the hearsay rule and the most commonly used exceptions to the rule. Other exceptions may be found in other statutes scattered throughout the codes. Under the Evidence Code, the hearsay objection is met if the evidence offered falls within any of the exceptions to the hearsay rule. But the fact that the hearsay objection is overcome does not necessarily make the evidence admissible. All other exclusionary rules apply and may require exclusion of the evidence.

CROSS-REFERENCES

Admissibility of hearsay evidence in criminal actions, see Penal Code § 686
Hospital records, see §§ 1560–1566
Official writings affecting property, see §§ 1600–1605
Official writings and recorded writings, see §§ 1450–1454, 1530–1532, 1600
Part of transaction proved, admissibility of whole, see § 356
Photographic copies of writings, see §§ 1550, 1551
Preliminary determinations on admissibility of evidence, see §§ 400–406
See also the *Cross-References* under Sections 1290 and 1500

CHAPTER 1. GENERAL PROVISIONS

§ 1200. The hearsay rule

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

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

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

Comment. Section 1200 states the hearsay rule. It defines hearsay evidence and provides that such evidence is inadmissible unless it meets the conditions of an exception established by law. Chapter 2 (commencing with Section 1220) of this division contains a series of exceptions to the hearsay rule. Other exceptions may be found in other statutes or in decisional law. But the fact that certain evidence meets the requirements of an exception to the hearsay rule does not necessarily make such evidence admissible. The exception merely provides that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law—such as privilege or the best evidence rule—that makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule. See also EVIDENCE CODE § 352.

Although the California courts have excluded hearsay evidence 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)), the hearsay rule has never been clearly stated in statutory form. Code of Civil Procedure Section 1845 (superseded by Evidence Code Section 702) has at times been considered to be the statutory basis for the hearsay rule. *People v. Spriggs,* 60 Cal.2d 868, 872, 36 Cal. Rptr. 841, 844, 389 P.2d 377, 380 (1964). Analytically, however, Section 1845 does not deal with hearsay at all; it deals only with the requirement of personal

knowledge. It is true that the section provides that there is an exception to the personal knowledge requirement "in those few express cases in which . . . the declarations of others, are admissible"; but "this section is inaccurate, so far as it refers to [this] exception. In such case the witness testifies merely to the making of the declaration, which he must have heard in order to be a competent witness to testify to it, and hence, the fact to which he testifies is a fact within his own knowledge, derived from his own perceptions." *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 that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Under this definition, as under existing case law, a statement that is offered for some purpose other than to prove the fact stated therein is not hearsay. *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 "a verbal expression" or "nonverbal conduct . . . intended . . . as a substitute for a verbal expression." 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") (overruled on other grounds in *People v. McCaughan,* 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957)).

Other California cases, however, have held that evidence of nonassertive conduct is not hearsay even though offered to prove 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 be unduly prejudicial, 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. Under existing law, too, the courts have recognized exceptions to the exclusionary rule in addition to those exceptions expressed in the statutes. See *People v. Spriggs*, 60 Cal.2d 868, 874, 36 Cal. Rptr. 841, 844, 389 P.2d 377, 380 (1964).

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Hearing, see § 145
Law, see § 160
Proof, see § 190
Statement, see § 225
See also the *Cross-References* for Division 10

§ 1201. Multiple hearsay

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

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 a previous trial may be used to prove the testimony previously given (EVIDENCE CODE § 1280); the former testimony may be used as evidence (EVIDENCE CODE § 1291) to prove that a party made a statement; and the party's statement is admissible against him as an admission (EVIDENCE CODE § 1220). 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).

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Hearsay evidence, see § 1200
Statement, see § 225
Hearsay rule, see § 1200

§ 1202. Credibility of hearsay declarant

1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other con-

duct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

Comment. Section 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It clarifies two points. *First,* evidence to impeach a hearsay declarant 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 or deny it—does not apply to a hearsay declarant.

When hearsay evidence in the form of former testimony has been admitted, the California courts have permitted a party to impeach the hearsay declarant with evidence of an inconsistent statement made by the hearsay declarant *after* the former testimony was given, even though the declarant was never given an opportunity to explain or deny the inconsistency. *People v. Collup,* 27 Cal.2d 829, 167 P.2d 714 (1946). 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). The courts permit dying declarations to be impeached by evidence of contradictory statements by the deceased despite the lack of any foundation, for only in very rare cases would it be possible to provide the declarant with an opportunity to explain or deny the inconsistency. *People v. Lawrence,* 21 Cal. 368 (1863).

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 becoming too remote from the issues that are actually at stake in the litigation. EVIDENCE CODE § 352.

Section 1235 provides that evidence of inconsistent statements made by a trial witness may be admitted to prove the truth of the matter stated. No similar exception to the hearsay rule is applicable to a hearsay declarant's inconsistent statements that are admitted under Section 1202. Hence, the hearsay rule prohibits any such statement from being used to prove the truth of the matter stated. If the declarant

is not a witness and is 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.

CROSS-REFERENCES

Definitions:
Action, see § 105
Conduct, see § 125
Declarant, see § 135
Evidence, see § 140
Hearsay evidence, see § 1200
Statement, see § 225
Deposition taken in same action, admissibility of, see Code of Civil Procedure § 2016(d)-(f); Penal Code §§ 1345, 1362

§ 1203. Cross-examination of hearsay declarant

1203. (a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the statement.

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

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

Comment. Hearsay evidence is generally excluded because the declarant was not in court and not subject to cross-examination before the trier of fact when he made the statement. *People v. Bob,* 29 Cal.2d 321, 325, 175 P.2d 12, 15 (1946).

In some situations, hearsay evidence is admitted because there is either some exceptional need for the evidence or some circumstantial probability of its trustworthiness, or both. *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 certain hearsay evidence to be admitted despite the fact that the adverse party had no opportunity to cross-examine the declarant when the hearsay statement was made, there seems to be no reason to prohibit the adverse party from cross-examining the declarant concerning the statement. 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 his statement.

Section 1203, therefore, reverses (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. Because 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.

Subdivisions (b) and (c) make Section 1203 inapplicable in certain situations where it would be inappropriate to permit a party to examine a hearsay declarant as if under cross-examination. Thus, for example, subdivision (b) does not permit counsel for a party to examine his own client as if under cross-examination merely because a hearsay statement of his client has been admitted; and, because a party should not have the right to cross-examine his own witness merely because the adverse party has introduced a hearsay statement of the witness, witnesses who have testified in the action concerning the statement are not subject to examination under Section 1203.

Subdivision (d) makes it clear that the unavailability of a hearsay declarant for examination under Section 1203 has no effect on the admissibility of his hearsay statements. The subdivision forestalls any argument that availability of the declarant for examination under Section 1203 is an additional condition of admissibility for hearsay evidence.

CROSS-REFERENCES

Definitions:
Action, see § 105
Declarant, see § 135
Hearsay evidence, see § 1200
Statement, see § 225
Examination of witnesses, method and scope, see §§ 760–778
Offer of proof unnecessary on cross-examination, see § 354
Similar provision:
Person upon whose statement an expert bases his opinion, examination as if under cross-examination, see § 804

§ 1204. Hearsay statement offered against criminal defendant

1204. A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

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.

CROSS-REFERENCES

Definitions:
Criminal action, see § 130
Hearsay evidence, see § 1200
Statement, see § 225

§ 1205. No implied repeal

1205. Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

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. To assure the continued validity of these provisions, Section 1205 states that they will not be impliedly repealed by the enactment of the Evidence Code.

CROSS-REFERENCES

Definitions:
Hearsay evidence, see § 1200
Statute, see § 230

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Admission of party

1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

Comment. Section 1220 states existing law as found in subdivision 2 of Section 1870 of the Code of Civil Procedure. 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).

In a criminal action, a defendant's statement is not admissible under this section unless it was made voluntarily. EVIDENCE CODE § 1204.

CROSS-REFERENCES

Admission made during compromise negotiations, see §§ 1152, 1154
Confession of defendant in criminal action, see §§ 402, 405, 1204
Definitions:
Action, see § 105
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200
Nolo contendere plea, see Penal Code § 1016
Withdrawn plea of guilty, or offer to plead guilty, see § 1153; Penal Code § 1192.4

§ 1221. Adoptive admission

1221. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

Comment. Section 1221 restates an exception found in subdivision 3 of Section 1870 of the Code of Civil Procedure.

CROSS-REFERENCES

Admissibility against criminal defendant, see § 1204
Admission made during compromise negotiations, see §§ 1152, 1154
Definitions:
Conduct, see § 125
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200
Partner's admission, see Corporations Code § 15011

§ 1222. Authorized admission

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

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

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

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. The authority of the declarant to make the statement need not be express; it may be implied. It is to be determined in each case under the substantive law of agency. Section 1222 restates an exception found in the first portion of subdivision 5 of Section 1870 of the Code of Civil Procedure. 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).

CROSS-REFERENCES

Admissibility against criminal defendant, see § 1204
Admission made during compromise negotiations, see §§ 1152, 1154
Definitions:
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200
Order of proof, see § 320
Partner's admission, see Corporations Code § 15011

§ 1223. Admission of co-conspirator

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

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

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

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

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, 897 (1928). See CALIFORNIA CRIMINAL LAW PRACTICE 471-472 (Cal. Cont. Ed. Bar 1964). Section 1223 restates an exception found in subdivision 6 of Section 1870 of the Code of Civil Procedure.

CROSS-REFERENCES

Admissibility against criminal defendant, see § 1204
Definitions:
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200
Order of proof, see § 320

§ 1224. Statement of declarant whose liability or breach of duty is in issue

1224. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

Comment. Section 1224 restates in substance a hearsay exception found in Code of Civil Procedure Section 1851 (superseded by Evidence Code Sections 1224 and 1302). See *Butte County v. Morgan,* 76 Cal. 1, 18 Pac. 115 (1888); *Ingram v. Bob Jaffe 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 1224, however, limits this hearsay exception to civil actions. Much of the evidence within this exception is also covered by Section 1230, which makes declarations against interest admissible. 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 1224.

Code of Civil Procedure Section 1851 provides for the admission of a declarant's statements in an action where the liability of the party against whom the statements are offered is based on the declarant's breach of duty. *Butte County v. Morgan,* 76 Cal. 1, 18 Pac. 115 (1888); *Nye & Nissen v. Central etc. Ins. Corp.,* 71 Cal. App.2d 570, 163 P.2d 100 (1945). Section 1224 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 vehicle owners established by Vehicle Code Section 17150. Under Section 1224, 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 1224. Section 1302 creates an exception for 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 1224 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).

CROSS-REFERENCES

Admission made during compromise negotiations, see §§ 1152, 1154
Definitions:
Action, see § 105
Civil action, see § 120
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Partner's admission, see Corporations Code § 15011

§ 1225. Statement of declarant whose right or title is in issue

1225. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

Comment. Section 1225 expresses a common law exception to the hearsay rule that is recognized in part in Section 1849 of the Code of Civil Procedure. Section 1849 (which is superseded by Section 1225) 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).

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 against 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 1225, 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).

Section 1225 supplements the rule provided in Section 1224. Under Section 1224, 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 1225, a party sued by an executor on an obligation claimed to have been owed to the decedent may introduce admissions of the decedent.

CROSS-REFERENCES

Admission made during compromise negotiations, see §§ 1152, 1154
Definitions:
Action, see § 105
Civil action, see § 120
Declarant, see § 135
Evidence, see § 140
Property, see § 185
Statement, see § 225
Partner's admission, see Corporations Code § 15011

§ 1226. Statement of minor child in parent's action for child's injury

1226. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

Comment. See the *Comment* to Section 1227.

CROSS-REFERENCES

Admission made during compromise negotiations, see §§ 1152, 1154
Definitions:
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200

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

1227. Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 377 of the Code of Civil Procedure.

Comment. Under existing law, an admission by a decedent is not admissible against his heirs or representatives in a wrongful death action brought by them. *Marks v. Reissinger,* 35 Cal. App. 44, 169 Pac. 243 (1917). *Cf. Hedge v. Williams,* 131 Cal. 455, 63 Pac. 721 (1901). 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 is contrary to the rule adopted by most American courts. *Carr v. Duncan*, 90 Cal. App.2d 282, 285, 202 P.2d 855, 856 (1949).

Under Section 1224, 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 Section 1227, 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. Section 1226 provides a similar rule for the analogous cases arising under Code of Civil Procedure Section 376 (action by parent of injured child).

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 should be admitted against the plaintiff, even though (as a technical matter) the plaintiff is asserting an independent right.

CROSS-REFERENCES

Admission made during compromise negotiations, see §§ 1152, 1154
Definitions:
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200

Article 2. Declarations Against Interest

§ 1230. Declaration against interest

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

Comment. Section 1230 codifies the hearsay exception for declarations against interest as that exception has been developed by the California courts (*People v. Spriggs*, 60 Cal.2d 868, 36 Cal. Rptr. 841, 389 P.2d 377 (1964)) and possibly expands the exception, for it is not clear whether the existing exception for declarations against interest applies to 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 868, 871-872, 36 Cal. Rptr. 841, 844-845, 389 P.2d 377, 380-381 (1964). 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).

CROSS-REFERENCES

Admissibility against criminal defendant, see § 1204
Definitions:
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200
Withdrawn plea of guilty, or offer to plead guilty, see § 1153; Penal Code § 1192.4

Article 3. Statements of Witnesses

§ 1235. Inconsistent statement

1235. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

Comment. Under existing 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 770—which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement. Because Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, 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, for such evidence is no longer irrelevant (and, hence, inadmissible).

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect 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.

CROSS-REFERENCES

Admissibility of extrinsic evidence of inconsistent statement, see § 770
Credibility of witnesses, see §§ 780, 785
Definitions:
Evidence, see § 140
Hearing, see § 145
Statement, see § 225
Examination of witness regarding inconsistent statement, see §§ 768, 769
Hearsay rule, see § 1200

§ 1236. Prior consistent statement

1236. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

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 matter stated. *People v. Kynette,* 15 Cal.2d 731, 753-754, 104 P.2d 794, 805-806 (1940) (overruled on other grounds in *People v. Snyder,* 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958)).

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.

CROSS-REFERENCES

Admissibility of evidence of prior consistent statement, see § 791
Credibility of witnesses, see §§ 780, 785
Definitions:
Evidence, see § 140
Hearing, see § 145
Statement, see § 225
Hearsay rule, see § 1200

§ 1237. Past recollection recorded

1237. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

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

(b) Was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness' statement at the time it was made;

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

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

Comment. Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." Although the provisions of Section 1237 are taken largely from the provisions of Section 2047 of the Code of Civil Procedure, there are some substantive differences between Section 1237 and existing 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 the time when the fact recorded in the writing actually occurred or at another 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.

CROSS-REFERENCES

Authentication of writings, see §§ 1400-1454
Definitions:
  Authentication, see § 1400
  Evidence, see § 140
  Statement, see § 225
  Writing, see § 250
Hearsay rule, see § 1200
Inspection of writing shown to witness, see § 768
Refreshing recollection with a writing, see § 771

§ 1238. Prior identification

1238. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

Comment. 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. Under Section 1238, evidence of a prior identification is admissible if the witness admits the prior identification and vouches for its accuracy.

Sections 1235 and 1238 codify exceptions to the hearsay rule similar to that which was recognized in *People v. Gould,* 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (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 867.

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.

CROSS-REFERENCES

Admissibility of prior consistent statements, see § 791
Definitions:
  Evidence, see § 140
  Statement, see § 225
Hearsay rule, see § 1200

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

§ 1240. Spontaneous statement

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

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

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

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). 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 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.

CROSS-REFERENCES

Definitions:
Declarant, see § 135
Evidence, see § 140
Perceive, see § 170
Statement, see § 225
Hearsay rule, see § 1200

§ 1241. Contemporaneous statement

1241. Evidence of a statement is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made while the declarant was perceiving the act, condition, or event.

Comment. Under existing law, where a person's conduct or act is relevant but is equivocal or ambiguous, the statements accompanying it may be admitted to explain and make the act or conduct understandable. *Sethman v. Bulkley*, 9 Cal.2d 21, 68 P.2d 961 (1937); *Airola v. Gorham*, 56 Cal. App.2d 42, 133 P.2d 78 (1942); WITKIN, CALIFORNIA EVIDENCE § 216 (1958). See also *Turney v. Sousa*, 146 Cal. App.2d 787, 304 P.2d 1025 (1956). The exception provided by Section 1241 covers not only these statements but provides a hearsay exception for contemporaneous statements generally. Whether Section 1241 goes beyond existing law cannot be determined. No California case in point has been found. Elsewhere, the authorities are conflicting in their results and confused in their reasoning because of their 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). See also EVIDENCE CODE § 1250 and the *Comment* thereto.

There is a need for the evidence made admissible under this section because of the declarant's unavailability. The statements 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.

It should be emphasized that this exception applies only when there is actual contemporaneousness; otherwise, the trustworthiness of the statement becomes questionable.

CROSS-REFERENCES

Definitions:
Declarant, see § 135
Evidence, see § 140
Perceive, see § 170
Statement, see § 225
Unavailable as a witness, see § 240
Hearsay rule, see § 1200
State of mind to prove or explain conduct of declarant, see § 1250

§ 1242. Dying declaration

1242. Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

Comment. Section 1242 is a broadened form of the well-established exception to the hearsay rule for dying declarations relating to the cause and circumstances 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). 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).

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200

Article 5. Statements of Mental or Physical State

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

1250. (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, mo-

tive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

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

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

Comment. Section 1250 provides an exception to the hearsay rule for statements of the declarant's *then* existing mental or physical state. 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 the then existing state of mind is itself an issue in the case. *Adkins v. Brett,* 184 Cal. 252, 193 Pac. 251 (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 or subsequent to the statement. *Watenpaugh v. State Teachers' Retirement System,* 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 No. 4,* 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition also are 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, after the execution of a will, declared, in effect, 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 certain murder victims' statements 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.

The doctrine of the *Merkouris* case is repudiated in Section 1250(b) because that doctrine undermines the hearsay rule itself. Other exceptions to the hearsay rule are based on some indicia of reliability peculiar to the evidence involved. *People v. Brust,* 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957). The exception created by *Merkouris* is not based on any probability of reliability; it is based on a rationale that destroys the very foundation of the hearsay rule.

CROSS-REFERENCES

Definitions:
Action, see § 105
Conduct, see § 125
Declarant, see § 135
Evidence, see § 140
Proof, see § 190
Statement, see § 225
Hearsay rule, see § 1200

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

1251. Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

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

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

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 or physical state to be used to prove the previous mental or physical state when the previous mental or physical state is itself an issue in the case. If

the past mental or physical 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.

The rule stated in Section 1251 is consistent with the California case law to the extent that it 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); *Kelly v. Bank of America,* 112 Cal. App.2d 388, 246 P.2d 92 (1952) (statement of previous intent to retain title admitted to prove such intent). However, the California cases have held that statements of previous bodily conditions and symptoms are inadmissible to prove the existence of such conditions or symptoms, although they may be admitted as a basis for an expert's opinion. *People v. Brown,* 49 Cal.2d 577, 320 P.2d 5 (1958); *Willoughby v. Zylstra,* 5 Cal. App.2d 297, 42 P.2d 685 (1935). Section 1251 eliminates the distinction between statements of previous mental conditions and statements of previous physical sensations; it permits both to be admitted as evidence of the matters stated. Both kinds of statements are equally subjective, and there is no reason to believe that one kind is more unreliable than the other.

Section 1251 requires that the declarant be unavailable as a witness. Some California cases seem to indicate that the unavailability of the declarant is a necessary condition for the admission of his statements to prove a previous state of mind. See, *e.g., Whitlow v. Durst,* 20 Cal.2d 523, 524, 127 P.2d 530, 531 (1942) ("declarations of a *decedent*" admissible to show previous mental state); *Kelly v. Bank of America,* 112 Cal. App.2d 388, 246 P.2d 92 (1952). But other cases have admitted such statements without insisting on the declarant's unavailability. *People v. One 1948 Chevrolet Conv. Coupe,* 45 Cal.2d 613, 290 P.2d 538 (1955). Section 1251 requires a showing of the declarant's unavailability because the statements involved are narrations of past conditions. There is, therefore, a greater opportunity for the declarant to remember inaccurately or even to fabricate. Hence, Section 1251 permits such statements to be admitted only when the declarant's unavailability necessitates reliance upon his out-of-court statements.

A statement is not admissible under Section 1251 if the statement was made under circumstances indicating that the statement is not trustworthy. See EVIDENCE CODE § 1252 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Action, see § 105
Declarant, see § 135
Evidence, see § 140
Proof, see § 190
Statement, see § 225
Unavailable as a witness, see § 240
Hearsay rule, see § 1200

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

1252. Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Comment. Section 1252 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 additional limitations on the admissibility of statements offered in a criminal action to prove the declarant's mental state. These additional limitations do not appear in the Evidence Code. In the *Hamilton* case, the court was concerned with a murder victim's statements that she was afraid of the accused, that the accused had threatened to kill her, and that the accused had beaten her. The statements were ostensibly offered to prove that the victim feared the accused and, therefore, to cast doubt on the accused's testimony that the victim had invited him to her house on the night of the murder. As the case was tried, however, the victim's declarations were used repeatedly in argument as a basis for the prosecution's claim that the beatings actually occurred, that the threats were actually made, and that the threats were carried out in the murder.

The court said that "testimony as to the 'state of mind' of the declarant . . . is admissible, but only when such testimony refers to threats as to future conduct on the part of the accused . . . and when [such declarations] show primarily the then state of mind of the declarant and not the state of mind of the accused. But . . . such testimony is not admissible if it refers 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.

These additional limitations on the admissibility of state of mind evidence are not mentioned in the Evidence Code for two reasons. *First,* they are confusing and contradictory: The declarations are inadmissible if they refer to past conduct of the accused; nevertheless, they are admissible "only" when they refer to his past conduct, *i.e.,* his threats. The declarations, to be admissible, must show primarily the state of mind of the declarant and not the state of mind of the accused; nevertheless, such declarations are admissible "only" if they refer to the accused's statements of his state of mind, *i.e.,* his intent to do future harm to the victim.

Second, these additional limitations are unnecessary. Section 1200 makes it clear that statements of past events cannot be used to prove those events unless they fall within an exception to the hearsay rule; and Sections 1250 and 1251 make it clear that statements of a declarant's past state of mind may be used to prove only that state of mind and no other fact. The real problem in the *Hamilton* case was the fact that much of the evidence was offered ostensibly not as hearsay but as circumstantial evidence of the victim's fear (see Section 1200 and the *Comment* thereto); but the prosecution endeavored nevertheless to have the jury consider the evidence as hearsay evidence, *i.e.,* as evidence that the events related actually occurred. Evidence Code Section 352 provides the judge with ample power to exclude evidence of this sort where its prejudicial effect outweighs its probative value. But, under Section 352, the judge must weigh the need for the evidence

against the danger of its misuse in each case. 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.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Statement, see § 225
Similar provisions, see §§ 1260, 1310, 1311, 1323

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

§ 1260. Statement concerning declarant's will

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

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Comment. Section 1260 codifies an exception recognized in California case law. *Estate of Morrison,* 198 Cal. 1, 242 Pac. 939 (1926); *Estate of Thompson,* 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 court decisions involving this exception. The limitation is desirable, however, to assure the reliability of the hearsay that is admissible under this section.

CROSS-REFERENCES

Definitions:
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Unavailable as a witness, see § 240
Establishment of lost or destroyed will, see Probate Code §§ 350, 351
Hearsay rule, see § 1200
Oral declarations of testator as to his intent, see Probate Code § 105
Trustworthiness requirement, similar provisions, see §§ 1252, 1310, 1311, 1323

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

1261. Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was:

(a) Made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear; and

(b) Made under circumstances such as to indicate its trustworthiness.

Comment. The dead man statute (subdivision 3 of Section 1880 of the Code of Civil Procedure) 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. To balance the positions of the parties, the living may not speak because the dead cannot.

The dead man statute operates unsatisfactorily. It prohibits testimony concerning matters of which the decedent had no knowledge and, hence, to which he could not have testified even if he had survived. It operates unevenly since it does not prohibit testimony relating to claims *under,* as distinguished from claims *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 Law Revision Commission's *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). The dead man statute excludes otherwise relevant and competent evidence—even if it is the only available evidence—and frequently 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."). Hence, the dead man statute is not continued in the Evidence Code.

Under the Evidence Code, the positions of the parties are balanced by throwing more light, not less, on the actual facts. Repeal of the dead man statute permits the claimant to testify without restriction. To balance this advantage, Section 1261 permits hearsay evidence of the decedent's statements to be admitted. Certain safeguards—*i.e.,* personal knowledge, 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.

CROSS-REFERENCES

Definitions:
Action, see § 105
Declarant, see § 135
Evidence, see § 140
Perceive, see § 170
Statement, see § 225
Evidence confined to personal knowledge, see § 702
Hearsay rule, see § 1200

Article 7. Business Records

§ 1270. "A business"

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

Comment. This article restates and supersedes the Uniform Business Records as Evidence Act appearing in Sections 1953e through 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 codify the decisions in cases holding the Uniform Act 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.,* 111 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 admissable under the section to prove the events recorded. 5 WIGMORE, EVIDENCE § 1523 (3d ed. 1940). *Cf.* EVIDENCE CODE § 1315.

§ 1271. Business record

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

(a) The writing was made in the regular course of a business;

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

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

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

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 (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 more accurate, 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 were 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 narrations 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 (1955). 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 they were 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.

CROSS-REFERENCES

Best evidence rule, see §§ 1500-1551
Corporation by-laws and minutes, see Corporations Code § 832
Definitions:
Business, see § 1270
Evidence, see § 140
Proof, see § 190
Writing, see § 250
Hearsay rule, see § 1200
Photographic copies of writings made in regular course of a business, see § 1550
***See also* the *Cross-References* under Section 1280**

§ 1272. Absence of entry in business records

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

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

(b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

Comment. Technically, evidence of the absence of a record may not be hearsay. Section 1272 removes any doubt that might otherwise exist 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).

CROSS-REFERENCES

Definitions:
Business, see § 1270
Evidence, see § 140
Proof, see § 190
Hearsay rule, see § 1200

Article 8. Official Records and Other Official Writings

§ 1280. Record by public employee

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

(a) The writing was made by and within the scope of duty of a public employee;

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

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

Comment. Section 1280 restates the substance of and supersedes Sections 1920 and 1926 of the Code of Civil Procedure. 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 in regard to an official record as is required 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 (1955). 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. In contrast, Section 1280, as does existing law, permits the court to 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. 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).

CROSS-REFERENCES

Articles or certificate of incorporation as evidence of corporate existence, see Corporations Code §§ 313, 6600
Best evidence rule, see §§ 1500-1510
Book published by public authority, presumption, see § 644
Definitions:
- Evidence, see § 140
- Proof, see § 190
- Public employee, see § 195
- Writing, see § 250

Hearsay rule, see § 1200
Judicial notice of official acts, see §§ 451, 452; Corporations Code § 6602
Official acts of executive and legislative departments, recording by Secretary of State, see Constitution, Art. V, § 18
Official writings and recorded writings:
- Copy as prima facie evidence, see §§ 1530, 1532
- Presumption of authenticity, see §§ 1450-1454

Penal records as evidence, see Penal Code § 969b
Photographic copies of writings, see § 1550 and the *Cross-References* thereunder
Presumption that official duty has been regularly performed, see § 664
Proof of lost or destroyed official writings, see § 1601 and the *Cross-References* thereunder
Removal of public record on court order, see Code of Civil Procedure § 1950

Return of sheriff upon process or notices as prima facie evidence, see Government Code § 26662
Transcript of testimony and proceedings as prima facie evidence, see Code of Civil Procedure § 273
Writings affecting property as prima facie evidence, see §§ 1600-1605
See also the *Cross-References* under Section 1281

§ 1281. Record of vital statistic

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

Comment. Section 1281 provides a hearsay exception for official reports concerning birth, death, and marriage. Official 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.

CROSS-REFERENCES

Birth, death, or marriage record as prima facie evidence, see Health and Safety Code § 10577
Definitions:
Evidence, see § 140
Law, see § 160
Writing, see § 250
Hearsay rule, see § 1200
Presumption that official duty was regularly performed, see § 664
See also the *Cross-References* under Section 1310

§ 1282. Finding of presumed death by authorized federal employee

1282. A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. 1001-1016), as enacted or as heretofore or hereafter amended, shall be received in any court, office, or other place in this State as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

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

The determination by the federal employee of the *date* of the presumed death 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.2d 432 (1955) (proof of death of 2-year-old dependent of serviceman where child was passenger on plane lost at sea).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Presumption of death, see § 667

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

1283. An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive.

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 and 1964 amendments to the Federal Missing Persons Act.

CROSS-REFERENCES

Copy as prima facie evidence, see §§ 1530, 1532
Definitions:
Evidence, see § 140
Law, see § 160
Presumption of authenticity, see §§ 1450-1454

§ 1284. Statement of absence of public record

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

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 a 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.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Proof, see § 190
Public employee, see § 195
Writing, see § 250
Hearsay rule, see § 1200
Presumption of authenticity, see §§ 1450-1454

Article 9. Former Testimony

§ 1290. "Former testimony"

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

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

(b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;

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

(d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

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 2016-2036 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.

CROSS-REFERENCES

Definitions:
Action, see § 105
Evidence, see § 140
Law, see § 160
Oath, see § 165
Public entity, see § 200
Depositions of witnesses in criminal cases, see Constitution, Art. I, § 13
Depositions taken in same action in which offered, see § 1202; Code of Civil Procedure § 2016(d)-(f); Penal Code §§ 1345, 1362
Depositions to perpetuate testimony before action or pending appeal, see Code of Civil Procedure § 2017(a)(4)
Former testimony in criminal action, see Penal Code § 686
Transcript as prima facie evidence of testimony, see Code of Civil Procedure § 273

§ 1291. Former testimony offered against party to former proceeding

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

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

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

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

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 arises involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met.

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

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. 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.

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 interest and motive to cross-examine the declarant. The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on 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 these matters 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 phrased the question himself; and where the former testimony is admitted 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.

CROSS-REFERENCES

Definitions:
Action, see § 105
Criminal action, see § 130
Declarant, see § 135
Evidence, see § 140
Former testimony, see § 1290
Hearing, see § 145
Person, see § 175
Unavailable as a witness, see § 240
Hearsay rule, see § 1200
See also the *Cross-References* under Section 1290

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

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

(1) The declarant is unavailable as a witness;

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

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

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

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 one occurrence gives rise to a series of cases involving one defendant and several plaintiffs, Section 1292 permits testimony given against the plaintiff in the first action to be used against a different plaintiff in a subsequent action if the conditions of admissibility stated in the section are met.

Code of Civil Procedure Section 1870(8) (which is superseded by this article) authorizes the admission of former testimony only if it was given in another action between the same parties and involving the same matter. Section 1292 substitutes for these restrictive requirements 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 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 these matters 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).

CROSS-REFERENCES

Definitions:
Action, see § 105
Civil action, see § 120
Criminal action, see § 130
Declarant, see § 135
Evidence, see § 140
Former testimony, see § 1290
Hearing, see § 145
Unavailable as a witness, see § 240
Hearsay rule, see § 1200
***See also* the *Cross-References* under Section 1290**

Article 10. Judgments

§ 1300. Judgment of conviction of crime punishable as felony

1300. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to

prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.

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 that was 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.

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 crime punishable as a felony. 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 conviction as evidence that the person convicted committed the crime. The exception does not, however, apply in criminal actions. Thus, Section 1300 does not permit the judgment to be used in a criminal action as evidence of the identity of the person who committed the crime or as evidence that the crime was committed.

Section 1300 will change the California law. Under existing 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.

Section 1300 applies to any crime punishable as a felony. The fact that a misdemeanor sentence is imposed does not affect the admissibility of the judgment of a conviction under this section. *Cf.* PENAL CODE § 17. The exclusion of judgments based on a plea of nolo contendere from the exception in Section 1300 is a reflection of the policy expressed in Penal Code Section 1016.

CROSS-REFERENCES

Definitions:
Civil action, see § 120
Evidence, see § 140
Proof, see § 190
Hearsay rule, see § 1200
Judgment of conviction as affecting credibility, see § 788
Judgment of conviction of motor vehicle violation, see Vehicle Code § 40834
Judicial notice, see §§ 451, 452
Nolo contendere plea, see Penal Code § 1016
Presumptions:
Court acted within its jurisdiction, see § 666
Judgment correctly determined rights of parties, see § 639

§ 1301. Judgment against person entitled to indemnity

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

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

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

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

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).

CROSS-REFERENCES

Definitions:
Action, see § 105
Evidence, see § 140
Proof, see § 190
Hearsay rule, see § 1200
See also the *Cross-References* under Section 1300

§ 1302. Judgment determining liability of third person

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

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). Evidence Code Sections 1302 and 1224 together restate and supersede the provisions of Code of Civil Procedure Section 1851.

CROSS-REFERENCES

Definitions:
Civil action, see § 120
Evidence, see § 140
Person, see § 175
Proof, see § 190
Hearsay rule, see § 1200
See also the *Cross-References* under Section 1300

Article 11. Family History

§ 1310. Statement concerning declarant's own family history

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

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Comment. Section 1310 provides a hearsay exception for a statement concerning the declarant's own family history. It restates in substance and supersedes Section 1870(4) of the Code of Civil Procedure. Section 1870(4), however, requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Section 240 makes the statement admissible under Section 1310.

The statement is not admissible if it was made under circumstances such as to indicate its lack of trustworthiness. The requirement is similar to the requirement of existing case law that the statement be made at a time when no controversy existed as to the matters stated. See, *e.g., Estate of Walden,* 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.

CROSS-REFERENCES

Administrative proceedings to establish birth, see Health and Safety Code § 10520 *et seq.*
Birth, marriage, or death, court proceedings to establish, see Health and Safety Code § 10550 *et seq.*
Church record of marriage without license, see Civil Code § 79
Definitions:
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Unavailable as a witness, see § 240
Federal Missing Persons Act, findings under, see §§ 1282-1283
Hearsay rule, see § 1200
Presumption of legitimacy, see §§ 621, 661
Presumption that ceremonial marriage is valid, see § 663
Trustworthiness requirement, similar provisions, see §§ 1252, 1260, 1311, 1323
Vital statistics records, see § 1281

§ 1311. Statement concerning family history of another

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

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

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

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

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 law as found in Section 1870(4) of the Code of Civil Procedure which it supersedes. Paragraph (2) is new to California law, but it is a sound extension of the present law to cover a situation where the declarant was a family housekeeper or doctor or so close a friend as to be included by the family in discussions of its family history.

There are two limitations on admissibility of a statement under Section 1311. *First,* a statement is admissible only if the declarant is unavailable as a witness within the meaning of Section 240. (Section 1870(4) requires that the declarant be deceased in order for his statement to be admissible.) *Second,* a statement is not admissible if it was made under circumstances such as to indicate its lack of trustworthiness. For a discussion of this requirement, see the *Comment* to EVIDENCE CODE § 1310.

CROSS-REFERENCES

Definitions:
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Unavailable as a witness, see § 240
Hearsay rule, see § 1200
Trustworthiness requirement, similar provisions, see §§ 1252, 1260, 1310, 1323
See also the *Cross-References* under Section 1310

§ 1312. Entries in family records and the like

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

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

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Proof, see § 190
Hearsay rule, see § 1200
See also the *Cross-References* under Section 1310

§ 1313. Reputation in family concerning family history

1313. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

Comment. Section 1313 restates the substance of 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 the family reputation in question to 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 1310 and 1311, might be.

The family reputation admitted under Section 1313 is necessarily multiple hearsay. If, however, such reputation were inadmissible because of the hearsay rule, and if direct statements of pedigree were inadmissible because they are based on such reputation (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).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Hearsay rule, see § 1200
See also the *Cross-References* under Section 1310

§ 1314. Reputation in community concerning family history

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

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, since proof of such facts by reputation is presently limited to reputation in the family. See *Estate of Heaton,* 135 Cal. 385, 67 Pac. 321 (1902).

CROSS-REFERENCES

Definition:
Evidence, see § 140
Hearsay rule, see § 1200
See also the *Cross-References* under Section 1310

§ 1315. Church records concerning family history

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

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

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

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

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 histories, 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.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Statement, see § 225
Writing, see § 250
Hearsay rule, see § 1200
See also the *Cross-References* under Section 1310

§ 1316. Marriage, baptismal, and similar certificates

1316. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, race, ancestry, relation-

ship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

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

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

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, with respect to marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure, whereas certificates made admissible by Section 1316 need meet only the general authentication requirement of Section 1401.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Law, see § 160
Statement, see § 225
Hearsay rule, see § 1200
***See also* the *Cross-References* under Section 1310**

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

§ 1320. Reputation concerning community history

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

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 previous to the controversy, respecting facts of a public or general interest 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.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
State, see § 220
Hearsay rule, see § 1200

§ 1321. Reputation concerning public interest in property

1321. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.

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; it requires merely that the reputation arose before there was a controversy concerning the matter. See the *Comment* to Section 1320.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Property, see § 185
Hearsay rule, see § 1200
Presumptions of ownership, see §§ 637, 638, 662

§ 1322. Reputation concerning boundary or custom affecting land

1322. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.

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

CROSS-REFERENCES

Definition:
Evidence, see § 140
Hearsay rule, see § 1200
Presumptions of ownership, see §§ 637, 638, 662

§ 1323. Statement concerning boundary

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

Comment. Section 1323 codifies existing 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).

CROSS-REFERENCES

Definitions:
Declarant, see § 135
Evidence, see § 140
Statement, see § 225
Unavailable as a witness, see § 240
Hearsay rule, see § 1200
Presumptions of ownership, see §§ 637, 638, 662
Trustworthiness requirement, similar provisions, see §§ 1252, 1260, 1310, 1311

§ 1324. Reputation concerning character

1324. Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant

time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.

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.

CROSS-REFERENCES

Character as affecting credibility, see §§ 786–790
Character evidence to prove conduct, see §§ 1101–1104
Character, manner of proving, see § 1100
Definition:
Evidence, see § 140
Hearsay rule, see § 1200

Article 13. Dispositive Instruments and Ancient Writings

§ 1330. Recitals in writings affecting property

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

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

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

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

Comment. Section 1330 restates the substance of 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.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Personal property, see § 180
Property, see § 185
Real property, see § 205
Statement, see § 225
Writing, see § 250
Hearsay rule, see § 1200

§ 1331. Recitals in ancient writings

1331. Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing

more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

Comment. Section 1331 clarifies the existing 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 the 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 it clear that the statement itself must have been generally acted upon as true for at least 30 years by persons having an interest in the matter.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Person, see § 175
Statement, see § 225
Writing, see § 250
Hearsay rule, see § 1200
Presumption of authenticity of ancient documents, see § 643

Article 14. Commercial, Scientific, and Similar Publications

§ 1340. Commercial lists and the like

1340. Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.

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).

CROSS-REFERENCES

Definitions:
Business, see § 1270
Evidence, see § 140
Statement, see § 225
Hearsay rule, see § 1200
Market quotations, see Commercial Code § 2724

§ 1341. Publications concerning facts of general notoriety and interest

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

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

CROSS-REFERENCES

Cross-examination of expert witness concerning published material, see § 721
Definition:
Proof, see § 190
Hearsay rule, see § 1200
Judicial notice of facts not subject to dispute, see §§ 451, 452

DIVISION 11. WRITINGS

CROSS-REFERENCES

Ancient writings and dispositive instruments as hearsay evidence, see §§ 1330–1331
Business records, see §§ 1270–1272
Church records and certificates, see §§ 1315, 1316
Commercial, scientific, and similar publications as hearsay evidence, see §§ 1340–1341
Court records, judicial notice, see §§ 451, 452
Examination of witness about writing, see § 768
Family records as hearsay evidence, see § 1312
Inspection of writings, see §§ 768, 771; Code of Civil Procedure §§ 449, 2031
Judgments as hearsay evidence, see §§ 1300–1302
Official records, see §§ 1280–1284
Part of transaction proved, admissibility of whole, see § 356
Preliminary determinations on admissibility of evidence, see §§ 400–406
Presumptions relating to:
  Authenticity of ancient writings affecting property interest, see § 643
  Book containing reports of cases, see § 645
  Book published by public authority, see § 644
  Letter mailed was received, see § 641
  Writing truly dated, see § 640
Privileges, exceptions relating to dispositive instruments, see §§ 960–961, 1002–1003, 1021–1022
Recorded memory, see § 1237
Refreshing recollection with writing, see § 771
Scientific and professional treatises, use in cross-examination, see § 721
Subscribing witnesses, see §§ 870, 959
Translators of writings, see §§ 750, 751, 753

CHAPTER 1. AUTHENTICATION AND PROOF OF WRITINGS

Article 1. Requirement of Authentication

§ 1400. Authentication defined

1400. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

Comment. Before any tangible object may be admitted into evidence, the party seeking to introduce the object must make a preliminary showing that the object is in some way relevant to the issues to be decided in the action. When the object sought to be introduced is a writing, this preliminary showing of relevancy usually entails some proof that the writing is authentic—*i.e.*, that the writing was made or signed by its purported maker. Hence, this showing is normally referred to as "authentication" of the writing. But authentication, correctly understood, may involve a preliminary showing that the writing is a forgery or is a writing found in particular files regardless of its authorship. *Cf. People v. Adamson,* 118 Cal. App.2d 714, 258 P.2d 1020 (1953). When the requisite preliminary showing has been made, the judge admits the writing into evidence for consideration by the trier of fact. However, the fact that the judge permits the writing to be admitted in evidence does not necessarily establish the authenticity of the writing; all that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic. The trier of fact independently determines the question of authenticity, and, if the trier of fact does

not believe the evidence of authenticity, it may find that the writing is not authentic despite the fact that the judge has determined that it was "authenticated." See 7 WIGMORE, EVIDENCE §§ 2129-2135 (3d ed. 1940).

This chapter sets forth the rules governing this process of authentication. Sections 1400-1402 (Article 1) define and state the general requirement of authentication—either by evidence sufficient to sustain a finding of authenticity or by other means sanctioned by law. Sections 1410-1454 (Articles 2 and 3) set forth some of the means that may be used to authenticate certain kinds of writings. The operation and effect of these sections is explained in separate *Comments* relating to them.

Under Section 1400, as under existing law, a writing may be authenticated by the presentation of evidence sufficient to sustain a finding of its authenticity. See *Verzan v. McGregor,* 23 Cal. 339, 342-343 (1863). Under Section 1400, as under existing law, the authenticity of a particular writing also may be established by some means other than the introduction of evidence of authenticity. Thus, the authenticity of a writing may be established by stipulation or by the pleadings. See *e.g.,* CODE CIV. PROC. §§ 447 and 448. The requisite preliminary showing may also be supplied by a presumption. See, *e.g.,* EVIDENCE CODE §§ 1450-1454, 1530. In some instances, a presumption of authenticity may also attach to a writing authenticated in a particular manner. See, *e.g.,* EVIDENCE CODE § 643 (the ancient documents rule). Where a presumption applies, the trier of fact is required to find that the writing is authentic unless the requisite contrary showing is made. EVIDENCE CODE §§ 600, 604, 606.

CROSS-REFERENCES

Definitions:
- Evidence, see § 140
- Law, see § 160
- Writing, see § 250

Genuineness of writing established by admission, see Code of Civil Procedure §§ 447–449, 2033

Means of authenticating writings:
- Certified abstracts of title, see § 1601
- Certified photographic copies, see § 1551
- Generally, see §§ 1410–1421
- Hospital records, see §§ 1560–1566
- Photographic copy made in regular course of business, see § 1550

Presumptions of authenticity:
- Acknowledged writings, official writings, see §§ 1450–1454
- Copies of official writings, see § 1530
- Recorded writings, see §§ 1532, 1600

See also the *Cross-References* under Division 11

§ 1401. Authentication required

1401. (a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

Comment. The requirement of authentication stated in subdivision (a) reflects existing law. *Ten Winkel v. Anglo California Sec. Co.,* 11 Cal.2d 707, 81 P.2d 958 (1938). However, the requirement has never been stated in the California statutes.

Some cases have indicated that authentication is not necessary under certain circumstances, as, for example, when the execution of the writing is not in issue. See *People v. Adamson,* 118 Cal. App.2d 714,

258 P.2d 1020 (1953). This is true, however, only if "authentication" is construed narrowly to refer only to proof of due execution. The Evidence Code defines the term more broadly and requires all writings to be authenticated. The writing involved in the *Adamson* case was a letter that a witness claimed he had received and acted upon. Under the Evidence Code, the requirement of authentication would require a showing that the letter offered in evidence was in fact the one received and acted upon; and this is the preliminary showing that was found sufficient in the *Adamson* case.

The "writing" referred to in subdivision (a) is any writing offered in evidence; although it may be either an original or a copy, it must be authenticated before it may be received in evidence.

Subdivision (b) of Section 1401 requires that a writing be authenticated even when it is not offered in evidence but is sought to be proved by a copy or by testimony as to its content under the circumstances permitted by Sections 1500-1510 (the best evidence rule). This is declarative of existing California law. *Spottiswood v. Weir,* 80 Cal. 448, 22 Pac. 289 (1889); *Smith v. Brannan,* 13 Cal. 107, 115 (1859); *Forman v. Goldberg,* 42 Cal. App.2d 308, 316-317, 108 P.2d 983, 988 (1941). Under Section 1401, therefore, if a person offers in evidence a copy of a writing, he must make a sufficient preliminary showing of the authenticity of both the copy and the original (*i.e.,* the writing sought to be proved by the copy).

In some instances, however, authentication of a copy will provide the necessary evidence to authenticate the original writing at the same time. For example: If a copy of a recorded deed is offered in evidence, Section 1401 requires that the copy be authenticated—proved to be a copy of the official record. It also requires that the official record be authenticated—proved to be the official record—because the official record is a writing of which secondary evidence of its content is being offered. Finally, Section 1401 requires the original deed itself to be authenticated—proved to have been executed by its purported maker—for it, too, is a writing of which secondary evidence of its content is being offered. The copy offered in evidence may be authenticated by the attestation or certification of the official custodian of the record as provided by Section 1530. Under Section 1530, the authenticated copy is prima facie evidence of the official record itself; therefore, it necessarily is evidence that there is an official record, *i.e.,* the record being proved by the copy. Thus, the authenticated copy supplies the necessary authenticating evidence for the official record. Under Section 1600, the official record is prima facie evidence of the content of the original deed and of its execution by its purported maker; hence, the official record is the requisite authenticating evidence for the original deed. Thus, the duly attested or certified copy of the record meets the requirement of authentication for the copy itself, for the official record, and for the original deed.

CROSS-REFERENCES

Definitions:
Authentication, see § 1400
Evidence, see § 140
Writing, see § 250
Secondary evidence of writings, see §§ 1500–1566
***See also* the *Cross-References* under Section 1400**

§ 1402. Authentication of altered writing

1402. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

Comment. Section 1402 restates and supersedes Code of Civil Procedure Section 1982. See *Miller v. Luco,* 80 Cal. 257, 265, 22 Pac. 195, 197 (1889); *King v. Tarabino,* 53 Cal. App. 157, 199 Pac. 890 (1921).

CROSS-REFERENCES

Contracts, alteration and cancellation, see Civil Code § 1697 *et seq.*
Definition:
Writing, see § 250
Negotiable instruments and investment securities, material alteration, see Commercial Code §§ 3406, 3407, 8206
Offering forged or altered instrument in evidence, see Penal Code § 132

Article 2. Means of Authenticating and Proving Writings

§ 1410. When writing is sufficiently authenticated to be received in evidence

1410. A writing is sufficiently authenticated to be received in evidence if there is any evidence sufficient to sustain a finding of the authenticity of the writing; and nothing in this article shall be construed to limit the means by which the authenticity of a writing may be shown.

Comment. This article (Sections 1410-1421) lists many of the evidentiary means for authenticating writings and supersedes the existing statutory expressions of such means.

Section 1410 is included in this article in recognition of the fact that it would be impossible to specify all of the varieties of circumstantial evidence that may be sufficient in particular cases to sustain a finding of the authenticity of a writing. Hence, Section 1410 ensures that the means of authentication listed in this article or stated elsewhere in the codes will not be considered the exclusive means of authenticating writings. Although Section 1410 has no counterpart in previous legislation, the California courts have never considered the listing of certain means of authentication in the various California statutes as precluding reliance upon other means of authentication. See, *e.g., People v. Ramsey,* 83 Cal. App.2d 707, 189 P.2d 802 (1948) (authentication by evidence of possession); *Geary St. etc. R.R. v. Campbell,* 39 Cal. App. 496, 179 Pac. 453 (1919) (corporate stock record book authenticated by age, appropriate custody, and unsuspicious appearance). See also the *Comments* to Sections 1420 and 1421.

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Evidence, see § 140
Writing, see § 250
***See also* the *Cross-References* under Section 1400**

§ 1411. Subscribing witness' testimony unnecessary

1411. Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

Comment. When Section 1940 of the Code of Civil Procedure was enacted in 1872, it stated the common law rule that a subscribing witness to a witnessed writing must be produced to authenticate the writing or his absence must be satisfactorily accounted for. See *Stevens v. Irwin*, 12 Cal. 306 (1859). Section 1940 was amended by the Code Amendments of 1873-74 to remove the requirement that the subscribing witness be produced. Cal. Stats. 1873-74, Ch. 383, § 231 (Code Amdts., p. 386). Instead, three alternative methods of authenticating a writing were listed.

Section 1411 states directly what the 1873-74 amendment to Code of Civil Procedure Section 1940 stated indirectly—that the common law rule requiring the production of a subscribing witness to a witnessed writing is not the law in California unless a statute specifically so requires.

CROSS-REFERENCES

Attorney-client privilege, exception for subscribing witness, see § 959
Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Statute, see § 230
Writing, see § 250
Sanity of maker, testimony of subscribing witness, see § 870
Wills, subscribing witness' testimony, see Probate Code §§ 329, 372

§ 1412. Use of other evidence when subscribing witness' testimony required

1412. If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.

Comment. When enacted in 1872, Code of Civil Procedure Section 1941 stated a limitation on the common law rule requiring proof of witnessed writings by a subscribing witness. Section 1941 provided, in effect, that this rule did not prohibit the authentication of a witnessed writing by other evidence if the subscribing witness denied or did not remember the execution of the writing. Evidence Code Section 1412, which supersedes Code of Civil Procedure Section 1941, retains this limitation on the subscribing witness rule in those few cases, such as those involving wills, where a statute requires the testimony of a subscribing witness to authenticate a writing.

CROSS-REFERENCES

Definitions:
Authentication, see § 1400
Evidence, see § 140
Statute, see § 230
Writing, see § 250
See also the *Cross-References* under Section 1411

§ 1413. Witness to the execution of a writing

1413. A writing may be authenticated by anyone who saw the writing executed, including a subscribing witness.

Comment. Section 1413 restates and supersedes the provisions of subdivisions 1 and 3 of Code of Civil Procedure Section 1940.

CROSS-REFERENCES

Definitions:
Authentication, see § 1400
Writing, see § 250
Subscribing witness' testimony not required, see § 1411
See also the *Cross-References* under Section 1411

§ 1414. Authentication by admission

1414. A writing may be authenticated by evidence that:

(a) The party against whom it is offered has at any time admitted its authenticity; or

(b) The writing is produced from the custody of the party against whom it is offered and has been acted upon by him as authentic.

Comment. Section 1414 restates and supersedes the provisions of Code of Civil Procedure Section 1942. Section 1942 is difficult to understand. It was amended in 1901 to make it more intelligible. Cal. Stats. 1901, Ch. 102, § 480, p. 247. However, the code revision of which the 1901 amendment was a part was held unconstitutional because of technical defects in the title of the act and because the act embraced more than one subject. *Lewis v. Dunne,* 134 Cal. 291, 66 Pac. 478 (1901). Evidence Code Section 1414 is based on the 1901 amendment of Section 1942.

CROSS-REFERENCES

Admission of party, see § 1220 *et seq.*
Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Evidence, see § 140
Writing, see § 250
Genuineness of document, request for admission, see Code of Civil Procedure § 2033
Genuineness of instrument where copy attached to pleading, see Code of Civil Procedure §§ 447-449

§ 1415. Authentication by handwriting evidence

1415. A writing may be authenticated by evidence of the authenticity of the handwriting of the maker.

Comment. Section 1415 restates and supersedes the provisions of subdivision 2 of Code of Civil Procedure Section 1940.

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Evidence, see § 140
Writing, see § 250
Opinion evidence of handwriting, see §§ 1416, 1418
Proof of handwriting by comparison with exemplar, see §§ 1417-1419
Will, admission to probate on proof of handwriting, see Probate Code §§ 329, 372

§ 1416. Proof of handwriting by person familiar therewith

1416. A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he

has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

(a) Having seen the supposed writer write;

(b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;

(c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or

(d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

Comment. Section 1416 is based on Code of Civil Procedure Section 1943 as amended in the code revision of 1901. Cal. Stats. 1901, Ch. 102, § 481, p. 247. See the *Comment* to Section 1414.

CROSS-REFERENCES

Authentication by handwriting evidence, see § 1415
Definition:
Writing, see § 250
Expert witnesses, see §§ 720-723
Opinion testimony, see §§ 800-805

§ 1417. Comparison of handwriting by trier of fact

1417. The authenticity of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as authentic by the party against whom the evidence is offered or (b) otherwise proved to be authentic to the satisfaction of the court.

Comment. Section 1417 is based on that portion of Code of Civil Procedure Section 1944 that permits the trier of fact to compare questioned handwriting with handwriting the court has found to be genuine.

CROSS-REFERENCES

Authentication by handwriting evidence, see § 1415
Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Evidence, see § 140
Trier of fact, see § 235
Exemplar for ancient writing, see § 1419
Wills, admission to probate on proof of handwriting, see Probate Code §§ 329, 372
***See also* the *Cross-References* under Section 1414**

§ 1418. Comparison of writing by expert witness

1418. The authenticity of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as authentic by the party against whom the evidence is offered or (b) otherwise proved to be authentic to the satisfaction of the court.

Comment. Section 1418 is based on that portion of Code of Civil Procedure Section 1944 that permits a witness to compare questioned handwriting with handwriting the court has found to be genuine. However, Section 1418 applies to any form of writing, not just handwriting. This is in recognition of the fact that experts can now compare type-

writing specimens and other forms of writing as accurately as they could compare handwriting specimens in 1872.

Although Code of Civil Procedure Section 1944 does not expressly require that the witness making the comparison be an expert witness (as Evidence Code Section 1418 does), the cases have nonetheless imposed this requirement. *E.g., Spottiswood v. Weir,* 80 Cal. 448, 22 Pac. 289 (1889). The witness' expertise may, of course, be derived from practical experience instead of from technical training. *In re Newell's Estate,* 75 Cal. App. 554, 243 Pac. 33 (1926) (experienced banker).

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Evidence, see § 140
Writing, see § 250
Opinion testimony by expert witness, see §§ 801-805
See also the *Cross-References* under Sections 1414 and 1417

§ 1419. Exemplars when writing is 30 years old

1419. Where a writing sought to be introduced in evidence is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be authentic, and generally respected and acted upon as such, by persons having an interest in knowing whether it is authentic.

Comment. Section 1419 restates and supersedes the provisions of Code of Civil Procedure Section 1945. The apparent purpose of Section 1945, continued without substantive change in Evidence Code Section 1419, is to permit the judge to be satisfied with a lesser degree of proof of the authenticity of an exemplar when the writing offered in evidence is more than 30 years old.

CROSS-REFERENCES

Definitions:
Person, see § 175
Writing, see § 250
Presumption of authenticity of ancient writing, see § 643

§ 1420. Authentication by evidence of reply

1420. A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

Comment. Section 1420 provides a method of authentication recognized in California case law but not previously reflected in California statutes. *House Grain Co. v. Finerman & Sons,* 116 Cal. App.2d 485, 253 P.2d 1034 (1953).

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Evidence, see § 140
Person, see § 175
Writing, see § 250
Presumption of receipt of letter, see § 641

§ 1421. Authentication by content

1421. A writing may be authenticated by evidence that the writing refers to or states facts that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.

Comment. Section 1421 provides a method of authentication recognized in California case law but not previously reflected in California statutes. *Chaplin v. Sullivan,* 67 Cal. App.2d 728, 734, 155 P.2d 368, 372 (1945).

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Authentication, see § 1400
Evidence, see § 140
Person, see § 175
Writing, see § 250

Article 3. Acknowledged Writings and Official Writings

§ 1450. Classification of presumptions in article

1450. The presumptions established by this article are presumptions affecting the burden of producing evidence.

Comment. This article (Sections 1450-1454) lists several presumptions that may be used to authenticate particular kinds of writings. Section 1450 prescribes the effect of these presumptions. They require a finding of authenticity unless the adverse party produces evidence sufficient to sustain a finding that the writing in question is not authentic. See EVIDENCE CODE § 604 and the *Comment* thereto.

CROSS-REFERENCES

Definitions:
Burden of producing evidence, see § 110
Presumption, see § 600
Presumption affecting the burden of producing evidence, effect of, see § 604

§ 1451. Acknowledged writings

1451. A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1180) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.

Comment. Section 1451 continues in effect and restates a method of authenticating private writings that is contained in Code of Civil Procedure Section 1948.

CROSS-REFERENCES

Acknowledgment or proof of writing, see Civil Code § 1180 *et seq.*
Articles of incorporation, see Corporations Code § 307
Definitions:
Evidence, see § 140
Person, see § 175
Writing, see § 250
Prima facie evidence, effect of, see §§ 602, 604, 1450
Recorded writings, see §§ 1532, 1600

§ 1452. Official seals

1452. A seal is presumed to be genuine and its use authorized if it purports to be the seal of:

(a) The United States or a department, agency, or public employee of the United States.

(b) A public entity in the United States or a department, agency, or public employee of such public entity.

(c) A nation recognized by the executive power of the United States or a department, agency, or officer of such nation.

(d) A public entity in a nation recognized by the executive power of the United States or a department, agency, or officer of such public entity.

(e) A court of admiralty or maritime jurisdiction.

(f) A notary public within any state of the United States.

Comment. Sections 1452 and 1453 eliminate the need for formal proof of the genuineness of certain official seals and signatures when such proof would otherwise be required by the general requirement of authentication.

Under existing law, formal proof of many of the signatures and seals mentioned in Sections 1452 and 1453 is not required because such signatures and seals are the subject of judicial notice. CODE CIV. PROC. § 1875(5), (6), (7), (8). (Section 1875 is superseded by Division 4 (Sections 450-459) of the Evidence Code.) The parties may not dispute a matter that has been judicially noticed. CODE CIV. PROC. § 2102 (superseded by EVIDENCE CODE § 457). Hence, judicial notice of facts should be confined to matters concerning which there can be no reasonable dispute. The authenticity of writings purporting to be official writings should not be determined conclusively by the judge when there is serious dispute as to such authenticity. Therefore, Sections 1452 and 1453 provide that the official seals and signatures mentioned shall be presumed genuine and authorized until evidence is introduced sufficient to sustain a finding that they are not genuine or authorized. When there is such evidence disputing the authenticity of an official seal or signature, the trier of fact is required to determine the question of authenticity without regard to any presumption created by this section. See EVIDENCE CODE § 604 and the *Comment* thereto.

This procedure will dispense with the necessity for proof of authenticity when there is no real dispute as to such authenticity, but it will assure the parties the right to contest the authenticity of official writings when there is a real dispute as to such authenticity.

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Public employee, see § 195
Public entity, see § 200
State, see § 220
Presumption, effect of, see §§ 604, 1450

§ 1453. Domestic official signatures

1453. A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

(a) A public employee of the United States.

(b) A public employee of any public entity in the United States.

(c) A notary public within any state of the United States.

Comment. See the *Comment* to Section 1452.

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Public employee, see § 195
Public entity, see § 200
State, see § 220
Presumption, effect of, see §§ 604, 1450

§ 1454. Foreign official signatures

1454. A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of an officer, or deputy of an officer, of a nation or public entity in a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.

Comment. Section 1454 supersedes the somewhat complex procedure for authenticating foreign official writings that is contained in subdivision 8 of Code of Civil Procedure Section 1918. Section 1454 is based on a proposed amendment to Rule 44 of the Federal Rules of Civil Procedure that has been prepared by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure. Proposed Amendments to Rules of Civil Procedure for the United States District Courts with Advisory Committee's Notes (mimeo., Feb. 25, 1964). Rule 44 and the proposed amendment, however, deal only with the question of authenticating *copies* of foreign official writings. Section 1454 relates to the authentication of *any* foreign official writing, whether it be an original or a copy.

The procedure set forth in Section 1454 is necessary for the reason that a United States foreign service officer may not be able to certify to the official position and signature of a particular foreign official. Accordingly, this section permits the original signature to be certified by a higher foreign official, whose signature can in turn be certified by a still higher official, and such certifications can be continued in a chain until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his final

certification. See, *e.g.*, *New York Life Ins. Co. v. Aronson*, 38 F. Supp. 687 (W.D. Pa. 1941).

See also the *Comment* to Section 1452.

CROSS-REFERENCES

Authentication required, see § 1401
Definitions:
Public entity, see § 200
Writing, see § 250
Presumption, effect of, see §§ 604, 1450

CHAPTER 2. SECONDARY EVIDENCE OF WRITINGS

Article 1. Best Evidence Rule

§ 1500. The best evidence rule

1500. Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

Comment. Section 1500 states the best evidence rule. This rule is now found in Code of Civil Procedure Sections 1855, 1937, and 1938, which are superseded by this article. The rule is that, unless certain exceptional conditions exist, the content of a writing must be proved by the original writing and not by testimony as to its content or a copy of the writing. The rule is designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available.

The rule stated in Section 1500 applies "except as otherwise provided by statute." Sections 1501–1510 list certain exceptions to the rule. Other statutes may create further exceptions. See, *e.g.*, EVIDENCE CODE §§ 1550 and 1562, making copies of particular records admissible to the same extent as the originals would be.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Statute, see § 230
Writing, see § 250
Hospital records, see §§ 1560-1566
Official writings and recorded writings, see §§ 1530, 1532, 1600
Photographic copies, admissibility of, see §§ 1550, 1551
Record of conveyance pursuant to legal process, see § 1603
Recorded writing destroyed by calamity, see § 1601
Secondary evidence of contents of writings, see §§ 1501-1510
Spanish title papers, duplicate copies, see § 1605
Will, proof by copy, see Probate Code § 330

§ 1501. Copy of lost or destroyed writing

1501. A copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

Comment. Section 1501 states an exception to the best evidence rule that is now found in Section 1855, subdivision 1, of the Code of Civil Procedure. Section 1501 requires the loss or destruction of the writing to have been without fraudulent intent on the part of the proponent of the evidence. Although no similar requirement appears in Section 1855,

the cases construing this section have nonetheless imposed this requirement. *Bagley v. McMickle,* 9 Cal. 430, 446–447 (1858).

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Evidence, see § 140
Writing, see § 250
Lost or destroyed will, see Probate Code §§ 350-352
Photographic copy of lost or destroyed writing, see § 1551
Recorded writing lost or destroyed by calamity, see § 1601
See also the *Cross-References* under Section 1601

§.1502. Copy of unavailable writing

1502. A copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means.

Comment. The exception stated in Section 1502 is not stated in the existing statutes. However, writings not subject to production through use of the court's process have been treated as "lost" writings, and secondary evidence has been admitted under the provisions of subdivision 1 of Section 1855. See, *e.g., Zellerbach v. Allenberg,* 99 Cal. 57, 33 Pac. 786 (1893). Because such writings have been treated as lost, the cases have admitted secondary evidence even when the original has been procurable by the proponent of the evidence by means other than the court's process. See, *e.g., Koenig v. Steinbach,* 119 Cal. App. 425, 6 P.2d 525 (1931); *Mackroth v. Sladky,* 27 Cal. App. 112, 148 Pac. 978 (1915). Section 1502 changes the rule of these cases and makes secondary evidence inadmissible if the proponent has any reasonable means available to procure the writing, even though it is beyond the reach of the court's process.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definition:
Writing, see § 250

§ 1503. Copy of writing under control of opponent

1503. (a) A copy of a writing is not made inadmissible by the best evidence rule if, at a time when the writing was under the control of the opponent, the opponent was expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing, and on request at the hearing the opponent has failed to produce the writing. In a criminal action, the request at the hearing to produce the writing may not be made in the presence of the jury.

(b) Though a writing requested by one party is produced by another, and is thereupon inspected by the party calling for it, the party calling for the writing is not obliged to introduce it as evidence in the action.

Comment. Subdivision (a) of Section 1503 states an exception to the best evidence rule that is now found in subdivision 2 of Section 1855 and in Section 1938 of the Code of Civil Procedure. Under existing law, notice to produce the writing is unnecessary where the writing

is itself a notice or where it has been wrongfully obtained or withheld by the adverse party. Section 1503 requires a notice to produce the writing in these cases, too. In most instances, the pleadings will give the requisite pretrial notice; in those cases where they do not, little hardship is imposed upon the proponent by requiring notice.

Under existing law, secondary evidence of the content of a writing is admissible in a criminal case without notice to the defendant upon a prima facie showing that the writing is in the defendant's possession. *People v. Chapman,* 55 Cal. App. 192, 203 Pac. 126 (1921). In fact, a request for the document at the trial is improper. *People v. Powell,* 71 Cal. App. 500, 236 Pac. 311 (1925). However, if the defendant objects to the introduction of secondary evidence of the writing, the prosecution may then request the defendant to produce it. *People v. Rial,* 23 Cal. App. 713, 139 Pac. 661 (1914). The possible prejudice to a defendant that may be caused by a request in the presence of the jury for the production of a writing is readily apparent; but, even if the impropriety of such a request is conceded, there appears to be no reason to deprive the defendant completely of his right to a pretrial notice and a request at the trial for production of the original. The notice and request do not require the defendant to produce the writing; they merely authorize the proponent to introduce secondary evidence of the writing upon the defendant's failure to produce it. Thus, subdivision (a) preserves the defendant's rights but avoids the possible prejudice to him by requiring the request at the trial to be made out of the presence and hearing of the jury.

Similarly, subdivision (a) avoids any possible prejudice to the prosecution that might result from a request being made by the defendant in the presence of the jury for the production of a writing that is protected by a privilege. For the possible consequences of the prosecution's reliance on a privilege in a criminal action, see EVIDENCE CODE § 1042.

Subdivision (b) of Section 1503 restates and supersedes the provisions of Code of Civil Procedure Section 1939.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Action, see § 105
Criminal action, see § 130
Evidence, see § 140
Hearing, see § 145
Writing, see § 250
Inspection of writings, see Code of Civil Procedure § 2031

§ 1504. Copy of collateral writing

1504. A copy of a writing is not made inadmissible by the best evidence rule if the writing is not closely related to the controlling issues and it would be inexpedient to require its production.

Comment. Section 1504 states an exception for writings that are collateral to the principal issues in the case. The exception is well recognized elsewhere. See MCCORMICK, EVIDENCE § 200 (1954). However, an early California case rejected it in dictum, and the issue apparently has not been raised on appeal since then. *Poole v. Gerrard,* 9 Cal. 593

(1858). See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 100, 154 (1964). The exception is desirable, for it precludes hypertechnical insistence on the best evidence rule when production of the writing in question would be impractical and its contents are not closely related to any important issue in the case.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definition:
Writing, see § 250

§ 1505. Other secondary evidence of writings described in Sections 1501-1504

1505. If the proponent does not have in his possession or under his control a copy of a writing described in Section 1501, 1502, 1503, or 1504, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule. This section does not apply to a writing that is also described in Section 1506 or 1507.

Comment. Sections 1501-1504 permit a copy of a writing described in those sections to be admitted despite the best evidence rule. Section 1505 provides that oral testimony of the content of a writing described in Sections 1501–1504 may be admitted when the proponent of the evidence does not have a copy of the writing in his possession or under his control.

The final paragraph of Code of Civil Procedure Section 1855 provides that either a copy or oral testimony may be used to prove the content of a writing when the original is unavailable. However, despite the language in Section 1855, two California cases have held that the proponent must prove the content of such writings by a copy if he has one. *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403 (1890); *Murphy v. Nielsen*, 132 Cal. App.2d 396, 282 P.2d 126 (1955).

Section 1505 codifies the requirement of these cases. A copy is better evidence of the content of a writing than testimony; hence, when a person seeking to prove such content has a copy in his possession or control, he should be required to produce it. 4 WIGMORE, EVIDENCE §§ 1266-1268 (3d ed. 1940).

Unlike Section 1508 (pertaining to official writings), Section 1505 does not require a showing of reasonable diligence to obtain a copy as a foundation for the introduction of testimonial secondary evidence. Although the proponent of the evidence may easily obtain a copy of a writing in official custody or show that the writing has been destroyed so that none is available, he may find it extremely difficult to show the unavailability of copies of writings in private custody. He may have no means of knowing whether any copies have been made or, if made, who has custody of them; yet, his right to introduce testimonial secondary evidence might be defeated merely by the opponent's showing that a copy, previously unknown to the proponent, does exist and is within reach of the court's process. The proponent's right to introduce testimonial secondary evidence of such writings should not be so easily defeated. Hence, Section 1505 requires no showing of reasonable diligence to obtain a copy of the writing. Of course, if the opponent knows

of a copy that is available, he can compel its production and thus protect himself against any misrepresentation made in the proponent's evidence of the content of the writing.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Evidence, see § 140
Writing, see § 250

§ 1506. Copy of public writing

1506. A copy of a writing is not made inadmissible by the best evidence rule if the writing is a record or other writing that is in the custody of a public entity.

Comment. Section 1506 restates an exception to the best evidence rule that is now found in subdivision 3 of Code of Civil Procedure Section 1855.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Public entity, see § 200
Writing, see § 250
Official writings and recorded writings, see §§ 1530, 1532, 1600

§ 1507. Copy of recorded writing

1507. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been recorded in the public records and the record or an attested or a certified copy thereof is made evidence of the writing by statute.

Comment. Section 1507 restates an exception to the best evidence rule that is now found in subdivision 4 of Code of Civil Procedure Section 1855.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Evidence, see § 140
Statute, see § 230
Writing, see § 250
Official writings and recorded writings, see §§ 1530, 1532, 1600

§ 1508. Other secondary evidence of writings described in Sections 1506 and 1507

1508. If the proponent does not have in his possession a copy of a writing described in Section 1506 or 1507 and could not in the exercise of reasonable diligence have obtained a copy, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule.

Comment. The final paragraph of Code of Civil Procedure Section 1855 requires that the content of official writings be proved by a copy. Despite the unequivocal language of that section, the courts have permitted testimonial secondary evidence when a copy could not be procured because of the destruction of the original. *Hibernia Savings & Loan Soc. v. Boyd,* 155 Cal. 193, 100 Pac. 239 (1909); *Seaboard Nat'l Bank v. Ackerman,* 16 Cal. App. 55, 116 Pac. 91 (1911).

Section 1508 also permits testimonial evidence of the content of an official writing when a copy cannot be obtained. However, because copies of official writings usually can be readily obtained, Section 1508 requires a party to exercise reasonable diligence to obtain such a copy.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Evidence, see § 140
Writing, see § 250

§ 1509. Voluminous writings

1509. Secondary evidence, whether written or oral, of the content of a writing is not made inadmissible by the best evidence rule if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; but the court in its discretion may require that such accounts or other writings be produced for inspection by the adverse party.

Comment. Section 1509 restates an exception to the best evidence rule that is found in subdivision 5 of Code of Civil Procedure Section 1855. The final clause, permitting the court to require production of the underlying records, is based on a principle that has been recognized in dicta by the California courts. See, *e.g., People v. Doble,* 203 Cal. 510, 515, 265 Pac. 184, 187 (1928) ("we, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party . . .").

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Evidence, see § 140
Writing, see § 250

§ 1510. Copy of writing produced at the hearing

1510. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been produced at the hearing and made available for inspection by the adverse party.

Comment. Section 1510 is designed to permit the owner of a writing that is needed for evidence to leave a copy for the court's use and to retain the original in his own possession. The exception is valuable for business records that are needed in the continuing operation of the business. If the original is produced in court for inspection, a copy may be left for the court's use and the original returned to the owner. Of course, if the original shows erasures or other marks of importance that are not apparent on the copy, the adverse party may place the original in evidence himself.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Hearing, see § 145
Writing, see § 250

Article 2. Official Writings and Recorded Writings

§ 1530. Copy of writing in official custody

1530. (a) A purported copy of a writing that is in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the content of such writing or entry if:

(1) The copy purports to be published by the authority of the nation or state, or public entity therein, in which the writing is kept;

(2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make the attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

Comment. Section 1530 deals with three evidentiary problems. ***First,*** it is concerned with the problem of proving the content of an original writing by means of a copy, *i.e.*, the best evidence rule. See EVIDENCE Code § 1500. ***Second,*** it is concerned with authentication, for the copy must be authenticated as a copy of the original writing. EVIDENCE CODE § 1401. ***Finally,*** it is concerned with the hearsay rule, for a certification or attestation of authenticity is "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." EVIDENCE CODE § 1200. Because this section is principally concerned with the use of a copy of a writing to prove the content of the original, it is located in the division relating to secondary evidence of writings.

Under existing California law, certain official records may be proved by copies purporting to have been published by official authority or by copies with attached certificates containing certain requisite seals and signatures. The rules are complex and detailed and appear for the most

part in Article 2 (beginning with Section 1892) of Chapter 3, Title 2, Part IV of the Code of Civil Procedure.

Section 1530 substitutes for these rules a uniform rule that can be applied to all writings in official custody found within the United States and another rule applicable to all writings in official custody found outside the United States.

Subdivision (a)(1). Subdivision (a)(1) of Section 1530 provides that an official writing may be proved by a copy purporting to be published by official authority. Under Section 1918 of the Code of Civil Procedure, the acts and proceedings of the executive and legislature of any state, the United States, or a foreign government may be proved by documents and journals published by official authority. Subdivision (a)(1) in effect makes these provisions of Section 1918 applicable to all classes of official documents. This extension of the means of proving official documents will facilitate the proof of many official documents the authenticity of which is presumed (EVIDENCE CODE § 644) and is seldom subject to question.

Subdivision (a)(2) and (a)(3) generally. Paragraphs (2) and (3) of subdivision (a) of Section 1530 set forth the rules for proving the content of writings in official custody by attested or certified copies. A person who "attests" a writing merely affirms it to be true or genuine by his signature. BLACK, LAW DICTIONARY (4th ed. 1951). Existing California statutes require certain writings to be "certified." Section 1923 of the Code of Civil Procedure (superseded by Evidence Code Section 1531) provides that the certificate affixed to a certified copy must state that the copy is a correct copy of the original, must be signed by the certifying officer, and must be under his seal of office, if he has one. Thus, the only difference between the words "attested" and "certified" is that the existing statutory definition of "certified" requires the use of a seal, if the authenticating officer has one, whereas the definition of "attested" does not. Section 1530 eliminates the requirement of the seal by the use of the word "attested." However, Section 1530 retains, in addition, the word "certified" because it is the more familiar term in California practice.

Subdivision (a)(2). Under existing law, copies of many records of the United States government and of the governments of sister states may be proved by a copy certified or attested by the custodian alone. See, *e.g.,* CODE CIV. PROC. §§ 1901 and 1918(1), (2), (3), (9); CORP. CODE § 6600. Yet, other official writings must be certified or attested not only by the custodian but also by a higher official certifying the authority and signature of the custodian. In order to provide a uniform rule for the proof of all domestic official writings, subdivision (a)(2) extends the simpler and more expeditious procedure to all official writings within the United States.

Subdivision (a)(3). Under existing law, some foreign official records may be proved by a copy certified or attested by the custodian alone. See CODE CIV. PROC. §§ 1901 and 1918(4). Yet, other copies of foreign official writings must be accompanied by three certificates: one executed by the custodian, another by a higher official certifying the authority and signature of the custodian, and a third by still another

official certifying the signature and official position of the second official. See CODE CIV. PROC. §§ 1906 and 1918(8).

For these complex rules, subdivision (a)(3) of Section 1530 substitutes a relatively simple and uniform procedure that is applicable to all classes of foreign official writings. Subdivision (a)(3) is based on a proposed amendment to Rule 44 of the Federal Rules of Civil Procedure that has been prepared by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure. Proposed Amendments to Rules of Civil Procedure for the United States District Courts with Advisory Committee's Notes (mimeo., Feb. 25, 1964).

Subdivision (a)(3) requires that the copy be attested as a correct copy by "a person having authority to make the attestation." In some foreign countries, the person with authority to attest a copy of an official writing is not necessarily the person with legal custody of the writing. See 2B BARRON & HOLTZOFF, FEDERAL PRACTICE PROCEDURE § 992 (Wright ed. 1961). In such a case, subdivision (a)(3) requires that the attester's signature and official position be certified by another official. If this is a United States foreign service officer stationed in the country, no further certificates are required. If a United States foreign service officer is not able to certify to the signature and official position of the attester, subdivision (a)(3) permits the attester's signature and official position to be certified by a higher foreign official, whose signature can in turn be certified by a still higher official. Such certifications can be continued in a chain until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his final certification. See, *e.g., New York Life Ins. Co. v. Aronson,* 38 F. Supp. 687 (W.D. Pa. 1941).

Subdivision (b). Where evidence is introduced that is sufficient to sustain a finding that the copy is not a correct copy, the trier of fact is required to determine whether the copy is a correct copy without regard to the presumptions created by this section. See EVIDENCE CODE § 604 and the *Comment* thereto.

CROSS-REFERENCES

Attestation or certification of writing, see § 1531
Best evidence rule, see §§ 1500, 1506, 1507
Books published by public authority, presumption, see § 644
Conveyance pursuant to legal process, certified copy, see § 1603
Definitions:
  Burden of producing evidence, see § 110
  Evidence, see § 140
  Presumption, see § 600
  Public employee, see § 195
  Public entity, see § 200
  State, see § 220
  Writing, see § 250
Official seals and signatures presumed genuine, see §§ 1450, 1452-1454
Presumption affecting the burden of producing evidence, effect of, see § 604
Prima facie evidence, effect of, see § 602
Spanish title papers, copies as prima facie evidence, see § 1605

§ 1531. Certification of copy for evidence

1531. For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate

must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

Comment. Section 1531 is based on the provisions of Section 1923 of the Code of Civil Procedure. The language has been modified to define the process of attestation as well as the process of certification. Since Section 1530 permits a writing to be attested or certified for purposes of evidence without the attachment of an official seal, Section 1531 omits any requirement of a seal.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Writing, see § 250

§ 1532. Official record of recorded writing

1532. (a) The official record of a writing is prima facie evidence of the content of the original recorded writing if:

(1) The record is in fact a record of an office of a public entity; and

(2) A statute authorized such a writing to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

Comment. Section 1530 authorizes the use of a copy of a writing in official custody to prove the content of that writing. When a writing has been recorded, Section 1530 merely permits a certified copy of the record to be used to prove the record, not the original recorded writing. Section 1532 permits the official record to be used to prove the content of the original recorded writing. However, under the provisions of Section 1401, the original recorded writing must be authenticated before the copy can be introduced. If the writing was executed by a public official, or if a certificate of acknowledgment or proof was attached to the writing, the original writing is presumed to be authentic and no further evidence of authenticity is required. EVIDENCE CODE §§ 1450, 1451, and 1453.

Where evidence is introduced that is sufficient to sustain a finding that the original writing is not authentic, the trier of fact is required to determine the authenticity of the original writing without regard to the presumption created by this section. See EVIDENCE CODE § 604 and the *Comment* thereto.

Code of Civil Procedure Section 1951 (superseded by Evidence Code Section 1600) is similar to Section 1532, but the Code of Civil Procedure section relates only to writings affecting property. Section 1532 extends the principle of the Code of Civil Procedure section to all recorded writings. There is no comparable provision in existing law.

CROSS-REFERENCES

Best evidence rule, see §§ 1500, 1507
Definitions:
Burden of producing evidence, see § 110
Evidence, see § 140
Presumption, see § 600
Public entity, see § 200
Statute, see § 230
Writing, see § 250

Presumption affecting the burden of producing evidence, effect of, see § 604
Prima facie evidence, effect of, see § 602
Record destroyed by calamity, see § 1601
Record of writing affecting property, see § 1600

Article 3. Photographic Copies of Writings

§ 1550. Photographic copies made as business records

1550. A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if such copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of such business. The introduction of such copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence.

Comment. Section 1550 continues in effect those provisions of the Uniform Photographic Copies of Business and Public Records as Evidence Act that are now found in Code of Civil Procedure Section 1953i.

Section 1550 omits the requirement, contained in Section 1953i of the Code of Civil Procedure, that the original writing be a business record. As long as the original writing is admissible under any exception to the hearsay rule, its trustworthiness is sufficiently assured; and the requirement that the photographic copy be made in the regular course of business sufficiently assures the trustworthiness of the copy. If the original is admissible not as an exception to the hearsay rule but as evidence of an ultimate fact in the case (*e.g.*, a will or a contract), a photographic copy, the trustworthiness of which is sufficiently assured by the fact that it was made in the regular course of business, should be as admissible as the original.

CROSS-REFERENCES

Definition:
Writing, see § 250

§ 1551. Photographic copies where original destroyed or lost

1551. A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken is as admissible as the original writing itself if, at the time of the taking of such film, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

Comment. Section 1551 restates without substantive change the provisions of Code of Civil Procedure Section 1920b.

CROSS-REFERENCES

Definition:
Writing, see § 250

Article 4. Hospital Records

§ 1560. Compliance with subpoena duces tecum for hospital records

1560. (a) As used in this article, "hospital" means a hospital located in this State that is operated by a public entity or any licensed hospital located in this State.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness from a hospital in an action in which the hospital is neither a party nor the place where any cause of action is alleged to have arisen and such subpoena requires the production of all or any part of the records of the hospital relating to the care or treatment of a patient in such hospital, it is sufficient compliance therewith if the custodian or other officer of the hospital, within five days after the receipt of such subpoena, delivers by mail or otherwise a true and correct copy (which may be a photographic or microphotographic reproduction) of all the records described in such subpoena to the clerk of court or to the court if there be no clerk or to such other person as described in subdivision (a) of Section 2018 of the Code of Civil Procedure, together with the affidavit described in Section 1561.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of such court, or to the judge thereof if there be no clerk.

(2) If the subpoena directs attendance at a deposition or other hearing, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at his place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.

Comment. Section 1560 is the same in substance as Code of Civil Procedure Section 1998, except for the clarifying definition of "hospital" added in subdivision (a).

CROSS-REFERENCES

Definitions:
Action, see § 105
Hearing, see § 145
Public entity, see § 200
Subpoena duces tecum, see generally Code of Civil Procedure § 1985 *et seq.*; Penal Code § 1326 *et seq.*

§ 1561. Affidavit accompanying records

1561. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) That the affiant is the duly authorized custodian of the records and has authority to certify the records.

(2) That the copy is a true copy of all the records described in the subpoena.

(3) That the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition, or event.

(b) If the hospital has none of the records described, or only part thereof, the custodian shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in Section 1560.

Comment. Section 1561 restates without substantive change the provisions of Code of Civil Procedure Section 1998.1.

CROSS-REFERENCES

Affidavit as evidence, see § 1562
Definition:
Hospital, see § 1560

§ 1562. Admissibility of affidavit and copy of records

1562. The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible in evidence and the matters stated therein are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Section 1562 restates without substantive change the provisions of Code of Civil Procedure Section 1998.2.

CROSS-REFERENCES

Best evidence rule, see § 1500
Definitions:
Burden of proof, see § 115
Presumption, see § 600
Presumption affecting the burden of proof, effect of, see § 606

§ 1563. One witness and mileage fee

1563. This article shall not be interpreted to require tender or payment of more than one witness and mileage fee or other charge unless there is an agreement to the contrary.

Comment. Section 1563 restates without substantive change the provisions of Code of Civil Procedure Section 1998.3.

§ 1564. Personal attendance of custodian and production of original records

1564. The personal attendance of the custodian or other qualified witness and the production of the original records is required if the subpoena duces tecum contains a clause which reads:

"The procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."

Comment. Section 1564 restates without substantive change the provisions of Code of Civil Procedure Section 1998.4.

§ 1565. Service of more than one subpoena duces tecum

1565. If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness from a hospital and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

Comment. Section 1565 restates without substantive change the provisions of Code of Civil Procedure Section 1998.5.

CROSS-REFERENCES

Definition:
Hospital, see § 1560

§ 1566. Applicability of article

1566. This article applies in any proceeding in which testimony can be compelled.

Comment. This section has no counterpart in the portion of the Code of Civil Procedure from which this article is taken. Section 1566 is intended to preserve the original effect of Code of Civil Procedure Sections 1998-1998.5 by removing Sections 1560-1565 from the limiting provisions of Section 300.

CHAPTER 3. OFFICIAL WRITINGS AFFECTING PROPERTY

§ 1600. Official record of document affecting property interest

1600. The official record of a document purporting to establish or affect an interest in property is prima facie evidence of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

(a) The record is in fact a record of an office of a public entity; and

(b) A statute authorized such a document to be recorded in that office.

Comment. The sections in this chapter all relate to official writings affecting property. The provisions of some sections provide hearsay exceptions; other sections provide exceptions to the best evidence rule; still others provide authentication procedures.

Section 1600 is based on Code of Civil Procedure Section 1951, which it supersedes. It is similar to Section 1532 of the Evidence Code,

which applies to all recorded writings, but it gives an added effect to the writings covered by its provisions. Under Section 1600, as under existing law, if an instrument purporting to affect an interest in property is recorded, a presumption of execution and delivery of the instrument arises. *Thomas v. Peterson*, 213 Cal. 672, 3 P.2d 306 (1931).

CROSS-REFERENCES

Best evidence rule, see §§ 1500, 1507
Definitions:
Evidence, see § 140
Person, see § 175
Property, see § 185
Public entity, see § 200
Statute, see § 230
Prima facie evidence, effect of, see § 602
Record of recorded writing, see § 1532

§ 1601. Proof of content of lost official record affecting property

1601. (a) Subject to subdivisions (b) and (c), when in any action it is desired to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity, after proof of such loss or destruction, the following may, without further proof, be admitted in evidence to prove the contents of such record:

(1) Any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person engaged in the business of preparing and making abstracts of title prior to such loss or destruction; or

(2) Any abstract of title, or of any instrument affecting title, made, issued, and certified as correct by any person engaged in the business of insuring titles or issuing abstracts of title to real estate, whether the same was made, issued, or certified before or after such loss or destruction and whether the same was made from the original records or from abstract and notes, or either, taken from such records in the preparation and upkeeping of its plant in the ordinary course of its business.

(b) No proof of the loss of the original writing is required other than the fact that the original is not known to the party desiring to prove its contents to be in existence.

(c) Any party desiring to use evidence admissible under this section shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use such evidence at the trial of the action, and shall give all such other parties a reasonable opportunity to inspect the evidence, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.

Comment. Section 1601 restates without substantive change the provisions of Section 1855a of the Code of Civil Procedure.

CROSS-REFERENCES

Best evidence rule, see § 1500
Court records, restoration when destroyed, see Code of Civil Procedure § 1953.01 *et seq.*

Definitions:
Action, see § 105
Evidence, see § 140
Person, see § 175
Proof, see § 190
Writing, see § 250
Destroyed Land Records Relief Law, see Code of Civil Procedure § 751.01 *et seq.*
Duplicates of public certificates, see Government Code § 1226
Lost or destroyed writing, see §§ 1501, 1505
Official writings, see §§ 1506-1508
Private writings, restoration when destroyed, see Code of Civil Procedure § 1953.10 *et seq.*
Private writings, restoration when lost or destroyed, see Civil Code § 3415
Recorded map or plat, restoration when lost or destroyed, see Code of Civil Procedure § 1855b

§ 1602. Recital in patent for mineral lands

1602. If a patent for mineral lands within this State, issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.

Comment. Section 1602 restates without substantive change the provisions of Section 1927 of the Code of Civil Procedure.

CROSS-REFERENCES

Certificate of purchase or of location of land as prima facie evidence, see § 1604
Definition:
Evidence, see § 140
Prima facie evidence, effect of, see § 602

§ 1603. Deed by officer in pursuance of court process

1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this State, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.

Comment. Section 1603 restates without substantive change the provisions of Section 1928 of the Code of Civil Procedure.

CROSS-REFERENCES

Acknowledged writings, see § 1451
Best evidence rule, see §§ 1500, 1506-1508
Certification of copy for evidence, see § 1531
Definitions:
Evidence, see § 140
Real property, see § 205
Official duty presumed performed, see § 664
Official writings, copies, see § 1530
Prima facie evidence, effect of, see § 602
Recorded writings, see §§ 1532, 1600

§ 1604. Certificate of purchase or of location of lands

1604. A certificate of purchase, or of location, of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is prima facie evidence that the holder or assignee of such certificate is the owner of the

land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

Comment. Section 1604 restates without substantive change the provisions of Section 1925 of the Code of Civil Procedure.

CROSS-REFERENCES

Definitions:
Evidence, see § 140
Law, see § 160
Proof, see § 190
Land defined, see Civil Code § 659
Mineral lands, patent as prima facie evidence of date of location, see § 1602
Prima facie evidence, effect of, see § 602

§ 1605. Authenticated Spanish title records

1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are receivable as prima facie evidence with like force and effect as the originals and without proving the execution of such originals.

Comment. Section 1605 restates without substantive change the provisions of Section 1927.5 of the Code of Civil Procedure.

CROSS-REFERENCES

Best evidence rule, see §§ 1500, 1506-1508
Definitions:
Authentication, see § 1400
Evidence, see § 140
Official writings, copies, see § 1530
Prima facie evidence, effect of, see § 602
Recorded writings, see §§ 1532, 1600

EXISTING CODES: AMENDMENTS, ADDITIONS, AND REPEALS

Comment. Many sections in existing codes will be superseded by the Evidence Code and should be repealed. Other sections should be revised to conform to the Evidence Code. In some cases, material in an existing section to be repealed should be continued by adding a new section to either the Civil Code or the Code of Civil Procedure. The reason that each of these sections is proposed to be added, amended, or repealed is stated in a separate *Comment* that follows the section.

BUSINESS AND PROFESSIONS CODE

Section 2904 (Repealed)

SEC. 2. Section 2904 of the Business and Professions Code is repealed.

~~2904. For the purpose of this chapter the confidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attorney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed.~~

Comment. Section 2904 is superseded by Evidence Code Sections 1010-1026. See the *Comment* to EVIDENCE CODE § 1014.

Section 5012 (Amended)

SEC. 3. Section 5012 of the Business and Professions Code is amended to read:

5012. The board shall have a seal ~~which shall be judicially noticed~~.

Comment. The deleted language in Section 5012 is inconsistent with Evidence Code Section 1452. See the *Comment* to that section.

Section 25009 (Amended)

SEC. 4. Section 25009 of the Business and Professions Code is amended to read:

25009. Any defendant in any action brought under this chapter or any person who may be a witness therein under Sections ~~2021, 2031 or 2055~~ *2016, 2018, and 2019* of the Code of Civil Procedure *or Section 776 of the Evidence Code,* and the books and records of any such defendant or witness, may be brought into court and the books and records may be introduced by reference into evidence, but no information so obtained may be used against the defendant or any such witness as a basis for a misdemeanor prosecution under this chapter.

Comment. The amendment merely substitutes correct references for the obsolete references in Section 25009.

CIVIL CODE

Section 53 (Amended)

SEC. 5. Section 53 of the Civil Code is amended to read:

53. (a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified race, color, religion, ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's race, color, religion, ancestry, or national origin is void.

(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquirer's, user's, or occupier's race, color, religion, ancestry, or national origin is void.

(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court ~~may take~~ *takes* judicial notice of the recorded instrument or instruments containing such prohibitions or restrictions *in the same manner that it takes judicial notice of the matters listed in Section 452 of the Evidence Code*.

Comment. This revision of Section 53 provides, in effect, that the court may take judicial notice of the matter specified in subdivision (c) and is required to take judicial notice of such matter upon request if the party making the request supplies the court with sufficient information. See EVIDENCE CODE §§ 452 and 453 and the *Comments* thereto.

Section 164.5 (Added)

SEC. 6. Section 164.5 is added to the Civil Code, to read:

164.5 The presumption that property acquired during marriage is community property does not apply to any property to which legal or equitable title is held by a person at the time of his death if the marriage during which the property was acquired was terminated by divorce more than four years prior to such death.

Comment. Section 164.5, which is a new section added to the Civil Code, states the apparent effect of subdivision 40 of Code of Civil Procedure Section 1963. The meaning of subdivision 40, however, is not clear. See 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 26 (7th ed. 1960); Note, 43 CAL. L. REV. 687, 690–691 (1955).

Section 193 (Repealed)

SEC. 7. Section 193 of the Civil Code is repealed.

~~193. LEGITIMACY OF CHILDREN BORN IN WEDLOCK. All children born in wedlock are presumed to be legitimate.~~

Comment. Sections 193, 194, and 195 are superseded by the more accurate statement of the presumption in Evidence Code Section 661. See the *Comment* to that section.

Section 194 (Repealed)

SEC. 8. Section 194 of the Civil Code is repealed.

~~194. All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.~~

Comment. See the Law Revision Commission's *Comment* to Civil Code Section 193.

Section 195 (Repealed)

SEC. 9. Section 195 of the Civil Code is repealed.

~~195. The presumption of legitimacy can be disputed only by the people of the State of California in a criminal action brought under the provisions of Section 270 of the Penal Code, or the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.~~

Comment. See the Law Revision Commission's *Comment* to Civil Code Section 193.

Section 3544 (Added)

SEC. 10. Section 3544 is added to the Civil Code, to read:

3544. A person intends the ordinary consequences of his voluntary act.

Comment. Sections 3544-3548 are new sections added to the Civil Code. They recast the presumptions declared by subdivisions 3, 19, 28, 32, and 33 of Code of Civil Procedure Section 1963 as maxims of jurisprudence and supersede those subdivisions.

These superseded subdivisions of Section 1963 of the Code of Civil Procedure are not continued in the Evidence Code as presumptions for a variety of reasons. Some do not fit the definition of a presumption contained in Evidence Code Section 600 in that they do not arise upon the proof of a preliminary fact. Others seem to be little more than truisms. They are cited most frequently in the appellate cases to uphold lower court decisions that could be sustained anyway either on the ground that the party with the burden of proof failed to persuade the trier of fact or on the ground that the evidence would support the inference drawn by the trier of fact.

The proposition stated in Civil Code Section 3544 has been a source of error in the cases, for it is error in a criminal case to treat it as a presumption and to instruct accordingly when specific intent is a necessary element of the crime charged. *People v. Snyder,* 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Mize,* 80 Cal. 41, 22 Pac. 80 (1889). Nonetheless, it is continually cited in appellate cases involving specific intent when it is unnecessary to the decision. See, *e.g., People v. Hulings,* 211 Cal. App.2d 218, 27 Cal. Rptr. 446 (1962); *People v. Williams,* 186 Cal. App.2d 420, 8 Cal. Rptr. 871 (1960). And, hence, despite repeated reversals, instructions on the presumption continue

to be given erroneously. See *People v. Booth*, 111 Cal. App.2d 106, 108, 243 P.2d 872, 873-874 (1952) ("we are at a loss to understand why [the instruction on this presumption] was given, or why it is given in so many cases").

Accordingly, these propositions are continued as maxims of jurisprudence, not as presumptions. As maxims, they are not intended to qualify any substantive provisions of law but merely to aid in their just application. CIVIL CODE § 3509.

Section 3545 (Added)

SEC. 11. Section 3545 is added to the Civil Code, to read:

3545. Private transactions are fair and regular.

Comment. See the Law Revision Commission's *Comment* to Civil Code Section 3544.

Section 3546 (Added)

SEC. 12. Section 3546 is added to the Civil Code, to read:

3546. Things happen according to the ordinary course of nature and the ordinary habits of life.

Comment. See the Law Revision Commission's *Comment* to Civil Code Section 3544.

Section 3547 (Added)

SEC. 13. Section 3547 is added to the Civil Code, to read:

3547. A thing continues to exist as long as is usual with things of that nature.

Comment. See the Law Revision Commission's *Comment* to Civil Code Section 3544.

Section 3548 (Added)

SEC. 14. Section 3548 is added to the Civil Code, to read:

3548. The law has been obeyed.

Comment. See the Law Revision Commission's *Comment* to Civil Code Section 3544.

CODE OF CIVIL PROCEDURE

Section 1 (Amended)

SEC. 15. Section 1 of the Code of Civil Procedure is amended to read:

1. ~~TITLE AND DIVISION OF THIS VOLUME.~~ This Act shall be known as the Code of Civil Procedure ~~of California~~, and is divided into four Parts, as follows:

Part I. Of Courts of Justice.
II. Of Civil Actions.
III. Of Special Proceedings of a Civil Nature.
IV. ~~Of Evidence~~ *Miscellaneous Provisions*.

Comment. The title of Part IV has been changed to reflect the fact that the evidence provisions in Part IV have been placed in the Evidence Code.

Section 117g (Amended)

SEC. 16. Section 117g of the Code of Civil Procedure is amended to read:

117g. No attorney at law or other person than the plaintiff and defendant shall take any part in the filing or the prosecution or defense of such litigation in the small claims court. The plaintiff and defendant shall have the right to offer evidence in their behalf by witnesses appearing at such hearing, or at any other time. The presence of the plaintiff or defendant, whether individual or corporate, at the hearing shall not be required to permit the proof of the items of an account but such proof shall be in accordance with the provisions of ~~the Uniform Business Records as Evidence Act~~ *Sections 1270 and 1271 of the Evidence Code*. The judge or justice may also informally make any investigation of the controversy between the parties either in or out of court and give judgment and make such orders as to time of payment or otherwise as may, by him, be deemed to be right and just. The provisions of Section 579 of the Code of Civil Procedure are hereby made applicable to small claims court actions.

Comment. The substance of the Uniform Business Records as Evidence Act (CODE CIV. PROC. §§ 1953e-1953h) appears in the Evidence Code as Sections 1270 and 1271.

Section 125 (Amended)

SEC. 17. Section 125 of the Code of Civil Procedure is amended to read:

125. In an action for divorce or seduction, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel ~~; provided, that in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all other witnesses in the cause~~. *Nothing in this section prevents the exclusion of a witness pursuant to Evidence Code Section 777.*

Comment. Evidence Code Section 777 sets forth precisely the conditions under which witnesses may be excluded.

Section 153 (Amended)

SEC. 18. Section 153 of the Code of Civil Procedure is amended to read:

153. Except as otherwise expressly provided by law, the seal of a court need not be affixed to any proceeding therein, or to any document, except:

1. To a writ;
2. To a summons;
3. To a warrant of arrest;
4. To the certificate of probate of a will or of the appointment of an executor, administrator, or guardian ~~;~~.

~~5. To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk or judge.~~

Comment. The deleted language, which relates to the authentication of copies of judicial records, is superseded by Evidence Code Section 1530.

Section 433 (Amended)

SEC. 19. Section 433 of the Code of Civil Procedure is amended to read:

433. When any of the matters enumerated in Section 430 do not appear upon the face of the complaint, the objection may be taken by answer; except that when the ground of demurrer is that there is another action *or proceeding* pending between the same parties for the same cause, *and* the court may take judicial notice of ~~other actions and proceedings pending in the same court, or in other courts of the State, and for this purpose only~~ *the other action or proceeding under Division 4 (commencing with Section 450) of the Evidence Code,* an affidavit may be filed with the demurrer ~~to establish~~ *for the sole purpose of establishing* such fact or ~~invoke~~ *invoking* such notice.

Comment. This revision is necessary to conform Section 433 to the judicial notice provisions of the Evidence Code.

Section 631.7 (Added)

SEC. 20. Section 631.7 is added to the Code of Civil Procedure, to read:

631.7. Ordinarily, unless the court otherwise directs, the trial of a civil action tried by the court without a jury shall proceed in the order specified in Section 607.

Comment. The second sentence of Code of Civil Procedure Section 2042 reads: "Ordinarily, the party beginning the case must exhaust his evidence before the other party begins." Section 631.7 supersedes this sentence insofar as it relates to nonjury civil cases; it states the existing law more accurately than does the sentence which it replaces. Insofar as the superseded sentence relates to other actions, it is unnecessary because of Code of Civil Procedure Section 607 (civil jury cases) and Penal Code Sections 1093 and 1094 (criminal actions).

Section 1256.2 (Repealed)

SEC. 21. Section 1256.2 of the Code of Civil Procedure is repealed.

~~1256.2. In any condemnation proceeding, either party shall be allowed to question any witness as to all expenses and fees paid or to be paid to such witness by the other party.~~

Comment. Section 1256.2 is superseded by Evidence Code Section 722(b).

Section 1747 (Amended)

SEC. 22. Section 1747 of the Code of Civil Procedure is amended to read:

1747. Notwithstanding the provisions of Section 124 of the Code of Civil Procedure, all superior court hearings or conferences in proceedings under this chapter shall be held in private and the court shall exclude all persons except the officers of the court, the parties, their counsel and witnesses. Conferences may be held with each party and his counsel separately and in the discretion of the judge, commissioner or counselor conducting the conference or hearing, counsel for one party may be excluded when the adverse party is present. All communications, verbal or written, from parties to the judge, commissioner or counselor in a proceeding under this chapter shall be deemed ~~made to such officer in official confidence~~ *to be official information* within the meaning of ~~subdivision 5, Section 1881 of the Code of Civil Procedure~~ *Section 1040 of the Evidence Code*.

The files of the conciliation court shall be closed. The petition, supporting affidavit, reconciliation agreement and any court order made in the matter may be opened to inspection by any party or his counsel upon the written authority of the judge of the conciliation court.

Comment. Section 1747 has been amended merely to substitute a reference to the pertinent section of the Evidence Code for the reference to the superseded Code of Civil Procedure section.

Title of Part IV of Code of Civil Procedure (Amended)

SEC. 23. The heading of Part IV of the Code of Civil Procedure is amended to read:

PART IV. ~~OF EVIDENCE~~ *MISCELLANEOUS PROVISIONS*

Comment. The title of Part IV has been changed to reflect the fact that the evidence provisions contained therein have been superseded by the Evidence Code.

Section 1823 (Repealed)

SEC. 24. Section 1823 of the Code of Civil Procedure is repealed.

~~1823. DEFINITION OF EVIDENCE. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.~~

Comment. Section 1823 is superseded by the definition of "evidence" in Evidence Code Section 140.

Section 1824 (Repealed)

SEC. 25. Section 1824 of the Code of Civil Procedure is repealed.

~~1824. DEFINITION OF PROOF. Proof is the effect of evidence, the establishment of a fact by evidence.~~

Comment. Section 1824 is substantially recodified as Evidence Code Section 190.

Section 1825 (Repealed)

SEC. 26. Section 1825 of the Code of Civil Procedure is repealed.

~~1825. DEFINITION OF LAW OF EVIDENCE. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:~~

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

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

~~3. For the production of legal evidence;~~

~~4. For the exclusion of whatever is not legal;~~

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

Comment. Section 1825, which merely states in general terms the content of Part IV of the Code of Civil Procedure, serves no useful purpose. No case has been found where the section was pertinent to the decision.

Section 1826 (Repealed)

SEC. 27. Section 1826 of the Code of Civil Procedure is repealed.

~~1826. THE DEGREE OF CERTAINTY REQUIRED TO ESTABLISH FACTS. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.~~

Comment. Section 1826 contains an inaccurate description of the normal burden of proof. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1149-1150 (1964). Section 1826 is superseded by Division 5 (commencing with Section 500) of the Evidence Code.

Section 1827 (Repealed)

SEC. 28. Section 1827 of the Code of Civil Procedure is repealed.

~~1827. FOUR KINDS OF EVIDENCE SPECIFIED. There are four kinds of evidence:~~

~~1. The knowledge of the Court;~~

~~2. The testimony of witnesses;~~

~~3. Writings;~~

~~4. Other material objects presented to the senses.~~

Comment. Section 1827 is superseded by the definition of "evidence" in Evidence Code Section 140. Although judicial notice is not included in the definition of "evidence" in Section 140, the subject is covered in Division 4 (commencing with Section 450) of the Evidence Code. Properly speaking, judicial notice is a substitute for evidence and not itself evidence. Taking judicial notice of a matter simply eliminates the necessity for proving the matter by evidence.

Section 1828 (Repealed)

SEC. 29. Section 1828 of the Code of Civil Procedure is repealed.

~~1828. There are several degrees of evidence:~~
~~One—Primary and secondary.~~
~~Two—Direct and indirect.~~
~~Three—Prima facie, partial, satisfactory, indispensable, and conclusive.~~

Comment. Section 1828 attempts to classify evidence into a number of different categories, each of which in turn is defined by the sections that follow, *i.e.,* Sections 1829-1837. This very elaborate classification system represents the analysis of evidence law of a century ago. Writers, courts, and lawyers today use different classifications and different terminology. Accordingly, Section 1828 is repealed. To the extent that the terms defined in Sections 1829-1837 should be retained, those terms are defined in the Evidence Code. See, *e.g.,* EVIDENCE CODE § 410, defining "direct evidence."

Section 1829 (Repealed)

SEC. 30. Section 1829 of the Code of Civil Procedure is repealed.

~~1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.~~

Comment. Sections 1829 and 1830 serve no definitional purpose in the existing statutes and appear to state a "best evidence rule" that is inconsistent with both the Evidence Code (Sections 1500-1510) and existing law. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 49-51 (1964).

Section 1830 (Repealed)

SEC. 31. Section 1830 of the Code of Civil Procedure is repealed.

~~1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1829.

Section 1831 (Repealed)

SEC. 32. Section 1831 of the Code of Civil Procedure is repealed.

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

Comment. Section 1831 is substantially recodified as Evidence Code Section 410. The term "direct evidence," which is defined in Section 1831, is not used in Part IV of the Code of Civil Procedure except in Section 1844. Section 1844 is also repealed and its substance is contained in Evidence Code Section 411.

Section 1832 (Repealed)

SEC. 33. Section 1832 of the Code of Civil Procedure is repealed.

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

Comment. "Indirect evidence" as defined in Section 1832 is more commonly known as circumstantial evidence. The defined term has no substantive significance insofar as either the Code of Civil Procedure or the Evidence Code is concerned, for under either statutory scheme circumstantial evidence, when relevant, is as admissible as direct evidence. The defined term is used in the Code of Civil Procedure only in Section 1957 (also repealed), which merely classifies indirect evidence as either inferences or presumptions.

The repeal of Section 1832 will not affect the instructions that are to be given to the jury in appropriate cases as to the difference between direct and circumstantial evidence. Nor will the repeal of this section affect the case law or other statutes relating to what evidence is sufficient to sustain a verdict or finding.

Section 1833 (Repealed)

SEC. 34. Section 1833 of the Code of Civil Procedure is repealed.

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

Comment. Section 1833 is inconsistent with Evidence Code Section 602. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1143–1149 (1964).

Section 1834 (Repealed)

SEC. 35. Section 1834 of the Code of Civil Procedure is repealed.

~~1834. PARTIAL EVIDENCE DEFINED. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected~~

~~as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute.~~

Comment. Insofar as Section 1834 defines "partial evidence," it is unnecessary because the defined term is not used in either the Evidence Code or the existing statutes.

Insofar as Section 1834 provides that evidence whose relevancy depends on the existence of another fact may be received on condition that evidence of the other fact be supplied later in the trial, it is superseded by Evidence Code Section 403(b). See also EVIDENCE CODE § 320.

Section 1836 (Repealed)

SEC. 36. Section 1836 of the Code of Civil Procedure is repealed.

~~1836. INDISPENSABLE EVIDENCE DEFINED. Indispensable evidence is that without which a particular fact cannot be proved.~~

Comment. Section 1836 is unnecessary. The defined term is not used in either the Evidence Code or the existing statutes.

Section 1837 (Repealed)

SEC. 37. Section 1837 of the Code of Civil Procedure is repealed.

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

Comment. Section 1837 is unnecessary. The defined term is not used in either the Evidence Code or the existing statutes.

Section 1838 (Repealed)

SEC. 38. Section 1838 of the Code of Civil Procedure is repealed.

~~1838. CUMULATIVE EVIDENCE DEFINED. Cumulative evidence is additional evidence of the same character, to the same point.~~

Comment. Section 1838 is unnecessary. The defined term is not used in either the Evidence Code or the existing statutes. The repeal of Section 1838 will have no effect on the principle that cumulative evidence may be excluded, for that principle is expressed in Evidence Code Section 352—without, however, using the term "cumulative evidence."

Section 1839 (Repealed)

SEC. 39. Section 1839 of the Code of Civil Procedure is repealed.

~~1839. CORROBORATIVE EVIDENCE DEFINED. Corroborative evidence is additional evidence of a different character, to the same point.~~

Comment. The definition in Section 1839 is a confusing, incomplete, and inadequate statement of what constitutes "corroborative evidence." Its repeal will have no effect on the interpretation of the sections in various codes that require corroborating evidence, for the cases that interpret those sections do not cite or rely on Section 1839 in defining what constitutes corroborating evidence. See CALIFORNIA CRIMINAL LAW PRACTICE 473–477 (Cal. Cont. Ed. Bar 1964); WITKIN, CALIFORNIA EVIDENCE §§ 486–491 (1958); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 56–57 (1964). Moreover, *California Jury Instructions, Criminal* provides definitions of corroborating evidence derived from the case law that are more accurate and complete than Section 1839. See, *e.g.*, CALJIC (2d ed. 1958) Nos. 203 (Rev.) (possession of stolen property), 235 (Rev.) (possession of stolen property), 592-C (Rev.) (abortion), 766 (perjury), and 822 (Rev.) (corroboration of testimony of accomplices). See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions), supra*, at 56–57.

Section 1844 (Repealed)

SEC. 40. Section 1844 of the Code of Civil Procedure is repealed.

~~1844. ONE WITNESS SUFFICIENT TO PROVE A FACT. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.~~

Comment. The substance of Section 1844 is recodified as Evidence Code Section 411.

Section 1845 (Repealed)

SEC. 41. Section 1845 of the Code of Civil Procedure is repealed.

~~1845. TESTIMONY CONFINED TO PERSONAL KNOWLEDGE. A witness can testify of those facts only which he knows of his own knowledge, that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.~~

Comment. Section 1845 is superseded by Evidence Code Sections 702, 800–801, and 1200.

Section 1845.5 (Repealed)

SEC. 42. Section 1845.5 of the Code of Civil Procedure is repealed.

~~1845.5. In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to the value of the real property including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to highest and best use and market value~~

~~of the property sought to be condemned the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vicinity of the property sought to be condemned.~~

Comment. Section 1845.5 is unnecessary under the general rules relating to the examination of experts that are stated in Evidence Code Sections 801–803.

Section 1846 (Repealed)

SEC. 43. Section 1846 of the Code of Civil Procedure is repealed.

~~1846. TESTIMONY TO BE IN PRESENCE OF PERSONS AFFECTED. A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.~~

Comment. Section 1846 is recodified in substance as Evidence Code Sections 710 and 711.

Section 1847 (Repealed)

SEC. 44. Section 1847 of the Code of Civil Procedure is repealed.

~~1847. WITNESS PRESUMED TO SPEAK THE TRUTH. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.~~

Comment. Section 1847 is inconsistent with the definition of a presumption in Evidence Code Section 600. The right of a party to attack the credibility of a witness by any evidence relevant to that issue is assured by Evidence Code Sections 351, 780, and 785.

Section 1848 (Repealed)

SEC. 45. Section 1848 of the Code of Civil Procedure is repealed.

~~1848. The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another.~~

Comment. The meaning of Section 1848 is somewhat obscure. The Code Commissioners' Note indicates that the section may have been intended to exclude hearsay declarations except vicarious admissions of agents, partners, predecessors in interest, etc. If so, the section is grossly inaccurate because a wide variety of hearsay declarations are admissible without regard to any relationship between the declarant and the parties. To the extent that it deals with acts or omissions, it is also inaccurate because the admissibility of evidence of a person's act is not necessarily dependent on his relationship with a party. And even

some proceedings against one person may affect the rights and duties of persons who were not parties to that proceeding. See *Teitelbaum 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).

Section 1848 is unnecessary to assure the admissibility of vicarious admissions. See EVIDENCE CODE §§ 1222–1225. The principles of agency, partnership, joint obligation, etc., that the section purports to state are well-established principles of substantive law that exist independently of the section. Since it serves no useful purpose and is inaccurate and obscure in meaning, Section 1848 is repealed.

Section 1849 (Repealed)

SEC. 46. Section 1849 of the Code of Civil Procedure is repealed.

~~1849. DECLARATIONS OF PREDECESSOR IN TITLE EVIDENCE. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.~~

Comment. Section 1849 is superseded by Evidence Code Section 1225.

Section 1850 (Repealed)

SEC. 47. Section 1850 of the Code of Civil Procedure is repealed.

~~1850. DECLARATIONS WHICH ARE A PART OF THE TRANSACTION. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.~~

Comment. Insofar as Section 1850 relates to hearsay, it is superseded by Evidence Code Sections 1240 and 1241, which provide exceptions to the hearsay rule for contemporaneous and spontaneous declarations. Insofar as Section 1850 relates to declarations that are themselves material, the section is unnecessary because Evidence Code Sections 225 and 1200 make it clear that such declarations are not hearsay; hence, they are admissible under the general principle that relevant evidence is admissible. See EVIDENCE CODE §§ 210, 351.

Section 1851 (Repealed)

SEC. 48. Section 1851 of the Code of Civil Procedure is repealed.

~~1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.~~

Comment. Section 1851 is superseded by the exceptions to the hearsay rule stated in Evidence Code Sections 1224 and 1302.

No case has been.found in which the "for" provision of Section 1851 has been applied, and it is difficult to conceive of a case in which the

"for" provision might be applied. A statement by one primarily liable can be offered *against* the party secondarily liable under Section 1851 (and under Evidence Code Section 1224) because it would be admissible against the declarant as an admission. But a statement by one primarily liable could not be offered *for* the party secondarily liable under Section 1851 (or under Evidence Code Section 1224) because it would be inadmissible as self-serving hearsay if offered for the declarant. The "for" provision, therefore, does not appear in the superseding sections of the Evidence Code because it has no ascertainable meaning. See the discussion in *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).

Section 1852 (Repealed)

SEC. 49. Section 1852 of the Code of Civil Procedure is repealed.

~~1852. DECLARATION OF DECEDENT EVIDENCE OF PEDIGREE. The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.~~

Comment. Section 1852 is superseded by the exceptions to the hearsay rule stated in Article 11 (commencing with Section 1310) of Chapter 2 of Division 10 of the Evidence Code.

Section 1853 (Repealed)

SEC. 50. Section 1853 of the Code of Civil Procedure is repealed.

~~1853. DECLARATION OF DECEDENT EVIDENCE AGAINST HIS SUCCESSOR IN INTEREST. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.~~

Comment. Section 1853 is an imperfect statement of the declaration against interest exception to the hearsay rule and is superseded by Evidence Code Section 1230. See the *Comment* to that section.

Section 1854 (Repealed)

SEC. 51. Section 1854 of the Code of Civil Procedure is repealed.

~~1854. WHEN PART OF A TRANSACTION PROVED, THE WHOLE IS ADMISSIBLE. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.~~

Comment. Section 1854 is recodified as Evidence Code Section 356.

Section 1855 (Repealed)

SEC. 52. Section 1855 of the Code of Civil Procedure is repealed.

~~1855. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:~~

~~One—When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.~~

~~Two—When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.~~

~~Three—When the original is a record or other document in the custody of a public officer.~~

~~Four—When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute.~~

~~Five—When the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.~~

~~In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.~~

Comment. Section 1855 is superseded by Evidence Code Sections 1500–1510.

Section 1855a (Repealed)

SEC. 53. Section 1855a of the Code of Civil Procedure is repealed.

~~1855a. When, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; (b) any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of title, to real estate whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstracts and notes, or either, taken from such records in the preparation and upkeeping of its, or his, plant in the ordinary course of its business, the same may, without further proof, be admitted in evidence for the purpose aforesaid. No proof of the loss of the original document~~

~~or instrument shall be required other than the fact that the same is not known to the party desiring to prove its contents to be in existence; provided, nevertheless, that any party so desiring to use said evidence shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.~~

Comment. Section 1855a is recodified as Evidence Code Section 1601.

Section 1863 (Repealed)

SEC. 54. Section 1863 of the Code of Civil Procedure is repealed.

~~1863. PERSONS SKILLED MAY TESTIFY TO DECIPHER CHARACTERS. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the Court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.~~

Comment. Section 1863 is superseded by Evidence Code Section 753.

Section 1867 (Repealed)

SEC. 55. Section 1867 of the Code of Civil Procedure is repealed.

~~1867. MATERIAL ALLEGATION ONLY TO BE PROVED. None but a material allegation need be proved.~~

Comment. Section 1867 is based on the obsolete theory that some allegations are necessary that are not material, *i.e.*, essential to the claim or defense; it provides that only the material allegations need be proved. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1119-1121 (1964). Since Section 1867 is obsolete and is not a correct statement of existing law, it is repealed.

Section 1868 (Repealed)

SEC. 56. Section 1868 of the Code of Civil Procedure is repealed.

~~1868. EVIDENCE CONFINED TO MATERIAL ALLEGATION. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the Court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.~~

Comment. Section 1868 is superseded by Evidence Code Sections 210, 350, and 352.

Section 1869 (Repealed)

SEC. 57. Section 1869 of the Code of Civil Procedure is repealed.

~~1869. AFFIRMATIVE ONLY TO BE PROVED. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.~~

Comment. Section 1869 is inconsistent with and superseded by Evidence Code Section 500. Moreover, it is an inaccurate statement of the manner in which the burden of proof is allocated under existing law. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1122-1124 (1964).

Section 1870 (Repealed)

SEC. 58. Section 1870 of the Code of Civil Procedure is repealed.

~~1870. FACTS WHICH MAY BE PROVED ON TRIAL. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:~~

~~1. The precise fact in dispute;~~

~~2. The act, declaration, or omission of a party, as evidence against such party;~~

~~3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;~~

~~4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;~~

~~5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;~~

~~6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;~~

~~7. The act, declaration, or omission forming part of a transaction, as explained in Section 1850;~~

~~8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;~~

~~9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;~~

~~10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;~~

~~11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;~~

~~12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;~~

~~13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;~~

~~14. The contents of a writing, when oral evidence thereof is admissible;~~

~~15. Any other facts from which the facts in issue are presumed or are logically inferable;~~

~~16. Such facts as serve to show the credibility of a witness, as explained in Section 1847.~~

Comment. Section 1870 is superseded by the provisions of the Evidence Code indicated below:

Section 1870 (subdivision)	*Evidence Code (section)*
1	210, 351
2	1220
3	1221
4 (first clause)	1310, 1311
4 (second clause)	1230
4 (third clause)	1242
5 (first sentence)	1222
5 (second sentence)	1224, 1225
6	1223
7	1240, 1241 (See also the Law Revision Commission's *Comment* to CODE CIV. PROC. § 1850)
8	1290–1292
9 (first clause)	720, 800, 801, 1416
9 (second clause)	720, 801
10	870
11	1313, 1314, 1320–1322
12	Unnecessary (See EVIDENCE CODE § 351; CIV. CODE §§ 1644, 1645; CODE CIV. PROC. § 1861. See also COM. CODE § 2208)
13	1312, 1313, 1320–1322
14	1500–1510
15	210, 351
16	210, 351, 780, 785

Section 1871 (Repealed)

SEC. 59. Section 1871 of the Code of Civil Procedure is repealed.

~~1871. Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action~~

~~or proceeding, civil, criminal, or juvenile court, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate, render a report as may be ordered by the court, and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable.~~

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

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

~~Any expert so appointed by the court may be called and examined as a witness by any party to such action or proceeding or by the court itself; but, when called, shall be subject to examination and objection as to his competency and qualifications as an expert witness and as to his bias. Such expert though called and examined by the court, may be cross-examined by the several parties to an action or proceeding in such order as the court may direct. When such witness is called and examined by the court, the several parties shall have the same right to object to the questions asked and the evidence adduced as though such witness were called and examined by an adverse party.~~

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

Comment. Section 1871 is recodified in the Evidence Code as indicated below:

Section 1871 (paragraph)	*Evidence Code (section)*
1	730
2	731
3	733
4	732
5	723

Section 1872 (Repealed)

SEC. 60. Section 1872 of the Code of Civil Procedure is repealed.

~~1872. Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel.~~

Comment. Section 1872 is recodified in Evidence Code Sections 721 and 802.

Section 1875 (Repealed)

SEC. 61. Section 1875 of the Code of Civil Procedure is repealed.

~~1875. Courts take judicial notice of the following:~~

~~1. The true signification of all English words and phrases, and of all legal expressions;~~

~~2. Whatever is established by law;~~

~~3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states;~~

~~4. The law and statutes of foreign countries and of political subdivisions of foreign countries; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable notice shall be given to the other parties to the action in the pleadings or otherwise;~~

~~5. The seals of all the courts of this State and of the United States;~~

~~6. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;~~

~~7. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;~~

~~8. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;~~

~~9. The laws of nature, the measure of time, and the geographical divisions and political history of the world.~~

~~In all these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 of this section, the court may also resort to the~~

~~advice of persons learned in the subject matter, which advice, if not received in open court, shall be in writing and made a part of the record in the action or proceeding.~~

~~If a court is unable to determine what the law of a foreign country or a political subdivision of a foreign country is, the court may, as the ends of justice require, either apply the law of this State if it can do so consistently with the Constitutions of this State and of the United States or dismiss the action without prejudice.~~

Comment. Section 1875 is superseded by the provisions of the Evidence Code indicated below.

Section 1875 (subdivision)	*Evidence Code (section)*
1	451(e)
2	451(a)–(d), 452(a)–(f)
3	451(a)–(d), 452(a)–(c), (e)
4	452(f), 453
5	1452
6, 7, and 8	1452–1454 (official signatures and seals); 451(f), 452(g) and (h) (remainder of subdivisions)
9	451(f), 452(g) and (h)
Next to last paragraph	454, 455
Last paragraph	311

Section 1879 (Repealed)

SEC. 62. Section 1879 of the Code of Civil Procedure is repealed.

~~1879. ALL PERSONS CAPABLE OF PERCEPTION AND COMMUNICATION MAY BE WITNESSES. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case the credibility of the witness may be drawn in question, as provided in Section 1847.~~

Comment. Insofar as Section 1879 declares all persons to be competent witnesses, it is superseded by Evidence Code Section 700; insofar as it requires perception and recollection on the part of the witness, it is superseded in part by Evidence Code Sections 701 and 702. Insofar as it is not superseded by the Evidence Code, Section 1879 treats matters of credibility as matters of competency and is, therefore, disapproved.

Section 1880 (Repealed)

SEC. 63. Section 1880 of the Code of Civil Procedure is repealed.

~~1880. The following persons cannot be witnesses:~~

~~1. Those who are of unsound mind at the time of their production for examination.~~

~~2. 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.~~

~~3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.~~

Comment. Subdivisions 1 and 2 of Section 1880 are superseded by Evidence Code Section 701.

Subdivision 3 of Section 1880 is the California version of the so-called "dead man statute." Dead man statutes provide that one engaged in litigation with a decedent's estate cannot be a witness as to any matter or fact occurring before the decedent's death. These statutes appear to rest on the belief that to permit the survivor to testify in the proceeding would be unfair because the other party to the transaction is not available to testify. Because the dead cannot speak, the living are also silenced out of a desire to treat both sides equally. See generally *Moul v. McVey,* 49 Cal. App.2d 101, 121 P.2d 83 (1942); 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to the Dead Man Statute* at D-1 (1957).

In 1957, the Commission recommended the repeal of the dead man statute and the enactment of a statute providing that, in certain specified types of actions, written or oral statements of a deceased person made upon his personal knowledge were not to be excluded as hearsay. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *supra,* at D-1 *et seq.* (1957). The 1957 recommendation has not been enacted as law. For the legislative history of this measure, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES IX (1957).

Although the dead man statute undoubtedly cuts off some fictitious claims, it results in the denial of just claims in a substantial number of cases. As the Commission's 1957 recommendation and study demonstrates, the statute balances the scales of justice unfairly in favor of decedents' estates. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *supra,* at D-6, D-43 to D-45 (1957). See also the *Comment* to EVIDENCE CODE § 1261. Moreover, the dead man statute has been productive of much litigation; yet, many questions as to its meaning and effect are still unanswered. For these reasons, the Commission again recommends that the dead man statute be repealed.

However, repeal of the dead man statute alone would tip the scales unfairly *against* decedents' estates by subjecting them to claims which could have been defeated, wholly or in part, if the decedent had lived to tell his story. If the living are to be permitted to testify, some steps ought to be taken to permit the decedent to testify, so to speak, from the grave. This is accomplished by relaxing the hearsay rule in Evidence Code Section 1261 to provide a limited hearsay exception for a statement of a deceased person offered in an action against an executor or administrator upon a claim or demand against the estate of such deceased person. This hearsay exception is more limited than that recommended in 1957 and will, it is believed, meet most of the objections made to the 1957 recommendation.

Section 1881 (Repealed)

SEC. 64. Section 1881 of the Code of Civil Procedure is repealed.

~~1881. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:~~

~~1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other; or in an action for damages against another person for adultery committed by either husband or wife; or in a hearing held to determine the mental competency or condition of either husband or wife.~~

~~2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.~~

~~3. A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.~~

~~4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; provided further, that after the death of the patient, the executor of his will, or the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give such consent, in any action or proceeding brought to recover~~

~~damages on account of the death of the patient; provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian, shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased.~~

~~5. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.~~

~~6. A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.~~

~~Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.~~

Comment. Section 1881 is superseded by the provisions of the Evidence Code indicated below.

Subdivision 1

Subdivision 1 of Section 1881 is superseded by Evidence Code Sections 970-973 and 980-987. Under this subdivision and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, to prevent his spouse from testifying for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

The "for" privilege. The Commission has concluded that the marital testimonial privilege provided by existing law as to testimony by one spouse *for* the other should be abolished in both civil and criminal actions. There would appear to be no need for this privilege, now given to a party to an action, not to call his spouse to testify in his *favor*. If a case can be imagined in which a party would wish to avail himself of this privilege, he could achieve the same result by simply not calling his spouse to the stand. Nor does it seem desirable to continue the present privilege of the nonparty spouse not to testify in *favor* of the party spouse in a criminal action. It is difficult to imagine a case in which this privilege would be claimed for other than mercenary or spiteful motives, and it precludes access to evidence which might save an innocent person from conviction.

The "against" privilege. Under existing law, either spouse may claim the privilege to prevent one spouse from testifying against the other in a criminal action, and the party spouse may claim the privilege to prevent his spouse from testifying against him in a civil action. The privilege under Evidence Code Sections 970 and 971 is given exclusively to the witness spouse because he, instead of the party spouse, is more likely to determine whether to claim the privilege on the basis of the probable effect of his testimony on the marital relationship. Because of his interest in the outcome of the action, a party spouse would be under considerable temptation to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse probably would not. Illustrative of the possible misuse of the existing privilege is the recent case of *People v. Ward,* 50 Cal.2d 702, 328 P.2d 777 (1958), involving a defendant who murdered his wife's mother and 13-year-old sister. He had threatened to murder his wife, and it seems likely that he would have done so had she not fled. The marital relationship was as thoroughly shattered as it could have been; yet, the defendant was entitled to invoke the privilege to prevent his wife from testifying. In such a situation, the privilege does not serve at all its true purpose of preserving a marital relationship from disruption; it serves only as an obstacle to the administration of justice.

Subdivisions 2–6

Subdivisions 2–6 of Section 1881 are superseded by provisions of the Evidence Code indicated below:

Section 1881 (subdivision)	*Evidence Code (sections)*
2	950–962
3	1030–1034
4	990–1006, 1010–1026
5	1040–1042
6	1070–1073

Section 1883 (Repealed)

SEC. 65. Section 1883 of the Code of Civil Procedure is repealed.

~~1883. JUDGE OR A JUROR MAY BE WITNESS. The Judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another Judge or jury.~~

Comment. Section 1883 is superseded by Evidence Code Sections 703 and 704.

Section 1884 (Repealed)

SEC. 66. Section 1884 of the Code of Civil Procedure is repealed.

~~1884. WHEN AN INTERPRETER TO BE SWORN. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any Court or Judge to appear before such Court or Judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any~~

~~person so summoned who fails to attend at the time and place named in the summons, is guilty of a contempt.~~

Comment. Section 1884 is superseded by Evidence Code Section 752.

Section 1885 (Repealed)

SEC. 67. Section 1885 of the Code of Civil Procedure is repealed.

~~1885. (a) In all criminal prosecutions, where the accused is a deaf person, he shall have all of the proceedings of the trial interpreted to him in a language that he can understand by a qualified interpreter appointed by the court.~~

~~(b) In all cases where the mental condition of a person is being considered and where such person may be committed to a mental institution, and where such person is a deaf person, 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.~~

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

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

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

Comment. Section 1885 is recodified as Evidence Code Sections 751 and 754.

Section 1893 (Amended)

SEC. 68. Section 1893 of the Code of Civil Procedure is amended to read:

1893. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor; ~~and such copy is admissible as evidence in like cases and with like effect as the original writing~~.

Comment. The language deleted from Section 1893 is unnecessary in view of Evidence Code Sections 1506 and 1530.

Section 1901 (Repealed)

SEC. 69. Section 1901 of the Code of Civil Procedure is repealed.

~~1901. A copy of a public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such writing.~~

Comment. Section 1901 is superseded by Evidence Code Section 1530.

Section 1903 (Repealed)

SEC. 70. Section 1903 of the Code of Civil Procedure is repealed.

~~1903. RECITALS IN STATUTES, HOW FAR EVIDENCE. The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.~~

Comment. Section 1903 is unnecessary to support the validity of statutes, for the California courts have said that statutes are "presumed" to be constitutional. *In re Cregler*, 56 Cal.2d 308, 311, 14 Cal. Rptr. 289, 291, 363 P.2d 305, 307 (1961). If Section 1903 is deemed to have an evidentiary effect, it is undesirable to the extent that it indicates that the Legislature may exercise the judicial power of making findings on controverted facts and that such findings are conclusive. Since the section is unnecessary to accomplish its essential purpose, it is repealed. This repeal will not change the law of California relating to the construction or validity of statutes because the courts have not placed that law upon the footing of this section.

Section 1905 (Repealed)

SEC. 71. Section 1905 of the Code of Civil Procedure is repealed.

~~1905. RECORD, HOW AUTHENTICATED AS EVIDENCE. A judicial record of this State, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the Clerk or other person having the legal custody thereof. That of a sister State may be proved by the attestation of the Clerk and the seal of the Court annexed, if there be a Clerk and seal, together with a certificate of the Chief Judge or presiding magistrate, that the attestation is in due form.~~

Comment. Insofar as Section 1905 provides for the proof of original judicial records, it is superseded by Evidence Code Sections 1452 and 1453 which provide a presumption of authenticity for official seals and signatures affixed to official documents. Insofar as Section 1905 provides for the proof of copies of judicial records, it is superseded by Evidence Code Section 1530 which relates to all official writings. To the extent that Section 1905 provides an exception to the best evidence rule, it is superseded by Evidence Code Section 1506.

Section 1906 (Repealed)

SEC. 72. Section 1906 of the Code of Civil Procedure is repealed.

~~1906. A judicial record of a foreign country may be proved by the attestation of the Clerk, with the seal of the Court annexed, if there be a Clerk and a seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the Chief Judge, or presid-~~

~~ing magistrate, that the person making the attestation is the Clerk of the Court or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the Chief Judge or presiding magistrate must be authenticated by the certificate of the Minister or Embassador, or a Consul, Vice Consul, or Consular Agent of the United States in such foreign country.~~

Comment. Section 1906 is superseded by Evidence Code Sections 1454 and 1530 which provide a much simpler method of authenticating originals and copies of foreign official writings than that provided in Section 1906. To the extent that Section 1906 provides an exception to the best evidence rule, it is superseded by Evidence Code Section 1506.

Section 1907 (Repealed)

SEC. 73. Section 1907 of the Code of Civil Procedure is repealed.

~~1907. ORAL EVIDENCE OF A FOREIGN RECORD. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:~~

~~1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;~~

~~2. That such original was in the custody of the Clerk of the Court or other legal keeper of the same; and,~~

~~3. That the copy is duly attested by a seal which is proved to be the seal of the Court where the record remains, if it be the record of a Court; or if there be no such seal, or if it be not a record of a Court, by the signature of the legal keeper of the original.~~

Comment. To the extent that Section 1907 permits a copy of a foreign record to be authenticated by direct testimony that it is such a copy, it is superseded by Evidence Code Sections 1400, 1401, and 1410 which permit any writing to be authenticated by evidence sufficient to sustain a finding of authenticity (which, of course, would include direct testimony to that effect). To the extent that Section 1907 requires a properly attested copy to be authenticated by direct testimony, it is inconsistent with and superseded by Evidence Code Section 1530 which, by providing a presumption of authenticity for properly attested copies of official writings, dispenses with the need for authenticating testimony. To the extent that Section 1907 provides an exception to the best evidence rule, it is superseded by Evidence Code Section 1506.

Section 1908.5 (Added)

SEC. 74. Section 1908.5 is added to the Code of Civil Procedure, to read:

1908.5. When a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

Comment. Section 1908.5 recodifies the rule of pleading stated in subdivision 6 of Section 1962 of the Code of Civil Procedure. See the Law Revision Commission's *Comment* to that section.

Section 1918 (Repealed)

SEC. 75. Section 1918 of the Code of Civil Procedure is repealed.

~~1918. Manner of proving other official documents. Other official documents may be proved, as follows:~~

~~1. Acts of the executive of this state, by the records of the state department of the state; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the Legislature or congress, or either house thereof.~~

~~2. The proceedings of the Legislature of this state, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.~~

~~3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.~~

~~4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.~~

~~5. Acts of a county or municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such county or corporation.~~

~~6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.~~

~~7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.~~

~~8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and the copy is duly certified by the officer having the legal custody of the original, provided, that in any foreign country which is composed of or divided into sovereign and/or independent states or other political subdivisions, the certificate of the country or sovereign herein mentioned may be executed by either the chief executive or the head of the state department of the state or other political subdivision of such~~

~~foreign country in which said documents are lodged or kept, under the seal of such state or other political subdivision; and provided, further, that the signature of the sovereign of a foreign country or the signature of the chief executive or of the head of the state department of a state or political subdivision of a foreign country must be authenticated by the certificate of the minister or ambassador or a consul, vice consul or consular agent of the United States in such foreign country.~~

~~9. Documents in the departments of the United States government, by the certificates of the legal custodian thereof.~~

Comment. Section 1918 relates to hearsay, authentication of official records, and the best evidence rule. To the extent that it permits the acts of public officers to be proved by official records, it relates to hearsay and is superseded by the hearsay exceptions contained in Evidence Code Sections 1270–1271 and 1280–1284. To the extent that Section 1918 makes officially published books and documents admissible without testimonial proof of authenticity, it is superseded by Evidence Code Sections 644 and 1530. To the extent that Section 1918 provides the method of authenticating original official writings, it is superseded by Evidence Code Sections 1400–1402 (relating to all writings) and by Evidence Code Sections 1452–1454 (relating to official writings). To the extent that Section 1918 permits original official writings to be proved by certified or attested copies, it is superseded by Evidence Code Sections 1506 (providing an exception to the best evidence rule) and 1530 (providing a presumption of authenticity for certified or attested official writings).

Subdivision 4 of Section 1918 provides for the authentication of a published foreign official journal by evidence that it was commonly received in the foreign country as published by the requisite authority. Although no similar provision appears in the Evidence Code, such evidence may be used to authenticate official writings under the general provisions of Sections 1400 and 1410, which provide that the requirement of authentication may be met by "evidence sufficient to sustain a finding of the authenticity of the writing."

Section 1919 (Repealed)

SEC. 76. Section 1919 of the Code of Civil Procedure is repealed.

~~1919. PUBLIC RECORD OF PRIVATE WRITING EVIDENCE. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.~~

Comment. Section 1919 is superseded by Evidence Code Sections 1452–1454 (relating to any official writings, including original public records), 1507 (providing a best evidence rule exception for copies of recorded writings), and 1530 (providing for proof of original recorded writings by an attested or certified copy). See also EVIDENCE CODE §§ 1532 and 1600, which prescribe the evidentiary effect of the official record of a private writing.

Section 1919a (Repealed)

SEC. 77. Section 1919a of the Code of Civil Procedure is repealed.

~~1919a. Church records and/or registers and/or entries therefrom and/or certificates kept or issued by a clergyman or other person in accordance with law or in accordance with the rules, regulations and/or requirements of a religious denomination, society or church, shall be competent evidence of the facts recited therein, if properly proved, attested and authenticated as provided in Section 1919b.~~

Comment. Section 1919a provides that church records or certificates issued by a church official are competent evidence of the facts recited therein if the complex authentication requirements of Section 1919b are met. Under Evidence Code Section 1271, church records are admissible to prove the facts recited therein to the same extent that business records are admissible. In addition, Evidence Code Sections 1315 and 1316 provide that church records and certificates (as well as comparable certificates issued by civil officers) are admissible to prove facts of family history that are recited therein. The complex authentication procedures of Section 1919b are not continued in the Evidence Code. Church records and certificates may be authenticated in the way that other private and business writings may be authenticated.

Section 1919b (Repealed)

SEC. 78. Section 1919b of the Code of Civil Procedure is repealed.

~~1919b. Church records or registers or entries therefrom or certificates, of the character mentioned in Section 1919a, in order to be admissible in evidence, shall be proved by the original or by a copy thereof certified by the clergyman or other person having the custody of the original, provided that the genuineness of the signature of the clergyman or other person issuing such certificate or certifying to a copy of the same or of such record or register or of entries therefrom, and the fact that he is the person having the custody of such record or register and/or certificate, and that such certificate or copy of certificate, record, register or entries therefrom, was duly issued by the person issuing the same shall be attested either by the bishop, chief priest, president, district superintendent or other presiding officer of such religious denomination, society or church, under his seal, if he has a seal, or by a notary public or other civil officer authorized by law to take acknowledgments or to issue certificates as to the genuineness of signatures and/or the correctness of documents or of copies thereof, under his seal, if he has a seal; provided, further, that the fact that such record, register and/or certificate is a document kept in accordance with law or in accordance with the rules, regulations and/or requirements of a religious denomination, society or church may be proved by the certificate of such bishop, chief priest, president, district superintendent or other presiding officer of such religious denomination, society or church or of a notary public or other civil officer~~

~~authorized by law to take acknowledgments and/or to issue certificates as to the genuineness of signatures and/or the correctness of documents or of copies thereof, under his seal, if he has a seal; and provided, further, that the genuineness of the signature and the status of such bishop, chief priest, president, district superintendent or other presiding officer of such religious denomination, society or church, and/or of such notary public or other civil officer shall, in this state or in any other state in the United States, be authenticated by the certificate of the secretary of state of such state, and shall, in a foreign country, be authenticated by the certificate of the sovereign or other chief executive of such foreign country or the head of the state department thereof, under the seal of such foreign country or of such state department, and that the signature of such sovereign, chief executive or of the head of the state department of such foreign country must be authenticated by the certificate of the minister or ambassador or a consul, vice consul or consular agent of the United States in such foreign country; but if such foreign country be one composed of or divided into sovereign and/or independent states or other political subdivisions, the certificate of the chief executive or of the head of the state department of such foreign country herein referred to, may be executed by the chief executive or by the head of the state department of the state or other political subdivision of such foreign country, in which said certificates, records, and/or registers are lodged or kept, under the seal of such state or other political subdivision, and the signature of the chief executive or of the head of the state department of such state or other political subdivision shall be authenticated in the manner hereinbefore provided for the authentication of the signature of the sovereign, chief executive or head of the state department of a foreign country.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1919a.

Section 1920 (Repealed)

SEC. 79. Section 1920 of the Code of Civil Procedure is repealed.

~~1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.~~

Comment. Section 1920 is superseded by the business records exception contained in Evidence Code Sections 1270 and 1271, by the exception to the hearsay rule for official records and other official writings contained in Evidence Code Sections 1280–1284, and by various specific exceptions to the hearsay rule that will continue to exist under various sections of the Evidence Code and other codes. The broad language of Section 1920 has been limited in Evidence Code Section 1280 to reflect existing law. See the *Comment* to EVIDENCE CODE § 1280. See also

EVIDENCE CODE § 664 (presumption that official duty has been regularly performed).

Section 1920a (Repealed)

SEC. 80. Section 1920a of the Code of Civil Procedure is repealed.

~~1920a. Photographic copies of the records of the Department of Motor Vehicles when certified by the department, shall be admitted in evidence with the same force and effect as the original records.~~

Comment. Section 1920a is unnecessary in view of Evidence Code Sections 1506 and 1530. See also EVIDENCE CODE § 1550.

Section 1920b (Repealed)

SEC. 81. Section 1920b of the Code of Civil Procedure is repealed.

~~1920b. A print, whether enlarged or not, from any photographic film, including any photographic plate, microphotographic film, or photostatic negative, of any original record, document, instrument, plan, book or paper may be used in all instances that the original record, document, instrument, plan, book or paper might have been used, and shall have the full force and effect of said original for all purposes; provided, that at the time of the taking of said photographic film, microphotographic, photostatic or similar reproduction, the person or officer under whose direction and control the same was taken, attached thereto, or to the sealed container in which the same was placed and has been kept, or incorporated in said photographic film, microphotographic, photostatic or similar reproduction, a certification complying with the provisions of Section 1923 of this code and stating the date on which, and the fact that, the same was so taken under his direction and control.~~

Comment. Section 1920b is recodified as Evidence Code Section 1551.

Section 1921 (Repealed)

SEC. 82. Section 1921 of the Code of Civil Procedure is repealed.

~~1921. JUSTICE'S JUDGMENT IN OTHER STATES, HOW PROVED. A transcript from the record or docket of a Justice of the Peace of a sister State, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the Justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.~~

Comment. Sections 1921 and 1922 are superseded by Evidence Code Sections 1270-1271, 1280, 1452, 1453, 1506, and 1530.

Section 1922 (Repealed)

SEC. 83. Section 1922 of the Code of Civil Procedure is repealed.

~~1922. SAME. There must be attached to the transcript a certificate of the Justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the Clerk or prothonotary of the county in which the Justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the Court of Common Pleas or County Court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a Justice of the Peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the Justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1921.

Section 1923 (Repealed)

SEC. 84. Section 1923 of the Code of Civil Procedure is repealed.

~~1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the Clerk of a Court having a seal, under the seal of such Court.~~

Comment. Section 1923 is superseded by Evidence Code Section 1531. See the *Comment* to that section.

Section 1924 (Repealed)

SEC. 85. Section 1924 of the Code of Civil Procedure is repealed.

~~1924. The provisions of the preceding sections of this Article applicable to the public writings of a sister State, are equally applicable to the public writings of the United States, or a Territory of the United States.~~

Comment. Section 1924 is unnecessary because the sections to which it relates are repealed.

Section 1925 (Repealed)

SEC. 86. Section 1925 of the Code of Civil Procedure is repealed.

~~1925. CERTIFICATES OF PURCHASE PRIMARY EVIDENCE OF OWNERSHIP. A certificate of purchase, or of location, of any lands in this State, issued or made in pursuance of any law of the United States, or of this State, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued,~~

~~the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.~~

Comment. Section 1925 is recodified as Evidence Code Section 1604.

Section 1926 (Repealed)

SEC. 87. Section 1926 of the Code of Civil Procedure is repealed.

~~1926. An entry made by an officer, or Board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.~~

Comment. Section 1926 is superseded by Evidence Code Sections 1270-1271 and 1280-1284. See the *Comment* to EVIDENCE CODE § 1280 for a comparison of the existing law and the provisions of the Evidence Code.

Section 1927 (Repealed)

SEC. 88. Section 1927 of the Code of Civil Procedure is repealed.

~~1927. Whenever any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be prima facie evidence of the date of such location.~~

Comment. Section 1927 is recodified as Evidence Code Section 1602.

Section 1927.5 (Repealed)

SEC. 89. Section 1927.5 of the Code of Civil Procedure is repealed.

~~1927.5. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as prima facie evidence in all the courts of this State with like force and effect as the originals and without proving the execution of such originals.~~

Comment. Section 1927.5 is recodified as Evidence Code Section 1605.

Section 1928 (Repealed)

SEC. 90. Section 1928 of the Code of Civil Procedure is repealed.

~~1928. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county~~

~~wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.~~

Comment. Section 1928 is recodified as Evidence Code Section 1603.

Sections 1928.1-1928.4 (Repealed)

SEC. 91. Article 2.1 (commencing with Section 1928.1) of Chapter 3 of Title 2 of Part IV of the Code of Civil Procedure is repealed.

Comment. Article 2.1 of Chapter 3, Title 2, Part 4 of the Code of Civil Procedure consists of Sections 1928.1–1928.4. See the Law Revision Commission's *Comments* to these sections.

Section 1928.1 (Repealed)

~~1928.1. A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P. L. 408, Ch. 371, 2d Sess. 78th Cong., 50 U. S. C. App. Supp. 1001-17), as it read on May 3, 1945, or is thereafter amended, or a duly certified copy of such finding, shall be received in any court, office, or other place in this State as evidence of the death of the person therein found to be dead, and the date, circumstances, and place of his disappearance.~~

Comment. Section 1928.1 is recodified as Evidence Code Section 1282.

Section 1928.2 (Repealed)

~~1928.2. An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by any law of the United States to make such report or record, shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive, as the case may be.~~

Comment. Section 1928.2 is recodified as Evidence Code Section 1283. See also EVIDENCE CODE § 1530 (purported copy of writing in custody of public employee).

Section 1928.3 (Repealed)

~~1928.3. For the purposes of this article any finding, report, or record, or duly certified copy thereof, purporting to have been signed by an officer or employee of the United States described in this article shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing such report or record shall prima~~

~~facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify it, such certified copy shall be prima facie evidence of his authority so to certify.~~

Comment. Section 1928.3 is unnecessary in view of Evidence Code Sections 1452, 1453, and 1530.

Section 1928.4 (Repealed)

~~1928.4. If any provision of this article or its application to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.~~

Comment. Section 1928.4 is unnecessary in view of Evidence Code Section 3.

Section 1936 (Repealed)

SEC. 92. Section 1936 of the Code of Civil Procedure is repealed.

~~1936. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.~~

Comment. Section 1936 is recodified as Evidence Code Section 1341.

Section 1936.1 (Repealed)

SEC. 93. Section 1936.1 of the Code of Civil Procedure is repealed.

~~1936.1. In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to said purpose. The written records of interviews, reports, statements or memoranda of such in-hospital medical staff committees relating to such medical studies shall be subject to Sections 2016 and 2036 of this code relating to discovery proceedings, but shall not be admitted as evidence in any action of any kind in any court or before any administrative body, agency or person; provided, however, that the admissibility in evidence of the original medical records of any patient shall not be affected by this section.~~

~~This section shall not be applicable to evidence which is material and relevant to a criminal proceeding.~~

Comment. Section 1936.1 is recodified as Evidence Code Section 1156.

Section 1937 (Repealed)

SEC. 94. Section 1937 of the Code of Civil Procedure is repealed.

~~1937. ORIGINAL WRITING TO BE PRODUCED OR ACCOUNTED FOR. The original writing must be produced and proved, except as provided in Sections 1855 and 1919. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in Section 1855.~~

Comment. Sections 1937, 1938, and 1939 relate to the best evidence rule and are superseded by Evidence Code Sections 1500-1510.

Section 1938 (Repealed)

SEC. 95. Section 1938 of the Code of Civil Procedure is repealed.

~~1938. WHEN IN POSSESSION OF ADVERSE PARTY, NOTICE TO BE GIVEN. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1937.

Section 1939 (Repealed)

SEC. 96. Section 1939 of the Code of Civil Procedure is repealed.

~~1939. WRITINGS CALLED FOR AND INSPECTED MAY BE WITHHELD. Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1937.

Section 1940 (Repealed)

SEC. 97. Section 1940 of the Code of Civil Procedure is repealed.

~~1940. Any writing may be proved either:~~

~~One—By any one who saw the writing executed; or,~~

~~Two—By evidence of the genuineness of the handwriting of the maker; or,~~

~~Three—By a subscribing witness.~~

Comment. Section 1940 is recodified as Evidence Code Sections 1413 and 1415.

Section 1941 (Repealed)

SEC. 98. Section 1941 of the Code of Civil Procedure is repealed.

~~1941. OTHER WITNESSES MAY ALSO TESTIFY. If the subscribing witness denies or does not recollect the execution of~~

~~the writing, its execution may still be proved by other evidence.~~

Comment. Section 1941 is recodified in substance as Evidence Code Section 1412.

Section 1942 (Repealed)

SEC. 99. Section 1942 of the Code of Civil Procedure is repealed.

~~1942. WHEN EVIDENCE OF EXECUTION NOT NECESSARY. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution no other evidence of the execution need be given, when the instrument is one mentioned in Section 1945, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.~~

Comment. Section 1942 is recodified in substance as Evidence Code Section 1414.

Section 1943 (Repealed)

SEC. 100. Section 1943 of the Code of Civil Procedure is repealed.

~~1943. EVIDENCE OF HANDWRITING. The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.~~

Comment. Section 1943 is recodified in substance in Evidence Code Section 1416.

Section 1944 (Repealed)

SEC. 101. Section 1944 of the Code of Civil Procedure is repealed.

~~1944. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the Judge.~~

Comment. Section 1944 is recodified in substance in Evidence Code Sections 1417 and 1418.

Section 1945 (Repealed)

SEC. 102. Section 1945 of the Code of Civil Procedure is repealed.

~~1945. SAME. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.~~

Comment. Section 1945 is recodified as Evidence Code Section 1419.

Section 1946 (Repealed)

SEC. 103. Section 1946 of the Code of Civil Procedure is repealed.

~~1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:~~

~~One—When the entry was made against the interest of the person making it.~~

~~Two—When it was made in a professional capacity and in the ordinary course of professional conduct.~~

~~Three—When it was made in the performance of a duty specially enjoined by law.~~

Comment. The first subdivision of Section 1946 is superseded by the declaration against interest exception to the hearsay rule contained in Evidence Code Section 1230; the second subdivision is superseded by the business records exception contained in Evidence Code Sections 1270 and 1271; and the third subdivision is superseded by the business records exception contained in Evidence Code Sections 1270 and 1271, the official records exceptions contained in Evidence Code Sections 1280-1284, and the various other exceptions to the hearsay rule contained elsewhere in the Evidence Code and in other codes.

Section 1947 (Repealed)

SEC. 104. Section 1947 of the Code of Civil Procedure is repealed.

~~1947. COPIES OF ENTRIES ALSO ALLOWED. When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals.~~

Comment. Section 1947 was a necessary provision when the only hearsay exception for business records was the common law "shop book" rule. That rule required that an entry be an original entry in order to qualify for admission in evidence. The business records exception to the hearsay rule contained in Evidence Code Sections 1270 and 1271 does not require that the entry be an original entry so long as it was made in the regular course of the business at or near the time of the act, condition, or event recorded. As Section 1947 no longer has any significant meaning, it is repealed.

Section 1948 (Repealed)

SEC. 105. Section 1948 of the Code of Civil Procedure is repealed.

~~1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property.~~

Comment. Section 1948 is recodified in substance as Evidence Code Section 1451.

Section 1951 (Repealed)

SEC. 106. Section 1951 of the Code of Civil Procedure is repealed.

~~1951. Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.~~

Comment. Section 1951 is superseded by Evidence Code Sections 1451, 1532, and 1600.

Sections 1953e-1953h (Repealed)

SEC. 107. Article 5 (commencing with Section 1953e) of Chapter 3 of Title 2 of Part IV of the Code of Civil Procedure is repealed.

~~1953e. The term "business" as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.~~

~~1953f. A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.~~

~~1953f.5. Subject to the conditions imposed by Section 1953f, open book accounts in ledgers, whether bound or unbound, shall be competent evidence.~~

~~1953g. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.~~

~~1953h. This article may be cited as the Uniform Business Records as Evidence Act.~~

Comment. Article 5 of Chapter 3 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1953e-1953h. These sections, which constitute the Uniform Business Records as Evidence Act, are recodified as Evidence Code Sections 1270-1271. Sections 1270-1271 do not, however, include the language of Section 1953f.5, which was added to the Code of Civil Procedure in 1959. Section 1953f.5 is not in the Uniform Act, and it inadequately attempts to make explicit the liberal case law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf, or some other form. The case law rule is satisfactory, and Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evi-*

dence (Article VIII. Hearsay Evidence), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES *Appendix* at 516-517 (1964).

Sections 1953i-1953l (Repealed)

SEC. 108. Article 6 (commencing with Section 1953i) of Chapter 3 of Title 2 of Part IV of the Code of Civil Procedure is repealed.

~~1953i. If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.~~

~~1953j. This article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it.~~

~~1953k. This article may be cited as the Uniform Photographic Copies of Business and Public Records as Evidence Act.~~

~~1953l. Nothing in this article shall affect the admissibility of any evidence permitted by Sections 1920a and 1920b of this code.~~

Comment. Article 6 of Chapter 3 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1953i-1953*l*. These sections, which comprise the Uniform Photographic Copies of Business and Public Records as Evidence Act, are recodified as Evidence Code Section 1550.

Section 1954 (Repealed)

SEC. 109. Chapter 4 (consisting of Section 1954) of Title 2 of Part IV of the Code of Civil Procedure is repealed.

~~1954. MATERIAL OBJECTS. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the Court.~~

Comment. Section 1954 is unnecessary in light of Evidence Code Sections 140, 210, 351, and 352.

Sections 1957-1963 (Repealed)

SEC. 110. Chapter 5 (commencing with Section 1957) of Title 2 of Part IV of the Code of Civil Procedure is repealed.

Comment. Chapter 5 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1957-1963. See the Law Revision Commission's *Comments* to these sections.

Section 1957 (Repealed)

~~1957. INDIRECT EVIDENCE CLASSIFIED. Indirect evidence is of two kinds:~~

~~1. Inferences; and,~~

~~2. Presumptions.~~

Comment. Section 1957 is inconsistent with Evidence Code Sections 140 (defining "evidence") and 600 (defining "presumption" and "inference"). See the *Comments* to EVIDENCE CODE §§ 140 and 600.

Section 1958 (Repealed)

~~1958. INFERENCE DEFINED. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.~~

Comment. The substance of Sections 1958 and 1960 is restated in subdivision (b) of Evidence Code Section 600.

Section 1959 (Repealed)

~~1959. PRESUMPTION DEFINED. A presumption is a deduction which the law expressly directs to be made from particular facts.~~

Comment. Section 1959 is superseded by subdivision (a) of Evidence Code Section 600.

Section 1960 (Repealed)

~~1960. WHEN AN INFERENCE ARISES. An inference must be founded:~~

~~1. On a fact legally proved; and,~~

~~2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1958.

Section 1961 (Repealed)

~~1961. PRESUMPTIONS MAY BE CONTROVERTED, WHEN. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption.~~

Comment. Section 1961 is superseded by Chapter 3 (commencing with Section 600) of Division 5 of the Evidence Code, which prescribes the nature and effect of presumptions.

Section 1962 (Repealed)

~~1962. The following presumptions, and no others, are deemed conclusive:~~

~~1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;~~

~~2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;~~

~~3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;~~

~~4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;~~

~~5. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;~~

~~6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;~~

~~7. Any other presumption which by statute is expressly made conclusive.~~

Comment. Subdivision 1 of Section 1962 is repealed because it "has little meaning, either as a rule of substantive law or as a rule of evidence . . . ." *People v. Gorshen,* 51 Cal.2d 716, 731, 336 P.2d 492, 501 (1959).

Subdivisions 2, 3, 4, and 5 are superseded by Evidence Code Sections 621-624.

The first clause of subdivision 6 states the meaningless truism that judgments are conclusive when declared by law to be conclusive. The pleading rule in the next two clauses has been recodified as Section 1908.5 of the Code of Civil Procedure.

Subdivision 7 is merely a cross-reference section to all other presumptions declared by law to be conclusive. This subdivision is unnecessary. See EVIDENCE CODE § 620.

Section 1963 (Repealed)

~~1963. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:~~

~~1. That a person is innocent of crime or wrong;~~

~~2. That an unlawful act was done with an unlawful intent;~~

~~3. That a person intends the ordinary consequence of his voluntary act;~~

~~4. That a person takes ordinary care of his own concerns;~~

~~5. That evidence wilfully suppressed would be adverse if produced;~~

~~6. That higher evidence would be adverse from inferior being produced;~~

~~7. That money paid by one to another was due to the latter;~~

~~8. That a thing delivered by one to another belonged to the latter;~~

~~9. That an obligation delivered up to the debtor has been paid;~~

~~10. That former rent or installments have been paid when a receipt for later is produced;~~

~~11. That things which a person possesses are owned by him;~~

~~12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership;~~

~~13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly;~~

~~14. That a person acting in a public office was regularly appointed to it;~~

~~15. That official duty has been regularly performed;~~

~~16. That a court or judge, acting as such, whether in this State or any other state or country, was acting in the lawful exercise of his jurisdiction;~~

~~17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;~~

~~18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;~~

~~19. That private transactions have been fair and regular;~~

~~20. That the ordinary course of business has been followed;~~

~~21. That a promissory note or bill of exchange was given or endorsed for a sufficient consideration;~~

~~22. That an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;~~

~~23. That a writing is truly dated;~~

~~24. That a letter duly directed and mailed was received in the regular course of the mail;~~

~~25. Identity of person from identity of name;~~

~~26. That a person not heard from in seven years is dead;~~

~~27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;~~

~~28. That things have happened according to the ordinary course of nature and the ordinary habits of life;~~

~~29. That persons acting as copartners have entered into a contract of copartnership;~~

~~30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;~~

~~31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;~~

~~32. That a thing once proved to exist continues as long as is usual with things of that nature;~~

~~33. That the law has been obeyed;~~

~~34. That a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained;~~

~~35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published;~~

~~36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases;~~

~~37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;~~

~~38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner, and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose;~~

~~39. That there was a good and sufficient consideration for a written contract;~~

~~40. That property owned at the time of death by a person who had been divorced from his or her spouse more than four years prior thereto was not community property acquired during marriage with such divorced spouse, but is his or her separate property.~~

Comment. Many of the presumptions listed in Section 1963 are classified and restated in the Evidence Code. A few have been recodified as maxims of jurisprudence in Part 4 of Division 4 of the Civil Code. Others are not continued at all. The disposition of each subdivision of Section 1963 is given in the table below. Following the table are comments indicating the reasons for repealing those provisions of Section 1963 that are not continued in California law.

Section 1963 (subdivision)	*Superseded by*
1	Evidence Code Section 520
2	Not continued
3	Civil Code Section 3544 (added in this recommendation)
4	Evidence Code Section 521
5	Not continued (*But see* Evidence Code Section 413)
6	Not continued (*But see* Evidence Code Section 412)
7	Evidence Code Section 631
8	Evidence Code Section 632
9	Evidence Code Section 633
10	Evidence Code Section 636
11	Evidence Code Section 637
12	Evidence Code Section 638
13	Evidence Code Section 634
14	Not continued
15	Evidence Code Section 664
16	Evidence Code Section 666

Section 1963 (subdivision)	*Superseded by*
17	Evidence Code Section 639
18	Not continued
19	Civil Code Section 3545 (added in this recommendation)
20	Not continued
21	Commercial Code Sections 3306, 3307, and 3408
22	Not continued
23	Evidence Code Section 640
24	Evidence Code Section 641
25	Not continued
26	Evidence Code Section 667
27	Not continued
28	Civil Code Section 3546 (added in this recommendation)
29	Not continued
30	Not continued (*But see* Evidence Code Section 1314)
31	Evidence Code Section 661
32	Civil Code Section 3547 (added in this recommendation)
33	Civil Code Section 3548 (added in this recommendation)
34	Evidence Code Section 643
35	Evidence Code Section 644
36	Evidence Code Section 645
37	Evidence Code Section 642
38	Not continued
39	Unnecessary (duplicates Civil Code Section 1614)
40	Civil Code Section 164.5 (added in this recommendation)

Subdivision 2 is not continued because it has been a source of error and confusion in the cases. An instruction based upon it is error whenever specific intent is in issue. *People v. Snyder,* 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Maciel,* 71 Cal. App. 213, 234 Pac. 877 (1925). A person's intent may be inferred from his actions and the surrounding circumstances, and an instruction to that effect may be given. *People v. Besold,* 154 Cal. 363, 97 Pac. 871 (1908).

Subdivisions 5 and 6 are not continued because, despite Section 1963, there is no presumption of the sort stated. The "presumptions" merely indicate that a party's evidence should be viewed with distrust if he could produce better evidence and that unfavorable inferences should be drawn from the evidence offered against him if he fails to deny or explain it. A party's failure to produce evidence cannot be turned into evidence against him by reliance on these presumptions. *Hampton v. Rose,* 8 Cal. App.2d 447, 56 P.2d 1243 (1935); *Girvetz v. Boys' Market, Inc.,* 91 Cal. App.2d 827, 830, 206 P.2d 6, 8-9 (1949). The substantive effect of these "presumptions" is stated more accurately in Evidence Code Sections 412 and 413.

Subdivision 14. The presumption stated in subdivision 14 is not continued because it is unnecessary, inaccurate, and misleading. This presumption has been used most frequently to sustain the validity of the official acts of a person acting in a public office when there has been no evidence to show that such person had the legal right to hold office. See, *e.g., City of Monterey v. Jacks,* 139 Cal. 542, 73 Pac. 436 (1903); *Delphi School Dist. v. Murray,* 53 Cal. 29 (1878). The presumption is unnecessary for this purpose, for it is well settled that the " 'acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.' " *In re Redevelopment Plan for Bunker Hill,* 61 Cal.2d ___, ___, 37 Cal. Rptr. 74, 88, 389 P.2d 538, 552 (1964); *Oakland Paving Co. v. Donovan,* 19 Cal. App. 488, 494, 126

Pac. 388, 390 (1912). Under the de facto doctrine, the validity of the official acts taken is conclusively established *Town of Susanville v. Long,* 144 Cal. 362, 77 Pac. 987 (1904); *People v. Hecht,* 105 Cal. 621, 38 Pac. 941 (1895). Thus, most of the cases applying subdivision 14 are erroneous in indicating that the official acts of a person acting in a public office may be attacked by evidence sufficient to overcome the presumption of a valid appointment. These cases can be explained only on the ground that they have overlooked the de facto doctrine. *Compare People v. Ah Lee Doon,* 97 Cal. 171, 31 Pac. 933 (1893) (using presumption to sustain authority of judge who presided at murder trial), *with People v. Sassovich,* 29 Cal. 480 (1866) (using de facto doctrine to sustain authority of judge who presided at murder trial).

In a few cases, subdivision 14 has been cited to support the authority of an officer to certify a copy of an official document. *People v. Beal,* 108 Cal. App.2d 200, 239 P.2d 84 (1951); *People v. Howard,* 72 Cal. App. 561, 237 Pac. 780 (1925). Evidence Code Sections 1452 and 1453 make the presumption unnecessary for this purpose.

In cases where the presumption might have some significance—cases where the party occupying the office is asserting some right of the office-holder—the presumption has been held inapplicable. *Burke v. Edgar,* 67 Cal. 182, 7 Pac. 488 (1885).

Subdivision 18. No case has been found where subdivision 18 has had any effect. The doctrine of res judicata determines the issues concluded between the parties without regard to this presumption. *Parnell v. Hahn,* 61 Cal. 131, 132 (1882) ("the judgment as rendered . . . is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case"). On appeal, the fact that it is the appellant's burden to establish that the lower court erred supplies whatever force this subdivision might have in appellate cases. See *Vaughn v. Jonas,* 31 Cal.2d 586, 191 P.2d 432 (1948).

Subdivision 20. The cases have used this "presumption" merely as a justification for holding that evidence of a business custom will sustain a finding that the custom was followed on a particular occasion. *E.g., Robinson v. Puls,* 28 Cal.2d 664, 171 P.2d 430 (1946); *American Can Co. v. Agricultural Ins. Co.,* 27 Cal. App. 647, 150 Pac. 996 (1915). Evidence Code Section 1105 provides for the admissibility of business custom evidence to prove that the custom was followed on a particular occasion. There is no reason to compel the trier of fact to find that the custom was followed by applying a presumption. The evidence of the custom may be strong or weak, and the trier of fact should be free to decide whether the custom was followed or not. No case has been found giving a presumptive effect to evidence of a business custom under subdivision 20.

Subdivision 22. The purpose of subdivision 22 appears to have been to compel an accommodation endorser to prove that he endorsed in accommodation of a subsequent party to the instrument and not in accommodation of the maker. See, *e.g., Pacific Portland Cement Co. v. Reinecke,* 30 Cal. App. 501, 158 Pac. 1041 (1916). The liability of accommodation endorsers is now fully covered by the Commercial Code. Accommodation is a defense which must be established by the defend-

ant. COM. CODE §§ 3307, 3415(5). Hence, subdivision 22 is no longer necessary.

Subdivision 25. Despite subdivision 25, the California courts have refused to apply the presumption of identity of person from identity of name when the name is common. *E.g., People v. Wong Sang Lung,* 3 Cal. App. 221, 224, 84 Pac. 843, 845 (1906). The matter should be left to inference, for the strength of the inference will depend in particular cases on whether the name is common or unusual.

Subdivision 27 has been rarely cited in the reported cases since it was enacted in 1872. It has been applied to situations where a statement has been made in the presence of a person who has failed to protest to the representations in the statement. The apparent acquiescence in the statement has been held to be proof of belief in the truth of the statement. *Estate of Flood,* 217 Cal. 763, 21 P.2d 579 (1933); *Estate of Clark,* 13 Cal. App. 786, 110 Pac. 828 (1910).

Although it may be appropriate under some circumstances to infer from the lack of protest that a person believes in the truth of a statement made in his presence, it is undesirable to require such a conclusion. The surrounding circumstances may vary greatly from case to case, and the trier of fact should be free to decide whether acquiescence resulted from belief or from some other cause. *Cf. Matt.* 27:13-14 (Revised Standard Version) ("Then Pilate said to him, 'Do you not hear how many things they testify against you?' But he gave him no answer, not even to a single charge . . . .").

Subdivision 29 has been cited in but one appellate decision in its 92-year history. It is unnecessary in light of the doctrine of ostensible authority. See 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 49-51 (7th ed. 1960).

Subdivision 30, in effect, declares that a marriage will be presumed from proof of cohabitation and repute. *Pulos v. Pulos,* 140 Cal. App.2d 913, 295 P.2d 907 (1956). Because reputation evidence may sometimes strongly indicate the existence of a marriage and at other times fail to do so, *requiring* a finding of a marriage from proof of such reputation is unwarranted. The cases have sometimes refused to apply the presumption because of the weakness of the reputation evidence relied on. *Estate of Baldwin,* 162 Cal. 471, 123 Pac. 267 (1912); *Cacioppo v. Triangle Co.,* 120 Cal. App.2d 281, 260 P.2d 985 (1953). Discontinuance of the presumption will not affect the rule that the existence of a marriage may be inferred from proof of reputation. *White v. White,* 82 Cal. 427, 430, 23 Pac. 276, 277 (1890) (" 'cohabitation and repute do not make marriage; they are merely items of evidence from which it may be *inferred* that a marriage had been entered into' ") (italics in original). See also EVIDENCE CODE § 1314.

Subdivision 38 has not been applied in any reported case in its 92-year history. The substantive law relating to implied dedication and dedication by prescription makes the presumption unnecessary. See 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 27-29 (7th ed. 1960).

Section 1967 (Repealed)

SEC. 111. Section 1967 of the Code of Civil Procedure is repealed.

~~1967. INDISPENSABLE EVIDENCE, WHAT. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.~~

Comment. Section 1967 has no substantive meaning and is unnecessary.

Section 1968 (Repealed)

SEC. 112. Section 1968 of the Code of Civil Procedure is repealed.

~~1968. TO PROVE PERJURY AND TREASON, MORE THAN ONE WITNESS REQUIRED. Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act, and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.~~

Comment. Section 1968 unnecessarily duplicates the provisions of Penal Code Sections 1103 and 1103a.

Section 1973 (Repealed)

SEC. 113. Section 1973 of the Code of Civil Procedure is repealed.

~~1973. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:~~

~~1. An agreement that by its terms is not to be performed within a year from the making thereof;~~

~~2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794 of the Civil Code;~~

~~3. An agreement made upon consideration of marriage other than a mutual promise to marry;~~

~~4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged;~~

~~5. An agreement authorizing or employing an agent or broker to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where such lease is for a longer period than one year, for compensation or a commission;~~

~~6. An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will;~~

~~7. An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of said indebtedness~~

~~by the purchaser is specifically provided for in the conveyance of such property.~~

Comment. Section 1973 is unnecessary. It merely describes in evidentiary terms the statute of frauds contained in Civil Code Section 1624. The repeal of Section 1973 will have no effect on existing law.

Section 1974 (Amended)

SEC. 114. Section 1974 of the Code of Civil Procedure is amended to read:

1974. ~~REPRESENTATION OF CREDIT BY WRITING.~~ No ~~evidence is admissible to charge a~~ person *is liable* upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be ~~charged~~ *held liable*.

Comment. The amendment to Section 1974 makes no substantive change in the law; the amendment merely makes it clear that Section 1974 is a substantive rule of law, not a rule of evidence.

Section 1978 (Repealed)

SEC. 115. Chapter 7 (consisting of Section 1978) of Title 2 of Part IV of the Code of Civil Procedure is repealed.

~~1978. CONCLUSIVE OR UNANSWERABLE EVIDENCE. No evidence is by law made conclusive or unanswerable, unless so declared by this Code.~~

Comment. Section 1978 incorrectly states the existing law of California. Certain things are declared to be "conclusive evidence" in other codes. See, *e.g.*, COM. CODE § 1201(6), (45). Moreover, the California courts have recognized that some evidence may be conclusive in the absence of statute, for a court, "in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit the verdict of a jury to change such facts, because . . . to do so would, in effect, destroy the intelligence of the court." *Austin v. Newton,* 46 Cal. App. 493, 497, 189 Pac. 471, 472 (1920); *Neilson v. Houle,* 200 Cal. 726, 729, 254 Pac. 891, 892 (1927). Nonetheless, the California courts have also relied upon this section to sustain a finding of paternity despite undisputed blood-test evidence showing that the defendant could not have been the father of the child. *Arais v. Kalensnikoff,* 10 Cal.2d 428, 74 P.2d 1043 (1937). The Legislature subsequently rejected this decision by enacting the Uniform Act on Blood Tests to Determine Paternity. Repeal of Section 1978 will remove the statutory basis for a similar decision in the rare case where such certainty is attainable.

Sections 1980.1-1980.7 (Repealed)

SEC. 116. Chapter 8 (commencing with Section 1980.1) of Title 2 of Part IV of the Code of Civil Procedure is repealed.

~~1980.1. This chapter may be cited as the Uniform Act on Blood Tests to Determine Paternity.~~

~~1980.2. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.~~

~~1980.3. In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.~~

~~1980.4. The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.~~

~~1980.5. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by the county, and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.~~

~~1980.6. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.~~

~~1980.7. This chapter shall apply to criminal cases subject to the following limitations and provisions: (a) An order for the tests shall be made only upon application of a party or on the court's initiative; (b) the compensation of the experts shall be paid by the county under order of court; (c) the court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 1980.6, otherwise the case shall be submitted for determination upon all the evidence.~~

Comment. Sections 1980.1-1980.7, which comprise the Uniform Act on Blood Tests to Determine Paternity, are recodified as Evidence Code Sections 890-897.

Sections 1981-1983 (Repealed)

SEC. 117. Chapter 1 (commencing with Section 1981) of Title 3 of Part IV of the Code of Civil Procedure is repealed.

Comment. Chapter 1 of Title 3, Part IV, of the Code of Civil Procedure consists of Sections 1981 through 1983. See the Law Revision Commission's *Comments* to these sections.

Section 1981 (Repealed)

~~1981. EVIDENCE TO BE PRODUCED BY WHOM. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.~~

Comment. Section 1981 is superseded by Evidence Code Sections 500 and 550. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1124-1125 (1964).

Section 1982 (Repealed)

~~1982. WRITING ALTERED, WHO TO EXPLAIN. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.~~

Comment. Section 1982 is recodified as Evidence Code Section 1402.

Section 1983 (Repealed)

~~1983. Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the~~

~~fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license.~~

Comment. Section 1983 was held unconstitutional as applied under the Alien Land Law. *Morrison v. California,* 291 U.S. 82 (1934). It has been applied but once by an appellate court since the *Morrison* case was decided. *People v. Cordero,* 50 Cal. App.2d 146, 122 P.2d 648 (1942). Section 1983 appears to have been designed principally to facilitate the enforcement of the Alien Land Law. Since that law has been held unconstitutional (*Sei Fujii v. State,* 38 Cal.2d 718, 242 P.2d 617 (1952)) and has been repealed (Cal. Stats. 1955, Ch. 316, § 1, p. 767), Section 1983 should no longer be retained in the law of California.

Section 1998 (Repealed)

SEC. 118. Section 1998 of the Code of Civil Procedure is repealed.

~~1998. (a) Except as provided in Section 1998.4, when a subpoena duces tecum is served upon the custodian of records or other qualified witness from a licensed or county hospital, state hospital or hospital in an institution under the jurisdiction of the Department of Corrections in an action in which the hospital is neither a party nor the place where any cause of action is alleged to have arisen and such subpoena requires the production of all or any part of the records of the hospital relating to the care or treatment of a patient in such hospital, it shall be sufficient compliance therewith if the custodian or other officer of the hospital shall, within five days after the receipt of such subpoena, deliver by mail or otherwise a true and correct copy (which may be a photographic or microphotographic reproduction) of all the records described in such subpoena to the clerk of court or to the court if there be no clerk or to such other person as described in subdivision (a) of Section 2018, together with the affidavit described in Section 1998.1.~~

~~(b) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, directed as follows:~~

~~If the subpoena directs attendance in court, to the clerk of such court, or to the judge thereof, if there be no clerk; if the subpoena directs attendance at a deposition or other hearing,~~

~~to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at his place of business; in other cases, to the officer, body, or tribunal conducting the hearing, at a like address.~~

~~(c) Unless the parties to the action or proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.~~

Comment. Sections 1998-1998.5 provide a special exception to the best evidence rule for hospital records. These sections are recodified as Evidence Code Sections 1560-1566.

Section 1998.1 (Repealed)

SEC. 119. Section 1998.1 of the Code of Civil Procedure is repealed.

~~1998.1. The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following: (a) that the affiant is the duly authorized custodian of the records and has authority to certify said records, (b) that the copy is a true copy of all the records described in the subpoena, (c) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition or event. If the hospital has none of the records described, or only part thereof, the custodian shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in Section 1998.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1998.

Section 1998.2 (Repealed)

SEC. 120. Section 1998.2 of the Code of Civil Procedure is repealed.

~~1998.2. The copy of the records shall be admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit shall be admissible in evidence and the matters stated therein shall be presumed true in the absence of a preponderance of evidence to the contrary. When more than one person has knowledge of the facts, more than one affidavit may be made.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1998.

Section 1998.3 (Repealed)

SEC. 121. Section 1998.3 of the Code of Civil Procedure is repealed.

~~1998.3. Sections 1998, 1998.1, 1998.2, 1998.4, and 1998.5 shall not be interpreted to require tender or payment of more than one witness and mileage fee or other charge unless there shall be an agreement to the contrary.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1998.

Section 1998.4 (Repealed)

SEC. 122. Section 1998.4 of the Code of Civil Procedure is repealed.

~~1998.4. The personal attendance of the custodian or other qualified witness and the production of the original records shall be required if the subpoena duces tecum contains a clause which reads:~~

~~"The procedure authorized pursuant to subdivision (a) of Section 1998, and Section 1998.1 and 1998.2 of the Code of Civil Procedure will not be deemed sufficient compliance with this subpoena."~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1998.

Section 1998.5 (Repealed)

SEC. 123. Section 1998.5 of the Code of Civil Procedure is repealed.

~~1998.5. In the event more than one subpoena duces tecum is served upon the custodian of records or other qualified witness from a licensed or county hospital or hospital in an institution under the jurisdiction of the Department of Corrections and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1998.4 of the Code of Civil Procedure the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.~~

Comment. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1998.

Section 2009 (Amended)

SEC. 124. Section 2009 of the Code of Civil Procedure is amended to read:

2009. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by ~~some other provision of this code~~ *statute*.

Comment. Section 2009 has been amended to reflect the fact that statutes in other codes may also authorize the use of affidavits. See, *e.g.*, PROB. CODE §§ 630, 705.

Section 2016 (Amended)

SEC. 125. Section 2016 of the Code of Civil Procedure is amended to read:

2016. (a) Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. Such depositions may be taken in an action at any time after the service of the summons or in a special proceeding after the service of the petition or after the appearance of the defendant or respondent. After commencement of the action or proceedings, the deposition may be taken without leave of court, except that leave of court, granted with or without notice, and for good cause shown, must be obtained if the notice of the taking of the deposition is served by the plaintiff within 20 days after service of the summons or petition on, or appearance of, the defendant or respondent. The attendance of witnesses or the production of books, documents, or other things at depositions may be compelled by the use of subpoena as provided in Chapter 2 (commencing with Section 1985), Title 3, Part 4 of this code.

(b) Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or by judicial decision.

The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

(c) Examination and cross-examination of deponents may proceed as permitted at the trial ~~under the provisions of this code~~.

(d) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party to the record of any civil action or proceeding or of a person for whose immediate benefit said action or proceeding is prosecuted or defended, or of anyone who at the time of taking the deposition was an officer, director, superintendent, member, agent, employee, or managing agent of any such party or person may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is *unavailable as a witness within the meaning of Section 240 of the Evidence Code or* ~~dead; or (ii) that the witness is at a greater distance than 150 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v)~~ *(ii)* upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) Subject to the requirements of this section, a party may offer in evidence all or any part of a deposition, and if such party introduces only part of such deposition, any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Subject to the provisions of subdivision (c) of Section 2021 of this code, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. Except where the deposition is used under the provisions of paragraph (2) of subdivision (d) of this section, the introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent, or for explaining or clarifying portions of the said deposition offered by an adverse party, makes the deponent the witness of the party introducing the deposition, as to the portions of the deposition introduced by said party. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by another party.

(g) It is the policy of this State (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

Comment. The amendment of Section 2016 substitutes the general definition of "unavailable as a witness" used in the Evidence Code for the substantially similar language in Section 2016.

Sections 2042-2056 (Repealed)

SEC. 126. Article 6 (commencing with Section 2042) of Chapter 3 of Title 3 of Part IV of the Code of Civil Procedure is repealed.

Comment. Article 6 of Chapter 3, Title 3, Part IV, of the Code of Civil Procedure consists of Sections 2042 through 2056. See the Law Revision Commission's *Comments* to these sections.

Section 2042 (Repealed)

~~2042. ORDER OF PROOF; HOW REGULATED. The order of proof must be regulated by the sound discretion of the Court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.~~

Comment. The first sentence of Section 2042 is superseded by Evidence Code Section 320. The second sentence is unnecessary in light of Code of Civil Procedure Sections 607 and 631.7 (added) and Penal Code Sections 1093 and 1094. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 631.7.

Section 2043 (Repealed)

~~2043. If either party requires it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses; but a party to the action or proceeding cannot be so excluded; and if a corporation is a party thereto, it is entitled to the presence of one of its officers, to be designated by its attorney.~~

Comment. Section 2043 is substantially recodified in Evidence Code Section 777.

Section 2044 (Repealed)

2044. COURT MAY CONTROL MODE OF INTERROGATION. The Court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth, as may be; but subject to this rule, the parties may put such pertinent and legal questions as they see fit. The Court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

Comment. The substance of the first sentence of Section 2044 is recodified as Evidence Code Section 765. The second sentence is superseded by Evidence Code Section 352.

Section 2045 (Repealed)

2045. DIRECT AND CROSS-EXAMINATION DEFINED. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the Court otherwise direct.

Comment. The first sentence of Section 2045 is superseded by Evidence Code Sections 760 and 761. The second sentence of Section 2045 is superseded by Evidence Code Section 772.

Section 2046 (Repealed)

2046. LEADING QUESTION DEFINED. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the Court, under special circumstances, making it appear that the interests of justice require it.

Comment. The first sentence of Section 2046 is recodified as Evidence Code Section 764. The second sentence of Section 2046 is superseded by Evidence Code Section 767.

Section 2047 (Repealed)

2047. WHEN WITNESS MAY REFRESH MEMORY FROM NOTES. A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

Comment. The last sentence of Section 2047 is superseded by Evidence Code Section 1237. The remainder of Section 2047 is superseded by Evidence Code Section 771.

Section 2048 (Repealed)

~~2048. CROSS-EXAMINATION, AS TO WHAT. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.~~

Comment. Section 2048 is superseded by Evidence Code Sections 767, 772, and 773.

Section 2049 (Repealed)

~~2049. PARTY PRODUCING NOT ALLOWED TO LEAD WITNESS. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 2052.~~

Comment. Section 2049 is inconsistent with and superseded by Evidence Code Section 785. See the *Comment* to that section. See also EVIDENCE CODE §§ 769, 770, 780, and 1235.

Section 2050 (Repealed)

~~2050. WITNESS, HOW EXAMINED. WHEN RE-EXAMINED. 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 the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the Court. Leave is granted or withheld, in the exercise of a sound discretion.~~

Comment. Section 2050 is recodified as Evidence Code Sections 774 and 778.

Section 2051 (Repealed)

~~2051. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.~~

Comment. Section 2051 is inconsistent with Evidence Code Sections 780 and 785–788. The provision of Section 2051 excluding evidence of particular wrongful acts is continued in Evidence Code Section 787. The principle of excluding criminal convictions where there has been a

subsequent pardon has been broadened to cover analogous situations in Evidence Code Section 788.

Section 2052 (Repealed)

2052. SAME. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

Comment. The first clause of Section 2052 is superseded by Evidence Code Section 780(h). The remainder of Section 2052 is inconsistent with Evidence Code Sections 768–770. See the *Comments* to those sections.

Section 2053 (Repealed)

2053. EVIDENCE OF GOOD CHARACTER, WHEN ALLOWED. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

Comment. Insofar as Section 2053 deals with the inability to support a witness' credibility until it has been impeached, it is superseded by Evidence Code Section 790. Insofar as Section 2053 deals with the inadmissibility of character evidence in a civil action, it is superseded by Evidence Code Sections 1100–1104.

Section 2054 (Repealed)

2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and no question must be put to the witness concerning a writing until it has been so shown to him.

Comment. Section 2054 is recodified in substance as Evidence Code Section 768(b).

Section 2055 (Repealed)

2055. A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, member, agent, employee, or managing agent of any such party or person, or the agent, officer or employee of a municipal corporation which is a party to the action or proceeding, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. A party, when

~~so called, may be examined by his own counsel, but only as to the matters testified to on such examination.~~

~~A witness other than a party, when so called, may be cross-examined by counsel for a party adverse to the party calling such witness, but only as to matters testified to on such examination.~~

Comment. Section 2055 is restated in substance as Evidence Code Section 776.

Section 2056 (Repealed)

~~2056. When, in the trial of any suit, the answer of the witness is not responsive to the question, a motion to strike the answer may be made by either party.~~

Comment. Section 2056 is restated in substance as Evidence Code Section 766.

Section 2061 (Repealed)

SEC. 127. Title 4 (consisting of Section 2061) of Part IV of the Code of Civil Procedure is repealed.

~~2061. JURY JUDGES OF EFFECT OF EVIDENCE, BUT TO BE INSTRUCTED ON CERTAIN POINTS. The jury, subject to the control of the Court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the Court on all proper occasions:~~

~~1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;~~

~~2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds;~~

~~3. That a witness false in one part of his testimony is to be distrusted in others;~~

~~4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution;~~

~~5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt;~~

~~6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,~~

~~7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.~~

Comment. The first sentence of Section 2061 is recodified in Evidence Code Section 312. Subdivision 5 of Section 2061 is superseded by Section 502 of the Evidence Code. Subdivisions 6 and 7 are superseded by Sections 412 and 413 of the Evidence Code.

The remainder of Section 2061 consists of cautionary instructions on evidence and witnesses. Since the Constitution was amended in 1934 to permit the court to comment on the evidence (CAL. CONST., Art. VI, § 19), the power of the court to give instructions of the sort listed has been unquestioned. 2 WITKIN, CALIFORNIA PROCEDURE, *Trial* § 67 (1954). The instructions listed were derived from the common law. See, *e.g.*, *People v. Coffey,* 161 Cal. 433, 119 Pac. 901 (1911). Hence, the courts have not relied on Section 2061 as a definitive list of the cautionary instructions that may or must be given on appropriate occasions. See, *e.g.*, *People v. Putnam,* 20 Cal.2d 885, 129 P.2d 367 (1942). Section 2061, therefore, is repealed to avoid singling out only a few of the cautionary instructions that are given by the courts. As the section is but a partial codification of the common law, the repeal should have no effect on the giving of the instructions contained in the section or on the giving of any other cautionary instructions that are permitted or required to be given by decisional law.

Section 2065 (Repealed)

SEC. 128. Section 2065 of the Code of Civil Procedure is repealed.

~~2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.~~

Comment. The first clause of Section 2065 is superseded by Evidence Code Sections 351 and 911. The second clause of Section 2065 is superseded by Evidence Code Section 940, which relates to the self-incrimination privilege.

The third clause—relating to degrading matter—is unnecessary under the Evidence Code, and it is also superfluous under existing law. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges),* 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 271–273 (1964). This language is apparently "designed to protect the witness against disclosure of discreditable facts which are *wholly irrelevant,* and which would simply injure him without accomplishing any legitimate purpose of proof." WITKIN, CALIFORNIA EVIDENCE § 476 at 532 (1958) (emphasis in original). This language does not grant a witness the right to remain silent about nonincriminating but degrading matter that is relevant to the merits of the case. *Clark v. Reese,* 35 Cal. 89 (1868) (breach of promise to marry; defense that plaintiff had immoral relations with *X; held, X*

must answer concerning such relations though answer degrading); *San Chez v. Superior Court*, 153 Cal. App.2d 162, 314 P.2d 135 (1957) (separate maintenance on ground of cruelty; defendant required to answer concerning cruelty, albeit degrading). Irrelevant evidence is inadmissible under Evidence Code Section 350. Evidence Code Section 787 provides that a witness' character may not be attacked by evidence of specific instances of his conduct; hence, degrading matter is inadmissible under Section 787 even when relevant if it consists of evidence of the witness' conduct on specified occasions and is offered for impeachment purposes. In addition, Evidence Code Section 765 requires the court to control the interrogation of witnesses so as to protect them from "undue harassment or embarrassment." Thus, the Evidence Code provides a witness with more protection against the revelation of matter that might degrade him than is provided by the third clause of Section 2065.

The remainder of Section 2065 is superseded by Evidence Code Section 788, dealing with the admissibility of criminal convictions for impeachment purposes.

Section 2066 (Repealed)

SEC. 129. Section 2066 of the Code of Civil Procedure is repealed.

~~2066. RIGHT OF WITNESSES TO PROTECTION. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.~~

Comment. Most of Section 2066 is unnecessary in the light of Evidence Code Section 765, which restates the substance of Code of Civil Procedure Section 2044. The remainder of Section 2066, which relates to the detaining of the witness, is unnecessary because this matter is adequately covered by Code of Civil Procedure Section 2064 and Evidence Code Section 778.

Section 2078 (Repealed)

SEC. 130. Section 2078 of the Code of Civil Procedure is repealed.

~~2078. COMPROMISE OFFER OF NO AVAIL. An offer of compromise is not an admission that anything is due.~~

Comment. Section 2078 is superseded by Evidence Code Sections 1152–1154. See the *Comments* to those sections.

Section 2079 (Repealed)

SEC. 131. Section 2079 of the Code of Civil Procedure is repealed.

~~2079. IN ACTION FOR DIVORCE, ADMISSION NOT SUFFICIENT. In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce.~~

Comment. Section 2079 is unnecessary because it repeats what is said in Civil Code Section 130.

Sections 2101-2103 (Repealed)

SEC. 132. Chapter 4 (commencing with Section 2101) of Title 6 of Part IV of the Code of Civil Procedure is repealed.

Comment. Chapter 4 of Title 6, Part IV, of the Code of Civil Procedure consists of Sections 2101–2103. See the Law Revision Commission's *Comments* to these sections.

Section 2101 (Repealed)

~~2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code.~~

Comment. Section 2101 is superseded by Evidence Code Section 312.

Section 2102 (Repealed)

~~2102. QUESTIONS OF LAW ADDRESSED TO THE COURT. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to it. Whenever the knowledge of the Court is, by this Code, made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it.~~

Comment. The first sentence of Section 2102 is recodified in Evidence Code Sections 310 and 400-406. The second sentence of Section 2102 is superseded by Evidence Code Section 457.

Section 2103 (Repealed)

~~2103. QUESTIONS OF FACT BY COURT OR REFEREES. The provisions contained in this part of the Code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a Court, referee, or other officer.~~

Comment. Section 2103 is superseded by Evidence Code Section 300.

CORPORATIONS CODE

Section 6602 (Amended)

SEC. 133. Section 6602 of the Corporations Code is amended to read:

6602. In any action or proceeding, the court ~~shall take~~ *takes* judicial notice ~~without proof in court of the Constitution and statutes applying to foreign corporations, and any interpretation thereof, the seals of State and state officials and notaries public, and~~ *, in the same manner that it takes judicial notice of the matters listed in Section 452 of the Evidence Code,* of the official acts affecting corporations of the legislative, executive, and judicial departments of the State or place under the laws of which the corporation purports to be incorporated.

Comment. This revision of Section 6602 provides, in effect, that the judge may take judicial notice of the matters listed in amended Section

6602 and that he is required to take such judicial notice if he is requested to do so and the party supplies him with sufficient information. See EVIDENCE CODE §§ 452 and 453 and the *Comments* thereto.

The portion of Section 6602 which has been deleted is either unnecessary because it duplicates the provisions of Evidence Code Sections 451 and 452 or undesirable because it conflicts with Evidence Code Section 1452. See the *Comments* to those sections.

Section 25310 (Amended)

SEC. 134. Section 25310 of the Corporations Code is amended to read:

25310. The commissioner shall adopt a seal bearing the inscription: "Commissioner of Corporations, State of California." The seal shall be affixed to all writs, orders, permits, and certificates issued by him, and to such other instruments as he directs. ~~All courts shall take judicial notice of this seal.~~

Comment. The deleted language is inconsistent with Evidence Code Section 1452. See the *Comment* to that section.

GOVERNMENT CODE

Section 11513 (Amended)

SEC. 135. Section 11513 of the Government Code is amended to read:

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining ~~any direct~~ *other* evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the ~~same~~ extent that they are ~~now or hereafter may~~ *otherwise required by statute to* be recognized ~~in civil actions~~ *at the hearing*, and irrelevant and unduly repetitious evidence shall be excluded.

Comment. The revision of the last sentence of Section 11513 is necessary because, under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative pro-

ceedings are at times different from those applicable in civil actions.

The substitution of "other" for "direct" in the third sentence of subdivision (c) of Section 11513 makes no significant substantive change but is desirable because "direct evidence" is not defined for the purposes of Section 11513. See the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1831.

Section 19580 (Amended)

SEC. 136. Section 19580 of the Government Code is amended to read:

19580. Either by deposition or at the hearing the employee may be examined and may examine or cause any person to be examined under Section ~~2055 of the Code of Civil Procedure~~ *776 of the Evidence Code*.

Comment. The amendment merely substitutes a reference to the correct Evidence Code section for the reference to the superseded Code of Civil Procedure section.

HEALTH AND SAFETY CODE

Section 3197 (Amended)

SEC. 137. Section 3197 of the Health and Safety Code is amended to read:

3197. In any prosecution for a violation of any provision of this article, or any rule or regulation of the board made pursuant to this article, or in any quarantine proceeding authorized by this article, or in any habeas corpus or other proceeding in which the legality of such quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom such prosecution or other proceeding was instituted, and ~~the provisions of subsections 1 and 4 of Section 1881 of the Code of Civil Procedure shall not be~~ *the privileges provided by Sections 970, 971, 980, 994, and 1014 of the Evidence Code are not* applicable to or in any such prosecution or proceeding.

Comment. The revision of Section 3197 merely substitutes references to the pertinent Evidence Code sections that supersede subdivisions 1 and 4 of Code of Civil Procedure Section 1881.

PENAL CODE

Section 270e (Amended)

SEC. 138. Section 270e of the Penal Code is amended to read:

270e. No other evidence shall be required to prove marriage of husband and wife, or that a person is the lawful father or mother of a child or children, than is or shall be required to prove such facts in a civil action. In all prosecutions under either Section 270a or 270 of this code, ~~any existing provisions of law prohibiting the disclosure of confidential communications between husband and wife shall~~ *Sections 970, 971, and 980 of the Evidence Code do* not apply, and both hus-

band and wife shall be competent to testify to any and all relevant matters, including the fact of marriage and the parentage of a child or children. Proof of the abandonment and nonsupport of a wife, or of the omission to furnish necessary food, clothing, shelter, or of medical attendance for a child or children is prima facie evidence that such abandonment and nonsupport or omission to furnish necessary food, clothing, shelter or medical attendance is wilful. In any prosecution under Section 270, it shall be competent for the people to prove nonaccess of husband to wife or any other fact establishing nonpaternity of a husband. In any prosecution pursuant to Section 270, the final establishment of paternity or nonpaternity in another proceeding shall be admissible as evidence of paternity or nonpaternity.

Comment. The revision of Section 270e merely inserts a reference to the pertinent sections of the Evidence Code.

Section 686 (Amended)

SEC. 139. Section 686 of the Penal Code is amended to read:

686. In a criminal action the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that *:*

(a) ~~Where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state, and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted.~~ *Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this State.*

(b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this State.

Comment. Section 686 sets forth three exceptions to the right of a defendant in a criminal trial to confront the witnesses against him. These exceptions purport to state the conditions under which the court may admit testimony taken at the preliminary hearing, testimony taken in a former trial of the action, and testimony in a deposition that is admissible under Penal Code Section 882. The section inaccurately sets forth the existing law, for it fails to provide for the admission of hearsay evidence generally or for the admission of testimony in a deposition that is admissible under Penal Code Sections 1345 and 1362, and its reference to the conditions under which depositions may be admitted under Penal Code Section 882 is not accurate. Since Evidence Code Sections 1290–1292 cover the situations in which testimony in another action or proceeding and testimony at the preliminary hearing are admissible as exceptions to the hearsay rule, Section 686 has been revised by eliminating the specific exceptions for these situations and by substituting for them a general cross-reference to admissible hearsay. The statement of the conditions under which a deposition may be admitted also has been deleted; in place of the deleted language, language is substituted that accurately provides for the admission of depositions under Penal Code Sections 882, 1345, and 1362.

Section 688 (Amended)

SEC. 140. Section 688 of the Penal Code is amended to read:

688. ~~No PERSON TO BE A WITNESS AGAINST HIMSELF IN A CRIMINAL ACTION, OR TO BE UNNECESSARILY RESTRAINED.~~ No person ~~can be compelled, in a criminal action, to be a witness against himself, nor can a person~~ charged with a public offense *may* be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

Comment. The language deleted from Section 688 is superseded by Evidence Code Sections 930 and 940.

Section 939.6 (Amended)

SEC. 141. Section 939.6 of the Penal Code is amended to read:

939.6. *(a) Subject to subdivision (b),* in the investigation of a charge, the grand jury shall receive no other evidence than such as is *:*

(1) Given by witnesses produced and sworn before the grand jury ~~,~~ *;*

(2) Furnished by ~~legal documentary evidence, or the~~ *writings, material objects, or other things presented to the senses; or*

(3) Contained in a deposition ~~of a witness in the cases mentioned in~~ *that is admissible under* subdivision 3 of Section 686

(b) The grand jury shall receive none but ~~legal~~ evidence ~~and the best evidence in degree, to the exclusion of hearsay or secondary evidence~~ *that would be admissible over objection at the trial of a criminal action, but the fact that evidence which would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient com-*

petent evidence to support the indictment was received by the grand jury.

Comment. The revision of Section 939.6 makes no substantive change. The amendment, however, states more clearly and precisely the meaning that has been given the section by the California courts. See, *e.g.*, *People v. Freudenberg*, 121 Cal. App.2d 564, 263 P.2d 875 (1953). See also WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 175, 228 (1963).

Section 961 (Amended)

SEC. 142. Section 961 of the Penal Code is amended to read:

961. Neither presumptions of law, nor matters of which judicial notice is *authorized or required to be* taken, need be stated in an accusatory pleading.

Comment. This revision of Section 961 makes it clear that matters that will be judicially noticed, whether such notice is mandatory or discretionary, need not be stated in an accusatory pleading. See EVIDENCE CODE §§ 451 and 452.

Section 963 (Amended)

SEC. 143. Section 963 of the Penal Code is amended to read:

963. In pleading a private statute, or an ordinance of a county or a municipal corporation, or a right derived therefrom, it is sufficient to refer to the statute or ordinance by its title and the day of its passage, and the court must thereupon take judicial notice thereof *in the same manner that it takes judicial notice of matters listed in Section 452 of the Evidence Code*.

Comment. This revision of Section 963 makes the procedure provided in Evidence Code Sections 454–459 applicable when judicial notice is taken of the matter listed in Penal Code Section 963. It should be noted that, notwithstanding Evidence Code Section 453, notice is mandatory if the private statute or ordinance is pleaded by reference to its title and the day of its passage.

Section 1120 (Amended)

SEC. 144. Section 1120 of the Penal Code is amended to read:

1120. ~~KNOWLEDGE OF JUROR TO BE DECLARED IN COURT, AND HE TO BE SWORN AS A WITNESS.~~ If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties *in order that the court may determine whether good cause exists for his discharge as a juror*.

Comment. Section 1120 requires a juror who discovers that he has personal knowledge of a fact in controversy in the case to disclose the same in open court. If he reveals such personal knowledge during the jury's retirement, the jury must return into court. The section then requires that the juror be sworn as a witness and examined in the presence of the parties.

The section does not make it clear whether this examination in the presence of the parties is for the purpose of determining if "good cause" exists for the juror's discharge in accordance with Penal Code Section 1123 or whether this examination is for the purpose of obtaining the juror's knowledge as evidence in the case. The circumstances under which a juror may testify on the merits in a criminal case are fully covered in Evidence Code Section 704. Therefore, Section 1120 has been amended to eliminate the ambiguity in its provisions and to provide assurance that the juror's examination is to be used solely to determine whether "good cause" exists for his discharge.

Section 1322 (Repealed)

SEC. 145. Section 1322 of the Penal Code is repealed.

~~1322. Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of section 270 and 270a of this code or under any provisions of the "Juvenile Court Law."~~

Comment. Section 1322 is superseded by Evidence Code Sections 970-973 and 980-987. See the Law Revision Commission's *Comment* to subdivision 1 of Section 1881 of the Code of Civil Procedure, which also is superseded by the same Evidence Code sections.

Section 1323 (Repealed)

SEC. 146. Section 1323 of the Penal Code is repealed.

~~1323. A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.~~

Comment. The first clause of the first sentence of Section 1323 is superseded by Evidence Code Sections 930 and 940. The second clause is recodified as Evidence Code Sections 761 and 773. See the *Comments* to those sections. The last sentence of Section 1323 is unnecessary because it merely duplicates the provisions of Article I, Section 13, of the California Constitution. See also EVIDENCE CODE § 413.

Section 1323.5 (Repealed)

SEC. 147. Section 1323.5 of the Penal Code is repealed.

~~1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.~~

~~This section shall not be construed as compelling any such person to testify.~~

Comment. Section 1323.5 is superseded by Evidence Code Section 930, which retains the only effect the section has ever been given—to prevent the prosecution from calling the defendant in a criminal action as a witness. See *People v. Talle*, 111 Cal. App.2d 650, 245 P.2d 633 (1952). Whether Section 1323.5 provides a broader privilege than Evidence Code Section 930 is not clear, for the meaning of the phrase "persons accused or charged" is uncertain. For example, a witness before a grand jury or at a coroner's inquest may not have been formally "accused or charged" by an information or indictment, but he may have been "accused or charged" by a complaint or by informal allegations; under such circumstances, it is uncertain whether Section 1323.5 would apply. A person who claims the privilege against self-incrimination before a grand jury, at a coroner's inquest, or in some other proceeding is provided with sufficient protection under Evidence Code Section 913, for his claim of privilege cannot be shown to impeach him or to provide a basis for inferences against him in a subsequent civil or criminal proceeding. See the *Comment* to EVIDENCE CODE § 913.

Section 1345 (Amended)

SEC. 148. Section 1345 of the Penal Code is amended to read:

1345. ~~WHEN MAY BE READ IN EVIDENCE.~~ The deposition, or a certified copy thereof, may be read in evidence by either party on the trial, ~~upon its appearing~~ *if the court finds* that the witness is ~~unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State~~ *unavailable as a witness within the meaning of Section 240 of the Evidence Code.* ~~Upon reading the deposition in evidence,~~ The same objections may be taken to a question or answer contained ~~therein~~ *in the deposition* as if the witness had been examined orally in court.

Comment. Section 1345 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Code Sections 1290-1292.

Section 1362 (Amended)

SEC. 149. Section 1362 of the Penal Code is amended to read:

1362. ~~DEPOSITIONS TO BE READ IN EVIDENCE. OBJECTIONS THERETO.~~ The depositions taken under the commission may be read in evidence by either party on the trial, ~~upon it being shown~~ *if the court finds* that the witness is ~~unable to attend from any cause whatever, and~~ *unavailable as a witness within the meaning of Section 240 of the Evidence Code.* The same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court.

Comment. Section 1362 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Code Sections 1290-1292.

PUBLIC UTILITIES CODE

Section 306 (Amended)

SEC. 150. Section 306 of the Public Utilities Code is amended to read:

306. The office of the commission shall be in the City and County of San Francisco. The office shall always be open, legal holidays and nonjudicial days excepted. The commission shall hold its sessions at least once in each calendar month in the City and County of San Francisco. The commission may also meet at such other times and in such other places as may be expedient and necessary for the proper performance of its duties, and for that purpose may rent quarters or offices. Except for the commission's deliberative conferences, the sessions and meetings of the commission shall be open and public and all persons shall be permitted to attend.

The commission shall have a seal, bearing the inscription "Public Utilities Commission State of California." The seal shall be affixed to all writs and authentications of copies of records and to such other instruments as the commission shall direct. ~~All courts shall take judicial notice of the seal.~~

The commission may procure all necessary books, maps, charts, stationery, instruments, office furniture, apparatus, and appliances.

Comment. The deleted language is inconsistent with Evidence Code Section 1452. See the *Comment* to that section.

OPERATIVE DATE OF AMENDMENTS, ADDITIONS, AND REPEALS

Operative Date of Amendments, Additions, and Repeals

SEC. 151. Sections 2 to 150 of this act shall become operative on January 1, 1967.

Comment. The amendments, additions, and repeals become operative at the same time as the Evidence Code. See EVIDENCE CODE § 12.

TABLE I

EVIDENCE CODE TO COMPARABLE SECTIONS

Table I indicates as to each section of the Evidence Code the comparable provisions of the California law in effect on January 1, 1965, that are superseded by the Evidence Code. Where the table indicates that a section in the Evidence Code supersedes an existing provision, the section replacing the existing provision may duplicate the superseded section or may be narrower or broader than the superseded section. For a discussion of the comparison, see the *Comment* to the Evidence Code section involved.

Where a particular section of the existing law is superseded by more than one section of the Evidence Code, that fact is indicated by an asterisk (*) after the number of the superseded section. (Table II indicates the various Evidence Code sections that supersede a particular section of existing law.)

The source of each section in the Evidence Code that does not supersede a specific provision in existing law is listed as "New." For example, some sections in the Evidence Code (principally the preliminary provisions and definitions) are based on comparable provisions in other recently enacted California codes, such as the Commercial Code and the Vehicle Code, and do not supersede any specific provision in existing law. For the source of a particular section, see the *Comment* to the Evidence Code section involved. See also Table III for an indication of a source in the Revised Rules of Evidence.

Evidence Code (Section)	*Existing Code (Section)*
1	New
2	New
3	New
4	New
5	New
6	New
7	New
8	New
9	New
10	New
11	New
12	New
100	New
105	New
110	New
115	New
120	New
125	New
130	New
135	New
140	CCP 1823, 1827*
145	New
150	New
160	New
165	New
170	New
175	New
180	New
185	New
190	CCP 1824

* In part.

Evidence Code (Section)	*Existing Code (Section)*
195	New
200	New
205	New
210	CCP 1868*, 1870(1)*, 1870(15)*, 1870(16)*
220	New
225	New
230	New
235	New
240	New
245	New
250	New
300	CCP 2103
310	CCP 2102*
311	CCP 1875*
312	CCP 2061*, 2101
320	CCP 2042*
350	CCP 1868 *
351	CCP 1847*, 1870(1)*, 1870(15)*, 1870(16)*
352	CCP 1838, 1868*, 2044*
353	New
354	New
355	New
356	CCP 1854

* In part.

Evidence Code (Section)	*Existing Code (Section)*
400–406	CCP 1834, 2102*
410	CCP 1831
411	CCP 1844
412	CCP 1963(6), 2061(6)*, 2061(7)
413	CCP 1963(5), 2061(6)*
	Penal 1323*
450–459	CCP 1875*, 2102*
500	CCP 1981*
501	New
502	CCP 2061(5)
520	CCP 1963(1)
521	CCP 1963(4)
522	New
550	CCP 1981*
600	CCP 1958–1960
601	CCP 1961
602	CCP 1833
603	New
604	New
605	New
606	New
607	New
620	CCP 1962*
621	CCP 1962(5)
622	CCP 1962(2)
623	CCP 1962(3)
624	CCP 1962(4)
630	New
631	CCP 1963(7)
632	CCP 1963(8)
633	CCP 1963(9)
634	CCP 1963(13)
635	New
636	CCP 1963(10)
637	CCP 1963(11)
638	CCP 1963(12)
639	CCP 1963(17)
640	CCP 1963(23)
641	CCP 1963(24)
642	CCP 1963(37)
643	CCP 1963(34)
644	CCP 1963(35)
645	CCP 1963(36)
660	New
661	Civil 193, 194, 195
	CCP 1963(31)
662	New
663	New
664	CCP 1963(15)
665	New
666	CCP 1963(16)
667	CCP 1963(26)
700	CCP 1879*
701	CCP 1879*, 1880*
702	CCP 1845*, 1879*, 1880*
703	CCP 1883*
704	CCP 1883*
710	CCP 1846*
711	CCP 1846*
720	CCP 1870(9)*
721	CCP 1872*
722	CCP 1256.2
723	CCP 1871*
730–733	CCP 1871*
750	New

* In part.

Evidence Code (Section)	*Existing Code (Section)*
751	CCP 1885*
752	CCP 1884
753	CCP 1863
754	CCP 1885*
760	CCP 2045*, 2048*
761	CCP 2045*
762	New
763	New
764	CCP 2046*
765	CCP 2044*, 2066
766	CCP 2056
767	CCP 2046*, 2048*
768	CCP 2052*, 2054
769	CCP 2049*, 2052*
770	CCP 2049*, 2052*
771	CCP 2047*
772	CCP 2045*, 2048*
773	CCP 2045*, 2048*
	Penal 1323*
774	CCP 2050*
775	New
776	CCP 2055
777	CCP 2043
778	CCP 2050*
780	CCP 1847*, 1870(16)*, 2049*, 2051*, 2052*, 2053*
785	CCP 2049*, 2051*
786	CCP 1847*, 2049*, 2051*, 2053*
787	CCP 2051*, 2065*
788	CCP 2051*, 2065*
789	New
790	CCP 2053*
791	New
800	CCP 1845*, 1870(9)*
801	CCP 1845*, 1870(9)*
802	CCP 1872*
803	New
804	New
805	New
870	CCP 1870(10)
890	CCP 1980.1
891	CCP 1980.2
892	CCP 1980.3
893	CCP 1980.4
894	CCP 1980.5*
895	CCP 1980.6
896	CCP 1980.7
897	CCP 1871*, 1980.5*
900	New
901	New
902	New
903	New
904	New
905	New
910	New
911	CCP 2065*
912	New
913	New
914	New
915	New
916	New
917	New
918	New

* In part.

Evidence Code (Section)	*Existing Code (Section)*
919	New
920	New
930	Penal 1323*, 1323.5
940	CCP 2065*
	Penal 1323*
950–962	CCP 1881(2)
970–973	CCP 1881(1)*
	Penal 1322*
980–987	CCP 1881(1)*
	Penal 1322*
990–1006	CCP 1881(4)*
1010–1026	B & P 2904
	CCP 1881(4)*
1030–1034	CCP 1881(3)
1040–1042	CCP 1881(5)
1050	New
1060	New
1070–1073	CCP 1881(6)
1100	CCP 2053*
1101	CCP 2053*
1102	New
1103	New
1104	New
1105	New
1150	New
1151	New
1152	CCP 2078*
1153	New
1154	CCP 2078*
1155	New
1156	CCP 1936.1
1200	CCP 1845*
1201	New
1202	New
1203	New
1204	New
1205	New
1220	CCP 1870(2)
1221	CCP 1870(3)
1222	CCP 1848*, 1870(5)*
1223	CCP 1848*, 1870(6)
1224	CCP 1848*, 1851*, 1870(5)*
1225	CCP 1848*, 1849, 1870(5)*
1226	New
1227	New
1230	CCP 1853, 1870(4)*, 1946(1)
1235	New
1236	New
1237	CCP 2047*
1238	New
1240	CCP 1850*, 1870(7)*
1241	CCP 1850*, 1870(7)*
1242	CCP 1870(4)*
1250	New
1251	New
1252	New
1260	New
1261	New
1270–1271	CCP 1918*, 1920*, 1921*, 1922*, 1926*, 1946*, 1953e–1953h
1272	New

* In part.

Evidence Code (Section)	*Existing Code (Section)*
1280	CCP 1918*, 1920*, 1921*, 1922*, 1926*, 1946*
1281	New
1282	CCP 1928.1
1283	CCP 1928.2
1284	New
1290–1292	CCP 1870(8)
1300	New
1301	New
1302	CCP 1851*
1310	CCP 1852*, 1870(4)*
1311	CCP 1852*, 1870(4)*
1312	CCP 1870(13)*
1313	CCP 1852*, 1870(11)*
1314	CCP 1870(11)*, 1963(30)
1315–1316	CCP 1919a, 1919b
1320	CCP 1870(11)*, 1870(13)*
1321	CCP 1870(11)*
1322	CCP 1870(11)*
1323	New
1324	CCP 2051*, 2053*
1330	New
1331	New
1340	New
1341	CCP 1936
1400	New
1401	New
1402	CCP 1982
1410	New
1411	New
1412	CCP 1941
1413	CCP 1940(1), 1940(3)
1414	CCP 1942
1415	CCP 1940(2)
1416	CCP 1870(9)*, 1943
1417–1418	CCP 1944
1419	CCP 1945
1420	New
1421	New
1450	New
1451	CCP 1948, 1951*
1452	CCP 1875(5), 1875(6)*, 1875(7)*, 1875(8), 1901*, 1905*, 1906*, 1907*, 1918*, 1921*, 1922*, 1928.3*
1453	CCP 1875(6)*, 1901*, 1905*, 1918*, 1919*, 1921*, 1922*, 1928.3*
1454	CCP 1901*, 1906*, 1907*, 1918*
1500	CCP 1855*, 1937*
1501	CCP 1855(1), 1937*
1502	New

* In part.

Evidence Code (Section)		*Existing Code (Section)*
1503	CCP	1855(2), 1938, 1939
1504		New
1505	CCP	1855*, 1870(14)*
1506	CCP	1855(3), 1901*, 1905*, 1906*, 1907*, 1918*, 1920a*, 1921*, 1922*
1507	CCP	1855(4), 1919*
1508	CCP	1855*, 1870(14)*
1509	CCP	1855(5), 1870(14)*
1510		New
1530	CCP	1901*, 1905*, 1906*, 1907*, 1918*, 1919*, 1920a*, 1921*, 1922*, 1928.3*
1531	CCP	1923
1532	CCP	1919*, 1951*
1550	CCP	1953i
1551	CCP	1920b
1560	CCP	1998
1561	CCP	1998.1
1562	CCP	1998.2
1563	CCP	1998.3
1564	CCP	1998.4
1565	CCP	1998.5
1566		New
1600	CCP	1919*, 1951*
1601	CCP	1855a
1602	CCP	1927
1603	CCP	1928
1604	CCP	1925
1605	CCP	1927.5

* In part.

* In part.

TABLE II

SUPERSEDED SECTIONS TO EVIDENCE CODE

Table II indicates as to each superseded section of the California law in effect on January 1, 1965, the comparable provisions of the Evidence Code. Where the table indicates that an existing section is superseded by a provision in the Evidence Code, the provision replacing the existing section may duplicate the superseded section or may be narrower or broader than the superseded section. For a discussion of the comparison, see the *Comment* to the Evidence Code section involved. See also the Law Revision Commission's *Comment* to the superseded section.

The disposition of an existing section that is not superseded by a specific provision in the Evidence Code is listed as "Not continued." The *Comment* to the repealed section gives the reason for its exclusion.

In addition to Evidence Code references, Table II also contains a reference to sections added to other codes that continue the substance of an existing section that is repealed but is not a proper subject for inclusion in the Evidence Code.

Bus & Prof Code (Section)	*Evidence Code (Section)*
2904	1010–1026
Civil Code (Section)	
193	661
194	661
195	661
Code Civ Proc (Section)	
1256.2	722
1823	140
1824	190
1825	Not continued
1826	500–667
1827	140, 450–459
1828	410
1829	1500–1510
1830	1500–1510
1831	410
1832	Not continued
1833	602
1834	403(b)
1836	Not continued
1837	Not continued
1838	352
1839	Not continued
1844	411
1845	702, 800, 801, 1200
1845.5	801–803
1846	710, 711
1847	351, 600, 780, 786
1848	1200, 1222–1227
1849	1225
1850	1240, 1241
1851	1224, 1302
1852	1310, 1311, 1313
1853	1230

Code Civ Proc (Section)	*Evidence Code (Section)*
1854	356
1855	1500–1510
1855a	1601
1863	753
1867	Not continued
1868	210, 350, 352
1869	500, 550
1870(1)	210, 351
1870(2)	1220
1870(3)	1221
1870(4)	1230, 1242, 1310, 1311
1870(5)	1222, 1224, 1225
1870(6)	1223
1870(7)	1240, 1241
1870(8)	1290–1292
1870(9)	720, 800, 801, 1416
1870(10)	870
1870(11)	1313, 1314, 1320–1322
1870(12)	Not continued
1870(13)	1312, 1320
1870(14)	1500–1510
1870(15)	210, 351
1870(16)	210, 351, 780
1871	723, 730–733
1872	721, 802
1875	311, 450–459, 1452, 1453
1879	700–702
1880	701, 702
1881(1)	970–973, 980–987
1881(2)	950–962
1881(3)	1030–1034
1881(4)	990–1006, 1010–1026
1881(5)	1040–1042
1881(6)	1070–1073
1883	703, 704

Code Civ Proc (Section)	*Evidence Code (Section)*
1884	752
1885	751, 754
1901	1452–1454, 1506, 1530
1903	1530
1905	1452, 1453, 1506, 1530
1906	1452, 1454, 1506, 1530
1907	1400, 1401, 1410, 1452, 1454, 1506, 1530
1918	1270, 1271, 1280, 1400-1402, 1410, 1452–1454, 1506, 1530
1919	1453, 1507, 1530, 1532, 1600
1919a	1315, 1316
1919b	1315, 1316
1920	1270, 1271, 1280
1920a	1506, 1530
1920b	1551
1921	1270, 1271, 1280, 1452, 1453, 1506, 1530
1922	1270, 1271, 1280, 1452, 1453, 1506, 1530
1923	1531
1924	Not continued
1925	1604
1926	1270, 1271, 1280
1927	1602
1927.5	1605
1928	1603
1928.1	1282
1928.2	1283
1928.3	1452, 1453, 1530
1928.4	3
1936	1341
1936.1	1156
1937	1500, 1501
1938	1503
1939	1503
1940	1413, 1415
1941	1412
1942	1414
1943	1416
1944	1417, 1418
1945	1419
1946	1230, 1270, 1271, 1280
1947	1270, 1271
1948	1451
1951	1451, 1532, 1600
1953e–1953h	1270–1272
1953i–1953*l*	1550
1954	140, 210, 351, 352
1957	140, 210
1958	600(b)
1959	600(a)
1960	600(b)
1961	601
1962	620
1962(1)	Not continued
1962(2)	622
1962(3)	623
1962(4)	624
1962(5)	621
1962(6)	* Not continued
1962(7)	Not continued
1963(1)	520
1963(2)	Not continued
1963(3) *Civil Code*	*3544 (Added)*
1963(4)	521
1963(5)	413
1963(6)	412
1963(7)	631
1963(8)	632
1963(9)	633
1963(10)	636
1963(11)	637
1963(12)	638
1963(13)	634
1963(14)	Not continued
1963(15)	664
1963(16)	666
1963(17)	639
1963(18)	Not continued
1963(19) *Civil Code*	*3545 (Added)*
1963(20)	Not continued
1963(21)	Not continued
1963(22)	Not continued
1963(23)	640
1963(24)	641
1963(25)	Not continued
1963(26)	667
1963(27)	Not continued
1963(28) *Civil Code*	*3546 (Added)*
1963(29)	Not continued
1963(30)	1314
1963(31)	661
1963(32) *Civil Code*	*3547 (Added)*
1963(33) *Civil Code*	*3548 (Added)*
1963(34)	643
1963(35)	644
1963(36)	645
1963(37)	642
1963(38)	Not continued
1963(39)	Not continued
1963(40) *Civil Code*	*164.5 (Added)*
1967	Not continued
1968	Not continued
1973	Not continued
1978	Not continued
1980.1	890
1980.2	891
1980.3	892
1980.4	893
1980.5	894, 897
1980.6	895
1980.7	896
1981	500, 550
1982	1402
1983	Not continued
1998	1560

* The last clause of Section 1962(6) is codified as *Code of Civil Procedure Section 1908.5 (Added)*.

Code Civ Proc (Section)	*Evidence Code (Section)*
1998.1	1561
1998.2	1562
1998.3	1563
1998.4	1564
1998.5	1565
2042	320
Code Civ Proc	*631.7 (Added)*
2043	777
2044	352, 765
2045	760, 761, 772, 773
2046	764, 767
2047	771, 1237
2048	760, 761, 767, 772, 773
2049	769, 770, 780, 785, 786, 1235
2050	774, 778
2051	780, 785, 786, 787, 788, 1324
2052	768, 769, 770, 780, 1235
2053	780, 786, 790, 1100–1104, 1324
2054	768
2055	776
2056	766
2061	312, 412, 413, 502
2065	351, 787, 788, 911, 940
2066	765
2078	1152, 1154
2079	Not continued
2101	312
2102	310, 400–406, 450–459
2103	300
Penal Code (Section)	
1322	970–973, 980–987
1323	413, 773, 930, 940
1323.5	930

TABLE III

EVIDENCE CODE TO REVISED RULES

Table III indicates as to each section of the Evidence Code the comparable provisions in the Uniform Rules of Evidence as revised by the Law Revision Commission (referred to in the table as "Revised Rules"). The Revised Rules are contained in separate pamphlets that are compiled in Volume 6 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES. Each pamphlet contains the tentative recommendation of the California Law Revision Commission on an article in the Uniform Rules of Evidence, as follows: Article I. *General Provisions* (Rules 1–8); Article II. *Judicial Notice* (Rules 9–12); Article III. *Burden of Producing Evidence, Burden of Proof, and Presumptions* (Rules 13–16 [omitted and proposed as Sections 500–667]); Article IV. *Witnesses* (Rules 17–22); Article V. *Privileges* (Rules 22.3–40.5); Article VI. *Extrinsic Policies Affecting Admissibility* (Rules 41–55); Article VII. *Expert and Other Opinion Testimony* (Rules 55.5–61); Article VIII. *Hearsay Evidence* (Rules 62–66.1); Article IX. *Authentication and Content of Writings* (Rules 67–72).

Generally speaking, the Evidence Code sections are substantially the same as the Revised Rule referred to. In some cases, however, the Evidence Code section may be narrower or broader than the Revised Rule. For a discussion of the comparison, see the *Comment* to the Evidence Code section involved and compare the *Comment* to the Revised Rule referred to. Where there is no provision in the Revised Rules comparable to an Evidence Code section, the table so indicates by the word "None."

Evidence Code (Section)	*Revised Rules (Rule)*
1	None
2	None
3	None
4	None
5	None
6	None
7	None
8	None
9	None
10	None
11	None
12	None
100	1(preamble)
105	1(14)
110	1(5)
115	1(4)
120	1(15)
125	1(6)
130	1(16)
135	62(2)
140	1(1)
145	1(7)
150	63(preamble)
160	None
165	None
170	62(3)
175	None
180	None
185	None
190	1(3)
195	22.3(6), 62(4)
200	1(17), 22.3(7), 22.3(8)
205	None
210	1(2)
220	1(18), 62(5)
225	62(1)
230	None
235	1(11)
240	62(6), 62(7)
245	1(12)
250	1(13)
300	1(9), 2
310	None
311	10.5
312	None
320	55.5(3)
350	7(3)
351	7(3)
352	45
353	4
354	5
355	6
356	None
400	8(1)
401	8(1)
402	1(8), 8(2)
403	8(3), 19(1), 19(3)

Evidence Code (Section)	*Revised Rules (Rule)*
404	8(4)
405	8(5)
406	8(6)
410	None
411	None
412	None
413	None
450	9(3)
451	9(1)
452	9(2)
453	9.5
454	10(2)
455	10(1), 10(2)
456	None
457	11(2)
458	12(1)
459	12(2)–12(5)
500	None
501	None
502	None
520	None
521	None
522	None
550	None
600	None
601	None
602	None
603	None
604	67.7(4)
605	None
606	None
607	None
620	None
621	None
622	None
623	None
624	None
630	None
631	None
632	None
633	None
634	None
635	None
636	None
637	None
638	None
639	None
640	None
641	None
642	None
643	None
644	None
645	None
660	None
661	None
662	None
663	None
664	None
665	None
666	None
667	None
700	7(1)
701	17(1)
702	19(1), 19(2)
703	42
704	43
710	18
711	None
720	55.5(1), 55.5(2)
721	58.5
722	61
723	None
730	None
731	None
732	None
733	None
750	17(2)
751	None
752	None
753	None
754	None
760	None
761	None
762	None
763	None
764	None
765	None
766	None
767	None
768	22(1)
769	22(1)
770	22(2)
771	None
772	None
773	None
774	None
775	None
776	None
777	None
778	None
780	None
785	20(1)
786	22(3)
787	22(4)
788	21(1), 21(3)
789	22(5)
790	20(3)
791	20(2)
800	56(1)
801	56(2)
802	57(1)
803	56(3)
804	57.5
805	56(4)
870	None
890	None
891	None
892	None
893	None
894	None
895	None
896	None
897	None
900	22.3(preamble)
901	22.3(5)
902	22.3(1)
903	22.3(2)
904	22.3(3)
905	22.3(4)
910	22.5
911	7(2)
912	37
913	39(1)
914	37.7
915	37.5
916	36.5
917	28.5
918	40
919	38
920	40.5
930	23
940	25

Evidence Code (Section)	*Revised Rules (Rule)*
950	26(1)(d)
951	26(1)(a)
952	26(1)(b)
953	26(1)(c)
954	26(2)
955	26(3)
956	26(4)(a)
957	26(4)(b)
958	26(4)(c)
959	26(4)(d)
960	26(4)(e)
961	26(4)(f)
962	26(5)
970	27.5(1)
971	27.5(2)
972	27.5(1), 27.5(2)
973	27.5(3), 27.5(4)
980	28(1)
981	28(2)(a)
982	28(2)(b)
983	28(2)(c)
984	28(2)(d)
985	28(2)(e)
986	28(2)(f)
987	28(2)(g)
990	27(1)(d)
991	27(1)(c)
992	27(1)(a)
993	27(1)(b)
994	27(2)
995	27(3)
996	27(4)(k)
997	27(4)(a)
998	27(4)(h), 27(4)(j)
999	27(4)(i)
1000	27(4)(b)
1001	27(4)(c)
1002	27(4)(d)
1003	27(4)(e)
1004	27(4)(f)
1005	27(4)(g)
1006	27(4)(*l*)
1010	27.3(1)(d)
1011	27.3(1)(c)
1012	27.3(1)(a)
1013	27.3(1)(b)
1014	27.3(2)
1015	27.3(3)
1016	27.3(4)(g)
1017	27.3(4)(h)
1018	27.3(4)(a)
1019	27.3(4)(b)
1020	27.3(4)(c)
1021	27.3(4)(d)
1022	27.3(4)(e)
1023	27.3(4)(h)
1024	None
1025	27.3(4)(f)
1026	27.3(4)(i)
1030	29(1)(c)
1031	29(1)(a)
1032	29(1)(b)
1033	29(2)
1034	29(3)
1040	34(1), 34(2)
1041	36(1), 36(2), 36(3)
1042	34(3), 34(4), 36(4), 36(5)
1050	31
1060	32
1070	None
1071	None
1072	None
1073	None
1100	46
1101	47(1), 47(4), 47(5)
1102	47(2)
1103	47(3)
1104	48
1105	49
1150	41
1151	51
1152	52
1153	52.5
1154	53
1155	54
1156	None
1200	63(preamble), 63(32)
1201	66
1202	65
1203	None
1204	63(6)
1205	63(32), 66.1
1220	63(6), 63(7)
1221	63(8)(b)
1222	63(8)(a)
1223	63(9)(b)
1224	63(9)(c)
1225	None
1226	None
1227	None
1230	63(10)
1235	63(1)(a)
1236	63(1)(b)
1237	63(1)(c)
1238	None
1240	63(4)(b)
1241	63(4)(a)
1242	63(5)
1250	63(12)(a)
1251	63(12)(b)
1252	None
1260	63(12)(d)
1261	None
1270	63(13)
1271	63(13)
1272	63(14)
1280	63(15)
1281	63(16)
1282	None
1283	None
1284	63(17)(b), 69
1290	62(8)
1291	63(3)
1292	63(3.1)
1300	None
1301	63(21)
1302	63(21.1)
1310	63(23)
1311	63(24)
1312	63(26.1)
1313	63(26)
1314	63(27)(c)
1315	None
1316	63(18)
1320	63(27)(b)
1321	None
1322	63(27)(a)
1323	63(27.1)
1324	63(28)
1330	63(29)
1331	63(29.1)

Evidence Code (Section)	*Revised Rules (Rule)*
1340	63(30)
1341	63(31)
1400	67
1401	67
1402	None
1410	67
1411	None
1412	None
1413	71(1), 71(3)
1414	None
1415	71(2)
1416	None
1417	None
1418	None
1419	None
1420	None
1421	None
1450	67.7(4)
1451	None
1452	67.7(1), 68, 69
1453	67.7(2), 68, 69
1454	67.7(3), 68, 69
1500	70(preamble)
1501	70(1)(a)
1502	70(1)(b)
1503	70(1)(c)
1504	70(1)(d)
1505	70(2)(a), 70(2)(b)
1506	70(1)(e)
1507	70(1)(f)
1508	70(2)(a), 70(2)(c)
1509	70(1)(g), 70(2)(a)
1510	None
1530	63(17)(a), 68
1531	None
1532	63(19)
1550	72
1551	None
1560	None
1561	None
1562	None
1563	None
1564	None
1565	None
1566	None
1600	63(19)
1601	None
1602	None
1603	None
1604	None
1605	None

TABLE IV

REVISED RULES TO EVIDENCE CODE

Table IV indicates as to each Revised Rule (and as to each subdivision of those revised Rules that are divided into subdivisions) the comparable provisions in the Evidence Code. The Revised Rules are contained in separate pamphlets that are compiled in Volume 6 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES. Each pamphlet contains the tentative recommendation of the California Law Revision Commission on an article in the Uniform Rules of Evidence, as follows: Article I. *General Provisions* (Rules 1–8); Article II. *Judicial Notice* (Rules 9–12); Article III. *Burden of Producing Evidence, Burden of Proof, and Presumptions* (Rules 13–16 [omitted and proposed as Sections 500–667]); Article IV. *Witnesses* (Rules 17–22); Article V. *Privileges* (Rules 22.3–40.5); Article VI. *Extrinsic Policies Affecting Admissibility* (Rules 41–55); Article VII. *Expert and Other Opinion Testimony* (Rules 55.5–61); Article VIII. *Hearsay Evidence* (Rules 62–66.1); Article IX. *Authentication and Content of Writings* (Rules 67–72).

Generally speaking, the Evidence Code sections are substantially the same as the Revised Rules referred to. In some cases, however, the Evidence Code section may be narrower or broader than the Revised Rule. For a discussion of the comparison, see the *Comment* to the Revised Rule involved and compare the *Comment* to the Evidence Code section referred to. Some Revised Rules that are not continued in the Evidence Code are identified by the phrase "Not continued."

Revised Rules (Rule)	*Evidence Code (Section)*
1(preamble)	100
1(1)	140
1(2)	210
1(3)	190
1(4)	115
1(5)	110
1(6)	125
1(7)	145
1(8)	402(d)
1(9)	300
1(10)	Not continued
1(11)	235
1(12)	245
1(13)	250
1(14)	105
1(15)	120
1(16)	130
1(17)	200
1(18)	220
2	300
4	353
5	354
6	355
7(1)	700
7(2)	911
7(3)	350, 351
8(1)	400, 401
8(2)	402
8(3)	403
8(4)	404
8(5)	405
8(6)	406
9(1)	451
9(2)	452
9(3)	450
9.5	453
10(1)	455(a)
10(2)	454, 455(b)
10.5	311
11(1)	Not continued
11(2)	457
12	458, 459
17(1)	701
17(2)	750
18	710
19(1)	403(a), 702(a)
19(2)	702(b)
19(3)	403(b)
20(1)	785
20(2)	791
20(3)	790
21(1)	788(a)
21(2)	Not continued
21(3)	788(b)
22(1)	768, 769
22(2)	770
22(3)	786
22(4)	787
22(5)	789
22.3(preamble)	900
22.3(1)	902

Revised Rules (Rule)	*Evidence Code (Section)*
22.3(2)	903
22.3(3)	904
22.3(4)	905
22.3(5)	901
22.3(6)	195
22.3(7)	200
22.3(8)	200
22.5	910
23	930
24	Not continued
25	940
26(1)(a)	951
26(1)(b)	952
26(1)(c)	953
26(1)(d)	950
26(2)	954
26(3)	955
26(4)(a)	956
26(4)(b)	957
26(4)(c)	958
26(4)(d)	959
26(4)(e)	960
26(4)(f)	961
26(4)(g)	Not continued
26(4)(h)	Not continued
26(5)	962
27(1)(a)	992
27(1)(b)	993
27(1)(c)	991
27(1)(d)	990
27(2)	994
27(3)	995
27(4)(a)	997
27(4)(b)	1000
27(4)(c)	1001
27(4)(d)	1002
27(4)(e)	1003
27(4)(f)	1004
27(4)(g)	1005
27(4)(h)	998
27(4)(i)	999
27(4)(j)	998
27(4)(k)	996
27(4)(*l*)	1006
27.3(1)(a)	1012
27.3(1)(b)	1013
27.3(1)(c)	1011
27.3(1)(d)	1010
27.3(2)	1014
27.3(3)	1015
27.3(4)(a)	1018
27.3(4)(b)	1019
27.3(4)(c)	1020
27.3(4)(d)	1021
27.3(4)(e)	1022
27.3(4)(f)	1025
27.3(4)(g)	1016
27.3(4)(h)	1017, 1023
27.3(4)(i)	1026
27.5(1)	970, 972
27.5(2)	971, 972
27.5(3)	973(a)
27.5(4)	973(b)
28(1)	980
28(2)(a)	981
28(2)(b)	982
28(2)(c)	983
28(2)(d)	984
28(2)(e)	985
28(2)(f)	986
28(2)(g)	987

Revised Rules (Rule)	*Evidence Code (Section)*
28.5	917
29(1)(a)	1031
29(1)(b)	1032
29(1)(c)	1030
29(2)	1033
29(3)	1034
31	1050
32	1060
34(1)	1040(a)
34(2)	1040(b)
34(3)	1042(a)
34(4)	1042(b)
36(1)	1041(a)
36(2)	1041(b)
36(3)	1041(d)
36(4)	1042(a)
36(5)	1042(b)
36.5	916
37	912
37.5	915
37.7	914
38	919
39(1)	913
39(2)	Not continued
39(3)	Not continued
40	918
40.5	920
41	1150
42	703
43	704
45	352
46	1100
47(1)	1101(a)
47(2)	1102
47(3)	1103
47(4)	1101(b)
47(5)	1101(c)
48	1104
49	1105
51	1151
52	1152
52.5	1153
53	1154
54	1155
55.5(1)	720(a)
55.5(2)	720(b)
55.5(3)	320
55.7	Not continued
56(1)	800
56(2)	801
56(3)	803
56(4)	805
57(1)	802
57(2)	Not continued
57.5	804
58.5	721
61	722
62(1)	225
62(2)	135
62(3)	170
62(4)	195
62(5)	220
62(6)	240(a)
62(7)	240(b)
62(8)	1290
63(preamble)	150, 1200
63(1)(a)	1235
63(1)(b)	1236
63(1)(c)	1237
63(3)	1291
63(3.1)	1292

Revised Rules (Rule)	*Evidence Code (Section)*
63(4)(a)	1241
63(4)(b)	1240
63(5)	1242
63(6)	1204, 1220
63(7)	1220
63(8)(a)	1222
63(8)(b)	1221
63(9)(a)	Not continued
63(9)(b)	1223
63(9)(c)	1224
63(10)	1230
62(12)(a)	1250
63(12)(b)	1251
63(12)(c)	Not continued
63(12)(d)	1260
63(13)	1270, 1271
63(14)	1272
63(15)	1280
63(16)	1281
63(17)(a)	1530
63(17)(b)	1284
63(18)	1316
63(19)	1532, 1600
63(21)	1301
63(21.1)	1302
63(22)	Not continued
63(23)	1310
63(24)	1311
63(26)	1313
63(26.1)	1312
63(27)(a)	1322
63(27)(b)	1320
63(27)(c)	1314
63(27.1)	1323
63(28)	1324
63(29)	1330
63(29.1)	1331
63(30)	1340
63(31)	1341
63(32)	1200(b), 1205
65	1202
66	1201
66.1	1205
67	1400, 1401, 1410
67.5	Not continued
67.7(1)	1452
67.7(2)	1453
67.7(3)	1454
67.7(4)	604, 1450
68	1452–1454, 1530
69	1284, 1452–1454
70(preamble)	1500
70(1)(a)	1501
70(1)(b)	1502
70(1)(c)	1503
70(1)(d)	1504
70(1)(e)	1506
70(1)(f)	1507
70(1)(g)	1509
70(2)(a)	1505, 1508, 1509
70(2)(b)	1505
70(2)(c)	1508
71(1)	1413
71(2)	1415
71(3)	1413
72	1550

INDEX

In the *Comments* to the new Evidence Code sections, references will be found to amended, added, or repealed sections of the existing codes. These existing sections, listed on pages 25-27, are set out in full on pages 294-368. The tables on pages 369-375 show the relationship between the sections in the Evidence Code and in the existing codes. For this reason, this index refers to specific existing code sections only when the *Comment* to that section contains a discussion of a topic not treated elsewhere in this pamphlet.

This index was prepared by Mrs. Margaret Loftus.

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