#34(L) 9/4/64

Memorandum 64-66

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

We have received no further comments on the hearsay division. There are, however, several important matters that remain to be considered.

Court-made exceptions; People v. Gould; inconsistent statements

At the last meeting, the Commission considered whether Section 1200 should permit the courts to continue to fashion exceptions to the hearsay rule. There were not enough votes to change the present policy of permitting the courts to continue to fashion exceptions. The Commission considered the fact that the prior identification exception created in People v. Gould will probably be continued as a result of the decision to permit the courts to create exceptions; but there were not enough votes either to codify the People v. Gould exception (in order to make our list as complete as possible) or to expressly deny the existence of such an exception. The Commission indicated that it wished to consider the matter further.

Related to the foregoing problem is the exception for prior inconsistent statements of witnesses. The Commission was concerned about the fact that this exception permits a prior identification inconsistent with the testimony at the trial to be shown as substantive evidence, while if the Gould exception is not continued, a prior identification vouched for by the witness at the trial would not be admissible as substantive evidence. There were insufficient votes to change the prior inconsistent statement exception; but the Commission asked the staff to report on the effect of the exception on trial practice.

Inconsistent statements. We report on the exception for inconsistent statements of witnesses first because we think that the decision here has some

bearing on the decision to be made on the Gould matter.

We all know, of course, that under existing law prior inconsistent statements of trial witnesses are not substantive evidence. Section 1235 will change that rule. It is the existing law, also, that a party cannot impeach his own witness in the absence of surprise, etc. Section 785 will change that rule.

A corollary of the foregoing rules is that even in those situations where a party may impeach his own witness (surprise, etc.) he is not permitted to do so unless the witness has given testimony unfavorable to the party. The party may not impeach merely because the witness has failed to give testimony the party expected--even though the party is surprised by the failure. People v. Mitchell, 94 Cal. 550 (1892). The reason for this rule is that the impeaching evidence is irrelevant when the witness has not given testimony that is damaging to the impeaching party--there is no need to impair the credibility of a witness whose testimony is innocuous.

A change in the inconsistent statement rule and a change in the impeachment rule will also change the corollary rule just mentioned for the inconsistent statement will no longer be irrelevant since it is substantive evidence of the matters stated.

We think the best way to illustrate the effect of these changes is to show how these rules would have operated in the decided cases.

> People v. Jacobs, 49 Cal. 384 (1874). J was convicted of burglary for the purpose of rape. Prosecution called K as a witness and asked if J had previously made threats that he would commit the offense. K testified that no threats were made. The prosecution claimed surprise, cross-examined K concerning such statements by J, and still failed to get the desired answers. After laying the proper foundation, the prosecution called deputy sheriff D who testified that K had stated to him that J had made such threats.
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> The Supreme Court reversed, for K had given no evidence damaging to the prosecution and the prosecution should not have

been permitted to impeach. McKinstry, J., in concurrence said: "But when a witness has not given adverse testimony, the party calling him ought not to be permitted to prove that he made statements which, if sworn to at the trial, would tend to make out his case. To admit the proof of such statements would enable the party to get the naked declarations of the witness before the jury as independent evidence."

Under the Evidence Code, the decision would be affirmed because the "declarations of the witness" are "independent evidence."

People v. Mitchell, 94 Cal. 550 (1892). C was shot to death about midnight while standing on the back porch of a saloon in Red Bluff. L was prosecuted and acquitted. M was then prosecuted for the murder and was convicted. B was called as a defense witness. B's brother was also charged with being implicated in the crime. B testified that he did not attempt to get money from H to aid L in fleeing and thus save his brother. The prosecution then called H who testified that B had asked for money to aid L's flight, but H testified that B did not say this was to save his brother. The prosecution was then permitted, after laying the proper foundation, to show that H had testified in the first trial--the trial of L for the murder--that B had said the money was to save his brother.

The Supreme Court reversed, for H had not testified against the prosecution; he had "simply failed to testify to a fact which the district attorney thought he could prove by him."

Under the Evidence Code, the trial court's rulings would have been correct.

People v. Crespi, 115 Cal. 50 (1896). C was convicted of criminal libel. The publication complained of reported that A, a newspaper publisher, was paid by "the Camorra" to libel and vilify certain people. "The camorra" was supposed to be a confederation of Italians banded together for dishonest and dishonorable purposes. C called A as a witness in an attempt to prove the existence of the camorra and A's connection with it. He asked A if A had not stated--giving time, place, persons present--that he had instituted the prosecution of C at the instance of others. A denied making the statement. D sought to impeach with evidence of the statement, but the prosecution's objection was sustained.

The Supreme Court affirmed. "It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him. Indeed, he was apparently questioned for the sole purpose of impeachment. Such practice is not permissible."

Under the Evidence Code, the trial court's ruling would be erroneous.

Thiele V. Newman, 116 Cal. 571 (1897). P recovered a judgment for treble damages for injury caused his land by a fire originating on adjoining land. The incident involved three parcels of property. P and D owned the outside parcels and R owned the middle parcel. D hired R to tend D's stock. R testified that D told R to set fire to some grass on D's land. R also testified that, without instruction from D, R set fires on his own land because he thought it would make the grass better the following year. It was a fire set on R's land that escaped and injured P's land. P's theory was the R set the fire on R's land at D's direction and for D's benefit; hence, D was liable under respondeat superior. P was permitted to produce two or three witnesses who testified that R had said that the fire on R's land was set for the benefit of D.

The Supreme Court reversed for lack of evidence to show that R set fire to his own land for the benefit of D.

Under the Evidence Code, the prior statements of R would be admissible to prove the matters stated; but even so, it seems dubious that there was any evidence of an agency on the part of R to set the fire in question.

Albert v. McKay & Co., 174 Cal. 451 (1917). A was killed by machinery in a lumber mill where he was employed. There were no eyewitnesses. The plaintiff widow's theory was that the machine was negligently set in motion while A was working adjacent to it. There was abundant evidence that the machine was not stopped prior to the accident and, hence, that the machine was not negligently started. Plaintiff impeached one defense witness by showing that he had said shortly after the accident that the machinery had not been running and somebody must have started it after A had started working. The plaintiff recovered a judgment.

The Supreme Court reversed for lack of evidence. The impeaching statement was held not to support the verdict because it was not substantive evidence.

Under the Evidence Code, the impeaching statement would be substantive evidence. Whether the result of the case would be changed is uncertain. The facts recited by the court indicate a lack of evidence that the defendant knew or had reason to know A was where he was.

People v. Brown, 81 Cal. App. 226 (1927). B was convicted of the murder of C. The prosecution claimed that B--or a co-conspirator--struck C on the head and killed him. B claimed that C fell off a windmill tower and struck his head on a cogwheel. The prosecution called witness W (who had passed by at the time of the events in question) and asked him what he had seen. W replied that he had merely seen three cars parked there. After laying the proper foundation, including testimony by the distric attorney himself that W had told him that W would testify differently, the prosecution called three witnesses who

testified that W had said that he had seen C, the deceased, staggering out the back door "like a chicken with his head cut off." One witness testified that he had asked W, "like a drunk man?" and that W had replied, "No, worse than that. Like a chicken with the head cut off."

The DCA reversed, holding the admission of this testimony to be error. W had given no testimony damaging to the prosecution; he had merely failed to testify as expected. Hence, it was improper to permit his impeachment.

Under the Evidence Code, the admission of this testimony would have been proper.

People v. Zoffel, 35 Cal. App.2d 215 (1939). Z was prosecuted, and convicted, as an accomplice to an abortion-murder committed by a "defrocked" doctor (he had been convicted of harboring John Dillinger). The prosecution's theory was that Z was living with the doctor and acting as his nurse. The doctor admitted that a woman had been living with him and acting as his nurse, but he denied that she was Z. To prove the nurse and Z were the same, the prosecution called the manager of the apartment house; but the witness testified that the nurse and Z were not the same person. The prosecution then called a detective who testified that the night Z was arrested she was taken to the apartment house and that the manager had then identified her as the woman living in the apartment.

The DCA reversed for lack of evidence that Z was the nurse who participated in the abortion-murder, holding incidentally that prior identification evidence was insufficient to place Z at the apartment house because such evidence merely impeached, it did not prove the matters stated.

Under the Evidence Code, this case might have had a different result. Certainly, the prior identification is substantive evidence under Section 1235. This case is an interesting one to compare with People v. Gould, for both involved prior identifications. If the reference to "law" is changed to "statute" in Section 1200, the prior identification involved here would still be substantive evidence; but if the witnesses at the trial confirmed the prior identification instead of denying it, the prior identification would be inadmissible hearsay.

The foregoing cases amply illustrate the effect that Section 1235 will have on the conduct of trials. Whether the effect is good or bad depends on the relative reliability of the prior statements in comparison with the testimony elicited from the witness at the trial. In some of the cases appearing above, the out-of-court statements seem more reliable than the at-trial testimony.

At least, it seems that the jury, seeing the witness on the stand and under examination, might be in a good position to evaluate the relative reliability of the in-court and out-of-court statements.

There can be no doubt, however, that the change of the hearsay rule together with the change of the impeachment rule will have a dramatic effect on the way cases are tried. I was surprised to find as many cases as I did in which the result on appeal actually turned on the effect of inconsistent statements as substantive evidence. It seems likely that a great many more never appear at the appellate level because correctly decided below, and less well-settled doctrines can be argued for appeal purposes. It seems likely, too, that because cases cannot be tried at the present time by impeaching your own witnesses, cases just aren't prepared for that type of presentation.

The Commission may retain the proposal in Section 1235. Or, the Commission may repeal Section 1235 and let inconsistent statements be used for impeachment purposes only. We recommend, however, that Section 1235 be retained. The jury and judge have the witness before them subject to thorough cross-examination. They have as adequate a basis for determining the truth of the prior statement as they do of the in-court statement.

The Commission might restore the impeachment rule. We do not recommend this course of action, for it represents a return to the idea that a party vouches for the witnesses he produces--and this idea, we have been advised, does not correspond with the actual facts. In truth, a party must use the witnesses available. He has no control over who has witnessed an event. The witnesses are not his champions nor are they on his team. He should be able to utilize such parts of their testifony as are of value to him and repudiate the rest.

The Commission might, too, retain only the rule that a party cannot impeach a witness with inconsistent statements if the witness has not testified

to any damaging facts. This would confine the hearsay exception, then, to those impeaching statements that would come in for impeachment purposes anyway. This change would preclude a party from proving his case by impeaching witnesses who have disappointed him by failing to testify as he desires. We recommend against such a provision, however, for the reasons stated above for not deleting Section 1235.

Court-made exceptions; People v. Gould. There is little we can contribute here. The Commission is familiar with the problem. The problem involves those previously made exceptions that the Commission has specifically considered and failed to approve. The only one we know of is the prior identification exception involved in People v. Gould. Unless the Gould rule is specifically repudiated by statute, Section 1200 will permit the court to create the exception again when the next case is presented involving the issue.

If the Gould case is not to be specifically repudiated, the question is whether it should be given statutory recognition so that our catalog of hearsay exceptions will be complete. We proposed a rule at one time limiting the Gould rule to those cases where the witness testifies that a true identification was made at the prior time and the witness, because of memory failure, is unable to repeat the identification at the trial. The only question under such a rule is the reliability of the evidence of the prior identification; and since that must be proved by a percipient witness, the problems of reliability are no greater and no less than they are with any other kind of eyewitness testimony.

Police reports

At the last meeting, the Commission instructed the staff to add a provision to both the business records rule and the official records rule excluding law enforcement officers' reports from criminal actions. We have added such a provision, but we used the term "peace officer" because it is the more precise term.

Since this action was taken without benefit of a research study to indicate the extent to which such reports are admissible or inadmissible under existing law, we thought we should provide such a report. It may be that there are more refined ways of eliminating the abusive use of police reports--if there is any--than by excluding them altogether. After all, in some cases, such reports may be valuable to the defense as well as to the prosecution. Such a report, made by an unavailable officer, may contain a declaration against penal interest implicating another instead of the defendant, just as such a report may contain an admission by the defendant implicating himself. Then, too, it may be important to either defense or prosecution to prove that the reported arrest took place or took place at a particular time noted in the arrest report.

The following discussion considers civil as well as criminal cases; but, as Justice Peters once noted in a different context (presumptions), unless some provision of law expressly provides otherwise the rules of evidence in criminal cases are the same as they are in civil cases. People v. Hewlett, 108 Cal. App.2d 358, 374 (1951); Pen. C. § 1102. Hence, restrictions on the admissibility of police reports developed in civil cases are applicable to criminal cases as well.

There are two bases for the admission of official documents under existing law: Section 1920 of the Code of Civil Procedure and the Uniform Business Records as Evidence Act. Nilsson v. State Personnel Board, 25 Cal. App.2d 699 (1938)(admitting State personnel record prior to enactment of Uniform Business Records Act; Nichols v. McCoy, 38 Cal.2d 447 (1952)(admitting record of test made in coroner's office as a business record).

Section 1920 states no conditions of admissibility for official records. It says they are prima facie evidence of their contents. Despite the unqualified statement in Section 1920, "[i]t has been held repeatedly that those sections

[1920 and 1926] cannot have universal literal application." Chandler v. Hibberd, 165 Cal. App.2d 39, 65 (1958).

Before exploring the basis upon which the courts admit some official reports and exclude others despite the unqualified statutory language, we will look at the Uniform Business Records Act. Section 1953f of the Code of Civil Procedure (the operative section of the act) requires the court to find that "the sources of information, method and time of preparation were such as to justify its admission." In giving meaning to this vague standard, the courts have held that the person making the record have "had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some person employed in the business whose duty it was to make the same in the regular course of business." Gough v. Security Trust & Savings Bank, 162 Cal. App.2d 90 (1958).

This standard has been applied to official reports--including police and similar reports--whether the report is offered under the official reports exception in Section 1920 or the business records exception in Section 1953f. Thus, a transcript of the testimony given at a coroner's inquest, although an official report, is inadmissible while the coroner's report of matters known to him is admissible. People v. Lessard, 58 Cal.2d 447, 455-456 (1962). A fire inspector's report on the origin of a fire in inadmissible when the report indicates that it is not based on personal knowledge of the inspector. Harrigan v. Chaperon, 118 Cal. App.2d 167 (1953). In Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959), the court held that a fire ranger's investigation report of the origin of a fire was inadmissible as a business record because based on hearsay, and that the report was still inadmissible if the ground urged was Section 1920 of the Code of Civil Procedure ("The above mentioned code sections [§§ 1920, 1926] could never have been intended to apply to reports based entirely upon hearsay").

As a result of the foregoing doctrines, the courts have repeatedly held that police reports are almost always inadmissible. In MacLean v. City & County of San Francisco, 151 Cal. App.2d 133 (1957), the court indicated that most such reports are inadmissible because based on the description of witnesses and others at the scene of the accident. "Such informants, of course, have no business duty to render reports to the police." At p. 143. The court indicated that either a police report should show on its face that it is based on personal knowledge or a qualifying witness should so testify if it is to be held admissible.

Hoel v. City of Los Angeles, 136 Cal. App.2d 295 (1955), is to the same effect. Holding a police report inadmissible, under both Sections 1920 and 1953f, the court said, "The extract from the report which was received at bar was essentially hearsay, as counsel for both sides asserted; it was not admissible under the suggested exceptions to the hearsay rule . . . ." At p. 310.

In contrast with the foregoing cases, however, Harris v. Alcoholic Bev. Con. Appeals Board, 212 Cal. App.2d 106 (1963), held that police reports are admissible to prove the matters known to the police officer making the report--such as the fact that an arrest was made. The question before the court was whether a particular bar constituted a law enforcement problem because of the large number of arrests for drunkenness made on the premises. The licensee produced testimony that few if any arrests for drunkenness were made on the premises. In rebuttal, the ABC Department introduced 101 arrest records of the San Francisco Police Department. To show that the arrests were not frivolous, other records showing the conviction of the arrested persons for drunkenness were also introduced.

One other matter should be noted in regard to the business records and official records exceptions as they have been developed by the courts. Under neither exception is an incompetent opinion admissible merely because it appears in an appropriate record. People v. Terrell, 138 Cal. App.2d 35 (1955), held that a diagnosis of "prob. criminal abortion" was inadmissible even though contained in a hospital record otherwise admissible as a business or official record. "[I]t constituted a conclusion to which the doctor who made the notation could not have testified to if called as a witness." Similarly, in Hutton v. Brookside Hospital, 213 Cal. App.2d 350 (1963), a nurse's notation in a hospital record that a patient "seemed too ill to be moved" was held inadmissible because the matter stated "was not one upon which the nurse was qualified to give an opinion." In Pruett v. Burr, 118 Cal. App.2d 188, 200 (1953), the court quoted the following with approval: "but records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records."

In the light of the foregoing, there does not appear to be any abusive use of police reports sanctioned by the cases under the existing law. The amendments made to Sections 1271 and 1280 at the last meeting were apparently designed to keep out official reports that are not admitted under existing law. They resulted from a fear that the change in the statutory language from that of Section 1920 to that of Section 2180 would encourage the courts to admit reports based on hearsay.

To meet this problem, Sections 1271 and 1280 might be amended to incorporate the limitation that the reports admissible under those sections

be based on the personal knowledge either of the recorder or of a person whose business or official duty it was to make such reports in the regular course of the business or office.

Such an amendment would meet precisely the problem that subdivision (b) of each section was aimed at. The present solution to the problem is too broad. Where alibi is in issue, either the prosecution of the defense might want a particular arrest report admitted to prove or disprove the claimed whereabouts of the defendant. We think that a police report should be admitted to prove such a matter just as a hotel register is admitted under the business records exception for the same purpose.

Section 1203--cross-examination

One minor defect seems to be present in the cross-examination section. As a matter of policy, we think that a party should have the right to cross-examine a hearsay declarant--whether a party, witness, etc.--if the party would otherwise have the right to cross-examine the declarant in the action. For example, in a multi-party case, P may introduce witness W's out-of-court statement. D, the party who called W originally, should not be permitted to cross-examine W concerning the statement as W is his witness. But the rationale underlying Section 1203 indicates that defendant E, who is adverse to defendant D, should have the right to cross-examine W concerning the statement even if the subject involved was not covered on D's direct examination of W.

To accomplish this, Section 1203(b) might be modified as follows:

> (b) Unless the party seeking to cross-examine the declarant has the right apart from this section to cross-examine the declarant in the action, this section is not applicable if the declarant is . . . .

Respectfully submitted,

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Prepared for Sept. 1964 Meeting

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§ 1200. The hearsay rule.

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

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

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

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

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

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

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

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

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

§ 1201. Multiple hearsay.

Comment. Section 1201 makes it possible to use admissible hearsay to prove another statement was made that is also admissible hearsay. For example, under Section 1201, an official reporter's transcript

of the testimony at another trial may be used to prove the nature of the testimony previously given (Section 1280), the former testimony may be used as hearsay evidence (under Section 1291) to prove that a party made an admission. The admission is admissible (Section 1221) to prove the truth of the matter stated. Thus, under Section 1201, the evidence of the admission contained in the transcript is admissible because each of the hearsay statements involved is within an exception to the hearsay rule.

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

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

§ 1202. Credibility of hearsay declarant.

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

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

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

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

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

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

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

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

§ 1203. Cross-examination of hearsay declarant.

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

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

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

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

§ 1204. Hearsay statement offered against criminal defendant.

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

§ 1205. Pretrial notice of certain hearsay statements.

Comment. The introduction of hearsay evidence will, in many instances, deprive the party against whom the evidence is offered of the right to cross-examine the hearsay declarant. To compensate for this loss, Section 1205 requires that the proponent of certain kinds of hearsay evidence provide the adverse party with pretrial notice of his intention to offer the hearsay. The adverse party is thus afforded the opportunity to investigate the accuracy of the perceptions and the veracity of the original declarant; and, in some cases, he will be able to require the appearance of the original declarant for cross-examination under Section 1203.

The kinds of hearsay mentioned in Section 1205 are limited to those where there appears to be an especial need to investigate the accuracy of the hearsay statement as distinguished from the accuracy of the evidence of the statement that is being offered. For example, business and official

records are included because these writings sometimes contain medical diagnoses and similar opinions of declarants who will not be present to give direct testimony. See, e.g., McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 160 P.2d 797 (1945); People v. Gorgol, 122 Cal.App.2d 281, 265 P.2d 69 (1953). As the introduction of hearsay of this nature deprives the adverse party of his right to cross-examine the author of such an opinion, he should at least have the opportunity to investigate the sufficiency of the basis for the opinion. On the other hand, judgments are excluded; for the veracity of the judge and jurors who determined the matters decided in the judgment is not really involved.

Section 1205 applies only to hearsay statements that are in writing in order to provide easily identifiable categories of evidence that are subject to the notice requirement and, thus, to avoid any possibility of creating a trap for litigants and their counsel.

Section 1205 is based in principle on Rule 64 of the Uniform Rules of Evidence.

§ 1206. No implied repeal.

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

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Confession or admission of criminal defendant.

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

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

§ 1221. Admission of party to civil action.

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

§ 1222. Adoptive admission.

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

§ 1223. Authorized admission.

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

§ 1224. Admission of co-conspirator.

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

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

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

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

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

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

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

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

Comment. Section 1226 restates in substance a hearsay exception found in Section 1851 of the Code of Civil Procedure (superseded by Evidence Code Sections 1226 and 1302). Cf., Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115 (1888); Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956); Standard Oil Co. v. Houser, 101 Cal. App.2d 480, 225 P.2d 539 (1950). Section 1226, however, limits this hearsay exception to civil actions. Much of the evidence within this exception is also covered by Section 1230, which makes admissible declarations against interest. However, to be admissible under Section 1230 the statement must have been against the declarant's interest when made whereas this requirement is not stated in Section 1226. A comparable exception is found in Rule 9(c) of the Uniform Rules of Evidence.

Code of Civil Procedure Section 1951 has been construed to admit statements of a declarant whose breach of duty gives rise to a liability on the part of the party against whom the statements are offered. Nye & Nissen v. Central etc. Ins. Corp., 1 Cal. App.2d 570, 163 P.2d 100 (1945). Section 1226 of the Evidence Code refers specifically to

"breach of duty" in order to admit statements of a declarant whose breach of duty is in issue without regard to whether that breach gives rise to a liability of the party against whom the statements are offered or merely defeats a right being asserted by that party. For example, in Ingram v. Bob Jaffe Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956), a statement of a person permitted to operate a vehicle was admitted against the owner of the vehicle in an action seeking to hold the owner liable on the derivative liability of vechicle owners established by Vehicle Code Section 17150. Under Section 1226, 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 1226. Section 1302 permits the admission of judgments against a third person when one of the issues between the parties is the liability, obligation, or duty of the third person and the judgment determines that liability, obligation, or duty. Together, Sections 1226 and 1302 codify the holdings of the cases applying Code of Civil Procedure Section 1851. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 491-496 (1963).

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

Comment. Section 1227 expresses a common law exception to the hearsay rule that is recognized in part in Code of Civil Procedure Section 1849. Section 1849 (which is superseded by Section 1227) permits the

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

Section 1227 supplements the rule provided in Section 1226. Under Section 1226, 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 1227, a party sued by an executor on an obligation claimed to have been owed to the decedent may introduce admissions of the decedent.

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

Despite the limitations of Section 1227, 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. Sections 1250, 1251. And 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 they may be admissible 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).

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

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

This rule has been severely criticized and does not reflect the thinking of most American courts. Carr v. Duncan, 90 Cal. App.2d 282, 285, 202 P.2d 855, 856 (1949). Under Code of Civil Procedure Section 1851 (superseded by Evidence Code Section 1226), the admissions of a decedent are admissible to establish the liability of his executor. Similarly, when the executor brings an action for the decedent's death under Code of Civil Procdure Section 377, the defendant should be permitted to introduce the admissions of the decedent. Without such a rule, in an action between two executors arising out of an accident killing 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 1228 changes the rule announced in the California cases and makes the admissions of the decedent admissible in wrongful death actions. It provides a similar rule for the analogous cases arising under Code of Civil Procedure Section 376.

Section 1228 recognizes that there is no reason, other than a technical procedural rule, to treat the admissions of a plaintiff's decedent differently from those of a defendant's decedent in an action brought under Code of Civil Procedure Section 377. The plaintiff in a wrongful death case--and the parent of an injured child in an action under Code of Civil Procedure Section 376--in reality stands so completely on the right of the deceased or injured person that such person's admissions of nonliability of the defendant should be admitted against the plaintiff, even though as a technical matter the plaintiff is asserting an independent right.

Article 2. Declarations Against Interest

§ 1230. Declaration against interest.

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

Section 1230 supersedes the partial and inaccurate statements of the declarations against interest exception found in Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). See People v. Spriggs, 60 Cal.2d at ___, 389 P.2d at 380-381, 36 Cal. Rptr. at 844-845 (1964). Section 1230 is based in large part on Rule 63(10) of the Uniform Rules of Evidence. The requirement that the declarant have "sufficient knowledge of the subject" continues the similar common law requirement stated in Code of Civil Procedure Section 1853 that the declarant must have had some peculiar means--such as personal observation--for obtaining accurate knowledge of the matter stated. See 5 Wigmore, Evidence § 1471 (3d ed. 1940).

Article 3. Prior Statements of Witnesses

§ 1235. Prior inconsistent statement.

Comment. Under existing law, a prior statement of a witness that is inconsistent with his testimony at the trial is admissible, but because of the hearsay rule such statements may not be used as evidence of the truth of the matters stated. They may be used only to cast discredit on the testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 456, 163 Pac. 666, 668 (1917).

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

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

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

§ 1236. Prior consistent statement.

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

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

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

§ 1237. Past recollection recorded.

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

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

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

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

§ 1240. Spontaneous statement.

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

§ 1241. Contemporaneous statement.

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

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

§ 1242. Dying declaration.

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

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

Article 5. Statements of Mental or Physical State

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

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

codifies an exception that has been developed by the courts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1252. Statement of previous symptoms.

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

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

§ 1251
§ 1252

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

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

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

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

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

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

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

§ 1260. Statement concerning declarant's will.

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

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

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

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

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

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

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

Article 8. Business Records

§ 1270. "A business."

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

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

§ 1271. Business record.

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

§ 1272. Absence of entry in business records.

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

Article 8. Official Reports and Other Official Writings

§ 1280. Report of public employee.

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

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

§ 1281. Report of vital statistic.

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

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

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

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

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

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

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

§ 1284. Statement of absence of public record.

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

Article 9. Former Testimony

§ 1290. "Former testimony."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 10. Judgments

§ 1300. Judgment of felony conviction.

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

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

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

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

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

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

§ 1301. Judgment against person entitled to indemnity.

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

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

§ 1302. Judgment determining liability of third person.

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

Article 11. Family History

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

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

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

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

§ 1311. Statement concerning family history of another.

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

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

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

§ 1312. Entries in family bibles and the like.

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

§ 1313. Reputation in family concerning family history.

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

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

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

§ 1314. Community reputation concerning family history.

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

§ 1315. Church records concerning family history.

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

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

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

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

§ 1316. Marriage, baptismal, and similar certificates.

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

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

§ 1320. Reputation concerning community history.

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

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

§ 1321. Reputation concerning public interest in property.

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

§ 1322. Reputation concerning boundary or custom affecting land.

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

§ 1323. Statement concerning boundary.

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

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§ 1324. Reputation concerning character.

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

Article 13. Dispositive Instruments and Ancient Writings

§ 1330. Recitals in writings affecting property.

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

§ 1331. Recitals in ancient writings.

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

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

Article 14. Commercial, Scientific, and Similar Publications

§ 1340. Commercial lists and the like.

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

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

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

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

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