#63(L) 4/20/66

First Supplement to Memorandum 66-21

Subject: Study 63(L) - Evidence Code

This supplement considers what revisions should be made in Evidence Code Sections 1600, 1602, 1603, 1604, and 1605. Attached as Exhibit I are recommended revisions of these sections, including the proposed official comments. The sections are discussed below.

Section 1600

The existing law on the presumption stated in Section 1600 is a bit obscure because of the tendency of the courts to refer to a party's "burden" without specifying which particular evidentiary burden is meant. Nonetheless, we think that the cases have probably treated this presumption as a presumption affecting the burden of proof. On the merits, we believe that the purpose of the presumption goes beyond the bare evidentiary purpose of authenticating the documents. Evidence Code Section 1532 performs that function. Section 1600 raises the additional presumptions of execution and delivery because, we think, it is better as a matter of public policy that a record title to property should have sufficient vigor to survive a bare denial of delivery of a deed somewhere in the chain of title. Accordingly, we believe that the presumption established by Section 1600 should be a presumption affecting the burden of proof.

Section 1602

Section 1602 of the Evidence Code provides, in effect, that a recital of the date of location of a mineral claim contained in a United States Patent for Mineral Lands "is prima facie evidence of the date of such location." The significance of the provision lies in the fact that the

owner of a mining claim has the right to all of the minerals in a vein or lode, the apex of which is within the surface boundaries of the claim, even though the vein or lode extends beyond the vertical extension of the surface sidelines of the claim. Where two veins or lodes intersect or unite, the right to the minerals at the point of intersection or below the point of union is given to the owner of the claim which was located first. Thus, the date of location can be of considerable significance when conflicting subsurface rights are involved.

In Champion Mining Company v. Consolidated Wyoming Gold Mining Company, 75 Cal. 78 (1888), the owner of one mining claim sued the owner of another mining claim for taking certain minerals that the first owner claimed were his. Two veins or ledges had been followed by the respective parties from their respective claims down to a point of union 500 feet below the surface. The defendant sought to prove the date of the location of his claim by the preliminary papers and proceedings filed and had in the United States Land Office prior to the issuance of his patent. The application for the patent stated that the mine was located in 1851 or 1852. It also stated that for the two years preceeding the application (in 1873) that there had been no opposing or adverse claims to the property. Since United States law required actual possession without adverse claim for two years prior to the issuance of the patent, the defendant contended that the issuance of the patent established that the mine had been located at least as early as 1871. The Supreme Court held that it was unnecessary to determine the propriety of the trial court's ruling admitting the evidence of the patent application proceedings, because there was no evidence that the plaintiff's location was prior to the date of the defendant's patent itself. But the court indicated anyway that "we would be strongly inclined to hold such ruling [admitting such evidence] to have been erroneous."

Although the word "hearsay" is not used, it appears the basis for the court's inclination was the hearsay nature of the evidence offered.

There seems to be a good possibility, then, that the predecessor of Evidence Code Section 1602 was enacted in 1905 merely to provide a hearsay exception. It would be difficult to justify giving the recital more weight than that by means of a presumption because the recital is usually based upon self-serving statements made in an ex parte application or proceeding. Accordingly, we recommend that the section be revised to provide a hearsay exception only instead of a presumption.

Chapter 4 (§§ 2301-2326) of Division 2 of the Public Resources Code relates to the manner of locating mining claims, tunnel rights and mill sites. There are a number of provisions in this chapter relating to the evidentiary effect of field notes and surveyor's certificates, admissibility of location records, etc. Section 1602 of the Evidence Code (which comes from Section 1927.5 of the Code of Civil Procedure) relates to the same subject matter as these Public Resources Code sections. As a matter of organization, we think that Section 1602 should probably be included in the same chapter of the Public Resources Code and should be removed from the Evidence Code.

Because the Public Resources Code sections relate to the same general subject matter, we will consider the presumptions provisions in the cited chapter at this point.

Public Resources Code

Although the comments to the proposed revisions explain the purpose of the sections involved, a little further explanation should aid in your understanding of these sections in the proposed revisions.

A party's rights in a mining claim are regulated by both federal and

state law. Of prime importance under both laws is the "location" of the mining claim. Location confers a property right in the location and the minerals found there. To validly establish a location a person must find a mineral vein or lode, he must distinctly mark the boundaries of his claim on the ground surrounding the vein or lode, and he must post a notice of the claim at the point of discovery which identifies the locator, describes the location, and gives the date of location. The notice of location may also be recorded within 90 days after the posting of the notice at discovery site, but failure to record does not impair the locator's rights in regard to any person who has actual knowledge or notice of the location. A person forfeits his right to a location unless he continues to perform at least $100 worth of work (called assessment work) on the site each year. After occupying the location for two years, the locator may secure a patent to the site from the federal government. There is no requirement that a patent be obtained, but a patent perfects the locator's title so that it can no longer be divested by failure to work the claim. The owner of a claim acquires the right to all of the minerals in any vein or lode the apex of which is contained within the surface boundaries of the location. That is, the owner of the claim acquires the right to all of the minerals in the vein or lode even where the dip of the vein extends beyond the vertical extensions of the surface sidelines of the claim. This "extralateral" right, however, does not extend to the minerals in the vein that are beyond the extensions of the end lines of the claim.

Sections 2311; 2315. We believe that Sections 2311 and 2315 were probably enacted merely to provide a means of preserving evidence. The matters referred to are essential to the validity of the initial location

or the continued existence of the claim, yet the passage of time may destroy ordinary sources of evidence or may make ordinary forms of evidence inaccessible. We think it would be improper to create presumptions because of the self-serving nature of the statements and the lack of opportunity for anybody to contest them.

Sections 2318, 2320. Sections 2318 and 2320, we believe, are somewhat similar. They provide a means for preserving evidence. But, again, the statements involved are self-serving and there seems to be no reason to give them a compulsive effect.

Sections 2322, 2323. Two sections in this chapter, although relating to evidence, should not be revised (in our view). They are:

> 2322. The record of any location of a mining claim, mill site, or tunnel right in the office of the county recorder, as provided in this chapter, shall be received in evidence and have the same force and effect in the courts of this State as the original notice.
>
> 2323. Copies of the records of all instruments required to be recorded by this chapter, duly certified by the recorder in whose custody such records are, may be read in evidence under the same circumstances and rules as are provided by law for using copies of instruments relating to real estate, duly executed or acknowledged or approved and recorded.

It seems likely that neither section is necessary since Evidence Code Section 1532 covers the same ground. But neither section does any harm and it seems desirable to retain them in the chapter to inform persons who are concerned with this particular subject of the nature of their contents.

Section 2606. Section 2606 is in the following chapter, but it is included here because it is the only remaining section relating to evidence in the Mines and Mining division of the code. Section 2606 seems meaningless if construed as a presumption. "Prima facie evidence" of what? It seems likely that the evidence provision in Section 2606 was intended merely to assure the admissibility of the evidence.

Evidence Code (continued)

Section 1603

There is some indication in the cases that this presumption was intended merely to affect the burden of producing evidence--to dispense with the necessity of producing independent evidence of the judgment, execution, and sale pursuant to which the sheriff's deed was executed. Nevertheless, since the presumption that official duty was regularly performed was classified as a presumption affecting the burden of proof, and since we recommend a similar classification of the presumption relating to other recorded deeds (Section 1600), we think consistency requires a similar classification here. The policy to be served is similar. Official acts and recorded titles should be regarded as valid until someone can actually prove they are not. Titles would not be sufficiently stable if the party relying on the official actions or the recorded title had to prove the facts lying behind the official records. Passage of time would frequently make evidence of such facts inaccessible.

Section 1604

The section already specifies the proof that is necessary to overcome the presumption.

Section 1605

The comment indicates the reason for the proposed revision.

Respectfully submitted,

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EXHIBIT I

SEC. . Section 1600 of the Evidence Code is amended to read:

1600. (a) The official record of a document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

~~(a)~~ (1) The record is in fact a record of an office of a public entity; and

~~(b)~~ (2) A statute authorized such a document to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Comment. The classification of the presumption in Section 1600 as a presumption affecting the burden of proof is consistent with the prior case law. See Thomas v. Peterson, 213 Cal. 672, 3 P.2d 306 (1931); DuBois v. Larke, 175 Cal. App.2d 737, 346 P.2d 830 (1959); Osterberg v. Osterberg, 68 Cal. App.2d 254, 156 P.2d 46 (1945). Such a classification supports the recorded title to property by requiring the record title to be sustained unless the party attacking that title can actually prove its invalidity. See EVID. CODE § 606 and Comment thereto.

SEC. . Section 1602 of the Evidence Code is repealed.

~~1602.--If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.~~

Comment. Section 1602 of the Evidence Code is repealed because its substance is contained in proposed Public Resources Code Section 2325.

SEC. . Section 1603 of the Evidence Code is amended to read:

1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. The presumption established by this section is a presumption affecting the burden of proof.

Comment. Prior to the enactment of Code of Civil Procedure Section 1928 in 1872 (upon which section Section 1603 of the Evidence Code is based), the recitals in a sheriff's deed, made pursuant to legal process, could not be used as evidence of the judgment, the execution, and the sale upon which the deed was based. The existence of the prior proceedings were required to be proved with independent evidence. Hihn v. Peck, 30 Cal. 280, 287-288 (1866); Heyman v. Babcock, 30 Cal. 367, 370 (1866). The enactment of the predecessor of Evidence Code Section 1603 obviated the need for such independent proof. See, e.g., Oakes v. Fernandez, 108 Cal. App.2d 168, 238 P.2d 641 (1951); Wagnor v. Blume, 71 Cal. App.2d 94, 161 P.2d 1001 (1945). See also BASYE, CLEARING LAND TITLES § 41 (1953). It also obviated the need for proof of a chain of title prior to the execution of the deed. Krug v. Warden, 57 Cal. App. 563, 207 Pac. 696 (1922).

The classification of the presumption in Section 1603 as a presumption affecting the burden of proof is consistent with the classification of the similar and overlapping presumptions contained in Evidence Code Sections 664 (official duty regularly performed) and 1600 (official record of document affecting property). Like the presumption in Section 1600, the presumption in Section 1603 serves the purpose of supporting the record chain of title.

1604. A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

No need for amendment.

SEC. . Section 1605 of the Evidence Code is amended to read:

1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are ~~receivable as prima facie evidence~~ admissible as evidence with like force and effect as the originals and without proving the execution of such originals.

Comment. Chapter 281 of the Statutes of 1865-66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865-66 statute, which is now codified as Section 1605 of the Evidence Code, provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule--which would have required production of the original or an excuse for its nonproduction before the recorded copy could be admitted--and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy. Section 1605, therefore has been revised to reflect this original purpose.

SEC. . Section 2311 of the Public Resources Code is amended to read:

2311. Where a locator, or his assigns, has the boundaries and corners of his claim established by a United States deputy mineral surveyor, or a licensed surveyor of this State, and his claim connected with the corner of the public or minor surveys of an established initial point, and incorporates into the record of the claim the field notes of such survey, and attaches to and files with such location notice a certificate of the surveyor setting forth (a) that the survey was actually made by him, giving the date thereof, (b) the name of the claim surveyed and the location thereof, and (c) that the description incorporated in the declaratory statement is sufficient to identify the claim, such survey and certificate becomes a part of the record, and such record is ~~prima-facie~~ admissible as evidence of the facts therein contained.

Comment. It is essential to the validity of a mining claim that the boundaries of the claim be marked so that they may be readily traced. PUB. RES. CODE § 2302. Prior to the enactment in 1909 of the statute upon which Section 2311 is based, the Supreme Court had indicated that the recorded notice of location of a mining claim, which recited the marking of the boundaries of the claim, was not competent evidence that the boundaries had been marked. Hence, an owner of an unpatented claim was exposed to the danger of losing, by the death or absence of the original locators and other witnesses, the necessary means of proving the validity of the original location. Daggett v. Yreka Mining & Milling Co., 149 Cal. 357, 364-366, 86 Pac. 968, 970-971 (1906). Section 2311 provides a locator of a claim

with a means of preserving in certain cases the evidence of the original marking. Such evidence should not, however, have presumptive force; for field notes and similar evidence should not be of greater weight than other evidence of the boundaries of a claim. See Denman v. Smith, 14 Cal.2d 752, 756, 97 P.2d 451 (1939)("monuments erected in the field should control courses and distances as indicated upon paper").

SEC. . Section 2315 of the Public Resources Code is amended to read:

2315. Whenever a mine owner has performed the labor and made the improvements required by law upon any mining claim, the person in whose behalf such labor was performed or improvements made, or someone in his behalf shall, within thirty days after the time limited for performing such labor or making such improvements, make and have recorded by the county recorder, in books kept for that purpose, in the county in which the mining claim is situated, an affidavit setting forth the value of labor or improvements, the name of the claim, and the name of the owner or claimant or the claim at whose expense the labor was performed or the improvements were made. The affidavit, or a copy thereof, duly certified by the county recorder, shall be ~~prima-facie~~ admissible as evidence of the performance of such labor or the making of such improvements, or both.

Comment. The purpose of Section 2315 is merely to ~~make more accessible~~ the evidence of the performance of the annual assessment work that is necessary to preserve an unpatented mining claim. Moodey v. Dale Consolidated Mines, 81 F.2d 794 (1936). As the purpose of the section is merely to provide a source of evidence, it has been revised to avoid giving such evidence a presumptive effect under Evidence Code Section 602.

SEC. . Section 2318 of the Public Resources Code is amended to read:

2318. The original of such notice and affidavit, or a duly certified copy of the record thereof, shall be ~~prima-facie~~ admissible as evidence that the delinquent mentioned in section 2324 of the Revised Statutes of the United States has failed or refused to contribute his proportion of the expenditure required by that section, and of the service of publication of the notice, unless the writing or affidavit hereinafter provided for is of record.

Comment. Section 2324 of the Revised Statutes of the United States (30 U.S.C. § 28) requires the owner of an unpatented claim to perform at least $100 worth of work (assessment work) on the claim each year. The section provides that in the case of co-owners, if the assessment work is done by one of them, he may serve the other with a notice requiring the payment of the latter's proportion of the expenditures. Failure of a co-owner to pay his proportion of the expenditures within 90 days after such service results in a forfeiture of the delinquent owner's interest in the claim.

Section 2317 of the Public Resources Code permits a copy of the delinquency notice together with an affidavit of service to be recorded in the office of the county recorder within 90 days after service of the notice. Section 2318 provides that the notice and affidavit, if recorded as prescribed, are "prima facie evidence" of the delinquency and of the service of the notice. Robinson v. Briest, 178 Cal. 237, 173 Pac. 88 (1918). If the affidavit and notice are not recorded within 90 days after service of the notice, the record furnishes no evidence of the delinquency and the service of the notice, and these facts must be proved with other forms of

evidence. Robinson v. Briest, 178 Cal. 237, 173 Pac. 88 (1918).

Section 2318 has been revised to make it clear that the purpose of the section is to provide a hearsay exception for the recorded notice and affidavit, not to relieve the party asserting the forfeiture of a co-owner's interest from proving his own assessment work, the delinquency of the co-owner, and the proper service of notice.

SEC. . Section 2320 of the Public Resources Code is amended to read:

2320. If such co-owner or co-owners fail to sign and deliver such writing to the delinquent or delinquents within twenty days after such contribution, the co-owner or co-owners so failing shall be liable to a penalty of one hundred dollars to be recovered by any person for the use of the delinquent or delinquents in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within twenty days after such contribution, the delinquent, with two disinterested persons having personal knowledge of the contribution, may make affidavit setting forth in what manner, the amount of, to whom, and upon what claim the contribution was made. Such affidavit, or a record thereof in the office of the county recorder of the county in which the claim is situated, shall be ~~prima-facie~~ admissible as evidence of such contribution.

Comment. Public Resources Code Section 2319 provides that if a delinquent co-owner of a mining claim contributes his share of the cost of the annual assessment work within 90 days after service of a notice of delinquency, the co-owner who served the notice must deliver a written acknowledgement of the contribution. Section 2320 prescribes certain penalties for failure to do so and permits the delinquent owner to make and record an affidavit of payment.

Section 2320 has been revised to make it clear that the recorded affidavit of payment is merely evidence of payment. Because the affidavit is self-serving and may be made without any notice to the other co-owners, it would be inappropriate to give the affidavit the compulsive force of a presumption.

SEC. . Section 2325 is added to the Public Resources Code, to read:

2325. If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is ~~prima facie~~ admissible as evidence of the date of such location.

[Note: As set out above changes in Section 1602 of the Evidence Code, which is superseded by the above section, are shown.]

Comment. Section 2325 is based on Section 1602 of the Evidence Code, which merely restated the provisions of former Section 1927.5 of the Code of Civil Procedure. Although the purpose for the enactment (in 1905) of Section 1927.5 of the Code of Civil Procedure is somewhat obscure, it seems likely that the section was intended merely to provide a hearsay exception and thus overcome the force of the suggestion in Champion Mining Co. v. Consolidated Wyoming Gold Mining Co., 75 Cal. 78, 81-83 (1888) that the issuance of a patent would not be evidence of a location at any time prior to the date of the patent. As a recital of location date in a patent may be based on self-serving statements made in an ex parte proceeding, it is inappropriate to give such a recital presumptive effect.

Section 2325 is probably unnecessary, for the statements that are made admissible by the section are probably admissible anyway under the provisions of Evidence Code Section 1330 (statements in dispositive instruments). Section 2325, however, removes whatever doubt there may be concerning such admissibility. The section has been relocated in the Public Resources Code so that it will appear among other statutory provisions relating to specific evidentiary problems involving mining claims.

SEC. . Section 2606 of the Public Resources Code is amended to read:

2606. All grubstake contracts and prospecting agreements hereafter entered into, and which may in any way affect the title of mining locations, or other locations under the mining laws of this State, shall be void and of no effect unless the instrument has first been recorded in the office of the county recorder of the county in which the instrument is made. The instrument shall be duly acknowledged before a notary public or other person competent to take acknowledgements. Grubstake contracts and prospecting agreements, duly acknowledged and recorded as provided for in this section, shall be ~~prima-facie~~ admissible as evidence in all courts in this State in all cases wherein the title to mining locations and other locations under the mining laws of this State are in dispute.

Comment. Section 2606 has been revised to eliminate an improper use of the term "prima facie evidence" and, thus, to restore what appears to be the original meaning of the section.