The California Evidence Code: A Precis

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The 1965 Session of the California Legislature enacted a new California Evidence Code, which will go into effect on January 1, 1967. The Evidence Code was drafted and proposed by the California Law Revision Commission, with the cooperation and able assistance of a large number of individuals and of a variety of organizations, including the State Bar, the Judicial Council, the Conference of California Judges, and many others. As a general framework for the articles and notes which follow, and which will deal with particular matters in considerable depth and detail, this article will attempt to provide a relatively brief general description of the new Evidence Code, with particular emphasis on those provisions which either change or may change the California law of evidence.

The Law Revision Commission's aim in undertaking the Evidence Code project was to produce a handbook of the California law of evidence, containing both a comprehensive code of evidence and draftsmen's comments designed to assist judges and lawyers in understanding and applying its provisions. It should be made clear

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2 7 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES (1965) [hereinafter cited as CAL. L. REVISION COMM'N]. The Commission's tentative recommendations and the several research studies relating to the Evidence Code are found in 6 CAL. L. REVISION COMM'N (1964).
3 A list of many of the persons who participated in the effort is found in 7 CAL. L. REVISION COMM'N 5 (1965).
4 In proposing the Evidence Code, the California Law Revision Commission provided a comment for each code section. The comment explained the section's purpose as well as its relation to other sections of the code and discussed some potential problems of its meaning or application. Similar comments were provided for each section added, amended, or repealed in other California codes when the Evidence Code was enacted.

These comments are of special significance in the legislative history of the Evidence Code as a result of the special attention given them by the legislative committees that
at the outset that although it does make a number of changes in the law, the new Evidence Code is far more a restatement of existing law than it is a revision of the California law of evidence. This fact should not be obscured by the emphasis in the rest of this issue on the departures from prior law which are made by the Code.

The Evidence Code is divided into eleven divisions. The first two of these, entitled “Preliminary Provisions and Construction” and “Words and Phrases Defined,” are formal and definitional and need not be discussed. They should not, however, be overlooked in using the Evidence Code.

Division 3—General Provisions

The Basic Structure of the Evidence Code

Although the Evidence Code consists of roughly 400 sections, two sections contained in division 3 are of paramount importance to an understanding of the Code’s structure and its impact on preexisting law. The first of these is section 300 which defines the Code’s area of application:

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

This provision means that the Evidence Code applies to all court proceedings, but only to court proceedings, “except as otherwise provided by statute.” A major exception “otherwise provided by statute” appears in the Evidence Code itself, in that division 8, entitled “Privileges,” is made applicable to all proceedings by section 910:

Except as otherwise provided by statute, the provisions of this division apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting
the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings.\(^5\)

Except for division 8, however, the Evidence Code does not apply to legislative hearings, administrative proceedings, arbitration proceedings or other non-court proceedings unless some statute so provides or the particular tribunal involved, having the power to do so, chooses voluntarily to apply the Code, or parts of it. It should also be noted that a statute may specifically make the Evidence Code inapplicable, wholly or in part, to some kinds of court proceedings.\(^6\)

The other section which is central to the format and essential to an understanding of the Evidence Code is section 351: “Except as otherwise provided by statute, all relevant evidence is admissible.”

The effect of section 351, speaking generally, is to wipe the slate clean insofar as the pre-1967 California law of evidence is concerned. This section makes all matter having probative value prima facie admissible in court proceedings, but, again, this is “except as otherwise provided by statute.” Of course, a good deal of the Evidence Code consists of just such statutes—that is, of exclusionary rules of evidence, which limit the scope of section 351. For example, division 8, entitled “Privileges” enacts some eleven testimonial privileges which bar certain relevant evidence on the theory that more important societal ends are served by protecting confidentiality under the various circumstances involved. Similarly, division 10, entitled “Hearsay Evidence” begins with section 1200, the hearsay rule, which operates to bar all relevant hearsay evidence that does not fall into one of the several hearsay exceptions which are found in the Code and elsewhere. Other exclusionary rules are found in division 9, entitled “Evidence Affected or Excluded by Extrinsic Policies.” Still other exceptions to section 351 “provided by statute” are found in sections of various California codes other than the Evidence Code. Nevertheless, the starting point

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\(^5\) “Proceeding” is defined in Cal. Evidence Code § 901 to mean “any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.”

\(^6\) See, e.g., Cal. Code Civ. Proc. § 117(g) (judge of small claims court may make informal investigation either in or out of court), Cal. Code Civ. Proc. § 1768 (hearing of conciliation proceeding to be conducted informally), Cal. Code Civ. Proc. § 2016(b) (inadmissibility of testimony at trial is not ground for objection to testimony sought from a deponent, provided that such testimony is reasonably calculated to lead to the discovery of admissible evidence), Cal. Pen. Code § 1203 (judge must consider probation officer’s investigative report on question of probation), Cal. Welfare & Inst’ns Code § 706 (juvenile court must consider probation officer’s social study in determining disposition to be made of ward or dependent child).
in understanding the structure of the Evidence Code—and the California law of evidence after January 1, 1967—is section 351, which enacts the basic proposition that all relevant evidence is admissible. All else in the Evidence Code relates to and revolves around this basic provision.

It should be particularly noted that the only exceptions to the admission of evidence are those provided by statute.⁷ "Statute" is defined in section 230 to include treaties and constitutional provisions, but not decisional law.⁸ Thus, there will be no decisional rules excluding relevant evidence in this State after January 1, 1967. Nor will there be any such rules in the future unless and until section 351 is amended or repealed. There will, of course, continue to be judicial decisions interpreting statutes, treaties, and constitutional provisions which themselves exclude relevant evidence, and recent experience suggests that this judicial power of interpretation, as it is currently being exercised by our federal and state courts, is a not insignificant factor in the development of the law of evidence.

By way of important contrast, it should be noted that there are several provisions in the Evidence Code which leave it open to the courts to promulgate decisional rules of law which will make more kinds of evidence admissible by limiting the effect of various of the exclusionary rules. For example, section 1200 states that hearsay evidence is inadmissible "except as provided by law," which, as defined in section 160, includes decisional law. This language was designedly chosen to enable the courts to create new exceptions to the hearsay rule in addition to those set forth in chapter 2 of Division 10 and the other California codes. On the other hand, the courts cannot create new privileges by judicial decision because all exclusionary rules are required by section 351 to be statutory.⁹

Another Evidence Code exception "provided by statute" to the broad rule of admissibility stated in section 351 is found in section 352:

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

⁷ CAL. EVIDENCE CODE § 351. (Emphasis added.)
⁸ Where the Evidence Code refers to decisional law as well as statutes, it uses the term "law" which is defined in § 160 to include constitutional, statutory and decisional law.
⁹ A similar provision is found in CAL. EVIDENCE CODE § 911, which states specifically that there are no testimonial privileges "except as otherwise provided by statute . . . ."
This provision, of course, codifies and continues a power which trial judges have always had.

**Procedure in Admitting and Excluding Evidence**

Division 3 of the Evidence Code also contains a number of general provisions governing the admission or exclusion of evidence. These provisions define the respective functions of judge and jury, establish the judge's authority to regulate the order of proof, and state the consequences of an erroneous admission or exclusion of evidence.

Sections 400-06 set forth the procedure that the judge is to follow in determining the admissibility of evidence when admissibility turns on a disputed question of fact. In conformance with prior law, the Evidence Code distinguishes between (1) those situations in which the judge himself determines the existence of the preliminary fact before the proffered evidence is admitted, and (2) those situations in which only prima facie proof of the preliminary fact is necessary to require admission of the proffered evidence and the existence of the preliminary fact is subject to redetermination by the jury. Under the Evidence Code the second category includes only the following situations: (1) where the relevance of the evidence depends upon the existence of the preliminary fact (e.g., agency or conspiracy), (2) where the preliminary fact is whether a witness has personal knowledge concerning a matter, (3) where the preliminary fact is whether a writing is authentic, and (4) where the preliminary fact is whether a statement or conduct was that of a particular person.

Additionally, in each of these situations except the second (the personal knowledge of a witness) the Evidence Code permits the court, as formerly, to admit the proffered evidence conditionally; evidence of the preliminary fact is not necessary at the time, but it must be supplied later in the course of the trial. And in each of these

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10 [Cal. Evidence Code §§ 310-12.](#)
11 [Cal. Evidence Code § 320.](#)
12 [Cal. Evidence Code § 353.](#)
13 [Cal. Evidence Code § 354.](#)
14 At various points herein it is stated that certain provisions of the Evidence Code restate existing law. The degree of confidence with which that statement can be made varies from case to case. This is because the existing rule of law is a good deal more certain in some cases than in others. One of the principal, and perhaps greatest, contributions of the Evidence Code is the degree to which it eliminates ambiguity and uncertainty in the California law of evidence and thus provides California judges and lawyers with ready answers to most evidentiary problems.
situations, the Evidence Code provides, as did prior law,\textsuperscript{16} that the court may, and on request shall, instruct the jury to disregard the proffered evidence unless the jury finds that the preliminary fact exists.

Except in the four situations just mentioned, the judge must be persuaded of the existence of a disputed preliminary fact before he may admit the proffered evidence. Thus, for example, he must be persuaded that an expert witness is properly qualified before he may admit his testimony; and that the person who made a statement offered as a dying declaration actually thought that he was dying when he made the statement.\textsuperscript{17} Of course, he must receive the evidence offered by both sides relating to the existence or nonexistence of the preliminary fact before he makes his factual determination and his ruling.

While the Evidence Code largely restates the law on these matters, it does make a significant change concerning the procedure for admitting confessions and admissions. Under the old law the court had discretion to hear and determine the admissibility of a confession or admission of a criminal defendant in the presence and hearing of the jury.\textsuperscript{18} This is objectionable because if the judge does so and then decides to exclude such evidence, the defendant will be prejudiced if the jury is unable to disregard the references made in argument to the damaging confession or admission. To avoid this situation, section 402 of the Evidence Code requires such a hearing to be held out of the presence and hearing of the jury, at the request of either party.

The Evidence Code also abrogates the so-called "second crack" doctrine which has applied to confessions,\textsuperscript{19} dying declarations,\textsuperscript{20} and spontaneous statements.\textsuperscript{21} Under this doctrine the judge, even though he has determined that proffered evidence of any of these types is admissible, must nevertheless submit the issue of the admissibility of the evidence to the jury, with an instruction to disregard the evidence if they determine that the particular requirements of admissibility

\textsuperscript{16}E.g., People v. Geiger, 49 Cal. 643, 649 (1875); People v. Talbott, 65 Cal. App. 2d 654, 663, 151 P.2d 317, 322 (1944).

\textsuperscript{17}On the other hand, it might be necessary for the judge to determine a preliminary fact before he may exclude evidence, \textit{i.e.} he must be persuaded that a lawyer-client relationship existed before he may exclude evidence based on this privilege.

\textsuperscript{18}People v. Gonzales, 24 Cal. 2d 870, 151 P.2d 251 (1944); People v. Garrow, 237 Cal. App. 2d 439, 442, 47 Cal. Rptr. 24, 27 (1965).


\textsuperscript{20}People v. Singh, 182 Cal. 457, 476, 188 Pac. 987, 995 (1920).

were not met. The elimination of this "second crack" makes the judge's ruling final, thereby removing the judge's temptation to "pass the buck" to the jury by letting the evidence in when a difficult issue of admissibility arises. Of course, a party may still attack the credibility of a confession, dying declaration, or spontaneous statement basing his argument to the jury, wholly or in part, on the same factors as are weighed by the judge in determining the admissibility of the evidence.

Division 4—Judicial Notice

Division 4 of the Evidence Code makes several significant changes in the California law relating to judicial notice. There are relatively few changes with respect to what matters may be judicially noticed. There are a number of changes, however, insofar as the mechanics of taking judicial notice are concerned. These procedural innovations are primarily designed to guarantee that the parties will have adequate notice and an opportunity to be heard before judicial notice is taken. Inasmuch as division 4 is discussed elsewhere in this symposium, further analysis will not be attempted here.22

Division 5—Burden of Proof, Burden of Producing Evidence, Presumptions and Inferences

It is helpful to an understanding of this division to begin with the definition of evidence that appears in section 140 of the Evidence Code:

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

This definition does not include inferences or presumptions. Thus, the rules relating to the process of offering exhibits and testimony to the trier of fact are clearly distinguished from those relating to the reasoning process which the jury and judge must perform after the exhibits and testimony have been admitted. By making this distinction, it was possible not only to draft more precise statutes dealing with the process of presenting evidence, such as the hearsay rule, the best evidence rule, the opinion rule, and the rules on privilege, but

22 For an analysis of the Evidence Code sections dealing with judicial notice, which appears as part of this symposium on the law of evidence, see Kongsgaard, Judicial Notice and the California Evidence Code, 18 Hastings L.J. 117 (1966)—Editor.
also to draft more precise statutes dealing with the process of reasoning from the evidence.

In making it clear that presumptions are not evidence, the Evidence Code departs significantly from the California Law it supersedes. Under the Code presumptions are rules of law which guide the trier of fact in reasoning from evidence. This is a desirable change in California law which will bring it, finally, into harmony with the law prevailing in most other American jurisdictions.

Division 5 contains the Evidence Code rules that govern the process of reasoning from evidence to determine the ultimate facts. Thus, it contains provisions relating to the burden of proof, the burden of producing evidence, presumptions, and inferences. Except as noted, the rules stated generally reflect the prior law.

Burden of Proof

The burden of proof is defined in section 115 of the Evidence Code as the obligation of presenting sufficient evidence to establish a particular degree of belief in the mind of the trier of fact concerning a disputed fact. Usually, the evidence need only cause the trier of fact to believe that it is more likely than not that the fact involved is as claimed by the party having the burden of proof. However, the Code recognizes that a greater or a lesser degree of belief may sometimes be required. For example, the prosecution's burden in a criminal case is to cause the trier of fact to believe the several elements of its case beyond a reasonable doubt. On the other hand, a lesser degree of belief may sometimes suffice, as in the recent case of In re Corey.\(^\text{23}\) There, Justice Molinari pointed out that a defendant in a criminal case has the burden of proving his alibi only to such a degree as will leave a reasonable doubt in the mind of the trier of fact as to the defendant's guilt of the crime with which he is charged. If the defendant succeeds in creating such a doubt, the trier of fact is required to find for the defendant. Because the defendant's burden in such a case is that of creating a state of belief in the mind of the trier of fact, his burden is a true burden of proof as that term is used in the Evidence Code.

Thus, the rules relating to burden of proof tell the trier of fact who should prevail on a particular issue in light of the evidence produced. If the party with the burden of proof succeeds in creating the requisite degree of belief by his evidence, the trier of fact is required to find in his favor on that issue; but if he fails to create the

requisite degree of belief, the trier of fact is required to find against him. These rules represent no change in the law.

The Evidence Code recognizes that there is no simple, mechanical formula for determining where the burden of proof lies.24 The burden of proof is implicitly placed on a party either by the Legislature or by the courts when they determine, as a matter of substantive law, what facts must be established to make out a claim for judicial relief and what facts, if established, constitute a defense. The Evidence Code makes no change in these allocations of the burden of proof on matters of substantive law. It does, however, contain a number of provisions allocating the burden of proof on facts necessary to show the admissibility or inadmissibility of evidence.25

**Burden of Producing Evidence**

The burden of producing evidence is defined in section 110 of the Evidence Code as a party's obligation to introduce sufficient evidence to avoid a ruling against him on an issue as a matter of law. Under Evidence Code section 550 this burden always rests initially on the party with the burden of proof, but may subsequently shift. What the burden of producing evidence amounts to is that if the party having the burden of proof as to an ultimate fact produces no evidence from which the trier of fact could find the fact, the judge must rule against him: dismiss the case, grant a nonsuit, direct a verdict, grant judgment notwithstanding the verdict, or refuse to submit an affirmative defense to the jury. The burden of producing evidence respecting an issue will shift to the other party if and when the party who first had that burden has introduced evidence so compelling that the judge would be required to rule in his favor as a matter of law in the absence of contrary evidence—a comparatively rare situation, of course, but one that can and does occur.

The Evidence Code thus clarifies the distinction between the two evidentiary burdens. The burden of proof, in effect, tells the trier of fact who must lose on a factual issue if the evidence does not create the requisite degree of belief in his mind concerning that issue. The burden of producing evidence, in effect, tells the judge when a party

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24 The Evidence Code has abandoned the misleading formula in section 1981 of the Code of Civil Procedure for determining who has the burden of proof: that the burden of proof lies with the party who has the affirmative of the issue. What is the affirmative of an issue depends on how the proposition is formulated. Lack of consideration in a suit on a note and want of probable cause in a malicious prosecution case are but two examples of negative facts that a party, in these cases the defendant, must affirmatively prove.

must lose on a factual issue as a matter of law because he has failed to produce any probative evidence on that issue. To take an example, the burden of proof says, in effect, that the defendant is entitled to an instruction that the plaintiff must lose if he fails to persuade the jury that the defendant was negligent; the burden of producing evidence says, in effect, that the plaintiff must be nonsuited if he fails to produce any evidence of the defendant's negligence.

Presumptions

At the outset of a case, the burden of proof as to some facts will be assigned by the substantive law to one party, the burden of proof as to other facts will be assigned to the adverse party. Each party will concomitantly have the initial burden of producing evidence of each fact as to which he has the burden of proof. As the case progresses, certain facts may be admitted or otherwise established as a matter of law, or sufficient evidence to warrant a finding of such facts may be introduced. At that point the burden of proof or the burden of producing evidence may be reallocated by a rule of law called a presumption. For example, in an ordinary paternity case, the child claiming support will begin the case with the burden of proving that the defendant is his father. If, however, the child proves that his mother was married to the defendant at the time of conception the presumption of legitimacy contained in section 661 becomes applicable and establishes the necessary precondition of the defendant's paternity. The defendant will then have the burden of proving that he is not the plaintiff's father.

Section 600 of the Evidence Code defines a presumption as an assumption of fact that the law requires to be made when certain other facts are found or otherwise established. Code of Civil Procedure section 1959 defined a presumption as a "deduction . . . to be made from particular facts." But this is a misnomer, for the conclusion is one reached as a result of the law's compulsion, not as the result of an exercise of reason. Indeed, the conclusion may be directly contrary to reason, as in the recent case of Wareham v. Wareham,26 where the conclusive presumption of legitimacy was applied despite blood test evidence which showed that the husband could not have been the father. The use of the word "assumption" in the Evidence Code definition, therefore, represents a clarification of rather than a change from the old law.

Under the Evidence Code, as under the old law, a few presumptions

are conclusive\textsuperscript{27} (and thus are not really presumptions at all, but rather rules of substantive law). All other presumptions are rebuttable.

At this point, the Evidence Code makes what may appear to be an innovation, for it provides in section 601 that a rebuttable presumption may be either a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. Thus, the Evidence Code does not take either one side or the other of a debate which has long raged among students of the law of evidence. Some authorities have asserted that a presumption always shifts the burden of proof (the so-called Morgan view).\textsuperscript{28} Others have contended just as vigorously that a presumption never does more than shift the burden of introducing evidence, or “going forward” (the Thayer view).\textsuperscript{29} Under the Thayer view, a presumption disappears from the case entirely once the person against whom it operates has introduced sufficient evidence to support a finding against the presumption, without regard to whether that evidence will be believed by the trier of fact. The Morgan view is that the presumption is not wholly dispelled by the introduction of such evidence but continues to have the operative effect of requiring the judge to instruct the jury to find in accordance with the presumption, unless it is persuaded that the opposite is true.

The Evidence Code takes the position, in effect, that the Thayer view is correct as to some presumptions, which the Evidence Code defines in section 603 as presumptions affecting the burden of producing evidence, and that the Morgan view is correct as to other presumptions, which the Evidence Code defines in section 605 as presumptions affecting the burden of proof. Certain rebuttable presumptions are clearly classified by the Code,\textsuperscript{30} and standards are provided in sections 603 and 605 for the classification of others by the courts.

Section 605 provides that a presumption established “to implement some public policy other than [merely] to facilitate the determination of the particular action in which the presumption is applied . . .” is a presumption affecting the burden of proof. Section 603 provides that a presumption “established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied” is a presumption affecting the burden of produc-


\textsuperscript{28} McCormick, Evidence § 317, at 671-72 (1954); Morgan, Some Problems of Proof 81 (1956).

\textsuperscript{29} Thayer, Preliminary Treatise on Evidence 313-52 (1898); 9 Wigmore, Evidence §§ 2485-91 (3d ed. 1940).

\textsuperscript{30} Cal. Evidence Code §§ 620-68.
ing evidence. Under this rationale, for example, the presumption of legitimacy would be classified as one affecting the burden of proof because its purpose is, in part, to stabilize family relationships. On the other hand, a presumption relating to the authenticity of official documents would be classified as one affecting the burden of producing evidence because its function is only to dispense with formal proof of matters in those cases in which there is not a bona fide dispute about them.

Sections 604, 606, and 607 set forth in some detail how each kind of presumption operates. Under section 604, a presumption affecting the burden of producing evidence requires that the presumed fact be assumed only until evidence which would support a finding of its non-existence is produced. Upon the introduction of such evidence, the presumption ceases to operate entirely, and the trier of fact decides the factual dispute entirely on the basis of the evidence and without regard to the presumption—all in accordance with the “Thayer view.” Under sections 606 and 607, however, a presumption affecting the burden of proof requires the trier of fact to assume the existence of the presumed fact until he is persuaded, to the requisite degree of persuasion, that the fact does not exist, thus codifying the “Morgan view.”

Sections 620-68 classify several specific presumptions as (1) conclusive presumptions, (2) presumptions affecting the burden of producing evidence, or (3) presumptions affecting the burden of proof. The presumptions thus classified either appeared as statutory presumptions in the Code of Civil Procedure or were common law presumptions closely associated with them. There are, of course, many other statutory and common law presumptions, and it is to be expected that the Legislature and the courts will create additional presumptions over the years. The Evidence Code contemplates that all of these presumptions will be classified by the courts in accordance with the scheme of classification set forth in division 5. This procedure may seem to give the courts a novel assignment. In fact, this is not the case, for the courts have long been engaged in substantially this process in dealing with presumptions. The Evidence Code merely brings the process out into the open.

Division 6—Witnesses

Division 6 deals with ordinary witnesses, expert witnesses, interpreters and translators. Most of division 6 is a restatement and codification of existing law, either statutory or decisional, and only the most important changes will be discussed.
Disqualification of witnesses is treated somewhat differently in the Evidence Code than it was under prior law. Section 701 provides:

A person is disqualified to be a witness if he is: (a) Incapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (b) Incapable of understanding the duty of a witness to tell the truth.

Under the prior law, the court determined not only the capacity of a witness to express himself and to tell the truth, but also his capacity to perceive and to recollect that which he is offered to relate. As the comment to section 701 makes clear, in the Evidence Code capacity to perceive and capacity to recollect are treated as elements relating to the witness' personal knowledge of the facts. Under section 702 whether a witness does have the requisite personal knowledge is a question for the jury rather than the judge to decide. Thus, if the proponent of a witness offers evidence that the witness does have personal knowledge, which necessarily includes capacity to perceive and recollect, the witness is permitted to testify, whether or not the judge is persuaded that he does have such capacity, unless the judge decides that the evidence of personal knowledge is so weak that no jury could reasonably believe it. In effect, the Evidence Code, by treating a person's capacity to perceive and capacity to recollect as factors relevant to his personal knowledge, has made these factors a condition of the admissibility of his testimony concerning a particular matter instead of a condition of his competency to be a witness.

Sections 703 and 704 make some changes in the law relating to calling the trial judge or a juror as a witness. But this problem arises so infrequently that it does not warrant discussion here, other than to note the fact of change.

Section 720, dealing with expert witnesses, may change the law in one respect. It provides, inter alia, that

Against the objection of a party [the] ... special knowledge, skill, experience, training or education [which an expert witness is required to have] must be shown before the witness may testify as an expert.

In other words, if a party objects, the expert witness is not permitted to give his testimony until the necessary foundation to establish his qualifications is laid, even though the testimony is offered subject to a motion to strike if the foundation is not later supplied.

Another provision in division 6 relating to expert witnesses which
may be new is subsection (b) of section 721, which deals with the cross-examination of expert witnesses. It provides:

If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless: (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or (2) Such publication has been admitted in evidence.

The California decisions have been rather confused on the extent to which an expert witness may be cross-examined by reference to books and other publications.31 Section 721 (b) permits the cross-examiner to ask the expert about any publication which he referred to, considered, or relied upon in arriving at his opinion, in order to probe the thought processes in which he engaged before taking the stand. It does not permit reference to other publications, unless they have already been introduced in evidence, because of concern that the real purpose of the cross-examiner may be to “bootleg” such hearsay material before the trier of fact, under the guise of cross-examination. If such publications have been previously introduced in evidence, cross-examination relating to them is permitted, because the trier of fact will have access to them anyway.

Subsection (b) of section 722 is also new, in part. It provides:

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

This has been the rule in condemnation cases,32 but it has not heretofore been explicitly applied to other kinds of experts.

There are two fairly substantial changes in the Evidence Code with respect to the use of writings in connection with testimony by, and examination of, witnesses. The first deals with refreshing memory by use of a writing:

[I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken ... 33

33 Cal. Evidence Code § 771. (Emphasis added.)
Prior law on this matter was not entirely clear. While it was established that a writing used by the witness while he is actually testifying must be produced, it was not clear whether writings used to refresh memory before the witness takes the stand had to be produced, particularly in civil cases. The Evidence Code theory is that the time when the witness used a writing to refresh his memory should be immaterial. It should be noted, however, that this requirement that the writing be produced does not apply if the writing is not procurable by the party offering the witness.

The other basic change is that under the Evidence Code it is never necessary to show a witness a writing before he is examined with reference to it. Although the practice may have been otherwise in some parts of the state, this is a restatement of pre-existing law except as to prior inconsistent written statements. A witness previously had to be shown a prior written inconsistent statement before he was examined concerning it, although there was no similar requirement of disclosure as to a prior oral inconsistent statement. Under Evidence Code section 769 neither written nor oral statements, consistent or inconsistent, have to be disclosed to a witness before he may be examined concerning them. The theory of section 769 is that prior disclosure should not be required because it eliminates or substantially reduces the element of surprise which is often an effective device for getting at the truth in the course of a trial. This change in the law does not, however, affect the requirement that where a writing is shown to a witness, all parties to the action must be given an opportunity to inspect the writing before the witness may be questioned about it. That requirement is codified in section 768 (b) of the Evidence Code.

Section 770 adds two new qualifications to the rule that extrinsic evidence of a prior inconsistent statement must be excluded, unless the witness is given an opportunity to explain or deny it. Under section 770, it will no longer be necessary to give the witness an opportunity to explain or deny the statement before it is admitted, if the witness has not been excused and can be called back to the stand after the statement is introduced. Moreover, the judge may dispense with the

witness's opportunity to explain or deny if the interests of justice so require, as, for example, when the inconsistent statement first comes to light after the witness has been excused.

The right to call and examine adverse witnesses which is provided in section 776 may depart from the prior law in two minor respects. First, under the Code the witness is identified with a party, and thus may be examined as an adverse witness, whether or not his relationship to the party exists at the time of the trial, so long as it did when the dispute in the suit arose or when the witness obtained knowledge of the dispute. As there is no California case which has considered this position, the Code seems to have broadened somewhat the definition of persons who may be examined as adverse witnesses. Second, subdivision (b), which deals with the cross-examination of witnesses who are called under section 776, provides in effect that those parties to the action as to whom the witness is not adverse in interest may only examine him as if on redirect examination—that is, may not use leading questions. Thus, for example, if the defendant's employee is called by the plaintiff under section 776, the defendant, while permitted to examine the witness following the plaintiff's examination of him, is not permitted to use leading questions in doing so.41

There are a few changes in chapter 6 of division 6, entitled "Credibility of Witnesses." Section 780 lays down the Code's basic principle on this matter in these terms:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following . . . .

Section 780 then lists some eleven matters which, among others, may be considered in determining the credibility of a witness. What is noteworthy here is that chapter 6 does not follow the rule that evidence relating to credibility is collateral as a matter of law, and hence inadmissible, unless it is independently relevant to the issue being tried.42 Instead, the Evidence Code leaves the matter to the trial judge's discretion under section 352, already discussed, which gives him a general power to exclude evidence when its probative value is outweighed by such considerations as undue delay, prejudice, or tendency to confuse the jury.

Section 785 makes another change in the law relating to attacks

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41 This limitation is subject to the discretion given the trial judge by § 767 to permit the use of leading questions, when they would not ordinarily be authorized, "under special circumstances where the interests of justice . . . [so] require . . . ."

upon the credibility of witnesses in that it permits a party to attack the credibility of his own witness, without showing surprise and damage.

Section 788 of the Evidence Code, which deals with the impeachment of a witness by showing his prior conviction of a felony, creates two new exceptions to the rule, neither of great significance. These exceptions provide that a prior felony conviction may not be shown if:

(a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.... (d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to [certain California procedures] .... referred to in subdivision (b) or (c).

The Law Revision Commission originally recommended substantially greater limitations on the use of felony convictions for impeachment but was unable to persuade the Legislature of their desirability over the concerted opposition of the Attorney General and other law enforcement officers and agencies.

Section 791, which deals with the admissibility of prior consistent statements of trial witnesses, may also make a change in the law. Subsection (b) of section 791 restates the law in authorizing the admission of a prior consistent statement if it is offered after "an express or implied charge has been made that his [a witness'] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the [prior consistent] statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

However, subsection (a) may go beyond the pre-1967 law by making prior consistent statements admissible if offered after a prior inconsistent statement has been admitted for the purpose of attacking the credibility of the witness, and the prior consistent statement was made before the alleged inconsistent statement. If this provision does change the law, it is no more than a logical extension of the rule that permits a prior consistent statement to come in to rehabilitate the witness following an express or implied charge of recent fabrication.

Division 7—Opinion Testimony and Scientific Evidence

Division 7 of the Evidence Code covers opinion testimony by both lay and expert witnesses. It is substantially a restatement of the

44 Division 7 has a separate chapter which codifies the former provisions of the
present law, albeit set forth with greater precision and clarity than in prior statutes and decisions. The most important change is found in section 804 (a):

If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

This provision is desirable because an expert witness is permitted by section 801 (b) to rely, in forming his opinion, upon matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . .

The language permits the expert in some situations to rely upon hearsay information furnished and opinions rendered by other persons. Where an expert does rely upon such matter the adverse party will probably not be able to cross-examine the expert effectively about it. In the absence of section 804 the adverse party would have no other recourse than to call as his own witness the person upon whom the expert relied, with the limitations upon scope of examination which that would entail. Section 804 permits the expert's informant to be called in effect, as an adverse witness. Subdivisions (b), (c), and (d) of section 804 spell out certain desirable limitations on this new rule.

**Division 8—Privileges**

Division 8 deals with the subject of privileges in too much detail to be recounted or even summarized in this brief survey. A few general comments may, however, convey some general sense of how the Evidence Code deals with this complex, not to say controversial, subject.

First, as has been noted earlier, division 8 is unique among the several divisions of the Evidence Code in that it applies to all proceedings in which testimony may be compelled, including court, legislative, administrative, arbitration and other proceedings.

Second, division 8 preserves all of the previously existing privileges,
creates at least one new privilege, and may create another. The privilege that is clearly new is the “psychotherapist-patient privilege” which is applicable, as provided in section 1011, when a person consults or is examined by a certified psychologist or by a doctor who devotes a substantial portion of his time to psychotherapy “for the purpose of securing a diagnosis or preventive, palliative or curative treatment of his mental or emotional condition . . . .” Another privilege which may be new is the trade secret privilege created by section 1060:

If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Third, while the pre-Code privileges are preserved, a number of them are changed in detail. The most significant changes were made in the marital testimonial privilege. Under sections 1881(1) of the Code of Civil Procedure and 1322 of the Penal Code (both superseded by the Evidence Code), a married person had a privilege, subject to certain exceptions, to prevent his spouse from testifying either for or against him in a civil or criminal action to which he was a party. Section 1322 of the Penal Code also gives a married person a privilege not to testify for or against his spouse in a criminal action to which the spouse was a party.

The privilege of a married person not to call his spouse to testify for him is not continued in the Evidence Code. If a case can be imagined in which a party would wish to avail himself of this privilege, he could achieve the same result by simply not asking his spouse to take the stand. Nor does the Evidence Code continue the privilege of a non-party spouse to refuse to testify in favor of the party spouse in a criminal action. It is difficult to imagine a case in which this privilege would be claimed for other than mercenary or spiteful motives, and it prevents access to evidence which might save an innocent person from conviction.

The Evidence Code does continue the privilege not to have one spouse testify against the other, but it makes an important change concerning who may claim the privilege. Prior to the Code either spouse could claim the privilege not to have one spouse testify against the other in a criminal action, and the party spouse could claim the privilege not to have his spouse testify against him in a civil action.

46 There is no California case holding that there is a privilege to refuse disclosure of a trade secret. However, the court in Wilson v. Superior Court, 66 Cal. App. 275, 225 Pac. 881 (1924), recognized that the privilege may exist.
The Evidence Code gives the “against” privilege exclusively to the witness spouse on the rationale that its purpose is to preserve domestic tranquility, and the witness spouse is likelier than the party spouse to determine objectively whether to claim the privilege on that basis.

Fourth, one of the major contributions of the new Evidence Code is that, subject to two important exceptions, the Code deals with each privilege in considerable detail. It also treats similar problems relating to several privileges in a uniform manner. The prior law was not only unclear on many matters of detail with respect to many privileges but, where it was clear, it often treated the same questions quite differently in respect of different privileges. At the very least, the new Evidence Code will provide judges and lawyers with a body of detailed and internally consistent rules on the subject; hopefully, the rules also embody sensible answers to the questions with which they deal.

However, there are major exceptions to the detailed treatment of privileges where the Code deals with the privilege of a defendant in a criminal case not to be called as a witness and the privilege against self-incrimination. In each instance the Evidence Code simply declares that the privilege exists “to the extent that such privilege exists under the Constitution of the United States or the State of California.” Because of the fluidity of our developing constitutional law in these areas, the Law Revision Commission concluded it would be unwise either to attempt to codify the existing law or to anticipate future developments. This treatment of the subject leaves to the courts the responsibility not only for determining the scope of the respective privileges, but also for developing the rules respecting waiver of these privileges and exceptions to them.

Fifth, section 913 provides, in effect, that no comment may be made by court or counsel concerning a claim of privilege, and that no inference may be drawn from the making of such a claim by the trier of fact on any issue, whether the privilege is exercised in the instant proceeding or was exercised on a prior occasion. Where the privilege against self-incrimination is claimed by one other than a defendant in a criminal case, section 913 would appear to be broader than the prior law.

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49 This statement depends on whether and to what extent Nelson v. Southern Pac. Ry., 8 Cal. 2d 648, 654-55, 67 P.2d 682, 685 (1937), may be considered as having been substantially overruled by such cases as People v. Snyder, 50 Cal. 2d 190,
Sixth, section 915 establishes a new procedure with respect to passing on some claims of privilege. Subsection (a) of this section precludes the judge from requiring disclosure of information in order to determine whether it is privileged, thus restating prior law. Subsection (b) creates an exception to this rule, however, in the case of three privileges: official information, identity of informer, and trade secret. The reason for these exceptions is that all three privileges are qualified privileges, in that they apply only where the necessity for preserving confidentiality outweighs the necessity for disclosure in the interest of justice. It seems not unlikely that cases will arise in which these competing considerations cannot be intelligently weighed and balanced by the trial judge unless he knows the substance of the information claimed to be privileged. Subsection (b) authorizes the judge to require such disclosure, while attempting to safeguard the information if it is then determined to be privileged, by prohibiting its later disclosure by those who were present in the judge's chambers when it was divulged.

Another important new provision is section 916 which puts the burden on the trial judge or other presiding officer to protect privileged information where it ought not to be disclosed and where neither the witness nor a party to the proceeding is entitled to claim the privilege.

In the case of the privilege not to disclose the identity of an informer, it should be noted that in Martin v. Superior Court, 242 A.C.A. 573, 51 Cal. Rptr. 567 (1966), the District Court of Appeal held that CAL. CODE Civ. Proc. § 1881.1 (now CAL. EVIDENCE CODE § 1042) was unconstitutional. The discretion vested in a magistrate as to whether disclosure of the identity of the informant must be required deprives the defendant of his constitutional right to due process of law where the testimony of the unidentified informant is necessary to establish probable cause for the issuance of a warrant.

CAL. EVIDENCE CODE § 916 provides: "(a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if:

1. The person from whom the information is sought is not a person authorized to claim the privilege; and
2. There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if:

1. He is otherwise instructed by a person authorized to permit disclosure; or
2. The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence."
Division 9—Evidence Affected or Excluded by Extrinsic Policies

Chapter 1 of this Division deals with the admissibility of evidence relating to character, habit, or custom. Most of its provisions probably restate the prior law, albeit with considerable clarification as to what evidence is admissible in what circumstances with respect to what issues. There are three principal innovations in chapter 1.

Section 1100 makes it clear that where a person's character or trait of character is an ultimate fact in dispute, it may be proved by opinion, reputation, or specific instances of conduct.

In the relatively few instances in which evidence of character is admissible in a criminal action to prove the conduct of the defendant, such character may be proved not only by evidence of reputation, as formerly, but also by opinion evidence.

Section 1105, which deals with evidence of habit or custom to prove conduct, makes such evidence admissible whether or not there are any eyewitnesses to the alleged conduct—clearly a departure from prior law.

Chapter 2 of division 9 deals with a variety of situations in which what is or may be relevant evidence is excluded because of some overriding extrinsic policy, for example, the inadmissibility of evidence of liability insurance and of offers to compromise. Here, again, the Evidence Code simply restates familiar and well-established law. The rules which, in conformity with existing law, exclude evidence of offers to compromise and offers to discount a claim are broadened beyond their previous scope to exclude evidence of any conduct or statements made in the course of negotiating toward or about such offers. This extension is made on the theory that the underlying policy of encouraging people to settle their differences out of court extends as logically to such negotiations as to the offers themselves.

Division 10—Hearsay Evidence

The first chapter of division 10 contains the hearsay rule itself and a few provisions of general application to hearsay evidence. Section 1200 defines hearsay evidence in traditional terms: "evidence of a

53 People v. Cobb, 45 Cal. 2d 158, 287 P.2d 752 (1955); People v. Fair, 43 Cal. 137 (1872); See Witkin, CALIFORNIA EVIDENCE §§ 329-30 (2d ed. 1966).
55 CAL. EVIDENCE CODE § 1155.
56 CAL. EVIDENCE CODE § 1152.
57 Ibid.
58 CAL. EVIDENCE CODE § 1154.
statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated.” If an extra-
judicial statement is offered to prove some fact other than the truth of the matter stated, it is not hearsay evidence and is, therefore, not sub-
ject to the hearsay rule, although it may be excludable on other grounds.

“Statement” as used in the hearsay rule is defined in section 225 to include only “verbal expression” or “nonverbal conduct . . . intended . . . as a substitute for . . . verbal expression.” Thus, hearsay as defined in the Evidence Code does not include—and the hearsay rule does not, therefore, exclude—evidence of nonverbal, nonassertive conduct that is offered to prove a person’s belief as a basis for an inference that the fact believed is true—e.g., proof of flight as evidence of a sense of guilt as evidence, in turn, that the actor committed a crime. There has been some confusion in the California cases as to whether such evidence is subject to the hearsay rule. Under the Evidence Code it is not.

Section 1202 makes a minor change in the law, by providing that any hearsay declarant can be impeached by an inconsistent statement, whether or not he has been given an opportunity to explain or deny the inconsistency.

Section 1203(a) introduces an innovation to California law. It permits a party against whom a hearsay statement has been introduced to call the hearsay declarant as a witness and cross-examine him. Thus, when the hearsay declarant is available as a witness the adverse party is put on substantially the same footing in respect of the hearsay de-
clarant as he is vis-a-vis an adverse witness at the trial.

Chapter 2 of Division 10 sets forth, in 14 articles, more than 40 exceptions to the hearsay rule. Most of these exceptions were recognized in the law prior to the Code. There are, however, some new exceptions, and some existing exceptions are substantially revised. The limitations of this article will not permit discussion of all of the exceptions, nor even mention of all of the minor changes. Provisions that are likely to have a significant impact on the California law are discussed briefly.

New Exceptions to the Hearsay Rule

Perhaps the most significant of the new exceptions is section 1235 which provides that a prior inconsistent statement of a trial witness

50 Compare Estate of DeLaveaga, 165 Cal. 607, 133 Pac. 307 (1913), with People v. Mendez, 193 Cal. 39, 223 Pac. 65 (1924).

60 CAL. EVIDENCE CODE § 1203(b)-(d) provides desirable limitations on this rule to prohibit, for example, a party’s counsel from examining the party himself with leading questions following the introduction of his extrajudicial admission.
is admissible as evidence of the truth of the matter stated. Formerly, such a statement was admissible for impeachment only, and could not be considered as substantive evidence. The significance of this change in the law is enhanced by section 785, which permits a party to impeach his own witness without showing that he was surprised and damaged by the witness' testimony or that the witness is hostile. The effect of the two sections, taken together, is to enable a party to get to the jury, if need be, by introducing the prior inconsistent statements of his own "turncoat" witness.

Section 1227 creates a new hearsay exception in wrongful death actions, making the statements of the decedent prior to his death admissible against the heirs or representatives. Similarly, section 1226 makes the statements of a minor admissible against his parents when they sue to recover damages for an injury to him.

The legislation that enacted the Evidence Code repealed the so-called "dead-man statute," which prohibited a person suing on a claim against a decedent's estate from testifying about anything that happened prior to the decedent's death. To balance the advantage given the claimant by repealing this provision, Evidence Code section 1261 creates a new exception to the hearsay rule that permits the estate to introduce on its own behalf in such cases relevant hearsay statements of the decedent.

Another new hearsay exception that may be of some significance is found in section 1300 which provides that a felony conviction is admissible in a civil action to prove any fact essential to the conviction. The person convicted need not be a party to the subsequent civil litigation. The section will, in effect, overrule such cases as *Burke v. Wells, Fargo & Co.*, wherein Wells Fargo successfully asserted that it did not have to pay a reward for the apprehension of a stage robber on the ground that the criminal conviction of the robber was not competent evidence that he had robbed the stage.

Section 1284 provides a new hearsay exception that may prove useful at times. Code of Civil Procedure section 1893 has been amended to require custodians of public records to issue certificates stating that a specified record cannot, after diligent search, be found. Section 1284 makes such certificates admissible to prove the absence of the specified record from the custodian's files. Such certificates may thus be used as evidence that particular events, which would normally have been recorded in various public records if they had occurred, did not occur.

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63 34 Cal. 60 (1867).
Substantially Revised Exceptions to the Hearsay Rule

Perhaps the most significant revision of an exception to the hearsay rule relates to the former testimony exception. The prior law made testimony given at a previous trial admissible only if the previous action was one between the same parties and related to the same subject matter as that involved in the subsequent trial in which the evidence is offered.\textsuperscript{64} Section 1291 of the Evidence Code permits former testimony to be introduced against a party if (1) he introduced the testimony himself at the previous trial or (2) he had an opportunity to cross-examine the witness at the former trial with an interest and motive similar to that which he has in the proceeding in which the former testimony is offered. Section 1292, which is limited to civil actions, goes a step further. It makes former testimony admissible against a party, even though he himself had no prior opportunity to cross-examine the witness, if a party to the former action did have the opportunity to do so and had, at that time, an interest and motive similar to that which the objecting party has in the proceeding in which the former testimony is offered. These provisions tend to minimize the consequences of the loss of a witness when several cases arise out of one event.

The hearsay exception for dying declarations relating to the cause and circumstances of the declarant's death has also been broadened. Under section 1242, such declarations are admissible in all civil and criminal actions, not just criminal homicide actions as provided by prior law.\textsuperscript{65}

Section 1237 makes it somewhat easier to prove recorded recollection for it does not require, as did prior law,\textsuperscript{66} that the record have been made by the witness himself or under his direction, so long as there is proof that the witness' memory was accurately recorded.

Section 1251 broadens slightly the hearsay exception for statements of feeling, pain, or bodily health. Under prior law, statements of past symptoms of this sort were inadmissible\textsuperscript{67} although statements of existing pain or feeling were admissible.\textsuperscript{68} Section 1251 makes the statements of past symptoms, whether made to a physician or to any other person, admissible if the declarant is not available to testify personally and he had no obvious motive to mislead anyone at the time when the statement was made.

\textsuperscript{64} Cal. Code Civ. Proc. § 1870(8).
\textsuperscript{67} People v. Brown, 49 Cal. 2d 577, 398, 320 P.2d 5, 10 (1958).
\textsuperscript{68} Adkins v. Brett, 184 Cal. 252, 193 Pac. 251 (1920).
Section 1224 may have considerable impact. It provides, in substance, that in any action where the liability of the defendant depends on the liability of another person, any statement of that other person that would have been admissible against him to prove his liability is admissible against the defendant. Section 1224 actually makes no major change in the law, for section 1851 of the Code of Civil Procedure states essentially the same rule. But while section 1851 has been applied in actions against a surety and in actions against a vehicle owner for the negligent driving of a person entrusted with the vehicle, it has not, for some inexplicable reason, been applied in actions against employers for torts committed by their employees. Section 1224 makes it quite clear that the admission of the employee is admissible against the employer when the latter’s liability is based on respondeat superior.

These, then, are the most significant revisions the Evidence Code makes in the law relating to hearsay. The remainder of the division, although it does not make major changes in the law, is nonetheless a significant contribution. Virtually all of the general exceptions to the hearsay rule are gathered into this division, organized for efficient use, and clearly stated. Thus, the hearsay rule and its principal exceptions will be readily available to both judges and lawyers who, perforce, must often read as they run.

Division 11—Writings

There is very little new law in any of the chapters on writings in division 11. Chapter 1, however, in dealing with authentication and proof of writings, provides a quite explicit and helpful analysis of the separate steps involved in this aspect of getting documents into evidence. The only new law encountered in chapter 1 is found in sections 1452, 1453, and 1454, which create rebuttable presumptions that certain official seals and signatures are genuine and authorized, thus effecting a desirable simplification of the law on this subject.

Article 1 of chapter 2, on Secondary Evidence of Writings, restates the best evidence rule, codifies a number of established exceptions thereto, and creates a few new or modified exceptions.

Article 2 of chapter 2 of division 11 is entitled “Official Writings and Recorded Writings.” Section 1530, which is new, establishes considerably simplified methods of proving the content of writings in the custody of public entities, whether in the United States or in a foreign

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country. The effect of the statute is to make purported copies of official writings *prima facie* self-authenticating by creating rebuttable presumptions of their authenticity. Thus, where there is no actual dispute between the parties as to their genuineness, the documents are automatically authenticated. Where there is a dispute, on the other hand, and the opponent is prepared to back up his challenge by introducing some evidence of the non-authenticity of such documents, the trier of fact must decide that issue from the available evidence, the burden of proof being on the proponent of the evidence.

Section 1532 makes an official record of a writing *prima facie* evidence of the authenticity of the original. This is the present rule with respect to writings affecting real property; the Evidence Code extends the rule to all recorded writings.

Article 3 of chapter 2 of division 11 deals with business-record photographic copies of writings; article 4 deals with proof of hospital records; and chapter 3 deals with official writings affecting property. For the most part, they restate previously existing law, as found in various sections of the Code of Civil Procedure and judicial decisions interpreting and supplementing them.

**Conclusion**

Hopefully, this preliminary “Cooks’ Tour” of the Evidence Code has provided some idea of the general organization and format of the Code and of the balance it strikes between restatement and revision of the California law of evidence. Even more hopefully, it has brought the reader to the view, at least tentatively, that this new handbook of the California law of evidence will be a useful tool for California judges and lawyers in their day-to-day work—whatever doubts or reservations he may entertain about particular innovations.

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71 Cal. Evidence Code § 1500.