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Some Recent Cases in Evidence

(This is the second of a series of articles being written by Professor Kidd on Evidence.)

EXAMINATION OF THE DEFENDANT IN CRIMINAL CASES

SECTION 2048 of the Code of Civil Procedure provides that the opposite party may cross-examine a witness as to any facts stated in his direct examination or connected therewith. The scope of this cross-examination is difficult to determine, but as has been seen the question seems now to be ignored by the courts because after all what difference does it make—if the evidence is relevant, let it in. If the court has any discretion at all, it should certainly be with regard to the order in which the testimony comes in. But with the defendant in a criminal case different questions are presented. The defendant cannot be made a witness for the prosecution and therefore if the prosecuting attorney can't ask the question on cross-examination he can't ask it at all. The scope of the cross-examination of a defendant in a criminal case is therefore of great importance. Section 1323 of the Penal Code provides that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself but if he offers himself as a witness he may be cross-examined by the counsel for the People as to all matters about which he was examined in chief. One question is whether the language is narrower than the corresponding language in the Code of Civil Procedure. Justices Temple and McFarland said that it was narrower and whenever they could control the decision, section 1323 was limited in accord with their views. On the other hand there is authority for making the cross-examination of a defendant in a criminal case as broad as that of any witness, the only difference being that it may be exceeded in the case of the ordinary witness by the cross-examiner making the witness his own, whereas with the defendant in a criminal case, the scope of the direct examination must not be exceeded. It has been definitely decided that a defendant taking the stand may be impeached by showing his conviction of a felony (Justice McFarland)

1 People v. Arrighini (1898) 122 Cal. 121, 54 Pac. 591; People v. Wong Ah Leong (1893) 99 Cal. 440, 34 Pac. 105; People v. O'Brien (1892) 96 Cal. 171, 180, 31 Pac. 45; People v. O'Brien (1885) 66 Cal. 602, 6 Pac. 695 (apparently questions as to other embezzlements from the same employer).

2 People v. Soeder (1906) 150 Cal. 12, 87 Pac. 1016; People v. Crowley (1893) 100 Cal. 478, 35 Pac. 84; People v. Meyer (1888) 75 Cal. 383, 17 Pac. 431.
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reluctantly agreeing). Motives affecting the testimony given by a defendant may be inquired into on cross-examination. Whenever the defendant takes the stand and makes a general denial of the crime, he opens himself up wide to cross-examination. Furthermore a defendant can't testify to events up to a certain moment and then cut off cross-examination on matters happening after that moment, but constituting a part of the transaction to which he has testified. These decisions seem to have settled most points arising, but lately the difficulty is coming up again. What is the scope of the matters testified to on direct examination? This is really the same problem presented in the case of the ordinary witness, only, as before pointed out, with the ordinary witness the difficulty is avoided by the cross-examiner making him his own. In *People v. Wilson* the questions on direct examination are not given and it was held that the cross-examination did not involve prejudicial error in view of the whole record although the case states that it went too far. The questions on cross-examination were as to whether the defendant hadn't been told that the decedent had betrayed him. If he testified at all on direct examination to the circumstances of the killing, or to his relations with the decedent, the opinion of the court on this point would seem to go back to overruled decisions, for the questions were clearly relevant to motive. In *People v. Brown* the defendant took the stand and testified to one thing only, namely that he had not made

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3 *People v. Dole* (1898) 122 Cal. 486, 498, 55 Pac. 481 (inconsistent conduct) "I concur in the views of the chief justice as to the scope of the cross-examination of the defendants. When a defendant goes upon the witness stand, and for the first time tells a Munchausen tale as to his connection with the affair, I think it proper and legitimate cross-examination to ask him: 'Did you ever tell this tale to anybody prior to this time? Did you tell it to the arresting officers?' I believe it is the universal practice to ask such questions, and until now I never heard the practice questioned. To ask and compel answers to those questions is certainly no invasion of defendant's constitutional rights. There is no power in the law to compel the defendant to take the witness stand in his own behalf, but when he does it he may be asked any question which will show his past conduct to be inconsistent with his present testimony. The rule of law is so declared in the recent case of *People v. Gallagher*, 100 Cal. 475. As a general principle, the defendant's silence may not be proven against him as a circumstance tending to show guilt. But upon cross-examination, if this silence be inconsistent with his present testimony, inquiry may be had upon it." Garoutte and Harrison, JJ., dissenting, per Garoutte, J. *People v. O'Bryan* (1913) 165 Cal. 55, 60, 130 Pac. 1042; see *People v. Bishop* (1889) 81 Cal. 113, 22 Pac. 477.

4 *People v. Buckley* (1904) 143 Cal. 375, 377, 77 Pac. 691; *People v. Gallagher* (1893) 100 Cal. 466, 473, 35 Pac. 80; *People v. Rozelle* (1888) 78 Cal. 84, 20 Pac. 36; *People v. Middleton* (1924) 65 Cal. App. 175, 223 Pac. 448.

5 *People v. Maughs* (1908) 8 Cal. App. 107, 117, 9 Pac. 407; *People v. Teshara* (1903) 141 Cal. 633, 66 Pac. 798.


7 (1923) 62 Cal. App. 96, 216 Pac. 411.
any threats against the life of a witness for the People, as this witness had testified. Now it has been decided that a defendant may take the stand and testify to as little as he pleases and the prosecution cannot comment on his failure to testify on other matters. It has been a favorite trick of attorneys for the defense to put the defendant on the stand and have him testify to a limited fact. A careless or ignorant district attorney cannot resist the temptation to question the defendant on the facts generally, so a reversal often follows. In the Brown case the defendant asked for an instruction that he had a right to testify to any portion of his case and no prejudice should be raised in the jurors' minds against him because he had not testified about all instances concerning his case. The refusal to give this instruction was held not error, although the court said that it may be under the circumstances it would have been error had the court refused a request for instruction to the effect that where a defendant in a criminal action testifies only to a collateral matter no inference unfavorable to him can be drawn from his failure to testify to such matters as are directly connected with the charge in issue. Yet isn't this wrong—the defendant in the Brown case testified to nothing except a collateral matter and the refusal of the instruction must have been taken to refer to the testimony on that point. The court goes on to say by way of dictum that a prisoner who takes the stand in his own behalf and testifies to the merits of the charge, but withholds testimony of other facts which form a part of the charge, must expect to incur the discredit which the jury would naturally visit upon the ordinary witness pursuing a like course. The Supreme Court in denying a hearing in banc refused to approve this portion of the opinion and sustained the refusal to give the instruction on another ground, so the matter is still at large.

It is only sixty years ago that the movement to allow a defendant to testify began to be realized. Up to that time a prisoner could not take the stand in his own behalf. The history of the abolition of the disqualification is given by text writers who cite the unfounded fears of the opponents of the innovation. Recently, however, there has come a disposition to question the desirability of the change from the common law rule. When the defendant has the privilege of testifying, the jury will draw an inference against him if he does not and

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8 People v. Mead (1904) 145 Cal. 500, 506, 78 Pac. 1047; People v. McGungill (1871) 41 Cal. 429.
10 Wigmore on Evidence (2d ed.) § 579.
no instructions from the court can prevent it. Under the common
law the jury were told that he could not take the stand at all. The
natural inference from this would be that if the defendant could
testify he would say something in his own favor. Furthermore, at
common law, the defendant was allowed to make an unsworn state-
ment to the jury, not subject to cross-examination. He was thus
enabled to clear up any misunderstanding by an explanation. From
the point of view of the defendant therefore the present law may be
less favorable than the common law. From the point of view of
the prosecution, the present law leaves much to be desired. It may
be that it is unwise to compel the defendant in a criminal case to
take the stand. Opinion on that matter differs, but there ought to
be no difference of opinion on the proposition that if he elects to
take the stand, the cross-examination should extend to the whole
question of his guilt or innocence. He should not be allowed to
testify to isolated facts and lay traps for the district attorney, with
error in the record if the district attorney guesses wrong as to the
latitude allowed on the cross-examination.

ADMISSIONS

The broad principle is that anything that a party says may be
used against him. The first criticism to be made on the cases is that
they confuse this simple principle with declarations of a deceased
person against interest. It really makes no difference whether the
admission is against interest or not. If the opponent wishes to use
it, it surely is no ground for objection that it supports the case of
the one making the admission. On account of the simplicity of the
principle, admissions are usually treated by themselves, although they
constitute an exception to the hearsay rule. The theory has been
advanced that admissions simply impeach the position of the party
and do not constitute affirmative evidence. In other words if the
plaintiff's only evidence on a material issue is an admission of his

11 In Canada there seems some conflict in the question whether making
the accused a competent witness in his own behalf, abrogated the privilege
of making an unsworn statement. It was not until 1898 that England made
the accused a competent witness, but the privilege of making an unsworn
statement was continued. 52 Canada Law Journal, 10.
Code Civ. Proc. § 1853 is responsible.
13 Wigmore on Evidence (2d. ed.) § 1048, where in view of Professor
Morgan's exposition, 30 Yale Law Journal, 355, admissions are recognized as
an exception to the hearsay rule.
opponent, a finding in his favor on that issue cannot be sustained. This view was early repudiated in California. *Gates v. Pendleton*\(^\text{14}\) affirms the earlier case. Not only words but also conduct may constitute an admission. The common case is the silence of a defendant when accused of a crime.\(^\text{25}\) *People v. Graney*\(^\text{16}\) has been affirmed to the point that it constitutes an admission against a party although his refusal to make a statement is based upon his legal right so to refuse. This seems going much too far. In fact, the usual purpose of the evidence is not to get before the jury the silence of the defendant or his refusal to answer, but the narrative statement made to him. There have been no cases of importance modifying the decisions of the court on admissions by a predecessor in interest of realty or personalty.\(^\text{17}\) The statement of an agent or servant within the scope of his authority is admissible against a party, and there are other relations which raise the same question. In the action for causing the death of a person, will the statements of the decedent be admissible against the plaintiff? *Gett v. Pacific Gas and Electric Company*\(^\text{18}\) simply refers to *Marks v. Reissinger*.\(^\text{19}\) This case holds squarely that the action for death did not belong to the decedent in his lifetime and therefore his statements are not admissible against the plaintiff. There is a conflict in other jurisdictions as there is in insurance cases.\(^\text{20}\) Certainly in both these situations, there is such a relationship between the plaintiff and the decedent as to make the decedent's statements clearly relevant and of great probative value. Their use should not be foreclosed by any application of the hearsay rule based upon technical distinctions on causes of action and vested interests.

One of the exceptions to the broad principle that whatever an opponent says can be used against him is made necessary by the rules of pleading. If inconsistent causes of action can be alleged and inconsistent defenses, to that extent the admission rule must be

\(^{14}\) (1925) 46 Cal. App. Dec. 813, 236 Pac. 365; *People v. Yeager* (1924) 194 Cal. 452, 229 Pac. 54.
\(^{17}\) 4 California Law Review, 250, where it was pointed out that the California courts have disregarded section 1849 of the Code of Civil Procedure, which was evidently drawn to incorporate the peculiar New York rule that the statements of a predecessor in interest are admissible in evidence against his successor when they concern real property but not personal.
\(^{18}\) (1923) 192 Cal. 621, 221 Pac. 376.
\(^{19}\) (1917) 35 Cal. App. 44, 169 Pac. 243.
If a party makes a positive statement in a pleading and then amends the pleading and makes an inconsistent statement, why shouldn’t the prior statement be shown in evidence? There is no good reason except that some cases decide that it cannot be done, evidently confusing the pleading rule which disregards in general superseded pleadings with the rule of admissions. An inconsistent statement in a superseded pleading is allowed to impeach the party who makes it after he takes the stand, but it is equally probative whether he takes the stand or not. The language in the case of Schuh v. Oilwell Supply Company is inconsistent. If the statement is allowed for impeachment purposes only, it is not really an admission. It would not constitute affirmative evidence. In criminal cases it was held that a plea of guilty withdrawn under the Penal Code section could not be given in evidence as an admission against the defendant, but in People v. Boyd the court holds that an offer to plead guilty might be shown and takes the opportunity to discredit the Ryan case. Apparently the Supreme Court would admit a withdrawn plea of guilty whether the defendant had taken the stand or not. There thus appears an inconsistency between the rule as to superseded pleadings in civil and criminal cases and a further inconsistency in the compromise rule, because as the Appellate Court pointed out in the Boyd case the offer to plead guilty to one charge was conditioned on a dismissal of the other charges and the grant of probation. If not a confession of guilt, the offer should have been excluded as it was an offer of compromise; if a confession of guilt it was obtained by a promise, and would therefore be obnoxious to the confession rule.

Confessions

Another exception to the rule that anything that a party says can be used against him is in criminal cases where a confession is offered, that is a direct acknowledgment of guilt. The confession must first be shown to be voluntary. Sometimes the courts seem to be getting away from technicality and again the quibbles seem to come back

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21 McCully v. McArthur (1921) 187 Cal. 194, 201 Pac. 323.
22 Williams v. Seiglitz (1921) 186 Cal. 767, 200 Pac. 635, citing cases.
24 (1920) 50 Cal. App. 588, 195 Pac. 703.
25 People v. Ryan (1890) 82 Cal. 617, 23 Pac. 121.
27 Supra, n. 25.
28 Supra, n. 26.
with their old-time vigor.\textsuperscript{29} The trouble is that the court is trying to do an impossible thing. By means of the rule that a confession must be free and voluntary it is trying to regulate the police methods of handling suspected persons. This can't be done. In England the courts apparently will not listen to any confession made in response to questions from police officers.\textsuperscript{30} This would probably not protect a defendant from third-degree methods. It might even result in more strenuous means being employed to get the evidence that would establish the truth of the confession. There is, however, another practice in England, that of bringing the suspect before the magistrate at the earliest opportunity and there giving him an opportunity to tell his story. Such a practice works well in some cases. There is a psychological moment immediately upon arrest which leads many defendants to be willing to confess and have it over with. We lose the advantage of that under our practice by delay. When a defendant has been confined in jail for a month or two awaiting trial, he gets in touch with criminal lawyers who will put up a defense for him if he, or his friends can raise any money. Police records show that many a daring burglary or robbery has been pulled off in order to get money for the defense of an arrested crook. At any rate the quibbles as to whether the confession is voluntary or not have no relation to the guilt or innocence of the defendant or to the truth of his confession. Usually the police deny that any force was used or promise was made and there is a conflict of evidence which the trial court must resolve and which is binding on the appellate court.\textsuperscript{31}

The most important question arises in regard to the procedure in confessions. Under the common law the court first determined whether the confession was voluntary. It then went to the jury for the jury to give such weight as they might deem proper and there is some California precedent for this, but the weight of California authority has changed the rule. As at common law the court determines whether the confession should be admitted, but after having

\textsuperscript{29} People v. Castello (1924) 194 Cal. 594, 599, 229 Pac. 855. "There can be no doubt but that the words, 'we better come through if you want him to help us out' would, under ordinary circumstances, if credited by the court, render the confessions inadmissible." The fact that the confession has been obtained by a trick is immaterial. People v. Perry (1925) 69 Cal. Dec. 311, 234 Pac. 890; People v. Connelly (1925) 69 Cal. Dec. 285, 234 Pac. 374.


done so, the court instructs the jury that if the jury think the confession was not voluntary that they must disregard it. There isn't much sense to this California rule. It requires an impossible feat of mental gymnastics. The jury after hearing the confession are told that they must erase it from their minds if they think it was obtained by improper threats or promises. There is, however, no technical difficulty in following the rule laid down by the California court, and it is therefore inexcusable for the trial judge and counsel for both sides to go astray as happened in *People v. Black).* Would it be asking too much to require that no one qualify as a judge or district attorney in criminal cases unless he passed an elementary examination in criminal law and evidence, and if it is not too much to hope for, in criminology? The cases cited make clear that the preliminary proof is addressed to the court; that full opportunity must be allowed the defendant at that stage to offer his proofs to show that the confession was improperly obtained; that during this preliminary procedure the jury should be excluded.

**OPINION**

That the courts are doing their work well as far as the opinion rule is concerned is evidenced by the paucity of recent cases. Some years ago the courts were excluding evidence, because it usurped the functions of the jury, because it involved the very matter at issue and for other ridiculous reasons. Now the court says, quoting from the sixteenth edition of Greenleaf,

"It is sometimes said that an opinion is not to be offered on the very issue before the jury", but this, as once remarked (*Snow v. Boston & Maine R. R. Co.*, 65 Me. 231), would rather "seem to be a very good reason for its admission." If the witness can add instruction over and above what the jury are able to obtain from the data before them, it is no objection

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Perhaps the rule that the voluntary character of the confession must be submitted to the jury, as well as to the court is not so well established that the Supreme Court could not overthrow it. Recent cases emphasize the rule that it is a preliminary question for the judge to decide. *People v. Connelly*, supra, n. 29.
that he refers to the precise matter in issue, and if his opinion
is superfluous, it is inadmissible even if it concerns a matter not
directly a part of the issue.' (1 Greenleaf on Evidence, 16th ed.,
p. 551.)\(^{33}\)

Some leading cases in California a few years ago made the proper
discriminations.\(^{34}\) The genuine expert gives his opinion because while
the facts can be made clear to the jury, the jury cannot draw the
conclusions from them. The lay witness gives his opinion because
in some cases it is impossible to state the facts so that the jury can
see them; in other words, impossible to present a word picture. The
attempt in People v. Boggess\(^{35}\) to form a third class does not seem
necessary. A practical and experienced operator of a quicksilver
mine is an expert and his conclusions are necessary if the jury
cannot draw them for themselves. It is doubtful if there should
ever be a reversal for an opinion based upon facts. If the jury
cannot draw the conclusion, then the expert witness is entitled to
draw it for them. If the jury can draw the conclusion for them-
slves there is no harm done. If the expert draws the same
conclusion it is merely superfluous.

The California law as to the fees for experts seems to be that a
special contract is allowable but in the absence of such contract, the
law implies no agreement for compensation other than the statutory
fee. Even an expert who has nothing to do with the case and is
merely asked for an expert conclusion, may be called, and must
give his opinion, but cannot be required to make any study or
investigation.\(^{36}\) It is error to charge that expert testimony should
be viewed with caution.\(^{37}\) Such instruction should not be given.
There are indications that the courts pay more attention to experts
than they used to.\(^{38}\) Perhaps that is because experts are becoming
more worthy of attention. Senate Bill number 124 has now become

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\(^{35}\) (1924) 194 Cal. 212, 228 Pac. 448.  
\(^{38}\) Estate of Nelson (1923) 191 Cal. 280, 216 Pac. 368, affirming 39 Cal. App. Dec. 318. In People v. Salaz (1924) 43 Cal. App. Dec. 616, 225 Pac. 777, the court reversed the case because a physician gave an opinion on the position of the defendant and the decedent from the course of the bullet, holding that no opinion from these facts could have any validity. Whether the qualifications of an expert shall be tested by a preliminary examination or on cross-examination is in the court's discretion. People v. Hinkle (1923) 44 Cal. App. 375, 221 Pac. 693.
This bill will fail of its effect unless both judges and experts co-operate. The medical profession, for example, should prepare a list of experts. A general practitioner is not an expert on psychiatry nor a heart specialist on brain surgery. The court should select from the list approved by the medical association. If this is done there will be much less disagreement. The present system is intolerable in criminal cases where insanity is set up as a defense. The prosecution engages an expert, the defense does likewise. Neither expert is furnished with the facts in the possession of the other side. They are not allowed to consult. Out of the conflict of testimony the prosecution selects only that portion which favors its contention. On that portion of the testimony, a hypothetical question is framed, the answer to which must of course be, that the defendant is sane. In a similar way, the defense frames a question, the answer to which must be that the defendant is insane. Two

39 "Section 1. A new section is hereby added to the Code of Civil Procedure, to be numbered one thousand eight hundred seventy-one; and to read as follows:

"1871. Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil or criminal, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable. In all criminal actions and proceedings such compensation so fixed shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court or judge. In all civil actions and proceedings such compensation shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court or judge may determine and may thereafter be taxed and allowed in like manner as other costs. Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees. Any expert so appointed by the court may be called and examined as a witness by any party to such action or proceeding or by the court itself; but, when called, shall be subject to examination and objection as to his competency and qualifications as an expert witness and as to his bias. Such expert though called and examined by the court, may be cross-examined by the several parties to an action or proceeding in such order as the court may direct. When such witness is called and examined by the court, the several parties shall have the same right to object to the questions asked and the evidence adduced as though such witness were called and examined by an adverse party.

"The court or judge may at any time before the trial or during the trial, limit the number of expert witnesses to be called by any party."
perfectly competent and honest psychiatrists have been made to appear opposed to each other and medical science discredited, when neither expert has been given an opportunity to study the case in its entirety or even to express the real opinion he has formed. Appointed by the court with full opportunity for examination and consultation, there will not be very many differences of opinion. The state of the criminal law which requires an acquittal in cases of insanity aggravates the situation. The expert for the defense who honestly believes the defendant insane is obliged to assist in obtaining an acquittal although he knows the defendant is a menace to society and should be a permanent custodial case. An institution for the criminal insane would solve this problem for us as it has in England and in New York.

THE HEARSAY RULE AND ITS EXCEPTIONS

It was held some years ago that the hearsay rule was not a mere technical rule of evidence and that a necessary finding by the Industrial Accident Commission based solely on hearsay would be annulled.\(^4\) Amendments were passed to change this rule, providing in substance that no award be invalidated because of the admission into the record and use as proof of any fact in dispute of any evidence not admissible under the common law or statutory rules of evidence and procedure. With this clear language before it, the Supreme Court in the case of State Compensation Insurance Fund v. Industrial Accident Commission,\(^4\) held that there was nothing to do but to affirm an award based on hearsay testimony, yet the Appellate Court had reached a contrary conclusion.\(^4\) The facts of the case were that the decedent was suffering internally and there were in his mind two possible causes—a fall and the eating of crab. Just before the operation, from which he died, realizing that it was serious, he impressed on several persons the importance on account of compensation of remembering that he had told them that he slipped in his office. It was doubtless the self-serving nature of this declaration that led the Appellate Court to refuse to follow the plain language of the statute. After all, however, isn’t it the business of

\(^{41}\) (1924) 69 Cal. Dec. 10, 231 Pac. 996. Wigmore on Evidence (2d ed.) §§ 4a-4f, gives the history, policy and decisions involving rules of evidence before administrative tribunals.
the Industrial Accident Commission to take into consideration the self-serving nature of the declarations and in view of that and all the evidence to make its finding? In other words, we must trust our trial judges and commissions to make decisions and not expect seven men constituting the Supreme Court to revise their mistakes on facts, and is there any doubt that on the whole the commissions are able to do more justice by getting all the facts including hearsay statements than they would if they were limited by the rules of evidence? Isn't the experience of administrative tribunals teaching us what we could have learned from European courts—that the hearsay rule is not necessary for the administration of justice? Certainly it is not in cases tried without a jury.

The hearsay rule is honeycombed with exceptions. The exceptions are based upon accident rather than principle and confusion is made worse in California by the code sections. Take the exceptions for the declaration of a deceased person against interest, the recent cases mentioning this section are cases of admissions and have nothing to do with this branch of the hearsay rule. Three sections of the Code touch it, each inconsistent with the others—none complete and none accurate. Nowhere is pecuniary and proprietary interest defined. A declaration of the commission of a crime has been held outside the rule. The commission of a tort has not been passed on. If we take the Code section literally, declarations in regard to the proprietary interest of personality must be written but for realty may be oral. It is more than probable that if a case came up the courts would discredit this nonsense as they have done in so many other instances.

In dying declarations there should be a contemplation of death, yet under the facts of People v. Ybarra, it is difficult to see how any such condition was met. The dying declaration is not admitted in civil cases, nor in any criminal case except homicide, and then only the declaration of the decedent as to the cause of his death. In questions of pedigree, it is provided that the declaration of a deceased member of a family is admissible as evi-

43 Supra, n. 12.
dence of common reputation in cases where on questions of pedigree such reputation is admissible and that common reputation existing previous to the controversy is admissible in cases of pedigree. After some question, the Oregon court has construed similar provisions as allowing evidence of the reputation in the community to prove pedigree. California has limited the application of the section to reputation within the family and presumably the declarant of the reputation would also have to be a member of the family. The English courts limited the use of this evidence to cases involving pedigree and by excluding this sort of evidence in other cases where a pedigree fact was involved. Pedigree facts, such as age, may often arise when the defense of infancy is pleaded and have often come up in California in cases of statutory rape. The decisions in California were in conflict but the latest opinion of the Supreme Court would seem to make the evidence admissible in all cases; in other words if the declaration of a deceased person is competent evidence to prove a pedigree fact in a pedigree case, it is equally competent to prove that same fact in any case. The courts have been terribly confused on this obscure exception. A declaration of A, now deceased, that he was a brother of B, is admissible under the rule. Strangely enough, it was held in California that if A said he had no relatives it was not a declaration of relationship. This foolish ruling has been properly repudiated. In the Estate of Ross, the court has had occasion to clear up another confusion. It is perfectly true that as an exception to the hearsay rule only the declaration of a deceased member of a family can be received to prove relationship, but that does not mean that relationship cannot be proved by any person who knows the fact, whether he is a member of the family or not, provided he takes the stand and testifies to the fact; no question of hearsay is involved.

In ancient matters of public interest, reputation and other hearsay must be admitted freely. In Simons v. Inyo Cerro Gordo Mining
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and Power Company,⁵⁶ the Supreme Court withheld its approval of the opinion of the District Court of Appeal that common reputation is admissible to prove ownership of a private claim to take water flowing upon public lands. The opinion of the Appellate Court would seem to be sound on this point. If there is anything of public interest on which there was a common reputation in Inyo County, it is over water sources on public lands.

The inextricable confusion of the common law and statutes on these exceptions to the hearsay rule would be intolerable if enough cases arose involving them. On the whole, the simplest solution would be to do as Massachusetts has done and, so far as deceased persons are concerned, to permit any declaration of a deceased person when it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.⁵⁷

In two of the exceptions to the hearsay rule the cases are prolific—situations involving books of account and the so-called res gestae rule.

MEMORANDA AND BOOKS OF ACCOUNT

Any writing made by a witness or under his direction may be used to refresh memory. If the memory is not refreshed, the writing may nevertheless be read. Some jurisdictions would allow the paper itself to be put in evidence, but the California Code says the witness may read from the memorandum.⁵⁸ This seems the better rule because a document carries with it a certain probative value. It can be read by the jury and certainly less weight should attach to a memorandum when the witness can't remember the facts than to the situations where he does remember them. If the memory is refreshed there is no need for the memorandum, the witness testifies from his own knowledge. Where memory is not refreshed it is proper to require as the Code does, that the memorandum should have been made by the witness or under his direction. Where the memory is actually refreshed however, why should it make any difference how it was refreshed? The witness may have seen a newspaper account of the transaction. If it really refreshes his memory, why shouldn't he use it? It may be objected that the use

⁵⁶ (1920) 48 Cal. App. 524, 192 Pac. 144.
of memoranda not made by the witness or under his direction may improperly suggest a story to the witness and lead him to believe that it actually happened that way. There is no doubt that this may happen, and may have a dangerous influence on testimony. The attempts to prevent this by the Code section seem impractical, for usually the witness can be shown the memorandum before he testifies. As was pointed out, the memorandum is not admitted in evidence to support the testimony of the witnesses. With a party's account books, however, the rule is different. The books come in not as primary evidence but supplementary and are now stated to be of equal value. The way in which this has come about is a long story. It goes back to the disqualification of parties as witnesses, with the exception in the United States permitting a party who kept no clerk to introduce his shop-book under various limitations. With the abolition of the party disqualification there is no place for the so-called shop-book exception with its limitations. The shop-book is at least as good as any other memorandum and in most cases considerably better. The simple rule should be, therefore, that any witness may use a memorandum under section 2047 of the Code of Civil Procedure; if the memorandum happens to be an entry in the regular course of business, the book itself comes in as well as the testimony, and this applies whether the witness is a party or not. Questions of difficulty will arise however, as to what the books may prove. In Lewis v. McNeal the plaintiff sued for a balance due a decedent for work done. The doing of the work, the amount to be paid, etc., were all admitted and the entire controversy was over two payments which the defendant claimed to have made. The decedent's books were not allowed to show by the absence of entries that these two payments had not been made. There is some authority for this contention, but also authority the other way. In a well kept set of books the absence of an entry is almost as significant as its presence and it would seem that the books should go in for what

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59 Arthur Train, The Prisoner at the Bar (2d ed.) p. 233, quoted Wigmore, Principles of Judicial Proof, p. 519. Under the common law rule, the witness may refresh his memory from a memorandum with the making of which he has had nothing to do. Jones on Evidence (3d ed.) § 877. A reporter's transcript comes within the California Code section. People v. Mercado (1922) 59 Cal. App. 69, 207 Pac. 1035.
60 Maguire v. Cunningham (1923) 64 Cal. App. 536, 222 Pac. 838.
61 (1922) 58 Cal. App. 70, 207 Pac. 1021.
62 Kerns v. McKeen (1888) 76 Cal. 87, 18 Pac. 172. But see Ford v. Cunningham (1890) 87 Cal. 209, 25 Pac. 403; 22 C. J. 879, where cases are collected. The absence of an entry may constitute an admission against a party. Dyer v. Minturn (1920) 47 Cal. App. 1, 189 Pac. 1046.
they are worth. Whether the books can show to whom credit was given, to whom the goods were sold, etc., is a matter of controversy not involved in recent California cases. Where a party's books are offered in evidence and have been made up by clerks or other employees, the older cases required the testimony of all parties concerned before admitting the books. A series of cases has finally overruled this position so that the books apparently come in on the testimony of the manager or person in charge. Curiously enough there is no code section that covers the use of a party's account books and no section covering directly the use of entries in the regular course of business. Entries of a decedent in a professional capacity are mentioned, but not a business capacity, and the Iowa court, under a similar code section has actually held that the books of a deceased insurance agent are not admissible in evidence. In California, in Wallace v. Oswald, the court in referring to section 1946 of the Civil Code, says,

"That section is an adoption in part of the well-established rule by which admissions, declarations, and entries made by strangers to the litigation who are since deceased may under certain conditions be admitted in evidence therein. We have no doubt that under that rule and under the provisions of this section entries in books of account made by a person since deceased may be received in evidence in an action between other parties, if it appear that the person making the entry had knowledge of the facts declared and that the entry was against his interest."

There is, however, much confusion in the cases. In Watrous v. Cunningham, where the witness (a third party) was available and testified to an account, it was held error to admit the book in evidence as would have been permitted had it been a party's books. Yet bank-books are often admitted, and in one case the books of a corporation

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63 Sanborn v. Cunningham (1893) 4 Cal. Unrep. 95, 33 Pac. 894.
67 (1884) 65 Cal. 410, 4 Pac. 408. Butler v. Estrella Raisin Co. (1890) 124 Cal. 239, 56 Pac. 1040, cites the Watrous case, supra, but there the books were not authenticated to the satisfaction of the court.
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on the curious ground that corporation books were covered by section 377 of the Civil Code of California. In Neilson v. Crawford, the court held that in an action on stockholder's liability the books of the corporation were not evidence. The stockholder's liability was primary and original and the corporation was not an agent to make admissions that could be used against the stockholder. Assume that this is true, nevertheless the court fell into the error of deciding that because the admissions of the corporation were not evidence against a stockholder that entries of a third party in the regular course of business when properly authenticated were not evidence. In McGowan v. McDonald without directly overruling the case, Neilson v. Crawford was discredited. In People v. Mitchell, the court in refusing to allow in evidence the register of the arrival and departure of trains kpt by the railroad, says:

"The register was then introduced, defendant objecting, from which it appears that the train arrived and left on the night in question on schedule time. Neither of the witnesses had any actual knowledge of the times, nor was the conductor who made the record called as a witness. The evidence was clearly incompetent, and was immaterial in the highest degree. If we can presume, as suggested, that the conductor was absent or dead, that fact would make no difference. It was hearsay evidence, and should have been excluded."

This case has been ignored and overruled without mentioning it in People v. Britt and People v. Vacarella. There are some cases in which the entries in the books of a deceased third person have been admitted in evidence. In the absence of an adequate code provision it is not surprising that there is the confusion in the subject.

68 Hurwitz v. Gross (1907) 5 Cal. App. 614, 91 Pac. 109. The books were not authenticated any better than in the Butler case, supra, n. 67. Section 377, Civil Code of California, does not seem to refer to the admission of such books in evidence. Under the liberal rule of Patrick v. Tetzlaff, supra, n. 64, the books could be admitted. Blinn Lumber Co. v. McArthur (1907) 150 Cal. 610, 89 Pac. 436.


71 (1892) 94 Cal. 550, 554, 29 Pac. 1106.

72 (1923) 62 Cal. App. 674, 217 Pac. 769.


74 Austin v. Wilcoxson (1906) 149 Cal. 24, 84 Pac. 417, 5 L. R. A. (N. S.) 870 and cases cited; Kerns v. McKean, supra, n. 62. The private books which a person keeps of his accounts do not constitute such books as may be admitted in evidence after the death of a decedent. Ensign v. Southern Pac. Co. (1924) 193 Cal. 311, 223 Pac. 953.
which the cases cited show. It has been suggested that a uniform statute be passed to the following effect:

"Any writing, whether in the form of an entry in a book or otherwise made as a memorandum of any act, transaction, occurrence or event shall be admissible in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business, to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing, including whether the facts so recorded were within the personal knowledge of the entrant or maker, or otherwise, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

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(To be concluded.)