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Evidence

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A pleasant Chinese custom is to designate each year with a name; the Western year 1968 is the Year of the Monkey. In the parlance of lawyers concerned with the law of evidence, 1967 was the Year of the Statute. The truly momentous event was January 1, the effective date of the Evidence Code. Some other statutory developments of lesser but still substantial significance have also occurred.

This survey is concerned with case law as well as with statutes, but the cases selected will be of primary interest because they shed some light on how California courts are apt to interpret the statutes. Somewhat paradoxically, this requires some preference for dictum over holding. The clear holdings from all but the very end of the calendar year were applications of the old law, because the appellate courts were still disposing of the cases that had gone to trial before

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January 1, 1967. But the appellate judges were alert to the new Code, and frequently they would consider how they might be required to rule if the new rather than the old law applied. These utterances may be dicta only, but they are more interesting than a most carefully considered decision that was obsolete the very day on which it was decided.

Not until the very end of the year did any number of cases actually tried under the Evidence Code come before the courts for reported decision, and these are noted when they seem to be significant. In a fair number of cases courts have noted, somewhat in surprise, that the new law is not different from the old. In nine out of ten instances, this is the case; most of the Code merely codifies the rule as it existed before.

Legislative Developments of 1967

Chapter 650 of the Session Laws made some technical changes in certain sections of the Evidence Code itself. The changes are narrow in scope, largely confirmatory in nature, and of only occasional interest to the general practitioner. Another legislative change is found in Chapter 262, which conforms the terminology of the Agriculture Code on presumptions and prima facie evidence to the scheme of the Evidence Code.[1] While some of these changes may prove to have significance in the future, their general purpose was not to amend the existing law but to correct the form of stating it. For that reason they are only mentioned.

Quite another type of change was worked by Chapter 1509. It collects some previous sections scattered at random through the Penal Code, amends those sections, adds some entirely new provisions, and assembles thereby a wholly new chapter of the Penal Code. This chapter is numbered 1.5 and is entitled Invasion of Privacy. Although found in the Penal Code, it has an important impact upon both civil and criminal trials, and its effect will be felt in office practice as well as in court. It therefore warrants some description.

1. See Levy, *Commercial Transactions* in this volume, for similar amendments to the Commercial Code.

The preamble[2] recites that technology has created new devices for the purpose of "eavesdropping upon private communications" and that the resulting "invasion of privacy" has "created a serious threat to the free exercise of personal liberties. . . ." New section 631 is former Penal Code section 640,[3] but with significant change; it now provides that anyone who makes an unauthorized connection with a telephone wire, or who, without the consent of *"all parties* to the communication," attempts to learn of the contents of a telephonic communication in that manner, or who uses any information so obtained, is guilty of a felony. Section 632 is a consolidation of former Penal Code sections 653(h)[4] and (j);[5] it now provides that any person who uses electronic devices to *eavesdrop* on or record a "confidential communication" without the consent of *all* of the parties to it is similarly guilty of a felony. But note, this confidential communication is not the kind of privileged confidential communication defined and protected in the Evidence Code.[6] The term is separately defined in the Penal Code and covers "any communication

2. Cal. Pen. Code § 630.

3. Cal. Stats. 1955, ch. 571, § 1 p. 1070.

4. Cal. Stats 1941, ch. 525, § 1 p. 1833.

5. Cal. Stats. 1963, ch. 1886, § 1 p. 3871.

6. Cal. Evid. Code § 917 does not define confidential communication but does establish a presumption that any communication made in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent or husband-wife relationship is confidential. Individual privileges may contain special provisions to define what is meant by the confidential relationship and the communications made within it. See, *e.g.*, Cal. Evid. Code § 952 (confidential communication between client and lawyer).

The rules of privileged communication prevent the person who heard the privilege from revealing it in court, and he is exempted from the pressure of contempt to reveal the confidence. Nothing in the new Invasion of Privacy chapter being discussed places any party to a conversation, no matter how confidential others expect it to be, under a requirement of silence, nor is there anything in the chapter which exempts the parties from compulsion to reveal the content of the "confidence" when subjected to subpoena.

Obviously, both laws could apply to a single conversation. A lawyer who secretly records an interview with a client is subject to Evidence Code restrictions on revealing it and probably violated the Penal Code chapter by recording it. § 636 also makes a felony of any electronic eavesdropping or recording of conversations between a person in police custody and his attorney, religious adviser or physician, if it be done without the consent of "all parties to the conversation."

carried on in such circumstances as may reasonably indicate that *any* party to such communication desires it to be confined to such parties. . . ."[7] (emphasis added)

In addition to the felony sanctions found in the two sections summarized, a whole battery of remedies is made available. No evidence obtained "as a result of eavesdropping shall be admissible in any kind of proceeding, judicial, administrative or legislative."[8] Civil remedies are also created; an injured person (it is not clear that the claimant need be one of the parties to the conversation, although it does seem that only one of those could suffer a violation of confidence) may seek an injunction[9] and can recover a minimum damage award of at least $3,000 without proof that any actual damages have been suffered or threatened.[10] And actual damages, if proved, are to be trebled.[11]

The potential impact of these new sections on the enforcement of the criminal law is controlled by two major exceptions. One allows a party to a confidential communication who reasonably believes that another party thereto will make utterances "believed to relate to the commission by another party to such communication" of certain named offenses—extortion, kidnaping, bribery, any felony involving violence against the person, or the making of obscene or threatening telephone calls—to record that communication.[12] Evidence so obtained

7. Cal. Pen. Code § 632(c).

8. Cal. Pen. Code § 632(d).

9. Cal. Pen. Code § 637.2(b).

10. Cal. Pen. Code § 637.2(a)(1).

11. Cal. Pen. Code § 637.2(a)(2).

12. Cal. Pen. Code § 633.5. The wording of this section presents a number of problems. If one of the parties to the conversation reasonably anticipates that another party to it will disclose evidence relating to one of the named crimes, the making of a recording is not prohibited. This seems enough to protect the person who records but does not obtain the reasonably expected evidence of crime; he is not guilty of a felony. It seems probable that the intent of the draftsmen was only to give that protection, and to make any other use of an innocent conversation, or one that discloses civil liability rather than a crime, or that discloses a crime other than one of those named, a violation subject at least to the noncriminal sanctions of exclusion from evidence. This suspicion seems confirmed by the language expressly admitting the evidence recorded in those prosecutions. But since the exclusion-from-evidence sanctions exclude only evidence obtained in violation of the basic sections, it would seem that none of the sanctions is applicable because recording on reasonable belief that the named crimes will be disclosed is not prohib-

(evidently either the tape itself or leads provided by it) is expressly made admissible in prosecutions for those named crimes. But since the making of such a recording is expressly excepted from the basic criminal sections themselves, there seems to be no reason why the evidence would not be admissible in any other judicial proceeding as well, nor should there be any civil remedy or recovery because there has been no violation of the prohibitory sections themselves.

The other major exception is a savings clause for police. Nothing in the basic prohibitory sections themselves shall prohibit any prosecuting attorney, member of the Highway Patrol, sheriff or deputy regularly employed and paid, or policeman, or any person acting at the authorized direction of one of those named, from overhearing or recording any communication they could lawfully have heard or recorded prior to the effective date of the act.[13] And the preamble, reciting a recognition of the needs of law enforcement to employ such devices in fighting crime, declares an intention not to place "greater restraints on the use of listening devices and techniques by law enforcement agencies than existed" prior to the act.[14]

The major change, apart from the elaborate and awesome penalty structure created, is found in the clearly deliberate change from the rule that any one party to a communication made by wire or otherwise, could record or authorize the recording or electronic eavesdropping on that conversation. Under the amended law, no party can record or authorize

ited. If the purpose was to exempt from felony sanctions recording on reasonable belief, but to allow use of the tape only if the named crimes were disclosed and prosecution followed, it is unlikely that this result has been achieved.

Even that result would not be without problems. People v Stanley, 67 Cal.2d 837, 63 Cal. Rptr. 825, 433 P.2d 913 (1967), was a prosecution for sodomy. An investigator retained by the defendant interviewed a principal witness, one of the victims. According to the offer of proof, that conversation disclosed an agreement between the witness and another person "to get" the defendant; the conversation had been taped. If the taping was without consent of the witness, and if it disclosed a scheme amounting to extortion, would it nevertheless be inadmissible because the prosecution was not for one of the named crimes but for something else? If it disclosed an agreement "to get" that fell short of extortion, would the tape be inadmissible?

13. Cal. Pen. Code § 633.

14. Cal. Pen. Code § 630.

electronic eavesdropping on a communication that any other party to it reasonably believes to be confidential.

The old law was clear enough. Prior section 653(j)[15] allowed "any party" to consent to amplified eavesdropping by third persons. An obvious proposition was that either party could secretly record. The same result obtained in wiretapping cases under old section 640[16] because of the construction given the language in People v. Malotte:[17] "There is no learning of the contents of a communication 'fraudulently, clandestinely, or in any other unauthorized manner' when one of the participants to the conversation consents to or directs its overhearing or preservation." The result of the *Malotte* case may still be the law after the statute because of the preservation of the right of the police to engage in activity that was permitted them before the amendment. But the reasoning of *Malotte* is no longer valid, since it is no longer possible for one of the participants in a conversation to authorize other persons to electronically eavesdrop on or record a "confidential conversation." The rule of *Malotte* protected any eavesdropper with consent; the statute now protects only eavesdropping police.

Another development in the field of privacy during 1967 came from another source but so overlaps with the California legislative enactment discussed above that the two must be joined for discussion. In *Katz v. United States,*[18] federal agents had attached a recording device to the outside of a public telephone booth. They overheard and recorded what Katz said to confederates in Miami and in Boston, and then used his words to convict him of transmitting wagering information over a wire communication facility in interstate commerce, a federal felony. The agents were scrupulous to hear and record only what Katz said, and thus they avoided violation of the Federal Communications Act prohibition against intercepting and divulging the telephonic communication itself. They thought that they had also avoided violation

15. Cal. Stats. 1963, ch. 1886, § 1 p. 3871.

16. Cal. Stats. 1955, ch. 571, § 1 p. 1070.

17. 46 Cal.2d at 64, 292 P.2d at 520 (1956).

18. — U.S. —, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

of the Fourth Amendment prohibition against unreasonable search and seizure. The Supreme Court held that they had not—words as well as things can be seized. Overruling *Olmstead v. United States*,[19] the Court held that the Fourth Amendment protects people, not places, and thus the absence of a common-law trespass (either because the agents did not penetrate the booth itself, or because it was a public booth, which they as well as Katz lawfully could enter) did not matter.

The extent of the overlap between the federal development discussed here and the California legislation should not be minimized by the fact that a telephone booth was involved. It was the entering of the enclosure, which was reasonably thought to be private and free from intrusion, that brought the Fourth Amendment into play. Had Katz and his confederate crowded into the booth and exchanged their information orally, but without use of the telephone at all they would equally have been entitled to be free from electronic or even unaided eavesdropping.[20]

In civil cases, the potential of the statutory development reaches at least some aspects of law office operation. Many a telephone conversation is routinely recorded without explicit warning to the other party that a recorder is operating. Investigators, and even clients themselves, are instructed to record conversations with potential witnesses, often without giving any warning and sometimes with active concealment of that fact. A not unusual practice in divorce cases is to have one spouse induce the other to make admissions of matters such as infidelity under express or implied assurances of confidence.

All of these practices are now at least suspect and dangerous. While it seems still to be the law that any party to a conversation, telephonic or not, may testify to what he and others said unless the contents are made privileged by the

19. 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564, 66 A.L.R. 376 (1928).

20. The refinement of the impact of this particular piece of 1967 legislation on enforcement of the criminal law is relegated to the companion article on criminal law and criminal procedure. The same is true of the Fourth Amendment developments of the *Katz* case.

Evidence Code, no person is entitled to bolster his credibility as a witness by producing a clandestine tape that confirms his version. A witness may still be impeached by the showing of prior inconsistent statements made, or a party confronted with his previous admissions, even if he was unaware that he was being overheard at the time he made the statement. But the making of the statement cannot be proved by a clandestine tape recording, or recounted orally by one who overheard it through the use of amplifying devices, whether or not it was simultaneously recorded.

The very employment of the recording or amplifying device is what is dangerous. The sanction is not merely that the recorded words will be refused admission. The person who offers the prohibited recording is guilty of a felony, as is the person who made it. If the prosecutor proves to be uninterested in the offense, the civil action for a minimum damage award of $3,000 is a threat within the control of the private party without prosecutorial aid.

It would seem that a minimum precaution to be taken by those who make such recordings would be an announcement heard on the tape itself that the conversation is being recorded, with some acknowledgment of that fact by the other party or parties thereto.[1] On the other side, a cross-examiner confronted with oral testimony about a conversation had between the witness and others might well inquire whether the conversation had been recorded.

A word of conjecture about the future of the Invasion of Privacy chapter may be in order. No doubt the draftsmen intended to achieve a significant change in the law. Whether their full hopes will be realized may be doubted, however; the combination of very vague and ambiguous drafting with

1. On this point as well, the new legislation is very vague. § 632(c), defining confidential communications, emphasizes the desire of any party to the communication that it be confidential. Mere knowledge that it is being recorded does not necessarily refute the desire for confidentiality. But § 632 (b), defining those persons who may be guilty of violating, specifically "excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication."

a system of most extreme penalties available at the instigation of any person who thinks himself wronged will in all probability lead to judicial constructions confining the impact of the legislation to the narrowest and clearest violations.

The Evidence Code Itself

As indicated, the legislative changes in the Evidence Code worked by the 1967 legislature are of a static nature. Some part of them may ultimately prove to be of significance, but that is not now predictable. More important is what happened during the year in early judicial anticipation of the Code and of later application of its terms.

Effective Date

Section 12 of the Code provides that it shall become operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date. Predictably, the challenge has already been raised that making the new rules of admissibility, more liberal than existed when the offense occurred, applicable to a crime committed before the effective date is a violation of provisions against retroactivity when used against a defendant.

It might be thought that this will be a burning problem for a short time under the Code but will decline quickly because cases of older vintage will soon disappear. This is doubtless true of civil actions. But as to them, the claim of unconstitutionally retrospective application seems too frail to warrant serious consideration. It is as to criminal cases, and the proscription against *ex post facto* legislation, that the contention is serious. And it arises not merely in the carryover of calendars pending at the end of 1966. Criminal convictions are more often reversed for new trials than are civil judgments. Further, the availability of habeas corpus and other modes of collateral attack make probable the holding of a new criminal trial not merely a few months after the effective date of the Code but also long after, for crimes committed years before that date.

People v. Johnson[2] is such a case. Defendant had been convicted of incest. The exact time sequence is not revealed in the opinion, but the grand jury indictment was returned in February 1964. The ensuing conviction was vacated by a United States District Court in July 1966. The new trial in the state court commenced on January 24, 1967, and the trial judge applied the Code. The result was an admission of hearsay evidence that would not have been admissible if the trial had commenced a month before, and that could not have been received at the time of the alleged offense (January 1964) or at any prompt trial time thereafter.

The case presents the issue in very stark form. As will be demonstrated in discussion of the substantive hearsay question of this case, no conviction could have resulted without the evidence newly made admissible by the Code. An advised verdict of acquittal would have been mandatory.

The case was well briefed and carefully decided, and it resulted in a sustaining of the conviction over the *ex post facto* objection. Obviously the last word lies with a higher court, possibly with the Supreme Court of the United States. The defendant urged, and the court of appeal primarily considered cases decided in that court. Prime among them was *Calder v. Bull,*[3] and the quoted language, although dictum, seems applicable; *ex post facto* laws include "every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender." But subsequent decisions have indicated that the essential protection of the *ex post facto* clause is against imparting criminality to conduct not criminal when it was engaged in, or increasing the punishment for what was then a lesser offense. It does not preclude reception of evidence from a source that was statutorily kept silent at the time of the conduct now charged. If a witness not competent to testify at the time of the charged conduct can be made competent by subsequent legislation, as the Supreme Court in *Hopt*

2. 257 Cal. App.2d 655, 64 Cal. Rptr. 875 (1967), hearing in California Supreme Court granted February 21, 1968.

3. 3 U.S. (3 Dall.) at 390, 1 L.Ed. at 650 (1798).

v. Utah,[4] it would seem even more clear that the previously inadmissible hearsay of a witness can be given the effect of substantive evidence of guilt rather than for mere impeachment. The opinion in *People v. Johnson* so holds, by rejecting the *ex post facto* objection.

The court of appeal did not consider a somewhat related constitutional objection, which is that the reception of hearsay may violate the Sixth Amendment right of a criminal accused to confront the witnesses against him. This is a ground not connected with the effective date of the Evidence Code, and it may invalidate the use of hearsay that was admissible under the old law, as well as some made newly admissible by the Evidence Code. It seems sufficient to note that in *Johnson,* unlike the situation presented by *Douglas v. Alabama,*[5] the accused did have opportunity at trial to examine the witnesses upon the content of their prior testimony before the grand jury. The opinion does not indicate that he made any effort to do so, and hence there was no showing that the witnesses might have invoked a privilege or otherwise refused to answer when questioned about their own prior statements, as they did in *Douglas.* At worst, one of the witnesses in *Johnson* testified that she could not recall the events described in one of the prior statements attributed to her. This was on direct examination; had she made the same disclaimer on cross-examination, a more tenable claim of ineffective opportunity to cross-examine, and hence a denial of the right to confront, would have been presented.

The record in *Johnson* thus did not directly present a confrontation claim. Cases still developing under the Code will raise that question and call for a decision. An attorney should be alert to the possibility that any of the hearsay

4. 110 U.S. 574, 28 L.Ed. 262, 4 S. Ct. 202 (1884).

5. 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965). The witness, allegedly with the accused when the crime was committed, invoked the privilege against self-incrimination and gave no testimony. Under the guise of impeachment, the prosecutor read the prior written statement of the witness, sentence by sentence, to the witness in front of the jury. When asked if he had made each of the statements, the witness again invoked the privilege. Since the witness had given no testimony, and refused to answer questions, cross-examination seemed futile.

exceptions that were newly created or substantially enlarged by the Evidence Code contain the potential for violation of the confrontation right if they effectively limit the opportunity for cross-examination. What was lacking in *Johnson* was a demonstration by questioning that cross-examination was rendered impossible or ineffective.

Witnesses

The Code purports to work a number of changes, most of them minor, in the rules regulating examination and cross-examination of witnesses. The most prominent of the cases decided on the point is *People v. Stanley*.[6] The defendant was charged with sodomy committed with two young boys, one 10 years old and another 14. The 10-year-old gave very precise testimony about the occasion charged and other occasions not charged, and about offenses committed both with himself and with other boys. Because of grave doubts about this testimony, the supreme court found ground for reversal under the pre-1967 law. Reversal was based largely upon the "other crimes" evidence, and represents nothing new.

More important is the fact that the trial judge had compounded that error by refusing to hear even an offer of proof to the effect that an investigator retained by defendant had interviewed the 14-year-old and obtained statements to the effect that the two boys had made an agreement "to get" the defendant. Because the judge refused to hear the offer on the ground that it was hearsay, the precise content of the conversation was not revealed. The supreme court held that it would be admissible for the purpose of impeachment on retrial.

The prosecution did not dismiss the counts relating to the 14-year-old, but neither did it offer him as a witness. Defendant's motion to dismiss charges as to this boy were denied, but the court did dismiss the boy as a prosecution witness. This left it to defendant to decide whether to call the boy

6. 67 Cal.2d 837, 63 Cal. Rptr. 825, 433 P.2d 913 (1967).

to the stand. The trial judge indicated that calling him would amount to an adoption by the defendant of the boy's testimony, under the time-honored rule that calling the boy made him "your own witness." Defendant did call the boy, daring to ask only two questions, and the prosecutor did not cross-examine.

All of the new law of this case is found in a footnote,[7] which is more important for the future than the longer opinion stated in the text. The Code abolishes[8] the rule applied by the trial judge which bound the party to the testimony of his own witness, or which at least prevented impeachment by the party calling the witness unless both surprise and damage could be shown. Thus the trial judge, although right at the time of trial, would be in error if he were to rule the same way at the new trial.

There are two questions the court did not expressly consider in this significant footnote. First, the tape recording might be an independently inadmissible item because of the Penal Code sections treated above, depending of course upon the conditions under which it was made and the time at which it was made. Second, the court did not consider the independent evidence effect of the prior statement of the 14-year-old under the enlarged hearsay exceptions of the new Code. The first of these problems has already been discussed. The second seems next in order here.

Hearsay Enlargements

The *Stanley* case displays the operative effect of making prior statements of a witness an exception to the hearsay rule rather than merely impeaching testimony. Continuing the prior law, the Code defines as hearsay any statement "made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."[9] Under that definition, the investigator's testimony about what the 14-year-old disclosed about the agreement "to get" the

7. 67 Cal.2d at 841 n. 1, 63 Cal. Rptr. at 827 n. 1, 433 P.2d at 913 n. 1.

8. Cal. Evid. Code § 785: "The credibility of a witness may be attacked or supported by any party including the party calling him."

9. Cal. Evid. Code § 1200(a).

defendant would indeed be hearsay. Under the old law, it would be admissible only to impeach the 14-year-old's testimony—if he gave any. It would not be evidence of such an agreement, and above all it would not discredit the very explicit and precise testimony of the 10-year-old. The jury would be instructed accordingly, and defense counsel would not use the testimony of the investigator for any purpose other than to discredit the 14-year-old.

The Code result, although not discussed in the opinion, would be very different. There would have to be compliance with section 770.[10] That is, the 14-year-old would have to be confronted with his alleged prior inconsistent statement and given opportunity to explain it, or at least he should not be excused from further attendance before the investigator testified. Given that assurance of opportunity to cross-examine the boy, the prior statements could be shown if they were "inconsistent with any part of his testimony at the hearing. . . ."[11] Given inconsistency, not shown in the record in *Stanley* because the prosecutor asked no questions of the boy and the defendant dared not ask any under the law governing at that time, the prior statement would be admissible as substantive evidence despite its hearsay character. It would be evidence of an agreement "to get" the defendant, made not merely by the 14-year-old but also by the 10-year-old, whose destructive evidence had already been received.

It may be argued that the only practical change is in the admissibility of the evidence of prior statement. The jury (or even a judge without a jury) probably would not limit the prior statement to impeachment but would consider the

10. Cal. Evid. Code § 770: "Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

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

11. Cal. Evid. Code § 1235: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

full substantive significance of the proved agreement, not merely to discredit the 14-year-old but to disbelieve the 10-year-old as well. Perhaps so, although there is always the possibility that a jury will at least attempt to follow instructions. Speculations about the judge are less tenable, for in this case he refused even to hear what the investigator would say because of its hearsay character. Even if judges and jurors will often ignore the law, there is still significance to the change from mere impeachment to substantive evidence. The judge must hear the evidence; he can no longer instruct the jury that it is only impeachment and not evidence. Above all, counsel can now argue to the jury that they should believe the prior story, not merely that they should refuse to credit the sworn but inconsistent tale told on the witness stand.

Even those who scoff at all these changes as being merely formal rather than real can hardly ignore what happens when the circumstances are reversed and the hearsay favors the prosecution rather than the accused. Section 1235 was also involved in *People v. Johnson,*[12] mentioned above. Johnson was charged by grand jury indictment with incest with his teen-aged daughter. At the 1967 trial, both the daughter and the mother gave testimony that, at very worst, indicated astonishing familiarity between father and daughter but which could not sustain a finding of intercourse; the daughter denied it had occurred, and the mother had never observed any impropriety at all.

The opinion does not reveal direct testimony from any other source that could have served to establish even suspicion of intercourse. In the nature of such things, there seldom will be outside observers. Both mother and daughter had, however, told the *grand jury* of specific details of intercourse that had occurred not merely once but many times, both in the presence of the mother and while she was absent. The grand jury transcript showing this testimony might have been admissible under the pre-1967 law to impeach the present

12. 257 Cal. App.2d 655, 64 Cal. Rptr. 875 (1967), hearing in California Supreme Court granted February 21, 1968.

relatively innocent testimony of the two;[13] it could have shown that they lied when they denied intercourse, but it could not have served as affirmative evidence that intercourse had occurred.

Fully recognizing this distinction, the court of appeal held that Evidence Code section 1235 gives substantive effect to the prior grand jury testimony by making it evidence that intercourse had occurred on the charged date. Further, the conviction appears to rest on these prior statements alone.

Most of the prior statements admitted were made before the grand jury. As a consequence, it can be assumed that they were made under oath, but any cross-examination that might have occurred was not by the defendant himself. Under existing practice, the proceeding is not adversary. This has significance only to distinguish another and very distinct hearsay exception, that of recorded prior testimony. In the *Johnson* case there had been a prior trial and conviction. Proffer of the sworn testimony of the two principal witnesses as recorded at that prior trial would be governed by quite distinct principles stated in great detail in section 1291. The important difference to be noted is that the prior trial testimony is receivable because the defendant had an opportunity to cross-examine at that time, which may warrant receipt against him of the transcript even if he has no opportunity to cross-examine at the present trial. He could not cross-examine before the grand jury, and his right to confront the daughter and wife may well be deemed to turn upon his present effective right to cross-examine them about their grand jury testimony.

The testimony of daughter and mother might have taken two lines very different from what actually occurred. Suppose the mother testified that she had no knowledge or recollection of the events at all. Would her grand jury testimony then have been "inconsistent with" her testimony at the second trial? This nearly occurred in another proof item offered, the testimony, by another witness, that the mother had related

13. The prosecutor having called the women, they were "his witnesses" under the old law. But if he succeeded in persuading the judge that he was both surprised by their change of testimony and damaged by what they said on the stand, the impeachment could be permitted. See Comment to Cal. Evid. Code § 785.

to the witness some of the same complaints about the conduct of the defendant. The opinion does not directly consider whether inconsistency can be found in memory matched against lack of memory, or whether it requires contradiction. The court said merely that "this exception to the hearsay rule should apply in order to fully ascertain the truth of the matter."[14] Although hardly an explanation, the ruling seems correct. The Code speaks of inconsistency, not contradiction.

The other and much more speculative line of testimony by mother and daughter would have been to refuse to testify upon grounds of the privilege against self-incrimination. Whether such a privilege claim would be sustained is not clear; the opinion does not reveal whether there was any risk of prosecution against them. If they had, rightly or wrongly but nevertheless successfully, claimed the privilege, the claim of lack of the constitutional right to confrontation would have assumed serious proportions. But the argument perhaps need not ascend to the constitutional level. Is a claim of privilege "testimony" at all within the meaning of section 1235? If it is not, and it seems very doubtful that refusal to testify can be the equivalent of testimony, there seems to be nothing with which the prior statement can be deemed to be inconsistent. This argument, then, is that the prior statement remains, as it always was, hearsay. Because this newly created exception does not apply, the argument continues, the grand jury testimony is not admissible.

A new hearsay exception found in the Evidence Code and without prior history in California is section 1300:

> Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.

How it may work can be illustrated by two cases decided during the year. In *O'Conner v. O'Leary*[15] a theater patron had

14. 257 Cal. App.2d at 664, 64 Cal. Rptr. at 882.

15. 247 Cal. App.2d 646, 56 Cal. Rptr. 1 (1967). For further discussion

been killed in an affray with O'Leary, an employee of the theater owner. O'Conner's heirs sued for his wrongful death, joining O'Leary and his employer. Prior to the trial O'Leary had been convicted of felony manslaughter, and plaintiffs offered proof of this as collateral estoppel against him under the doctrine of *Teitelbaum v. Dominion Insurance Co.*[16] The court of appeal held exclusion to be proper; although ordinarily conclusive against O'Leary alone, admitting the conviction as to O'Leary would also bring it before the jury as to the employer as well, working prejudice to the employer's interests. And there would be no realization of judicial economy by avoiding trial of the issue of cause of death, because that issue had to be tried against the employer in any event.

The decision is a careful treatment of the problem, and was probably the correct decision at the time it was made. The Code section quoted above would seem to require a different result today. Since the felony conviction would now be admissible against the employer, he cannot be saved from the "prejudice" of having the jury hear about it. And there is no reason why the conviction would not be given its full collateral estoppel effect against the employee, although allowed only as evidence effective against the employer. An explanation of this distinction is that O'Leary had prior opportunity to defend himself on the charge and failed, but that the employer had no such opportunity.

The first case actually applying section 1300 did expose a little difficulty in judicial handling, however. *People v. One 1964 Chevrolet*[17] was a proceeding to forfeit an automobile because the registered owner had entrusted it to his son, who had knowingly possessed and transported contraband narcotics in the automobile. The son was tried and convicted, in a jury trial, of felony possession of marijuana. He testified in the forfeiture proceeding that he had no knowledge of the presence of the drug. The trial judge allowed

of this case, see Weiner, *Civil Procedure* in this volume.

16. 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962).

17. 251 Cal. App.2d 424, 59 Cal. Rptr. 594 (1967).

receipt of the felony conviction as evidence that the son did know of its presence. After a verdict for defendants, the judge granted a new trial on several grounds, two of them having to do with the felony conviction. The first of these was that he should have ruled that the conviction was conclusive on the point of knowledge. On this the trial judge was clearly wrong. It was evidence only against the owner, who had no previous opportunity to contest that point because he was not a party to the criminal conviction. The court of appeal so held.

The second ground is closely connected; the judge also thought that he erred in permitting the owner's counsel to argue to the jury that the felony conviction was wrong because the jury had rendered "inconsistent verdicts," had "undeniably" compromised its verdicts in acquitting on some counts and convicting on only one, and had violated oaths in not "applying the doctrine of reasonable doubt." The court of appeal opinion is unsatisfactory on this point. It appears to agree with the trial judge's self-assigned error. If the conviction is only evidence, and it is no more than that under section 1300, it is not sacrosanct evidence that cannot be questioned or contradicted. As with any other hearsay, it is subject to question on the reliability of the out-of-court declarant—here the criminal jury. This is especially true when the issue is credibility. If the forfeiture jury believed the boy's denial of knowledge, can they be required to yield to the criminal jury's contrary conclusion that he lied? A holding that they must comes perilously close to denial of due process to the owner, as well as denial of a right to jury trial on a contested issue of fact.

Although section 1300 of the Evidence Code has relaxed the former prohibition against the use in evidence of felony convictions, the limitation contained in the language implies that misdemeanor convictions must still be excluded. Recognizing this distinction, *Rousseau v. West Coast House Movers*[18] rightly held that it was improper to receive evidence

18. 256 Cal. App.2d 989, 64 Cal. Rptr. 655 (1967).

of three convictions for misdemeanor drunk driving, which were evidently offered to show that plaintiff had not lost his capacity to drive as a consequence of the injuries claimed. Although finding the error not prejudicial in the circumstances, the correct rule was stated.[19]

The court did find its ruling on that point somewhat anomalous when compared to another hearsay decision it made in the same case. It approved reception of some twenty police arrest reports which recited the names of the arresting officers, the times and places of arrests, and that plaintiff was "drunk on sidewalk" or "unable to care for self." Some contained an admission to drinking beer or whiskey. Since the prime injury claimed was that the injury had transformed a sober, reliable worker into an irrational alcoholic, evidence of arrests for drunkenness dating prior to the date of injury must have had a very telling effect. The court found that these records were admissible under the Business Records Act, which is continued substantially unchanged from its pre-Code form.[20] The court found it "somewhat illogical" to admit the arrest reports while excluding the misdemeanor convictions. But again the ruling seems correct. The reports gave every appearance of being made on first-hand knowledge and observation of the officer making the report, and did not contain what is so usual in accident investigation reports—the unchecked hearsay of unknown witnesses who have no duty to make honest or accurate reports. But this is only an assumption made from the face of the records themselves. If it is necessary to summon as a witness the arresting officer so that he can testify that the entries are his own observation

19. Another possible distinction to be drawn, perhaps misleading, is that the section is confined to civil actions, suggesting that convictions may not be received in criminal cases. It has long been the rule that in those limited circumstances in which prior crimes are provable in a criminal case, the fact that the prior crime was committed may be proved by the judgment of conviction. In People v. Griffin, 66 Cal.2d 459, 58 Cal. Rptr. 107, 426 P.2d 507 (1967), the supreme court faced for the first time the question of what effect should be given to a judgment of acquittal. Noting that the effect of the burden of proof beyond reasonable doubt made the effect of acquittal less convincing, the court nevertheless held that the fact of acquittal was admissible, leaving the question of its weight to the jury.

20. Cal. Evid. Code § 1271.

rather than second-hand knowledge, as some cases suggest, the utility of the Business Records Act is sharply restricted. If the arrest reports are old, the arresting officer may be unavailable or, more likely, without any present memory of the event at all.

A final hearsay case of significance decided during the year was *Markley v. Beagle* which purported to be under the old law but which in fact anticipated the new Code, and the supreme court so declared.[1] It is unlike the other cases discussed in that the ruling was against rather than in favor of admissibility. Markley was injured when he went to the roof of a building to service an exhaust fan. Among the defendants he sued were the contractors who allegedly had removed and replaced a guardrail. In support of this claim, Markley offered proof that one of the employees of the contractors said, long after the alleged removal and after his employment with them had ended, that workmen employed by the contractors had removed and replaced the rail. Because of the lapse of time there could be no spontaneous utterance, and, because the employment had ceased, the statement could not have been made within the scope of authority. Markley was thus driven to reliance on Evidence Code section 1224:

> When the liability . . . of a party to a civil action is based in whole or in part upon the liability . . . of the declarant, . . . evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability. . . .

Substitute the words "contractor" for "party to a civil action" and "employee" for "declarant," and the argument seems compelling.

The court in *Markley* agreed that the language was susceptible to an interpretation that would render the employee's statement admissible. Although the case could be distin-

1. Markley v. Beagle, 66 Cal.2d 951, 59 Cal. Rptr. 809, 429 P.2d 129 (1967).

guished, in that the employee had not made any statement that disclosed that he personally had removed the railing, but said only that some employees of the contractor had, the court did not postpone decision. It held that Code of Civil Procedure section 1851,[2] the progenitor of Evidence Code section 1224, did not apply to cases of this kind. Despite the apparent meaning, that application had not been given to the section during the nearly 100 years the statute had been in existence. Unless the statement of the employee qualifies as an excited utterance[3] or so exposes him to prospective liability that it may be received as a declaration against interest,[4] it must meet the more stringent agency test of being a statement the employee was authorized to make.[5] It is not enough that it was a statement made about acts the employee was authorized to do.

Evidence Code—Presumptions

The large attention given in this article to hearsay changes probably is predictive of the future as well. Most of the Code innovations are in the hearsay area. Another field in which difficulty is certain to arise, because important changes have been made there as well, is that of presumptions. The cases have not yet arrived for clarification, but one that does suggest the character of the problems that will be encountered is *Albers v. Owens*.[6] As with some others noted here, the case was tried before the effective date of the Code but the supreme court, in reversing, ventured an observation on the law to be applied at retrial. The defense was contributory negligence. Plaintiff offered evidence that he suffered from retrograde amnesia, thus invoking the so-called presumption of due care that has played so large a role in these cases. The opinion says, "This presumption had been held to be evi-

2. Cal. Stats. 1945, ch. 1292, § 2 p. 2425.

3. Cal. Evid. Code § 1240.

4. Cal. Evid. Code § 1230.

5. Cal. Evid. Code § 1222. The suggestion of LeMire v. Lyman, 250 Cal. App.2d 799, 58 Cal. Rptr. 804 (1967), that § 1224 might extend to such cases, seems discredited by the supreme court holding in *Markley*, which was not known at the time *LeMire* was decided.

6. 66 Cal.2d 790, 59 Cal. Rptr. 117, 427 P.2d 781 (1967).

dence in itself sufficient to forestall a nonsuit based on contributory negligence."[7] Since the opinion had already ruled that a jury issue was presented, the court merely observed that "on retrial it is clear that such a presumption would not have the effect of evidence."[8] The citation is to Evidence Code section 600(a), which expressly so declares.

The question not discussed is whether the so-called presumption of due care any longer exists or can have any operative effect. It is not listed among the presumptions classified as affecting the burden of producing evidence[9] nor is it found in the list of those that affect the burden of proof.[10] The reason for omission is not oversight. Under the Code scheme, the maximum effect a presumption can have is to shift the burden of proof to the person against whom the presumption operates (sometimes aptly called the "victim" of the presumption). Since the defendant already bears the burden of proving contributory negligence, there is little procedural role that the presumption of due care can any longer play.

This is not to say, however, that the old wisdom that was incorporated in the discredited presumption is also repealed. While an attorney can no longer argue to the jury that there is "evidence" of due care, he can appeal to the common sense of the jurors by invoking their own realization that people do in fact have a high incentive to look out for their own safety, and as such the jury can reason that plaintiff did act accordingly.

Conclusion

A critical reader may say that many of the statements found herein are more conjecture than projection. That is conceded. At the end of the first full year of experience under the Evidence Code, we know scarcely more about it

7. 66 Cal.2d at 799, 59 Cal. Rptr. at 123, 427 P.2d at 787.

8. 66 Cal.2d at 800, 59 Cal. Rptr. at 124, 427 P.2d at 788.

9. Cal. Evid. Code §§ 631–645.

10. Cal. Evid. Code §§ 661–668.

than we did at the beginning. One observation can be made, however, that tells something about the Code's probable future. The appellate decisions have embraced the new law with near enthusiasm rather than doubt and hostility. This indicates willing acceptance of at least its general provisions.