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Evidence

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On January 1, 1967, the California Evidence Code began to govern trials held in California courts.[1] Because of the delays necessarily incident to litigation, the appellate courts were not called upon to review trials held under the new rules in significant numbers until 1968. With the 1968 decisions, however, the impact of the Code upon California practice has become fairly apparent. At the same time, the courts have continued to develop rules of evidence designed to implement the various procedural guarantees found in the Constitution of the United States, and some of these court-developed rules have had significant effect, particularly in criminal cases.

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1. Cal. Evid. Code § 12.

Meanwhile, the legislature was content to make few, and only minor, changes in the statutory law of evidence. Thus the principal arena for securing changes in evidence law has shifted from the legislature to the courts.

Legislative Developments of 1968

The 1968 session of the California Legislature added four sections to the Evidence Code, none of major significance.

Chapter 1375 of the statutes of 1968 authorized the formation of professional service corporations by lawyers and physicians to perform legal and medical services.[2] As part of this legislation, sections 954 and 994 of the Evidence Code were amended to provide that the attorney-client relationship and the physician-patient relationship exists between the law corporation and its client and the medical corporation and its patient for the purposes of the respective communication privileges.

By Chapter 1122 of the statutes of 1968, the legislature also added sections 1157 and 1158 to the Evidence Code. Section 1157 provides that the proceedings and records of neither a hospital medical staff committee having the responsibility of evaluation and improvement of the quality of care rendered in the hospital nor a medical review committee of a local medical society are subject to discovery. No person in attendance at a meeting of such a committee may be required to testify concerning its proceedings. However, the privilege created by the section does not apply to statements made at such a meeting by a party to an action the subject matter of which was reviewed at the meeting. Nor does it apply to a meeting if a person serves on a committee reviewing his own conduct. The privilege is inapplicable, also, in any action against an insurance carrier for bad faith in refusing to settle a case within policy limits.

Section 1158 requires licensed medical personnel and licensed hospitals to make available to an attorney for a patient all of the patient's medical records for inspection and copying

2. See Bus. & Prof. Code §§ 2500–2508, 6160–6172.

upon the patient's written authorization. The section may be invoked though no action has been filed. Thus, an attorney who wants to inspect his client's medical records to see if there is a basis for a malpractice claim may force disclosure of such records without filing an action and using the formal discovery procedures provided in the Code of Civil Procedure.

Judicial Developments of 1968

As in prior years the courts have continued to develop rules of evidence from the procedural guarantees of the United States Constitution. The bulk of the appellate cases dealing with evidence are, therefore, criminal cases. There have been a few significant noncriminal cases—e.g., those cases dealing with the parol evidence rule—but almost all of the significant decisions dealing with evidence have dealt with criminal matters.

Identification Evidence

The most significant series of cases decided in 1968 were those dealing with pretrial identification of criminal defendants by their victims and other witnesses. In 1967 the United States Supreme Court decided that a defendant is entitled to counsel at a police lineup.[3] In *People v. Feggans*[4] the state supreme court decided that, as a matter of state law, this rule would be applicable only to police lineups occurring after June 12, 1967.[4.1] As to lineups occurring before such time,

3. United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967); Gilbert v. California, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967).

4. 67 Cal.2d 444, 62 Cal. Rptr. 419, 432 P.2d 21 (1967).

4.1. The date thus established is another in a series of dates fixed by the United States and California Supreme Courts for determining the applicability of various constitutional rules of evidence. *June 19, 1961*—the federal rule prohibiting admission in state court trials of evidence obtained by an illegal search and seizure will be applied only to *cases not final* on the date of the decision in Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 A.L.R.2d 933 (1961). Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965). *June 22, 1964*—the federal rule prohibiting admission of a statement elicited in violation of the defendant's right to counsel is applicable to *trials beginning* after the date of decision in Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964); Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct.

a defendant is entitled to attack the procedure if it unfairly directed the attention of the identifying witness to the particular defendant.[5]

The consequences of failure to comply with these constitutional requirements have been spelled out in a number of cases. In *People v. Caruso,*[5.1] the defendant was placed with four men who did not resemble him at all. The defendant was six feet one inch tall and weighed 238 pounds. He was

1772 (1966). In California, the rule is applicable to *cases not final* on the stated date. People v. Rollins, 65 Cal. 2d 681, 56 Cal. Rptr. 293, 423 P.2d 221 (1967). *April 28, 1965*—the federal rule prohibiting comment upon a defendant's failure to testify will be applied only to *cases not final* on the date of decision in Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). Tehan v. Shott, 382 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459 (1966). *June 13, 1966*—the federal rule prohibiting the admission of statements elicited during custodial interrogation without the warning prescribed in Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966) is applicable only in *trials commencing* after the date of the Miranda decision. Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966); People v. Rollins, 65 Cal.2d 681, 56 Cal. Rptr. 293, 423 P.2d 221 (1967). *June 12, 1967*—the federal rule requiring representation by counsel at lineups is applicable only to *lineups occurring* after the date of decision in United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967) and Gilbert v. California, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967). Stovall v. Denno, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967).

The trend of these decisions is toward a recognition that the court is making law (as does a legislature), not discovering it. Hence, the courts are beginning to establish "effective dates" for their legislative pronouncements even as legislatures do. The judicial process is such, however, that a discrimination frequently results when "legislation" is created by a case decision: *e.g.,* a rule was applied to the lineups in Wade and Gilbert that was different from the rule applied to all other lineups occurring prior to June 12, 1967. Moreover, law enforcement officials frequently find the evidence they have obtained is inadmissible because of the violation of rules they could not know would be applicable.

These problems might be avoided if the Court would candidly admit that the federal Constitution does not prescribe these new evidentiary rules—these rules have been devised by the court as a means of enforcing the Constitution. The rules adopted by the court for enforcing the Constitution might then be set forth in promulgated court rules with a prescribed effective date. Then all litigants would be treated equally. Enforcement officials would not be subject to retroactive rules. Moreover, the court rule procedure would provide a needed flexibility should it develop that any of these new constitutional rules of evidence are not workable.

5. People v. Caruso, 68 Cal.2d 183, 65 Cal. Rptr. 336, 436 P.2d 336 (1968).

5.1. 68 Cal.2d 183, 65 Cal. Rptr. 336, 436 P.2d 336 (1968). For further discussion of this case, see Collings, CRIMINAL LAW, in this volume.

of Italian descent with a very dark complexion and dark wavy hair. The other lineup participants were not his size, did not have dark complexions, and did not have dark wavy hair. Accordingly, the supreme court determined that the lineup and identification procedure was grossly unfair to the defendant. The evidence of the lineup was, therefore, inadmissible. Moreover, the court held that the identifying witness should not be permitted to identify the defendant in court unless the people can show on *voir dire* by clear and convincing proof that the in-court identification testimony is not tainted by the unfair pretrial lineup. The people must show that the in-court identification testimony is based on the original recollection of the appearance of the defendant and not upon a recollection based on the unfair lineup.[6]

In *People v. Menchaca*[7] the victim was face to face with the actual criminal for but a few seconds. The criminal was of Mexican extraction. In the lineup, the defendant was the only Mexican participating. The court found the lineup to be unfair, and found no evidence in the record to show that the in-court identification of the defendant was free from the taint of the unfair lineup. The conviction was reversed.

In *People v. Hogan*[8] the defendant was the only Negro in the lineup. This, too, was found to be so unfair as to amount to a deprivation of due process of law, and the defendant's conviction was reversed. The trial court was instructed to exclude any evidence of an in-court identification unless the people could establish by clear and convincing proof that the in-court identification was based solely upon the witness's observations of the accused at the scene of the crime and not upon the pretrial identification.

In *People v. Irvin*[9] the identification witness was confronted at the police station with only the accused persons. There was no lineup and no exhibition of any person other than

6. See 68 Cal.2d at 189–191, 65 Cal. Rptr. at 341, 436 P.2d at 341.

7. 264 Cal. App.2d —, 70 Cal. Rptr. 843 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

8. 264 Cal. App.2d —, 70 Cal. Rptr. 448 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

9. 264 Cal. App.2d —, 70 Cal. Rptr. 892 (1968).

the suspect. Although the court criticized the practice of permitting identification by confrontation with only the accused, it nevertheless held that such a confrontation may be justifiable under exceptional circumstances. The court pointed out the need for a prompt identification where apprehension of the suspect immediately follows the crime. Such a prompt confrontation aids in quickly exonerating the innocent and discovering the guilty.[10] Prompt confrontation may also promote accuracy of identification. The court in *Irvin* also found that the in-court identification testimony itself showed that the prior confrontation had no "priming" effect on the witness.

In *People v. Padgitt*[11] the defendant was identified by one victim of his crimes from mug shots. He asserted on appeal that he had the right to have counsel present at the identification. The court of appeal disagreed, holding in accord with *Simmons v. United States*[12] that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Finding no unfairness in the particular instance, the defendant's conviction was affirmed. In *People v. Shannon*[13] pictures of the defendant were illegally taken from his apartment and shown to the victim. The victim's in-court identification was admitted despite the identification of the defendant from the illegally taken photographs. The court was able to conclude that the in-court identification of the defendant was independent of the iden-

10. In People v. Mickelson, 59 Cal. 2d 448, 30 Cal. Rptr. 18, 380 P.2d 658 (1963), the court suggested such a single confrontation as an investigatory technique for determining whether there was probable cause for arresting a suspect. In Stovall v. Denno, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967) there is an implication that a one-on-one identification without the presence of counsel is prohibited by the rule announced in Gilbert v. California, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967); for the identification in Stovall was a one-on-one identification and was saved by the court's refusal to apply Gilbert to identifications occurring before June 12, 1967.

11. 264 Cal. App.2d —, 70 Cal. Rptr. 345 (1968).

12. 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968).

13. 256 Cal. App.2d 889, 64 Cal. Rptr. 491 (1967).

tification made from the photographs shown to the victim, because she had been in earnest conversation with the defendant for at least one-half hour at a distance of twelve to fourteen inches, and had great familiarity with his face.

In *People v. Douglas*[14] there was a conflict in the testimony concerning the circumstances of the lineup. The court pointed out that, under Evidence Code section 405, the judge is required to resolve any evidentiary conflict in determining whether the lineup was unfair. If he determines that the lineup was unfair, he may still admit the in-court identification if he determines that the in-court testimony had an independent origin and was not tainted by the unfair pretrial lineup. If the judge permits the in-court identification, the defendant may nevertheless offer before the jury such evidence of unfairness as he can produce. This, however, goes to weight rather than admissibility.[14.1]

Admissions and Confessions

During 1968 many of the appellate cases dealing with evidence were concerned with establishing the limits of the *Dorado–Escobedo–Miranda* interrogation rules.[15]

In *Miranda v. Arizona*[16] the Supreme Court held that, not only must a suspect in custody be warned of his constitutional right to remain silent, but all police questioning must cease when it appears that the suspect wishes to assert that right and remain silent. In *People v. Fioritto,*[17] the defendant was warned and refused to waive his right to remain silent. The

14. 259 Cal. App.2d 694, 66 Cal. Rptr. 492 (1968).

14.1. See Cal. Evid. Code § 406.

15. See Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966); Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964); People v. Dorado, 62 Cal.2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), cert. den. 381 U.S. 937, 14 L.Ed.2d 702, 85 S.Ct. 1765. The Dorado-Escobedo rules are applicable to those cases where the appeal was not final before June 22, 1964. The additional criteria established by Miranda are to be applied to *trials beginning* after June 13, 1966. People v. Rollins, 65 Cal.2d 681, 56 Cal. Rptr. 293, 423 P.2d 221 (1967).

16. 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966).

17. 68 Cal.2d 714, 68 Cal. Rptr. 817, 441 P.2d 625 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

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police then confronted the defendant with his accomplices, who had confessed and implicated the defendant. After a heated argument between the defendant and his accomplices, the accomplices were taken away and the defendant was again asked if he would waive his right to remain silent. The defendant then signed a waiver and confessed. The court held that his interrogation should have ceased upon his first refusal to waive his right to remain silent. The confession was obtained, therefore, in violation of the *Miranda* standard and was inadmissible.

In *People v. Matthews*[18] the defendant solicited an interview with the police "to clear things up." Previously, he had been given several warnings as to his constitutional rights. None of the warnings, however, was wholly adequate under *Miranda* to inform the defendant of his right to the presence of his counsel at the interview. The interview was conducted in question and answer form and it elicited several highly incriminating statements. The people sought to avoid exclusion of the defendant's statements on the ground that they were volunteered and, hence, *Miranda* was inapplicable. The court held that the interrogating officer, in a volunteered interview, must remain neutral. Otherwise, the officer may "elicit more incriminating matter than the suspect would have volunteered." Where the police role in the interview is not passive, where the police lead the direction of the interview through their questioning, they must give the *Miranda* warning despite the fact that the defendant's participation in the interview is volunteered. If the warning is not given, the information elicited is inadmissible despite the defendant's voluntary participation in the interview.

Matthews also held that it is essential to warn the suspect of his *Miranda* rights at the outset of each interrogation.[19] This statement is in conflict with at least two other appellate cases. In both *People v. Long*[20] and in *People v. Sievers*,[1]

18. 264 Cal. App.2d —, 70 Cal. Rptr. 756 (1968).

19. 264 Cal. App.2d at —, 70 Cal. Rptr. at 765.

20. 263 Cal. App.2d 540, 69 Cal. Rptr. 698 (1968).

1. 255 Cal. App.2d 34, 62 Cal. Rptr. 841 (1967).

it was held that one warning is sufficient. It is not necessary to give an additional warning at each interview. The *Matthews* court relied upon the Supreme Court's statement in *Miranda* that "whatever the background of the person interrogated, *a warning at the time of the interrogation* is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."[2] Moreover, *Miranda* holds that there must be an affirmative waiver of the suspect's constitutional rights before the questioning can proceed.[3]

The *Miranda* standards were not applicable to the *Sievers* trial.[4] They were, however, applicable to the trial in *People v. Long*.[5] Nevertheless, the court in *Long* followed *Sievers* in ruling that one warning is sufficient.[6] The *Matthews* reading of *Miranda* appears, however, to be correct.[7] Accordingly, police officers and prosecuting officials should be reluctant to place too much weight on the *Sievers* and *Long* opinions. Admissibility will be assured only if a warning is given each time governmental representatives undertake to obtain information from a suspect in custody through an interrogation process. Under *Matthews,* such a warning should be given whenever questioning is carried on even though the suspect solicited the interview.

The courts have also been concerned with the definition of a custodial interrogation. A conversation in a police station is not necessarily a custodial interrogation if the defendant is under the impression that he can leave at any time.[8] The

2. 384 U.S. at 469, 16 L.Ed.2d at 720, 86 S.Ct. at —, 10 A.L.R.3d at 1008.

3. "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . . . 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'" 384 U.S. at 475, 16 L.Ed.2d at 724, 86 S.Ct. at —, 10 A.L.R.3d at 1012.

4. See 255 Cal. App.2d at 37, 62 Cal. Rptr. at 843.

5. 263 Cal. App.2d at 544–545, 69 Cal. Rptr. at 701.

6. 263 Cal. App.2d at 545, 69 Cal. Rptr. at 701.

7. See footnote 2, supra and accompanying text.

8. People v. Giovannini, 260 Cal. App.2d 597, 67 Cal. Rptr. 303 (1968).

emphasis is not on the interrogator's subjective intent, but on whether the defendant reasonably believes his freedom of movement is restricted by pressures of physical authority. Where the defendant is in custody on a charge other than that under investigation, an interrogation conducted by the usual question and answer method is a custodial interrogation and the *Miranda* warning must be given if the information elicited is to be used against the defendant.[9] However, even though a person is in custody, a custodial officer can ask him a neutral question such as "what happened?" upon arriving at the scene of some incident in the prison where the question is asked as part of the general investigation to determine whether a crime has been committed.[10] If the conduct of the individual being questioned is itself the subject matter of the inquiry, however, it seems likely that any answers will be inadmissible unless the *Miranda* warning was given.[11]

In *People v. Hernandez*[12] the court concluded that the routine questions asked by a booking officer at the jail do not amount to the kind of custodial interrogation against which the *Miranda* rule is intended as a guard. Thus, in *Hernandez* the booking officer at the jail was permitted to testify to the birthdate given by the defendant at the time of his booking even though the *Miranda* warning requirement was not met before the booking questions were asked. The defendant's birthdate was important in the case to identify him as the same person referred to in a birth certificate. The birth certificate, in turn, was relevant to show the defendant to be over 21, an essential element of the crime charged—violation of Health and Safety Code section 11532 (sale of marijuana to a minor).

Miranda does *not* apply to statements made by a defendant in custody to a probation officer engaged in preparing the defendant's pre-sentence report.[13] *Miranda* does not require

9. People v. Woodberry, 265 Cal. App.2d —, 71 Cal. Rptr. 165 (1968); Mathis v. United States, 391 U.S. 1, 20 L.Ed.2d 381, 88 S.Ct. 1503 (1968).

10. People v. Mercer, 257 Cal. App. 2d 244, 64 Cal. Rptr. 861 (1968).

11. Mathis v. United States, 391 U.S. 1, 20 L.Ed.2d 381, 88 S.Ct. 1503 (1968).

12. 263 Cal. App.2d 242, 69 Cal. Rptr. 448 (1968).

13. People v. Smith, 259 Cal. App.2d 814, 66 Cal. Rptr. 551 (1968).

a warning before a suspect is asked to perform an act such as the giving of a handwriting exemplar.[14] A suspect not in custody need not be given a *Miranda* warning before he talks to a person who, unknown to the suspect, is acting as a police agent.[15] Similarly, a person who is unknowingly in the presence of police officers need not be given a *Miranda* warning before he is permitted to perform a criminal act.[16]

A reading of the many cases dealing with confessions and a defendant's rights under custodial interrogation leads one to believe that the enactment of the Evidence Code may have solved some of the procedural problems that could have been presented to the appellate courts under the former law. In *People v. Midkiff*[17] it is pointed out that the judge alone must decide whether the *Miranda–Dorado* warning requirements were met. The enactment of section 405 of the Evidence Code has forestalled any contention that compliance with the *Miranda* warning requirements must be decided by the jury as well as the judge. As the warning cases shade imperceptibly into the coerced confession cases, it would have been extremely difficult to determine which confession cases should be decided by the judge alone and which confession cases would be submitted to the jury. By providing a uniform admissibility procedure, the Code has permitted the courts to confine the jury in all cases to its basic responsibility of determining guilt or innocence, withholding from it the additional responsibility of determining the admissibilty of evidence.

Co-conspirators' Confessions

In *People v. Spriggs*[18] the California Supreme Court created a new exception to the hearsay rule for declarations against penal interest—i.e., statements that are so self-incriminating

14. People v. Sesslin, 68 Cal.2d 418, 67 Cal. Rptr. 409, 439 P.2d 321 (1968).

15. People v. Ragen, 262 Cal. App.2d 392, 68 Cal. Rptr. 700 (1968).

16. People v. Marinos, 260 Cal. App. 2d 735, 67 Cal. Rptr. 452 (1968).

17. 262 Cal App.2d 734, 68 Cal. Rptr. 866 (1968).

18. 60 Cal.2d 868, 36 Cal. Rptr. 841, 389 P.2d 377 (1964).

that it is unlikely the speaker would have made them if they were not true. In that case, the declaration against penal interest was offered by the defendant. The rule of *People v. Spriggs* was codified in section 1230 of the Evidence Code, subject to the qualification that the declarant be shown to be unavailable as a witness.

In *People v. Aranda*[19] the court held that the confession of one codefendant identifying a codefendant as another participant in the crime cannot be admitted in the trial of the identified codefendant unless the identification can be successfully deleted from the confession. If the identifying information cannot be successfully deleted, the trials of the codefendants must be severed. In *Bruton v. United States*[20] the United States Supreme Court adopted the *Aranda* rule as a requirement of federal due process. *Aranda* and *Bruton* both considered an instruction to the jury—permitting use of the confession against the confessor only—an inadequate protection for the codefendant. *Roberts v. Russell*[1] made the rule in *Bruton* retroactive.

Unfortunately, there has been little discussion of the relationship between the *Aranda-Bruton* rule and the hearsay exception for declarations against penal interest. One may hypothesize that the rationale underlying *Aranda* is that, since the portion of a confession that implicates another is not incriminatory as to the declarant, it is not against his penal interest. Therefore, the portion of a confession implicating another is not sufficiently against the penal interest of the declarant to meet the demands of the exception to the hearsay rule. If this analysis is correct, the portion of the confession that implicates the declarant himself should be admissible to prove the declarant's own participation in the crime whenever relevant in the trial of another. This could be relevant to the guilt of another in a number of contexts. For example, if the declarant and defendant were co-conspirators, the

19. 63 Cal.2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965).

20. 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968).

1. 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921 (1968).

confessor's statement might be used to prove what the confessor had done in the course of the conspiracy. In a prosecution for receiving stolen goods, the thief's confession that he stole the goods might be used to prove that the goods were stolen by the thief and not by some third person.

This rationale and analysis has yet to be tested in the courts. In *Bruton,* the United States Supreme Court suggested that one reason for the rule requiring separate trials is that, where the confessor does not take the stand, his confession cannot be tested by cross-examination. This, perhaps, violates the defendant's right of confrontation.[2] This rationale would prevent the introduction in a defendant's separate trial of a declaration against penal interest made by a co-conspirator, for the co-conspirator's privilege against self-incrimination would preclude effective cross-examination. But, this rationale, too, would exclude a considerable amount of hearsay traditionally thought to be admissible against criminal defendants. For example, in *People v. Morales*[3] it was held that the *Aranda* rule does not require separate trials when the statement of the declarant is admissible under Evidence Code section 1223 as a statement of a co-conspirator made in the course and in furtherance of a conspiracy. Where the declarant does not take the stand, however, his statement, even though made to further a conspiracy and admissible under the traditional hearsay exception, cannot be tested by cross-examination. The *Bruton* rationale, thus, would strike at the admissibility of this statement. It would also strike at the admissibility of dying declarations,[4] for it is inherent in the nature of the exception that the declarant is unavailable for cross-examination. Statements under these latter exceptions can be far more devastating to a defendant than a declaration against penal interest implicating only the declarant, for statements of a co-conspirator and dying declarations are admissible though they specifically identify the defendant.

The real problem here is how far the legislature and the

2. 391 U.S. at 136. See 20 L.Ed.2d at 485, 88 S.Ct. at —.

3. 263 Cal. App.2d 368, 69 Cal. Rptr. 402 (1968).

4. See Cal. Evid. Code § 1242.

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courts can go in creating exceptions to the hearsay rule.[5] The question is whether the hearsay rule was frozen upon the adoption of the Bill of Rights in 1791 or whether it can be permitted to develop. Heretofore, it has always been supposed that the right of confrontation has not precluded the development of new hearsay exceptions.[6] The recent emphasis of the Supreme Courts of this state and of the United States upon the right of confrontation in hearsay contexts may foreshadow some rolling back of the hearsay rule insofar as the exceptions to it may be invoked against the defendant in a criminal case.

Perhaps, because of the right of confrontation, section 1230 of the Evidence Code states an exception that may be invoked by a defendant in a criminal case but not by the people. There is language in *Bruton* that suggests that this may be the case. Nevertheless, there is no holding to that effect at the present time, and so far as this author knows the question has not as yet been presented to the California appellate courts. Until the question is decided, therefore, it is at least still arguable that *Aranda* and section 1230 are reconcilable and that the portion of a confession that implicates only the declarant himself is admissible as a declaration against penal interest when the declarant is unavailable as a witness.

Cases dealing with the *Aranda* rule during 1968 have held that it does not apply to statements of a co-conspirator, made in the course of the conspiracy, that are admissible under section 1223 of the Evidence Code.[7] The *Aranda* rule does not require a separate trial when the evidence taken from the codefendant is physical evidence, and not a statement or confession.[8] Noncompliance with the *Aranda* rule does not

5. This problem also arises in other contexts which will be discussed infra.

6. "The exceptions are not . . . static, but may be enlarged from time to time if there is no material departure from the reason for the general rule." Cardozo, J., in Snyder v. Massachusetts, 291 U.S. 97 at 107, 78 L.Ed. 674 at 679, 54 S.Ct. 330 at —, 90 A.L.R. 575 at 580, overruled on other grounds 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1934).

7. People v. Morales, 263 Cal. App. 2d 368, 69 Cal. Rptr. 402 (1968).

8. People v. King, 255 Cal. App.2d 551, 63 Cal. Rptr. 345 (1967).

require a reversal when the defendant himself has made an admissible confession which completely shatters his own case.[9]

Prior Statements of Witnesses; Former Testimony

The Evidence Code has four sections—1235, 1236, 1237 and 1238—dealing with statements made by trial witnesses prior to the commencement of the trial. Sections 1290–1292 of the Code deal with testimony given at previous trials by witnesses who are not available to testify at the current trial. The cases dealing with these sections during 1968 have considered the problems somewhat interrelated, and they will be considered together here.

Under the Code, a prior inconsistent statement of a witness is admissible though he has not given damaging testimony against the party introducing the inconsistent statement.[10] In *People v. Johnson*[11] the supreme court considered the application of this exception to a criminal defendant. The court found that it violates the criminal defendant's right to confront the witnesses against him, and is thus unconstitutional if so applied. The court developed its ruling from cases where there had been an attempt to introduce a pretrial statement of a person who was not available for cross-examination at the trial. But the court reasoned that a right of cross-examination, to be meaningful, must be a right to cross-examine at the time of the statements that are being offered as substantive evidence.

The court criticized the rationale of the Law Revision Commission in recommending section 1235, which stated "the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter."[12] But in giving this justification for the rule, the Law Revision Commission was echoing the

9. People v. Bosby, 256 Cal. App.2d 209, 64 Cal. Rptr. 159 (1967).

10. See People v. Woodberry, 265 Cal. App.2d —, 71 Cal. Rptr. 165 (1968).

11. 68 Cal.2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968).

12. Comment to Cal. Evid. Code § 1235.

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supreme court itself. In *People v. Gould*[13] the court had held that a pretrial identification, although hearsay, can be admitted against a criminal defendant because "the principal danger of admitting hearsay evidence is not present *since the witness is available at the trial for cross-examination.*"[14]

This rationale when used by the Law Revision Commission obviously did not appeal to the court as much as it did when conceived by the court itself. Yet, there seems little to distinguish the *Johnson* case substantively from the *Gould* case. *Gould* involved a pretrial identification of two suspects by a witness. At the trial, the witness did not testify that she had previously identified the criminals. She said that she was shown pictures and selected two that "looked similar to the men who were in my apartment but not all the features were the same."[15] Her testimony at the trial was the same insofar as one defendant was concerned, and in regard to the other defendant the witness did not identify him at the trial. The prosecution then introduced a police officer to testify that the witness had made a positive identification of the defendants from photographs. This, obviously, was inconsistent with her testimony that she had not made such a positive identification. In *Gould,* the court held the police officer's testimony admissible and justified its holding on the ground that the identifying witness was present in court for cross-examination. Yet, if the rationale of *Johnson* had been applied, the lack of opportunity to cross-examine the identifying witness *at* the time of the identification should have resulted in an exclusion of the identification testimony under the hearsay rule.

Evidence Code section 1238 provides a hearsay exception for prior identification testimony, but only where the identifying witness testifies positively that he made a true identification on the prior occasion. The *Gould* case would not have been saved by section 1238 of the Code, for in *Gould* the

13. 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960).

14. 54 Cal.2d at 626, 7 Cal. Rptr. at 275, 354 P.2d at 867.

15. 54 Cal.2d at 625, 7 Cal. Rptr. at 274–275, 354 P.2d at 866–867.

identifying witness did not testify positively that the prior identification was a correct identification. Insofar as *Gould* states a broader rule than section 1238 of the Code, therefore, it may be that *People v. Johnson* has overruled the *Gould* decision. Whether it has or not will have to await further decisions.

The scope of the new rule in *Johnson* is not altogether clear. Apparently, the defendant can still use the prior inconsistent statement of a witness as substantive evidence, because the prosecution has no constitutional right of confrontation.[16] Apparently, where a witness gives damaging testimony against the prosecution, the prosecution can use a prior inconsistent statement to impeach the witness though the prosecution is not surprised by the testimony.[17] Although the courts in other contexts have been critical of the efficacy of limiting instructions,[18] it is likely that a court must give an instruction on a prior inconsistent statement limiting its consideration to impeachment only.[19]

Where the inconsistent statement was given in testimony at the preliminary hearing, application of *Johnson* has resulted in a rather anomalous rule. Section 1291 of the Evidence Code provides that testimony given in a previous hearing or trial, where the defendant had an opportunity to fully cross-examine the witness, is admissible against the defendant at a subsequent trial if the witness is unavailable to testify at that time. Under this exception, the testimony of a witness at a preliminary hearing can be admitted at the trial if the witness is no longer available[20] and the defendant, by counsel, had a full opportunity to cross-examine at the preliminary hearing.[1]

16. See the suggestion in People v. Stanley, 67 Cal.2d 812, 816, footnote 1, 63 Cal. Rptr. 825, 827, 433 P.2d 913, 915 (1968).

17. People v. Woodberry, 265 Cal. App.2d —, 71 Cal. Rptr. 165 (1968).

18. See Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968).

19. The law as stated in People v Orcalles, 32 Cal.2d 562, 197 P.2d 26 (1948) probably remains unchanged in the light of Johnson. People v. Odom, 265 A.C.A. 387, 71 Cal. Rptr. 260 held that such an instruction must be given, but the Supreme Court vacated the opinion by granting a hearing.

20. See Cal. Evid. Code § 240.

1. People v. Hernandez, 263 Cal. App.2d 242, 69 Cal. Rptr. 448 (1968).

The United States Supreme Court has recently added the further limitation that if a preliminary hearing witness is incarcerated outside the state, the prosecution must show a diligent effort to obtain his presence at the trial in order that the defendant might confront and cross-examine the witness at the trial.[2] Thus, where the preliminary hearing witness is entirely absent and there is no opportunity to question him at the trial on the merits, his preliminary hearing testimony can be introduced as substantive evidence under section 1291. However, if the witness appears and testifies in a manner inconsistent with his preliminary hearing testimony, the preliminary hearing testimony can be shown only for impeachment, and not as substantive evidence.[3] It seems strange that the preliminary hearing testimony should be received as substantive evidence when there is no current opportunity to cross-examine the witness, yet it cannot be received as substantive evidence when there *is* a current opportunity to cross-examine the witness. This anomalous result suggests that the courts may have gone too far in restricting the application of section 1235 against criminal defendants.[4] As the inconsistent statement is admissible anyway where the witness gives testimony harmful to the prosecution,[5] and since the courts seem to believe that limiting instructions have no substantive effect,[6] it is difficult to see why it should be constitutionally necessary to give a limiting instruction forbidding the

2. Barber v. Page, 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968).

3. People v. Green, 70 A.C. 696, 75 Cal. Rptr 782, 451 P.2d 422 (1969). The factual recitation by the Supreme Court suggests that the preliminary transcript could have been admitted as substantive evidence under Cal. Evid. Code § 1237 as recorded memory. The Court did not, however, discuss this possibility. It may be that the "confrontation" objection to admissibility under § 1235 is also applicable to recorded memory offered under § 1237. See footnote 6 of the court's opinion. See also People v Davis, infra footnote 8, and the discussion relating thereto.

4. A more rational rule would be to hold that § 1235 *can* be used against a criminal defendant if the witness has first given testimony damaging to the prosecution's case or if the inconsistent statement would be admissible under § 1291 were the witness unavailable at the trial.

5. See People v. Woodberry, 265 Cal. App.2d at —, 71 Cal. Rptr. at 172.

6. See Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968).

use of the prior statement as substantive evidence.[7] If the courts are right and the limiting instruction does not have any real effect, the only other rule which might be applied rationally would be to forbid the prosecution from impeaching the defendant's witnesses with their inconsistent pretrial statements. This, it is submitted, would withhold too much evidence from the trier of fact and would create too great a possibility of misdetermination of the facts.

One further development in this area should be noted. In *People v. Davis*[8] the court had occasion to apply the recorded memory exception contained in section 1237. The case is notable because the memory was that recorded by two individuals. One witness testified that she had made a true notation of a license number and read it to the other witness over the phone. The other witness testified that he had made a true recording of his telephone conversation, and he produced his recorded note in court. His testimony as to the content of his note was held admissible as recorded memory. Under former law, of course, the document containing recorded memory had to be made by or under the supervision of the person witnessing the matter recorded in the document. The Evidence Code made possible the admission of a memory recorded by another.

Here again, the opportunity for cross-examining the witness concerning the subject matter of his observation is totally absent for he has no recollection of the matter he observed. If confrontation is to be a bar to further developments of the hearsay rule in criminal cases, perhaps the extension of section 1237 to cooperatively recorded memory is also forbidden by the constitution.

State of Mind

The hearsay exception for statements of the declarant's state of mind has been peculiarly troublesome for the California courts. Some of the problems are explored in the

7. See the discussion in People v. Pierce, 269 A.C.A. 192, 269 Cal. App. 2d —, 75 Cal. Rptr. 257 (1969).

8. 265 Cal. App.2d —, 71 Cal. Rptr. 242 (1968).

comments to the Evidence Code sections dealing with this exception to the hearsay rule.[9] In 1968, this exception was again before the court on a number of occasions. The principal case was *People v. Lew*.[10] This case, like *People v. Merkouris*[11] and *People v. Hamilton*[12] and several subsequent court of appeal decisions, again concerned evidence of statements made by a murder victim relating threats made by the defendant and other fear-engendering acts.

In *Lew,* the defendant and the victim were alone inside his apartment. The victim was shot by a pistol owned by the defendant. The defendant testified that the shooting occurred accidentally. The prosecution introduced, over defense objection, remarks made by the victim stating that the defendant had threatened to kill her. Some of the witnesses testified, in addition, that the victim had stated that the defendant had threatened her parents, that the victim had stated she feared the defendant, that the victim had stated that the defendant had a terrible temper and went into rages, and that the victim had stated that the defendant displayed a gun to her and threatened to throw her rings into the ocean. Some of the victim's statements reflected no more than her attitude toward the defendant. Some of the statements, however, related threats and violent conduct on the part of the defendant. The evidence was offered ostensibly to show the victim's state of mind. It was the defendant's story that the victim had asked to see the gun owned by the defendant and, while she was handling it, the gun accidentally discharged. The prosecution offered the victim's state of mind to show that the victim was afraid of the defendant, and it asked the jury to infer that, because of her fear, she would have been reluctant to handle a gun in the defendant's presence.

The supreme court agreed that the victim's fear of the

9. See comments to Cal. Evid. Code §§ 1250–1252.

10. 68 Cal.2d 774, 69 Cal. Rptr. 102, 441 P.2d 942 (1968).

11. 52 Cal.2d 672, 344 P.2d 1 (1959) cert. den. 361 U.S. 943, 4 L.Ed.2d 364, 80 S.Ct. 411, overruled on other grounds 66 C.2d 518.

12. 55 Cal.2d 881, 13 Cal. Rptr. 649, 362 P.2d 473 (1961).

defendant was relevant to show her reluctance to handle a gun in the defendant's presence.[13] Nevertheless, the court held that the testimony concerning the victim's statements was inadmissible. The court said that testimony to prove the victim's state of mind is not admissible "if it refers solely to alleged past conduct on the part of the accused." Moreover, such testimony is admissible only if there is "at least circumstantial evidence that [the statements] are probably trustworthy and credible." The court found that the victim's statements related predominantly to conduct of the defendant, and the court included among such conduct the defendant's threats. Moreover, the court found that the victim had motives for falsifying her fear of the defendant. Therefore, under both criteria, her statements were inadmissible.

The *Lew* decision leaves in doubt the admissibility of a victim's narration of threats made by the defendant. In *Hamilton,* upon which the court relied, the court said that statements of threats were admissible if they met the criteria stated above. In *Lew,* the court states that the narration of a threat is a narration of "past conduct" which is inadmissible. We are left in doubt, therefore, under these cases, whether the supreme court will admit a victim's narration of the defendant's threats to harm the victim when there is no evidence that the narration was not trustworthy, and when the victim's state of mind is truly relevant to the later conduct of the victim.

Two other cases dealing with this exception to the hearsay rule point to possible defense use of this exception as it is expressed in the Evidence Code. In *People v. Farr*[14] the defendant was on trial for killing his wife. The defendant sought to introduce a long memorandum written prior to the death in which he discussed his relationship with his wife. The principal mood expressed was love and compassion and,

13. This asserted relevancy is extremely difficult to follow. If she were afraid that the defendant might harm her, it would seem more rational for her to want possession of the gun both to provide herself with self-protection and to deprive the defendant of a means of harming her. Nevertheless, we accept the court's rationale for the purpose of discussion.

14. 255 Cal. App.2d 679, 63 Cal. Rptr. 477 (1967).

if sincere, it belied an intention to take her life. The trial court ruled the document inadmissible. The appellate court points out that, whereas some prior cases had held such a document inadmissible because "self-serving," under the provisions of the Code, the document would be admissible to show the declarant's state of mind at the time the document was written and his state of mind for a reasonable time thereafter. Evidence of this state of mind would be properly admissible because that state of mind had a vital bearing on the gravity of the offense of which he was guilty. It was pointed out, however, that the admissibility of the document under section 1250 of the Code is subject to the requirement of section 1252. Thus, the court should exclude the document if it was made under circumstances indicating its lack of trustworthiness. The appellate court pointed out, though, that the record of the first trial showed no evidence indicating the insincerity of the document.

Another case, decided by the same court, is illustrative of a proper application of section 1252. In *People v. Cruz*[15] the defendant sought to introduce a tape of an interview with the police after the crime had been committed in which he made several exculpatory statements. The tape was offered under Code section 1250 to show the then state of mind of the declarant from which it was sought to be shown that the declarant's state of mind at or about the time of the crime was inconsistent with his guilt. The appellate court found that there were no indicia of trustworthiness surrounding the making of the statement. The defendant had the strongest possible motives for his exculpatory statement, even if false. The lack of indicia of trustworthiness rendered the statement inadmissible.

Character Evidence; Habit or Custom

The Evidence Code contains some new law on the admissibility of evidence relating to character. Under the Code

15. 264 Cal. App.2d —, 70 Cal. Rptr. 603 (1968).

character evidence in the form of either reputation or opinion is admissible on the issue of the credibility of a witness. A criminal defendant may introduce evidence of his good character in the form of opinion or reputation evidence. The prosecution may introduce similar evidence to show the bad character of the criminal defendant if the criminal defendant first introduces evidence of his good character. Where there is a victim of the alleged crime, the defendant may introduce character evidence consisting of reputation, opinion, or evidence of specific acts to show the bad character of the victim and the likelihood that the victim behaved in accordance with that character at the time in question.

Several of these rules came before the appellate courts during 1968. In *People v. Rowland*[16] the defendant was convicted of an assault with a deadly weapon. The victim and the defendant were riding in the victim's car, and were the only persons in the car when the victim was shot. The defendant's version of the incident was that the victim was an aggressive pervert, and the gun accidentally discharged while the defendant was warding off a homosexual advance by the victim. To establish this defense, the defendant offered to show evidence of the victim's similar aggressions towards third persons. The trial court excluded such evidence, but the appellate court held that the exclusion was error. Under section 1103 of the Evidence Code, evidence of such specific acts is admissible to show the character of the victim of a crime for the purpose of proving his conduct in conformity with that character at the time of the alleged crime.

In *People v. Ogg*[17] defendant was prosecuted for murder. The defendant offered character evidence to show his peaceful disposition. On rebuttal, the prosecution presented two witnesses who gave their opinion that the defendant was violent. Cross-examination developed that each witness knew personally of but one violent incident. Nevertheless, when it was shown that the witnesses had known the defendant intimately for many years, the court held their opinions admissible

16. 262 Cal. App.2d 790, 69 Cal. Rptr. 269 (1968).

17. 258 Cal. App.2d 841, 66 Cal. Rptr. 289 (1968).

and found that their knowledge of specific incidents went to the weight of their opinions not to the admissibility.

An analagous problem relates to the admissibility of expert opinion evidence concerning the credibility of the prosecuting witness in sex cases. In *People v. Russel*[18] the state supreme court held that the trial court in a sex case may order a prosecuting witness to submit to a psychiatric examination for the purpose of determining his or her credibility "if the circumstances indicate a necessity therefor." The court indicated that where the charge rests on the credibility of a child as against the bare denial of of the defendant, the trial court should exercise its discretion liberally in favor of the defendant to permit the examining psychiatrist to give his opinion on the credibility of the prosecuting witnesses. In *Russel*, the conviction was reversed because of the exclusion of the psychiatric evidence.

In *People v. McIntyre*[19] the court pointed out that a defendant must move for the appointment of a psychiatrist to examine the prosecuting witness. If the defendant fails to request a psychiatric examination for the prosecutrix, he is not entitled to introduce psychiatric testimony impeaching the prosecuting witness:

> We hold that where a defendant wants to introduce psychiatric testimony impeaching a prosecutrix in a sex offense prosecution, he must request the trial court to exercise its discretion, to determine, *inter alia*, whether the need for psychiatric testimony about the credibility of the prosecutrix outweighs the danger of such testimony, and to order the prosecutrix to submit to psychiatric examination.[20]

Closely related to character evidence, and sometimes confused with it, is evidence of habit or custom. The confusion possibly lies in the terms that are used to describe the traits

18. 69 Cal.2d 187, 70 Cal. Rptr. 210, 443 P.2d 794 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

19. 256 Cal. App.2d 894, 64 Cal. Rptr. 530 (1967).

20. 256 Cal. App.2d at 900, 64 Cal. Rptr. at 534–535.

involved. The word "character" seems to connote some moral quality, yet for evidentiary purposes this is not what is intended. What the Evidence Code refers to as "character" is simply the general disposition or propensity of a person to engage in a certain type of conduct. On the other hand, the Code's reference to "habit" contemplates a regular response to a repeated specific situation.[1] The confusion that sometimes arises is illustrated by the first opinion in *People v. Gaines*.[2] In that case the trial court rejected a defense offer of proof that it was the arresting officer's long standing policy to make any conceivable narcotics arrest in spite of highly tenuous grounds for probable cause in order to remove any suspected contraband narcotics from circulation. The appellate court stated that the trial court properly excluded the evidence because of the collateral issues which it would have raised, but suggested that the evidence was relevant to show habit or custom in order to prove conduct on a specified occasion in conformity with the habit or custom. It is doubtful that this type of conduct can properly be called "habit". It seems to fit more nearly within the description of "character"—the evidence related to the officer's *propensity* for making arrests on inadequate cause. As pointed out by McCormick,[3] "a habit . . . is a person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving a hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." As a matter of fact, one might add that habitual acts usually are semi-automatic, and many times a person will not be conscious of his performance of the habitual act.[4] It should be apparent, therefore, that an

1. See comment to Cal. Evid. Code § 1105. See also McCormick, *Evidence*, pages 340–341.

2. 265 Cal. App.2d —, 71 Cal. Rptr. 468 (1968). The first opinion in the case appears at 67 Cal. Rptr. 159.

3. McCormick, *Evidence* at page 341.

4. "Habit is a product of acquisition. In this respect it differs from instinct, with which otherwise it has much in common. We say we do a thing from habit, e. g., nod back when a person not recognized nods to us, when as a consequence of long practice and frequent repetition the action has become in a measure organized, and thus shorn

officer's determination of probable cause for a narcotics arrest is not likely to become so habitual that it can become semi-automatic and performed below the level of full consciousness. Far more likely, an officer's propensity for making arrests reflects just that—his propensity or "character" for arresting narcotics violators upon insufficient evidence. The appellate court may have recognized that its discussion of this aspect of the case was deficient, for a rehearing was granted and the discussion of habit evidence was omitted from the ultimate opinion in the case.

Evidence of Other Crimes

The Evidence Code continued the prior law that evidence of specific acts of misconduct, including evidence of the commission of other crimes, is inadmissible to prove the propensity of a defendant to commit the crime with which he is charged. Nevertheless, evidence of other crimes is admissible where relevant to show some other fact.

A frequent use of evidence of other crimes committed by the defendant is to show a distinctive method by which the defendant performs such acts. By identifying the same distinctive methods in the crime charged, the prosecution then is able to argue that the charged crime must also have been committed by the defendant. In *People v. Haston*[5] the defendant was charged with robbery. The prosecution introduced evidence of prior robberies committed by the defendant in an effort to demonstrate that he committed the robbery charged as well. The supreme court pointed out several features that were common to both the prior crimes and the charged crime. Nevertheless, the court held that these common features were not "of that distinctive nature necessary to

of some of its original appanage of full consciousness or attention. The characteristic note of habit is mechanicality . . . the oft-repeated becomes habitual and so automatic because the nervous centers engaged have taken on special modifications, have, according to the customary physiological figure, become 'seamed' by special lines of discharge." 2 Sully, *The Human Mind,* 224 (1892) excerpts from quotations in Wigmore, *Science of Judicial Proof,* 127, 128 (3d ed., 1937).

5. 69 Cal.2d 233, 70 Cal. Rptr. 419, 444 P.2d 91 (1968).

raise a logical inference that the perpetrators of the prior offenses . . . were the perpetrators of the charged offenses." The common features were common to many armed robberies, and to permit such evidence to be received would be to authorize the conviction of the defendant merely because he had been proved to have been a robber on prior occasions. The court went further, however, and pointed out that a common feature of all of the crimes, including the crime charged, was the identity of the other participant in the crime. "There is only one [D.M.] and his conjunction with defendant in earlier robberies, together with his admitted participation in the robberies charged, supports the inference that defendant and not some other person was his accomplice in those charged offenses."[6]

It sometimes becomes appropriate to introduce evidence of other crimes in sex cases. For example, in *People v. McIntyre*,[7] evidence of uncharged sex offenses was introduced in order to show the lack of the defendant's innocent intent in engaging in the conduct charged and to show his lustful intent in such conduct. Evidence of other not too remote sex crimes against the prosecuting witness has been held admissible to show a lewd disposition or the intent of the defendant towards the prosecuting witness.[8] In *People v. Stanley*[9] the supreme court announced a limitation on this rule permitting the admission of uncharged crimes in sex cases. Where proof of the crime itself depends upon the uncorroborated testimony of the prosecuting witness, and the prior crimes are also sought to be proved by the uncorroborated testimony of the prosecuting witness, the supreme court held that the evidence of the prior crimes is inadmissible. Said the court, "the cases establish that where the basic issue of the case is the veracity of the prosecuting witness and the

6. 69 Cal.2d at 249, 70 Cal. Rptr. at 430, 444 P.2d at 102. People v. Cavanaugh, 69 Cal.2d 262, 70 Cal. Rptr. 438, 444 P.2d 110 (1968) is to the same effect.

7. 256 Cal. App.2d 894, 64 Cal. Rptr. 530 (1967).

8. See the discussion in People v. Stanley, 67 Cal.2d 812, 63 Cal. Rptr. 825, 433 P.2d 913 (1967).

9. 67 Cal.2d 812, 63 Cal. Rptr. 825, 433 P.2d 913 (1967).

defendant as to the commission of the acts charged, the trier of fact is not aided by evidence of other offenses where that evidence is limited to the uncorroborated testimony of the prosecuting witness."[10] There was the additional factor in the *Stanley* case that the prosecuting witness was substantially impeached—the court said that the witness' recitation of prior misconduct by the defendant against the witness added nothing to the credibility of the testimony concerning the charged crime.

In *People v. Jackson*[11] the court was involved with another aspect of the problem. There the other crimes sought to be proved did not relate to the defendant's conduct but related to the conduct of the defendant's co-conspirator. The other crimes were offered to show the co-conspirator's intent in engaging in the acts. Since the defendant was aiding and abetting the co-conspirator in performing these acts, that intent would be imputed to the defendant as an aider and abettor. The court rejected this rationale because it considered it unfair for the defendant to have the burden of proving his co-conspirator's innocence of the uncharged crimes.

The court misstated the issue somewhat. Of course, the defendant does not have the burden of proving anyone's innocence. The burden is on the prosecution to prove the co-conspirator's intent, and that burden remains with the prosecution. What the court meant is that it is unfair to expect the defendant to meet the prosecution's evidence of his co-conspirator's uncharged crimes. Nevertheless, since the crucial element in the case was the intent with which the co-conspirator and the defendant were doing the acts they were engaged in, the rule prohibiting the admission of uncharged crimes seems unduly stultifying if that evidence is relevant to prove the co-conspirator's intent. A similar argument could be made against any other evidence relating to the co-conspirator's acts or intent. The problem is not limited to the situation before the court; it is inherent whenever the criminal responsibility of one individual is based on the conduct of an-

10. 67 Cal.2d at 817, 63 Cal. Rptr. at 827–828, 433 P.2d at 915–916.

11. 254 Cal. App.2d 655, 62 Cal. Rptr. 208 (1967).

other. There seems to be no special reason to bar the prosecution from presenting evidence relevant to prove the acts or intent of one party to a conspiracy in only those cases where the evidence shows he committed an uncharged crime.

Search and Seizure

The major new development in the search and seizure cases was the holding in *People v. Sesslin*[12] that a complaint "on information and belief" is insufficient to support a valid arrest warrant unless the facts underlying the belief are also alleged and the magistrate determines that such facts support the complainant's belief. Hence, an arrest based on such a warrant is an illegal arrest, and evidence seized incident to such an arrest is inadmissible. A complaint alleging the commission of a crime on information and belief may be adequate if the complaint alleges sufficient facts to show the commission of the crime by the person whose arrest is sought and the reliability of the information and credibility of its source. The complaint found inadequate in *Sesslin* did not relate any facts which would support the complainant's belief that the defendant had committed the crime charged and did not state any facts relating to the identity or credibility of the source of the complainant's information. Accordingly, the complaint was found inadequate.

As a general rule, a police officer may not forcibly enter property pursuant to a search warrant unless he has announced his authority and purpose and is refused admittance.[13] However, if there are facts known to the officer before his entry sufficient to support his good faith belief that such an announcement would increase his peril or frustrate the purpose of the warrant, he may force an entry without an announcement.[14] In *People v. Gastelo*[15] the court held that it could not authorize forced entry without announcement in

12. 68 Cal.2d 418, 67 Cal. Rptr. 409, 439 P.2d 321 (1968).

13. Cal. Penal Code § 1531.

14. People v. Gastelo, 67 C.2d 586, 63 Cal. Rptr. 10, 432 P.2d 706 (1967).

15. 67 Cal.2d 586, 63 Cal. Rptr. 10, 432 P.2d 706 (1967).

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all narcotics cases.[16] Particularized justification for an unannounced, forcible entry into the property to be searched must be shown before the evidence obtained can be used.

In *People v. Wohlleben*[17] the defendant was arrested upon three traffic warrants. During the booking process, he was routinely searched, and marijuana was found. At the later prosecution for the possession of the marijuana, the prosecution attempted to establish the admissibility of the marijuana evidence by showing the legality of the arrest and subsequent search. To prove the legality of the arrest, the prosecution called one of the arresting officers to testify to the traffic warrants. He testified that he had seen telegraphic copies or abstracts of the traffic warrants at the police station. The defendant objected to this testimony on the ground of the best evidence rule. The trial court overruled the objection, but the appellate court properly reversed the trial court. Evidence Code sections 1500 and 1506 forbid the admission of any evidence of the content of a public writing (the warrants in this case) other than the writing itself or a copy. Testimony as to the content of a copy of a public writing is not admissible under normal circumstances.[18]

Parol Evidence Rule

The major development in the civil cases during 1968 is found in three supreme court cases dealing with the parol evidence rule. In *Masterson v. Sine*[19] the court abandoned the rule that had been stated in some prior cases that whether a written agreement was intended to be the entire agreement between the parties is to be determined solely from the face of the instrument. The court found that this strict formulation of the parol evidence rule had never been consistently applied. The court pointed out that the Restatement of Contracts would authorize proof of a collateral agreement if it

16. Cf. People v. De Leon, 260 Cal. App.2d 143, 67 Cal. Rptr. 45 (1968).

17. 261 Cal. App.2d 461, 67 Cal. Rptr. 826 (1968).

18. See Cal. Evid. Code § 1508.

19. 68 Cal.2d 222, 65 Cal. Rptr. 545, 436 P.2d 561 (1968).

"is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."[20] The draftsmen of the Uniform Commercial Code would exclude oral evidence only if the additional terms are such that, if agreed upon, they would *certainly* have been included in the document.

In *Masterson*, the court was dealing with a conveyance of a ranch reserving to the grantors an option to purchase the property back again. The question was whether the option was personal to the grantors or whether it could be assigned. The document was silent. The court held that evidence was admissible to show that the option was not assignable, and reversed the ruling of the trial court which had excluded such evidence.

In *Pacific Gas & Electric Company v. G.W. Thomas Drayage & Rigging Company*[1] the court was dealing with an indemnity clause in a contract. One party offered evidence to show that the indemnity clause was meant to cover injury to property of third parties only and not to property of the contracting parties. Here the court stated that the test of admissibility of extrinsic evidence to explain the meaning of a written contract is not whether the contract appears to the court to be plain and unambiguous on its face, but whether the offered language is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. The court stated that rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. The trial court was found to have erroneously refused to consider extrinsic evidence to show the meaning of the indemnity clause.

The final case dealing with the parol evidence rule is *Delta Dynamics, Inc. v. Arioto.*[2] Here, the plaintiff and the defendant had entered into a contract by which the defendant agreed to purchase and sell 50,000 locks from the plaintiff

20. Restatement of Contracts, § 240 (1)(b).

1. 69 Cal.2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (1968).

2. 69 Cal.2d —, 72 Cal. Rptr. 785, 446 P.2d 785 (1968).

during the first year of the contract, and not less than 100,000 locks during the remaining years of the contract. The contract provided that if the defendant failed to distribute the minimum number of locks to be distributed by it, the agreement was subject to termination by the plaintiff on 30 days' notice. The defendant failed to purchase and sell the requisite number of locks. The plaintiff terminated the contract and sued for damages. The defendant offered evidence to show that termination of the contract was the plaintiff's sole remedy. The supreme court held that the language of the contract was reasonably susceptible of the meaning contended for by the defendant. Accordingly, the trial court committed prejudicial error by excluding extrinsic evidence offered to prove the meaning of the termination clause. The court said that such evidence would be admissible to show that the parties had in fact intended to make termination the sole remedy.

Presumptions

In *People v. Johnson*[3] the court considered certain presumptions created by Penal Code section 270, which provides that it is a misdemeanor for a father to willfully fail, without lawful excuse, to provide for the support and maintenance of his minor children. It further provides that proof of abandonment or desertion of a child by the father, or the omission by the father to provide necessary food, clothing, shelter, or medical assistance, is "prima facie" evidence that the abandonment or desertion or failure to provide necessary care is willful and without lawful excuse. Under the Evidence Code, this provision creates a rebuttable presumption.[4] The defendant argued that it is unconstitutional to create such a presumption, but his argument was rejected by the court.

Section 270 of the Penal Code also provides that if the father fails to provide for his children and remains out of the state for 30 days during such violation he is guilty of a felony. Proof of the omission by the father to provide neces-

3. 258 Cal. App.2d 705, 66 Cal. Rptr. 99 (1968).

4. Cal. Evid. Code § 602.

sary care for more than 30 days, under the statute, is prima facie evidence that the father was outside the state. This provision, said the court, is unconstitutional. There is no rational connection between the omission of a father to provide for his children for 30 days and his location at the time of such omission. Inasmuch as there is no rational connection between the proven fact giving rise to the presumption and the presumed fact, the presumption was held unconstitutional.

Privileges

In *Carlton v. Superior Court*[5] the plaintiff in a personal injury action was seeking to obtain hospital records pertaining to the defendant to show that the defendant was under the influence of alcohol. The superior court agreed with the plaintiff's contention that the defendant, by denying liability, had tendered the issue of his condition and thus waived his physician-patient privilege. The appellate court disagreed. Said the court, "it seems clear that in an action for damages for personal injuries the issues are 'tendered' by the plaintiff within the meaning of section 996 of the Evidence Code, by plaintiff's factual allegations as to such things as defendant's conduct (intoxication, etc.), and not by defendant's denial of such allegations which constitutes no more than a joinder of issue." The defendant did not tender his condition by denying liability and, therefore, did not waive the physician-patient privilege. Accordingly, the plaintiff was not entitled to discover the hospital records for they were protected by the defendant's physician-patient privilege.

In the same case the trial court indicated that it would look at the hospital records to determine which of those records were protected by the privilege and which were not. The appellate court pointed out that Evidence Code section 915 forbids the determination of the applicability of the physician-patient privilege by this procedure. A judge may not require disclosure of information claimed to be privileged in order to rule on the claim of privilege unless the privilege in-

5. 261 Cal. App.2d 282, 67 Cal. Rptr. 568 (1968).

volved is the official information,[6] identity of informer,[7] or trade secret privilege.[8]

In *Richards v. Superior Court*,[9] the court seems to have read a substantive meaning into section 1040 of the Evidence Code that was not intended by its authors. The case involved a plaintiff in a personal injury action who had previously made a claim for disability insurance benefits under the Unemployment Insurance Code. In connection with that claim, which arose out of the same occurrence involved in the personal injury action, the department of employment referred the plaintiff to a physician, who submitted a report of his findings to the department.

The plaintiff thereafter signed a document authorizing the doctor to release the records of his examination to the defendants' attorney, whereupon defendants attempted to subpoena the doctor and his records for a discovery deposition. The department of employment moved to quash the subpoena, and the court granted the motion, on the ground that the records were privileged.

All parties conceded that the Unemployment Insurance Code created a privilege. The only question was whether it had been waived by a person authorized to do so. The defendant relied on *Crest Catering Co. v. Superior Court*[10] which had held that the person reporting to the department can waive the privilege created by the Unemployment Insurance Code. The court in *Richards* distinguished the *Crest Catering* decision on the grounds that it was decided before enactment of the Evidence Code and that the privilege was invoked in *Crest* by the person reporting, not the department. The opinion suggests that the enactment of the Code made the privilege absolute and not subject to waiver by the person reporting.

It is unlikely that the Evidence Code was intended to have any effect on statutory privileges created by other codes.

6. Cal. Evid. Code § 1040.

7. Cal. Evid. Code § 1041.

8. Cal. Evid. Code § 1060.

9. 258 Cal. App.2d 635, 65 Cal. Rptr. 917 (1968).

10. 62 Cal.2d 274, 42 Cal. Rptr. 110, 398 P.2d 150 (1965).

Evidence Code section 1040, upon which *Richards* relies, merely recognizes the existence of other statutory privileges, it does not purport to modify them. If a statute creating a privilege permitted waiver of the privilege prior to the Evidence Code, there is no reason to believe the statute would not permit a similiar waiver after enactment of the Code. Section 1040 states merely that "official information" is privileged if "disclosure is forbidden by . . . a statute of this state." If such a statute permits waiver under certain circumstances, therefore, disclosure under those circumstances is not forbidden by the statute. If *Crest Catering* held that the statute permits waiver by the person reporting, it would follow that the statute would still permit such waiver after enactment of the Evidence Code. As pointed out in *Richards*, however, *Crest Catering* did not involve a claim of privilege by the department itself. Therefore, it held only that the person reporting could effectively waive his own privilege under the statute. *Richards* involved a claim of privilege by the department, and it holds that the department's right to claim the privilege cannot be waived by the person reporting. The holding must be based, however, on the Unemployment Insurance Code, not upon some additional force given to that code by the Evidence Code.

Judicial Notice

In *People v. MacLaird*,[11] the court, relying on section 451 of the Evidence Code, held that the principles underlying radar are so universally known that a court must take judicial notice of the accuracy of radar as a speed measuring device. Of course, the installation, accuracy, and operation of a particular radar machine cannot be judicially noticed; those facts must be established by competent evidence.

Conclusion

The courts for the most part have continued to accept and apply the Evidence Code with enthusiasm and understanding.

11. 264 Cal. App.2d —, 71 Cal. Rptr. 191 (1968).

In a few instances, they have shown a tendency to apply broadened rules of admissibility only against the prosecution in criminal cases, finding constitutional objections to broadened rules of admissibility against defendants. It remains to be seen whether these are isolated instances involving specific problems or whether the cases indicate a trend.

It is clear, however, that the initiative for change in the law of evidence has once more been assumed by the courts. In exercising this initiative, it is to be hoped that they will not consider specific problems in isolation from the whole law of evidence for such an approach can only lead to the creation of the anomalies and anachronisms that prompted the enactment of the Code.