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## Appellate Review of Criminal Convictions on Appeal

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### INTRODUCTION

Article VI, Section 4½ of the Constitution of the State of California was adopted by the voters of California in its present form on November 3, 1914, having first been enacted on October 10, 1911.<sup>1</sup> This section incorporated into the constitution what had long been the accepted law of this State, exemplified by Section 475 of the Code of Civil Procedure and Penal Code Sections 1258 and 1404.<sup>2</sup>

Little has been written as to the reasons why the section was originally enacted. Reference is made to the report of the Commonwealth Club of San Francisco<sup>3</sup> on the subject following the reversal of the judgment of conviction in *People v. Schmitz*<sup>4</sup> and the order made by the supreme court grant-

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<sup>1</sup> As originally enacted article VI, section 4½ was as follows: "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." CAL. CONST. art. VI, § 4½ (1911).

<sup>2</sup> "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." CAL. CODE CIV. PROC. § 475.

"After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." CAL. PEN. CODE § 1258.

"Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." CAL. PEN. CODE § 1404.

<sup>3</sup> Transactions of the Commonwealth Club, Vol. 4, page 274.

<sup>4</sup> 7 Cal.App. 330, 94 Pac. 407 (1908).

ing a hearing in *People v. Ruef*.<sup>5</sup> However, the American Bar Association, by recommendation made to the annual convention of the House of Delegates in 1910, suggested to the governments of the several states that they enact a constitutional or statutory provision identical with or similar in effect to the following:

No judgment shall be set aside or new trial granted by any appellate court of this State in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a Constitutional or Statutory right.

Unquestionably, this recommendation and the then California political atmosphere resulted in the enactment of article VI, section 4½, in its original form on October 10, 1911.

Article VI, Section 4 of the Constitution of 1879 gave sole appellate jurisdiction to the supreme court. Its criminal appellate power was restricted to questions of law alone.<sup>6</sup>

To accommodate the creation of the District Courts of Appeal, article VI, section 4 was amended in 1904. However, the supreme court's power of review was still restricted to questions of law alone.<sup>7</sup> Similar language applicable to the District Courts of Appeal was enacted in 1904.<sup>8</sup>

Article VI, section 4½ directed appellate courts to review the trial evidence. One of the functions of this article will be to determine the scope and limits of this power.

Twenty-three states have a rule either identical with or similar to article VI, section 4½. An analysis will be made at the end of this article of the scope of appellate court review provided by the constitutional provisions or applicable statutes of the forty-eight states.

Textual discussion of the various facets of the problem may be found

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<sup>5</sup> 14 Cal.App. 576, 114 Pac. 48 (1910).

<sup>6</sup> "... also, in all criminal cases prosecuted by indictment or information in a court of record on *questions of law alone* . . ." CAL. CONST. art. VI, § 4. (Emphasis added.)

<sup>7</sup> "... also, on *questions of law alone*, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters, and proceedings pending before a district court of appeal which shall be ordered by the supreme court to be transferred to itself for hearing and decision, as hereinafter provided . . ." *Ibid.* (Emphasis added.)

<sup>8</sup> "... also, on *questions of law alone*, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered. The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the supreme court which shall be ordered by the supreme court to be transferred to a district court of appeal for hearing and decision . . ." *Ibid.* (Emphasis added.)

in *American Jurisprudence*,<sup>9</sup> *Corpus Juris Secundum*<sup>10</sup> and *California Jurisprudence, Second Edition*.<sup>11</sup>

There are more than three thousand criminal cases which cite the constitutional section as authority for affirmance or reversal. Some civil cases have been examined and are discussed. Whether the court affirms or reverses depends largely upon the charge, the facts and errors involved. For convenience, therefore, the various types of errors which occur have been discussed separately. They are errors of procedure, the admission of evidence, the exclusion of evidence, misconduct of the district attorney, misconduct of the court and errors in jury instructions.

There is a gradation of error both in omission and commission. For the most flagrant errors the appellate court applies the descriptive phrase: *the defendant is deprived of his right to a fair trial*; or *he was convicted without due process*.

Less opprobrious language is directed at lesser errors. These errors have been placed in their various descriptive classifications and examples of language employed by the courts used to illustrate the thesis.

Due process of law and defendant's right to a fair trial is separately provided in article I, section 13 of the constitution.<sup>12</sup> However, the courts combine these concepts of due process and miscarriage of justice.

Since article VI, section 4½ was enacted, the appellate courts have differently treated almost identical situations. The possible reasons therefore have been examined.

Statistical analysis may reveal that, since its enactment, article VI, section 4½ is responsible for an alarming decrease of the number of criminal appeals which are reversed. Trial courts may have usurped the functions of appellate courts. Discussion and analysis may demonstrate that, unknown to them, the appellate courts are but rubber stamps for the trial courts, unless the error or errors committed are too gross to be disregarded.

To restore what the writer considers to be the proper balance between the appellate and trial courts, recommendations have been made which look to modification of the Section.

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<sup>9</sup> 3 AM. JUR., *Appeal and Error* §§ 923-958 (1936).

<sup>10</sup> 5 C.J.S., *Appeal and Error* §§ 1676-1820 (1937).

<sup>11</sup> 4 CAL. JUR. 2d, *Appeal and Error* §§ 616-624 (1952).

<sup>12</sup> CAL. CONST. art. I, § 13: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; *nor be deprived of life, liberty, or property without due process of law* . . . The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial." (Emphasis added.)

## RELEVANT WORDS DEFINED

Article VI, Section 4½ of the Constitution of the State of California in its present form is as follows:<sup>13</sup>

No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, *unless, after an examination of the entire cause, including the evidence*, the court shall be of the *opinion* that the error complained of has resulted in a *miscarriage of justice*.

Preliminary consideration will be given to the meaning of the clause: *unless, after an examination of the entire cause, including the evidence*.

How does an appellate court weigh and judge the evidence? Does it pass upon the evidence as a trial court would upon a motion for a new trial? Does it weigh the evidence as would the triers of fact? Or is it bound by rules which differ in scope and effect from trial courts and juries?

Article VI, section 4½ obviously was not intended to convert appellate courts into triers of fact, for it is the general rule that a judgment of a trial court or jury which is founded upon substantial evidence is conclusive upon appeal. Counsel for appellant must examine the entire record, including the clerk's transcript, reporter's transcript, the pleadings and all other documents which form the record on appeal and point out to the court the error or errors which are claimed to warrant reversal of the judgment. The appellate court will then examine the entire record to determine if the appellant has been substantially injured by the claimed errors.<sup>14</sup>

The first supreme court case which discussed the scope of appellate court review established by article VI, section 4½ is *People v. O'Bryan*. Judge Sloss stated the general rule which has been followed without substantial deviation from 1913 to the present time:<sup>15</sup>

[T]his view requires the court, to some extent, to weigh the evidence, and form conclusions upon its weight—a function which, heretofore, has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amendment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury has found him guilty, we must, upon review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached.

<sup>13</sup> CAL. CONST. art. VI, § 4½. (Emphasis added.)

<sup>14</sup> *Tupman v. Haberkern*, 208 Cal. 256, 269, 270, 280 Pac. 970, 972, 974 (1929); *Hirshfeld v. Dana*, 193 Cal. 142, 150, 223 Pac. 451, 454 (1924); *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (1913); *People v. Cowan*, 44 Cal.App.2d 155, 158-60, 112 P.2d 62, 64-65 (1941); *People v. Lawlor*, 21 Cal.App. 63, 131 Pac. 63 (1913); *People v. Haydon*, 18 Cal.App. 543, 123 Pac. 1102 (1912).

<sup>15</sup> *People v. O'Bryan*, 165 Cal. 55, 66, 130 Pac. 1042, 1046-47 (1913).

*People v. Lawlor*<sup>16</sup> likewise considered the effect of the constitutional amendment. The court said:<sup>17</sup>

In order to comply with the mandate of the Constitution there is no escape from the conclusion, it seems to us, that we are called upon and compelled to weigh the evidence upon which the conviction was had, and then decide whether or not the error or irregularity complained of had the effect indicated [*i.e.*, a miscarriage of justice]. If these views be correct then it must follow that where in any given case it appears to the satisfaction of this court from a reading of the evidence adduced upon the whole case that the verdict found by the jury was just, and would have been the same notwithstanding the error or irregularity complained of, a new trial will not be ordered.

*People v. Tomskey*<sup>18</sup> and *J. I. Case Threshing Machine Company v. Copran Brothers*<sup>19</sup> likewise consider the scope of review. Justice Hart in the former, and Justice Chipman in the latter, both of the Third District, conclude that the applicability of the section is determined by the balance of the strength of the evidence with the character and gravity of the error.<sup>20</sup>

The appellate courts have construed the word "opinion" as it appears in the section. "Opinion" is equivalent to "belief" or "conviction," but it must be supported by a substantial legal foundation.<sup>21</sup>

Justice Lemon of the First District in *People v. Ho Kim You*<sup>22</sup> is more explicit. He says in the opinion:<sup>23</sup>

Incidentally it may not be amiss to state that the determination of this court as to whether or not an irregularity in pleading or procedure has contributed to a miscarriage of justice in any given case, must depend largely if not entirely upon the *opinion* which the justices of this court collectively form of the guilt or innocence of the defendant after having weighed the evidence in the individual case before us. In short, our determination as to what is or is not a miscarriage of justice must in every case be a mere matter of *opinion* which, in view of the varying facts of each case, cannot be based

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<sup>16</sup> 21 Cal.App. 63, 131 Pac. 63 (1913).

<sup>17</sup> *Id.* at 70, 131 Pac. at 67.

<sup>18</sup> 20 Cal.App. 672, 683, 130 Pac. 184, 189 (1912).

<sup>19</sup> 32 Cal.App. 194, 204, 162 Pac. 647, 651 (1916).

<sup>20</sup> *Accord*, *People v. Carmine*, 41 Cal.2d 384, 260 P.2d 16 (1953); *People v. Sarazzawski*, 27 Cal.2d 7, 161 P.2d 934 (1945); *People v. McCoy*, 25 Cal.2d 177, 153 P.2d 315 (1944); *People v. Barrett*, 207 Cal. 47, 276 Pac. 1003 (1929); *People v. Pokrajac*, 206 Cal. 259, 274 Pac. 63 (1929); *People v. Mahoney*, 201 Cal. 618, 258 Pac. 607 (1927); *People v. Fleming*, 166 Cal. 357, 136 Pac. 291 (1913); *Southern Cal. Home Builders v. Young*, 45 Cal.App. 679, 188 Pac. 586 (1920).

<sup>21</sup> *Markham v. Hancock Oil Co.*, 2 Cal.App.2d 392, 37 P.2d 1087 (1934); *People v. Hancock*, 1 Cal.App.2d 577, 37 P.2d 120 (1934); *People v. Bartol*, 24 Cal.App. 659, 142 Pac. 510 (1914); *People v. Ho Kim You*, 24 Cal.App. 451, 141 Pac. 950 (1914); *People v. Tomskey*, 20 Cal.App. 672, 130 Pac. 184 (1912).

<sup>22</sup> 24 Cal.App. 451, 141 Pac. 950 (1914).

<sup>23</sup> *Id.* at 469, 141 Pac. at 957. (Emphasis added.)

upon any hard and fast rule, but necessarily must be formed from the cold record without the valuable and often times indispensable aid of hearing and seeing the witnesses who testified at the trial.

Difficulty is encountered in defining "miscarriage of justice." Obviously a miscarriage of justice occurs if the court's judgment fails to meet basic legal requirements.

Thus, if a defendant's conviction is solely based upon the testimony of an accomplice it will be reversed. Article VI, section 4½ cannot protect such a judgment.<sup>24</sup>

Similarly, the absence of evidence with reference to a complainant's age, where the age is an essential element of the offense, is a fatal defect,<sup>25</sup> as is the failure of the charging document to state a crime.<sup>26</sup>

"Miscarriage of justice" appears to be synonymous with "prejudice," "prejudicial misconduct" and similar expressions.<sup>27</sup>

When an appellate court affirms, it will use language to the effect that:

(1) the evidence is clear and convincing and the error did not prejudice the defendant;<sup>28</sup> or

(2) independent of the erroneously admitted evidence, defendant's guilt was established and the jury would have come to the same conclusion had such evidence not been received;<sup>29</sup> or

(3) the evidence of defendant's guilt is clear and convincing and it appears probable that there would have been no different verdict had the trial court given defendant's requested instructions;<sup>30</sup> or

(4) the issue upon which the improperly excluded evidence was offered was not a close one so that the refusal of the defendant's proffered testimony did not result in a miscarriage of justice;<sup>31</sup> or

(5) the procedural defect is so technical as to have been cured by the suf-

<sup>24</sup> *People v. Kempley*, 205 Cal. 441, 271 Pac. 478 (1928); *People v. Heddens*, 12 Cal.App.2d 245, 55 P.2d 230 (1936); *People v. Haack*, 86 Cal.App. 390, 260 Pac. 913 (1927); *People v. Dillon*, 68 Cal.App. 457, 229 Pac. 974 (1924).

<sup>25</sup> *People v. Levoy*, 49 Cal.App. 770, 194 Pac. 524 (1920).

<sup>26</sup> *People v. Zerillo*, 36 Cal.2d 222, 223 P.2d 223 (1950); *People v. Arnest*, 133 Cal.App. 114, 23 P.2d 812 (1933); *People v. Kloss*, 130 Cal.App. 194, 19 P.2d 822 (1933); *People v. Frost*, 125 Cal.App.Supp. 794, 12 P.2d 1096 (1932); *People v. Burns*, 75 Cal.App. 84, 241 Pac. 935 (1925); *People v. Schiaffino*, 73 Cal.App. 357, 238 Pac. 725 (1925); *People v. Teixeira*, 59 Cal.App. 598, 211 Pac. 470 (1922); *People v. Salisbury*, 59 Cal.App. 299, 210 Pac. 642 (1922).

<sup>27</sup> *People v. De La Roi*, 23 Cal.2d 692, 146 P.2d 225 (1943); *People v. Brown*, 22 Cal.2d 752, 141 P.2d 1 (1943).

<sup>28</sup> *People v. De La Roi*, 23 Cal.2d 692, 146 P.2d 225 (1944).

<sup>29</sup> *People v. Gonzales*, 24 Cal.2d 870, 151 P.2d 251 (1944).

<sup>30</sup> *People v. Kelso*, 25 Cal.2d 848, 155 P.2d 819 (1945).

<sup>31</sup> *In re Wells*, 35 Cal.2d 889, 221 P.2d 947 (1950); *People v. Letourneau*, 34 Cal.2d 478, 211 P.2d 865 (1949); *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1949); *People v. Dyer*, 11 Cal.2d 317, 79 P.2d 1071 (1938); *People v. Watts*, 198 Cal. 776, 247 Pac. 884 (1926); *People v. Burch*, 46 Cal.App. 391, 189 Pac. 716 (1920); *People v. Kilfoil*, 27 Cal.App. 29, 148 Pac. 812 (1915); *People v. Haydon*, 18 Cal.App. 543, 123 Pac. 1102 (1912); *People v. Conte*, 17 Cal.App. 771, 122 Pac. 450 (1912).

iciency of the evidence and the clarity of the instructions at the time of the trial;<sup>32</sup> or

(6) misconduct of the district attorney having been properly called to the attention of the trial court by objection and citation of misconduct and the trial court having promptly admonished the district attorney and the jury, the misconduct was cured.<sup>33</sup>

When the appellate court reverses, it uses language similar to the illustrations found in *People v. Adams*,<sup>34</sup> or as in *People v. Brower*,<sup>35</sup> dissent by Justice Peters. Or, it may say:

(1) While the evidence is sufficient to sustain the judgment it does not unerringly point to defendant's guilt. Under the circumstances we cannot say that the erroneously admitted evidence did not tip the scales against the defendant.<sup>36</sup>

(2) Miscarriage of justice does not mean that an innocent man has probably been convicted. In this case, because of the erroneous instructions given by the trial court his defense was obscured and crippled.<sup>37</sup>

(3) The failure of the trial court to admit evidence on a point vital to the defendant's sole defense cannot be said not to have resulted in a miscarriage of justice.<sup>38</sup>

(4) The misconduct of the district attorney having been so continuous and unmindful of the court's admonitions cannot help but have influenced and prejudiced the trial jury against the defendant. Under the circumstances, we are compelled to say that such misconduct might have resulted in defendant's conviction.<sup>39</sup>

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<sup>32</sup> *People v. Codina*, 30 Cal.2d 356, 181 P.2d 881 (1947); *People v. Rankin*, 10 Cal.2d 198, 74 P.2d 71 (1937); *People v. Kempley*, 205 Cal. 441, 271 Pac. 478 (1928); *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521 (1917).

<sup>33</sup> *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952); *People v. Goold*, 215 Cal. 763, 12 P.2d 958 (1932); *People v. Loomis*, 170 Cal. 347, 149 Pac. 581 (1915); *People v. Johnson*, 57 Cal.App. 271, 207 Pac. 257 (1922); *People v. Diamond*, 57 Cal.App. 162, 206 Pac. 1010 (1922); *People v. Chapman*, 55 Cal.App. 192, 203 Pac. 126 (1921); *People v. Rollins*, 54 Cal. App. 609, 202 Pac. 475 (1921); *People v. Saenz*, 50 Cal. App. 382, 195 Pac. 442 (1920); *People v. Dye*, 29 Cal.App. 169, 154 Pac. 875 (1915); *People v. Kilfoil*, 27 Cal.App. 29, 148 Pac. 812 (1915); *People v. Ho Kim You*, 24 Cal.App. 451, 141 Pac. 950 (1914).

<sup>34</sup> 76 Cal.App. 178, 186-87, 244 Pac. 106, 109-10 (1925).

<sup>35</sup> 92 Cal.App.2d 562, 207 P.2d 571 (1949).

<sup>36</sup> *People v. Newson*, 37 Cal.2d 34, 230 P.2d 618 (1951); *People v. Hamilton*, 33 Cal.2d 45, 198 P.2d 873 (1948); *People v. Albertson*, 23 Cal.2d 550, 145 P.2d 7 (1944); *People v. Rogers*, 22 Cal.2d 787, 141 P.2d 722 (1943); *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367 (1942); *People v. Braun*, 14 Cal.2d 1, 92 P.2d 402 (1939); *People v. Van Cleave*, 208 Cal. 295, 280 Pac. 983 (1929); *People v. Mahoney*, 201 Cal. 618, 258 Pac. 607 (1927).

<sup>37</sup> *People v. Bemis*, 33 Cal.2d 395, 202 P.2d 82 (1949); *People v. Rogers*, 22 Cal.2d 787, 141 P.2d 722 (1943); *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828 (1943); *People v. Snyder*, 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Roe*, 189 Cal. 548, 209 Pac. 560 (1922).

<sup>38</sup> *People v. Jones*, 42 Cal.2d 219, 266 P.2d 38 (1954); *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *People v. Weatherford*, 27 Cal.2d 401, 164 P.2d 753 (1946).

<sup>39</sup> *People v. Hidalgo*, 78 Cal.App.2d 926, 179 P.2d 102 (1947); *People v. Adams*, 92 Cal. App. 6, 267 Pac. 906 (1928); *People v. Alpine*, 81 Cal.App. 456, 254 Pac. 281 (1927); *People v. Simon*, 80 Cal.App. 675, 252 Pac 758 (1926).

(5) The continuous interruption by the trial court of defendant's attempts to introduce evidence favorable to his cause and the court's derogatory treatment of defendant's counsel could not have done otherwise than to cause the jury to believe that the judge thought defendant guilty.<sup>40</sup>

There are matters which the appellate courts have excluded from the scope of the section. Article VI, section 4½ was never intended to abrogate, modify, lessen or otherwise imperil the fundamental liberties or rights of a citizen of the State of California;<sup>41</sup> nor does the appellate court assume for itself the function of passing upon the credibility of the witnesses who have appeared before the trial court.<sup>42</sup> In a close case, for example, one based entirely upon circumstantial evidence, or one where the evidence practically balances, the court often will refer to the individual witnesses for the People and their seeming lack of credibility, not as a ground for reversal but as an element that the court feels constrained to comment upon in its opinion upon remission to the trial court.<sup>43</sup> The exception must be noted that this rule has no application to a situation where the People's evidence is inherently improbable.<sup>44</sup>

#### DISTINCTION BETWEEN FAIR TRIAL, DUE PROCESS AND MISCARRIAGE OF JUSTICE

Zealous excesses indulged in by the trial judge or the prosecution may deny a defendant his right to a fair trial. Such gross errors, either of omission or commission, may result in defendant's conviction without due process of law. These errors, of necessity, constitute a "miscarriage of justice" and such a conviction cannot be saved by the "benevolent and protective mantle" of article VI, section 4½.

Is lack of a "fair trial" synonymous with the absence of "due process"?

To reverse a judgment of conviction, must an appellate court find either absence of "due process" or an "unfair trial"?

May a judgment of conviction be reversed even though defendant was

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<sup>40</sup> *People v. Patubo*, 9 Cal.2d 537, 71 P.2d 270 (1937); *People v. Mahoney*, 201 Cal. 618, 258 Pac. 607 (1927); *People v. Hooper*, 92 Cal.App.2d 524, 207 P.2d 117 (1949); *People v. Long*, 63 Cal.App.2d 679, 147 P.2d 659 (1944); *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943); *People v. Reese*, 136 Cal.App. 657, 29 P.2d 450 (1934).

<sup>41</sup> Right to a jury trial: *People v. Barrett*, 207 Cal. 47, 276 Pac. 1003 (1929) and *People v. Carmichael*, 198 Cal. 534, 246 Pac. 62 (1926). Right to a public trial: *People v. Brynes*, 84 Cal.App.2d 72, 190 P.2d 290 (1948). Confrontation of witness: *People v. Williams*, 32 Cal.2d 78, 195 P.2d 393 (1948).

<sup>42</sup> *Hirshfeld v. Dana*, 193 Cal. 142, 223 Pac. 451 (1924); *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (1913); *People v. Sellas*, 114 Cal.App. 367, 300 Pac. 150 (1931); *Rodetsky v. Nerney*, 72 Cal.App. 545, 237 Pac. 791 (1925).

<sup>43</sup> *People v. Jones*, 42 Cal.2d 219, 266 P.2d 38 (1954); *People v. Castillo*, 5 Cal.App.2d 194, 42 P.2d 682 (1935); *People v. Biescar*, 97 Cal.App. 205, 275 Pac. 851 (1929); *People v. Degnen*, 70 Cal.App. 567, 234 Pac. 129 (1925).

<sup>44</sup> *People v. Stephens*, 66 Cal.App.2d 755, 152 P.2d 1019 (1944); *People v. Moreno*, 26 Cal.App.2d 334, 79 P.2d 390 (1938).



accorded a "fair trial" or his conviction was secured by "due process of law"?

Unquestionably, the appellate courts of California tend to intermingle these concepts. For example:

- (1) the failure of the trial court to instruct upon defendant's previous good character "materially affected his general right to a fair and lawful trial";<sup>45</sup> or
- (2) discourteous and disparaging remarks made by the trial judge to defendant's counsel and defendant's witnesses meant that "defendant did not have the fair trial guaranteed to him by law and the Constitution";<sup>46</sup> or
- (3) the trial court's scathing denunciation of a defendant accused of murder warranted reversal;<sup>47</sup> or
- (4) defendant's conviction of a crime upon which no preliminary hearing was conducted "denies to him a fair trial";<sup>48</sup> or
- (5) where from a course of persistent misconduct by the prosecuting officer "it is apparent that the right of a defendant to a fair trial has been prejudicially invaded";<sup>49</sup> or
- (6) the erroneous admission of evidence of an unconnected offense may "deprive defendant of a fair and impartial trial, which may have resulted in a 'miscarriage of justice'."<sup>50</sup>

Since it is axiomatic that the lesser is included within the greater, according to the cases absence of a fair trial denies to defendant the due process of law, and his conviction is necessarily a miscarriage of justice.

"Fair trial" and absence of "due process" are synonymous as illustrated by the following examples:

- (1) constant interjection by the trial court deprives defendant of a fair trial. "When the right is violated it amounts to a denial of due process of law."<sup>51</sup>
- (2) improper jury instruction plus the erroneous denial to a defendant of his right to present a motion for a new trial deny to him an "essential element of a fair trial or due process."<sup>52</sup>
- (3) where prompt admonition by the court cannot remove from the jury's minds the stigma of improper argument by the prosecutor, "defendant is denied that fair and impartial trial guaranteed by law, [and] such procedure amounts to a denial of due process of law."<sup>53</sup>

Absence of due process is further exemplified by errors which occurred in the following cases: *In re Wells*<sup>54</sup> (dissent, exclusion of evidence); *People*

<sup>45</sup> *People v. Wilson*, 23 Cal.App. 513, 526, 138 Pac. 971, 975 (1914).

<sup>46</sup> *People v. Mahoney*, 201 Cal. 618, 627, 258 Pac. 607, 610 (1927).

<sup>47</sup> *People v. Patubo*, 9 Cal.2d 537, 543, 71 P.2d 270, 272 (1937).

<sup>48</sup> *People v. Bomar*, 73 Cal.App. 372, 378, 238 Pac. 758, 760 (1925).

<sup>49</sup> *People v. Rosenthal*, 139 Cal.App. 42, 46, 33 P.2d 864, 865 (1934).

<sup>50</sup> *People v. Hudson*, 86 Cal.App. 497, 504, 260 Pac. 887, 890 (1927).

<sup>51</sup> *People v. O'Donnell*, 11 Cal.2d 666, 674, 81 P.2d 939, 941 (1938).

<sup>52</sup> *People v. Sarazzawski*, 27 Cal.2d 7, 11, 161 P.2d 934, 940 (1945).

<sup>53</sup> *People v. Duvernay*, 43 Cal.App.2d 823, 829, 111 P.2d 659, 662 (1941).

<sup>54</sup> 35 Cal.2d 889, 895, 221 P.2d 947, 951 (1950).

*v. Wells*<sup>55</sup> (dissent, exclusion of evidence); *People v. De La Roi*<sup>56</sup> (instructions); *People v. Steelik*<sup>57</sup> (misconduct of the district attorney); *People v. Robarge*<sup>58</sup> (misconduct of the district attorney); *People v. Diaz*<sup>59</sup> (procedure); *People v. Hooper*<sup>60</sup> (misconduct of the court); *People v. Byrnes*<sup>61</sup> (procedure); *People v. Navarro*<sup>62</sup> (procedure); *People v. Lynch*<sup>63</sup> (misconduct of the district attorney); *People v. Cowan*<sup>64</sup> (right of court to comment on evidence); *People v. Gilliland*<sup>65</sup> (admission of evidence); *People v. Little*<sup>66</sup> (misconduct of the court); *People v. Dye*<sup>67</sup> (admission of evidence); *People v. Horiuchi*<sup>68</sup> (procedure); *People v. Adams*<sup>69</sup> (misconduct of the district attorney); and *People v. Simon*<sup>70</sup> (misconduct of the district attorney).

*People v. Cahan*, and its companion case, *People v. Berger*, recently decided by our supreme court, hold that the introduction of unlawfully secured evidence may deny to a defendant his right to a fair trial.<sup>71</sup> The results of these far-reaching decisions will not be immediately discernible. The procedures and principles to be applied to illegally secured evidence must await possible future legislative action and judicial decision.

*People v. Lear and Jackson*,<sup>72</sup> also decided recently by our supreme court, expands the "slanted instruction theory" subsequently discussed to a new area capable of general application. No longer is it confined to the limited issue of self-defense instructions abstractly correct in principle but favorable to the prosecution. The court modified the judgments of conviction and applied article VI, section 4½ to the case instead of ordering a reversal and new trial.

Thus the conclusion may be drawn that the absence of a fair trial or of due process is ipso facto a miscarriage of justice. As has been illustrated, absence of a fair trial or due process is the conclusion formed by the appel-

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<sup>55</sup> 33 Cal.2d 330, 358, 202 P.2d 53, 70 (1949).

<sup>56</sup> 23 Cal.2d 692, 146 P.2d 225 (1944).

<sup>57</sup> 187 Cal. 361, 203 Pac. 78 (1921).

<sup>58</sup> 111 Cal.App.2d 87, 244 P.2d 407 (1952).

<sup>59</sup> 105 Cal.App.2d 690, 234 P.2d 300 (1951).

<sup>60</sup> 92 Cal.App.2d 524, 207 P.2d 117 (1949).

<sup>61</sup> 84 Cal.App.2d 72, 190 P.2d 290 (1948).

<sup>62</sup> 74 Cal.App.2d 544, 169 P.2d 265 (1946).

<sup>63</sup> 60 Cal.App.2d 133, 140 P.2d 418 (1943).

<sup>64</sup> 44 Cal.App.2d 155, 112 P.2d 62 (1941).

<sup>65</sup> 39 Cal.App.2d 250, 103 P.2d 179 (1940).

<sup>66</sup> 122 Cal.App. 275, 10 P.2d 171 (1932).

<sup>67</sup> 119 Cal.App. 262, 6 P.2d 313 (1931).

<sup>68</sup> 114 Cal.App. 415, 300 Pac. 457 (1931).

<sup>69</sup> 92 Cal.App. 6, 267 Pac. 906 (1928).

<sup>70</sup> 80 Cal.App. 675, 252 Pac. 758 (1927).

<sup>71</sup> *People v. Cahan*, 44 A.C. 461 (1955); *People v. Berger*, 44 A.C. 485 (1955).

<sup>72</sup> *People v. Jackson*, 44 A.C. 537 (1955).

late court when, in its opinion, the error committed at the trial court level is gross.

Assume a situation, however, where it cannot be said that a defendant has been deprived of his right to a fair trial, will article VI, section 4½ preclude the reversal of such a conviction? The appellate courts have enunciated other theories which create additional reasons for reversal even if it cannot be said that a defendant was deprived of his right to a fair trial or that his conviction was violative of due process.

#### CUMULATIVE ERROR THEORY

The supreme court has announced a theory of reversal which for purposes of discussion will be referred to as the "cumulative error theory." No district court of appeal has seen fit to apply this theory to any case which cites article VI, section 4½ as authority for affirmance or reversal. The theory has its origin in the case of *Dam v. Lake Aliso Riding School*. Justice Conroy by dictum stated as follows:<sup>73</sup>

Errors of a trial court in relation to matters of pleading, rulings on evidence, instructions to a jury or in relation to matters of procedure, do not justify the reversal of a judgment unless the court of review, after consideration of the entire case, becomes satisfied that such errors resulted in a miscarriage of justice . . . Counsel for appellants in his brief recognizes the principle above stated, but proceeds upon the *assumption that a multitude of minor errors acquires the cumulative force of grave and prejudicial error*. This might be possible when they establish a course of conduct from which the court can infer that the appellant was deprived of a *fair trial*. But the intelligence and spirit of fairness usually manifested by trial courts makes very exceptional the *unfair conduct of a trial*. We are unable to say that there was any such *unfair trial* in this case.

The next reference to the "cumulative error theory" is found in the dissenting opinion of Justice Carter in *People v. McGhee* as follows:<sup>74</sup>

In the face of this plethora of error, the majority opinion concludes that no prejudice was suffered by defendant and that no reversible error was committed. This conclusion is reached by the method of discussing separately with respect to each error the matter of prejudice resulting from it. The question whether the accumulation of error is so heavy as to itself constitute possible prejudice is not mentioned. *The subject of the cumulative effect of numerous errors, each of which separately committed might not show prejudice, should be considered*. Where mistakes on the part of the trial court abound and touch not only the charge to the jury but also rulings on evidence, it cannot be assumed that defendant has had a fair trial and that no miscarriage of justice has resulted.

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<sup>73</sup> *Dam v. Lake Aliso Riding School*, 6 Cal.2d 395, 399, 57 P.2d 1315, 1317 (1936). (Emphasis added.)

<sup>74</sup> *People v. McGhee*, 31 Cal.2d 229, 244, 187 P.2d 706, 715 (1947). (Emphasis added.)

The theory became respectable and no longer requires absence of due process as it did when first enunciated. Thus a unanimous court reversed a judgment of conviction in the case of *People v. Zerillo*. Chief Justice Gibson writing for the court, said:<sup>75</sup>

Under all the circumstances of this case, we are of the opinion that the *cumulative effect of the errors discussed above resulted in a miscarriage of justice*. Since the judgment must be reversed for this reason, we need not discuss the other assignments of error because the same situations will probably not arise on a retrial.

Justice Carter used the "cumulative evidence" theory and the "slanted instruction" theory to reverse a manslaughter judgment in *People v. Moore*.<sup>76</sup> His language is set forth at length in the next section where consideration is given to the "slanted instructions" theory.

Where an appellate court can say that but for the procedural errors, the erroneous admission or exclusion of evidence, improper instructions given or proper instructions refused, the misconduct of the district attorney or the misconduct of the trial court, the defendant would not have been convicted, it follows that the cumulative error theory will and should apply.

#### SLANTED INSTRUCTIONS THEORY

Four appellate court decisions consider the problem of instructions abstractly correct in principle, but which state their legal propositions in a manner favorable to the prosecution. Each is concerned with homicide, and each involves the issue of self-defense. They are *People v. Moore*,<sup>77</sup> *People v. McGee*,<sup>78</sup> *People v. Hatchett*,<sup>79</sup> and *People v. Estrada*.<sup>80</sup> The trial court gave instructions from the viewpoint of the prosecution in a negative rather than in an affirmative manner. Justice Carter, in *People v. Moore*, said as follows:<sup>81</sup>

If we were considering any one of these instructions separately, *even including the last one, the harm would not be so serious, but the five instructions together*, we think, in the absence of a statement of the law of self-defense from the viewpoint of the defendant, tended to create the impression in the minds of the jury that the judge was of the opinion that self-defense had not been established.

Similar reasoning is used in other situations. In *People v. Thomas*, Justice Schauer commented upon the stock prosecution instruction given by

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<sup>75</sup> *People v. Zerillo*, 36 Cal.2d 222, 233, 223 Pac. 2d 223, 230 (1950). (Emphasis added.)

<sup>76</sup> 43 Cal.2d 517, 527, 275 P.2d 485, 492 (1954).

<sup>77</sup> 43 A.C. 529 (1954).

<sup>78</sup> 31 Cal.2d 229, 187 P.2d 706 (1947).

<sup>79</sup> 63 Cal.App.2d 144, 146 P.2d 469 (1944).

<sup>80</sup> 60 Cal.App. 477, 213 Pac. 67 (1923).

<sup>81</sup> 43 Cal.2d 517, 527, 275 P.2d 485, 492 (1954). (Emphasis added.)

trial courts that "there need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind." This instruction he criticized as not properly stating the law as follows:<sup>82</sup>

Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed.

The same slanted prosecution instruction was given by the trial court and again was criticized by Justice Schauer in *People v. Bender* as follows:<sup>83</sup>

But if they are instructed in that vein, which emphasizes the rapidity with which thoughts may follow each other, *fairness requires a further instruction placing at least equal emphasis on the true* (see definitions above) *meaning of the terms*. In other words, while the jury may be told that the brain can function rapidly they must not be misled into thinking that an act can at the same time be hasty, hurried, and deliberate, or impulsive, unstudied, and premeditated. The extent of the reflection in every case, if it is to pass the test, must fairly and reasonably meet the ordinary and unquestioned significations of the test words.

Such instruction errors were sufficient to reverse the judgment of the trial court in *People v. Thomas*,<sup>84</sup> and to modify a conviction of first degree to second degree in *People v. Bender*.<sup>85</sup> The language from the cited opinions indicates that this theory applies to a "due process" or "unfair trial" situation rather than to a "miscarriage of justice" set of facts and errors.

Whether defendant is accused of a homicide or any other type of crime, instructions must favor neither the prosecution nor the defense. No trial court can rightfully take unto itself the role of acting as the strong right arm for the prosecution. Its course, of necessity, must be a middle ground; otherwise a defendant cannot secure the fair trial guaranteed to him.

#### STANDARD REVERSAL PROCEDURE

To quote the language used by appellate courts in reversing judgments of convictions because of a "miscarriage of justice" is unnecessary and quite

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<sup>82</sup> *People v. Thomas*, 25 Cal.2d 880, 900, 156 P.2d 7, 18 (1945).

<sup>83</sup> *People v. Bender*, 27 Cal.2d 164, 185, 163 P.2d 8, 20 (1945).

<sup>84</sup> 25 Cal.2d 880, 156 P.2d 7 (1945).

<sup>85</sup> 27 Cal.2d 164, 163 P.2d 8 (1945).

useless. A re-examination of Section 475 of the Code of Civil Procedure discloses the clue to what is facetiously described as "standard reversal procedure." The basic tests therein set forth are: (1) Does the defect affect the substantial right of a party? (2) Is the error prejudicial? (3) Did the defendant sustain and suffer substantial injury? and (4) Would a different result have been probable if the error had not occurred?

The familiar "double negative" used either to affirm or reverse unquestionably has its genesis in the language of this section. How simple it is to insert the words "not improbable" in the next to the last line of Section 475 of the Code of Civil Procedure which is as follows:

No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would [not] have been [im]probable if such error, ruling, instruction, or defect had not occurred or existed . . . .

When the supreme court uses the double negative, as, for example, in *People v. Snyder*, the court uses the following language:<sup>86</sup>

On the contrary, defendant was convicted solely of an offense requiring proof of a specific intent and, as indicated, *it is impossible to now state that the jury was not influenced in its deliberations and verdict thereon by the inapplicable instructions*. Under such circumstances, the authorities above cited expressly declare that the error is beyond the reach of the saving grace of Section 4½, Article VI of the Constitution.

The so-called circumstantial evidence cases, those based entirely or in major part upon circumstantial evidence, afford the best illustrations of "standard reversal procedure." Reference is made to *People v. Zerillo*,<sup>87</sup> *People v. Garnier*,<sup>88</sup> *People v. Tholke*,<sup>89</sup> *People v. Navarro*,<sup>90</sup> *People v. Chénault*,<sup>91</sup> *People v. Rayol*,<sup>92</sup> and *People v. Hatchell*<sup>93</sup> for examples of "standard reversal procedure" language.

Even if there is sufficient evidence to affirm a judgment of conviction, if the case is a close one on its facts, and the error of omission or commission may have contributed to the judgment, then the protection afforded by article VI, section 4½ is dissipated and the judgment will be reversed.

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<sup>86</sup> *People v. Snyder*, 15 Cal.2d 706, 711, 104 P.2d 639, 641 (1940). (Emphasis added.)

<sup>87</sup> 36 Cal.2d 222, 233, 223 P.2d 223, 230 (1950).

<sup>88</sup> 95 Cal.App.2d 489, 213 P.2d 111 (1950).

<sup>89</sup> 75 Cal.App.2d 857, 859-61, 171 P.2d 904, 906 (1946).

<sup>90</sup> 74 Cal.App.2d 544, 169 P.2d 265 (1946).

<sup>91</sup> 74 Cal.App.2d 487, 499, 169 P.2d 29, 36 (1946).

<sup>92</sup> 65 Cal.App.2d 462, 464, 150 P.2d 812, 814 (1944).

<sup>93</sup> 63 Cal.App.2d 144, 155, 146 P.2d 469, 480 (1944).

## PROCEDURAL ERRORS

Procedural defects of every kind, nature and description occur prior to, during and after the trial of a defendant. The great majority of such defects have never been considered sufficiently important to warrant the reversal of a defendant's conviction. Therefore, consideration first will be given to those errors which are deemed by appellate courts to be grave enough to have warranted reversal.

As has been developed previously, errors of procedure may deny to a defendant the "due process of law" required by article I, section 13 of the constitution. Such errors, of necessity, result in a "miscarriage of justice" as defined in article VI, section 4½.

Examples of errors deemed sufficiently gross to be a denial of due process found in cases which cite article VI, section 4½ are: (1) denial of defendant's right to interpose a special defense,<sup>94</sup> (2) denial of defendant's right to a speedy trial,<sup>95</sup> (3) denial of a common law jury,<sup>96</sup> (4) denial to a defendant of his right to a public and open trial,<sup>97</sup> (5) undue restraint upon the person of the defendant,<sup>98</sup> (6) denial to a defendant of his right to be confronted by witnesses against him,<sup>99</sup> (7) denial to defendant of his right to obtain counsel,<sup>100</sup> (8) the filing of an accusatory pleading against a defendant which fails to plead a criminal offense<sup>101</sup> or (9) the refusal of a trial court to consider a motion for a new trial.<sup>102</sup>

Turning to errors not sufficiently gross to warrant the conclusion that the defendant was deprived of his liberty without "due process of law," consideration will be given to those errors which have been held to be sufficiently grave to constitute a "miscarriage of justice."

Although one appellate decision seemingly contradicts another, proper analysis shows that the reason why one court reverses while another affirms is to be found in what can best be described as the "curative process." Examples of this process will be considered when the various types of errors are scrutinized according to whether the errors are classified as procedural,

<sup>94</sup> *Southern California Home Builders v. Young*, 45 Cal.App. 679, 188 Pac. 586 (1920).

<sup>95</sup> *People v. Echols*, 125 Cal.App.2d 810, 271 P.2d 595 (1954). *Cf. People v. Flores*, 37 Cal. App.2d 282, 99 P.2d 326 (1940).

<sup>96</sup> *Farrell v. City of Ontario*, 39 Cal.App. 351, 178 Pac. 740 (1919). *Cf. People v. Tugwell*, 32 Cal.App. 520, 163 Pac. 508 (1917) (defendant waived right).

<sup>97</sup> *People v. Byrnes*, 84 Cal.App.2d 72, 190 P.2d 290 (1948). *Cf. People v. Terry*, 99 Cal. App.2d 579, 222 P.2d 95 (1950).

<sup>98</sup> *Cf. People v. Deveny*, 112 Cal.App.2d 767, 247 P.2d 128 (1952) (defendant failed to object) and *People v. Thompson*, 23 Cal.App.2d 339, 72 P.2d 927 (1937) (proof of guilt strong).

<sup>99</sup> *Cf. People v. Williams*, 32 Cal.2d 78, 195 P.2d 393 (1948).

<sup>100</sup> *Cf. People v. Stroble*, 36 Cal.2d 615, 226 P.2d 330 (1951); *People v. Boyden*, 116 Cal. App.2d 278, 253 P.2d 773 (1953); and *People v. Mayfield*, 85 Cal.App. 77, 259 Pac. 75 (1927).

<sup>101</sup> *People v. Horiuchi*, 114 Cal.App. 415, 300 Pac. 457 (1931).

<sup>102</sup> *People v. Navarro*, 74 Cal.App.2d 544, 169 P.2d 265 (1946); *People v. Shepherd*, 14 Cal.App.2d 513, 58 P.2d 970 (1936).

misconduct of the trial court or district attorney, concern the admission or exclusion of evidence or finally, relate to instruction errors.

Many opinions analyze procedural errors which are cured during the course of the entire proceeding, so that what might have been prejudicial at one stage of the proceeding becomes innocuous and nonprejudicial.

Reversal of a defendant's conviction will not be ordered where the evidence is clear as to his guilt.<sup>103</sup>

Errors occurring at the committing magistrate level, or even in the Superior Court, such as the failure to take defendant's plea, are said to be cured by a full and fair trial.<sup>104</sup>

Technical defects in pleading may be waived according to Section 1012 of the Penal Code unless they are called to the trial court's attention by demurrer. Most of these defects are too minor to warrant a reversal and are said to be cured by the introduction of evidence upon the point.<sup>105</sup>

Furthermore, since it is incumbent upon a defendant to show that he was in some way injured by the error, his failure to demonstrate prejudice cures the error, since the burden of proof was upon him.<sup>106</sup>

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<sup>103</sup> *People v. Brower*, 92 Cal.App.2d 562, 207 P.2d 571 (1949); *People v. Curtis*, 36 Cal. App.2d 306, 98 P.2d 228 (1939); *People v. Thompson*, 23 Cal.App.2d 339, 72 P.2d 927 (1937); *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945 (1935); *People v. Calkins*, 8 Cal.App.2d 251, 47 P.2d 544 (1935); *People v. Aguinaldo*, 3 Cal.App.2d 254, 39 P.2d 505 (1934); *People v. Hancock*, 1 Cal.App.2d 577, 37 P.2d 120 (1934); *People v. Carter*, 130 Cal.App. 95, 19 P.2d 843 (1933); *People v. Mahach*, 65 Cal.App. 359, 224 Pac. 130 (1924); *People v. Norman*, 62 Cal.App. 219, 216 Pac. 402 (1923); *People v. Dunstan*, 59 Cal.App. 574, 211 Pac. 813 (1922); *People v. Tomskey*, 20 Cal.App. 672, 130 Pac. 184 (1912).

<sup>104</sup> *People v. Agnew*, 77 Cal.App.2d 748, 176 P.2d 724 (1947); *People v. Miller*, 140 Cal. App. 241, 35 P.2d 229 (1934); *People v. Turner*, 28 Cal.App. 766, 154 Pac. 34 (1915); *People v. Stein*, 23 Cal.App. 108, 137 Pac. 271 (1913).

<sup>105</sup> *People v. Codina*, 30 Cal.2d 356, 181 P.2d 881 (1947); *People v. Rankin*, 10 Cal.2d 198, 74 P.2d 71 (1935); *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521 (1917); *People v. Foogert*, 85 Cal.App.2d 290, 193 P.2d 14 (1948); *People v. Thompson*, 85 Cal.App.2d 261, 192 P.2d 802 (1948); *People v. Gelardi*, 77 Cal.App.2d 467, 175 P.2d 855 (1946); *People v. Triplett*, 70 Cal.App.2d 534, 161 P.2d 397 (1945); *In re Schenk*, 61 Cal.App.2d 168, 142 P.2d 343 (1943); *People v. Harby*, 51 Cal.App.2d 759, 125 P.2d 874 (1942); *People v. Price*, 46 Cal. App.2d 59, 115 P.2d 225 (1941); *People v. Pearson*, 41 Cal.App.2d 614, 107 P.2d 463 (1940); *People v. Mandell*, 35 Cal.App.2d 368, 95 P.2d 704 (1939); *People v. Yant*, 26 Cal.App.2d 725, 80 P.2d 506 (1938); *People v. Maggio*, 140 Cal.App. 246, 35 P.2d 369 (1934); *People v. Francisco*, 112 Cal.App. 442, 297 Pac. 34 (1931); *People v. Kuder*, 93 Cal.App. 42, 269 Pac. 198 (1928); *People v. Adams*, 79 Cal.App. 373, 249 Pac. 536 (1926); *People v. Pearson*, 69 Cal.App. 524, 231 Pac. 612 (1924); *People v. Thomas*, 58 Cal.App. 308, 208 Pac. 343 (1922); *People v. Ellena*, 56 Cal.App. 428, 205 Pac. 701 (1922); *People v. Gavin*, 50 Cal.App. 424, 195 Pac. 436 (1920); *People v. Malley*, 49 Cal.App. 597, 194 Pac. 48 (1920); *People v. Bruno*, 49 Cal.App. 372, 193 Pac. 511 (1920); *People v. Arcega*, 49 Cal.App. 239, 193 Pac. 264 (1920); *People v. Bonfanti*, 40 Cal.App. 614, 181 Pac. 80 (1919); *People v. Ruiz*, 39 Cal.App. 593, 179 Pac. 691 (1919); *People v. Epperson*, 38 Cal.App. 486, 176 Pac. 702 (1918); *People v. Wademan*, 38 Cal. App. 116, 175 Pac. 791 (1918); *People v. Brown*, 37 Cal.App. 101, 173 Pac. 621 (1918).

<sup>106</sup> *People v. Howard*, 211 Cal. 322, 295 Pac. 333 (1930); *People v. Mitman*, 122 Cal.App.2d 490, 265 P.2d 105 (1954); *People v. Bean*, 88 Cal.App.2d 34, 198 P.2d 379 (1948); *People v.*



The issue may be one upon which the trial court is called upon to exercise discretion. The appellant, thus, may fail to show abuse of discretion.<sup>107</sup>

Nor may an appellant complain of an error for which he may be said to be wholly or partially responsible. Thus, if by his own act he invites the error,<sup>108</sup> or actually or impliedly waives it or acquiesces in the trial court's erroneous ruling, he may not complain of the error upon appeal.<sup>109</sup>

Brief mention will be made of other devices utilized by appellate courts to excuse errors at the trial court level. The error may be said to be a "mere irregularity,"<sup>110</sup> or not of sufficient gravity to warrant reversal,<sup>111</sup> or the error is said to be cured by a defendant's plea of guilty to the charge or by his subsequent admission of guilt.<sup>112</sup>

If a defendant fails to exhaust his rights, that is, by failure to exercise all peremptory challenges when a challenge for cause is at issue, or by fail-

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Henry, 86 Cal.App.2d 785, 195 P.2d 478 (1948); *People v. Daniels*, 85 Cal.App.2d 182, 192 P.2d 788 (1948); *People v. Defer*, 81 Cal.App.2d 732, 184 P.2d 955 (1947); *People v. Bugg*, 79 Cal.App.2d 174, 179 P.2d 346 (1947); *People v. Denton*, 78 Cal.App.2d 540, 178 P.2d 524 (1947); *People v. Horowitz*, 70 Cal.App.2d 675, 161 P.2d 833 (1945); *People v. Johns*, 69 Cal.App.2d 737, 160 P.2d 102 (1945); *People v. Pianezzi*, 42 Cal.App.2d 270, 108 P.2d 685 (1940); *People v. Chan Chaun*, 41 Cal.App.2d 586, 107 P.2d 455 (1940); *People v. Henry*, 23 Cal.App.2d 155, 72 P.2d 915 (1937); *People v. Perez*, 19 Cal.App.2d 472, 65 P.2d 1319 (1937); *People v. Shepherd*, 14 Cal.App.2d 513, 58 P.2d 970 (1936); *People v. McNeer*, 8 Cal.App.2d 676, 47 P.2d 813 (1935); *People v. Hill*, 2 Cal.App.2d 141, 37 P.2d 849 (1934); *People v. Swift*, 140 Cal.App. 7, 34 P.2d 1041 (1934); *People v. Stroff*, 134 Cal.App. 670, 26 P.2d 315 (1933); *People v. Nahhas*, 121 Cal.App. 428, 9 P.2d 278 (1932); *People v. Cruz*, 113 Cal.App. 519, 298 Pac. 556 (1931); *People v. Crossan*, 87 Cal.App. 5, 261 Pac. 531 (1927); *People v. Jensen*, 82 Cal.App. 489, 255 Pac. 781 (1927); *People v. Clawson*, 82 Cal.App. 422, 255 Pac. 552 (1927); *People v. Wal-lach*, 79 Cal.App. 605, 250 Pac. 578 (1926); *People v. Rambaud*, 78 Cal.App. 685, 248 Pac. 954 (1926); *People v. Olsen*, 64 Cal.App. 126, 220 Pac. 444 (1923); *People v. Bassetti*, 58 Cal.App. 390, 208 Pac. 696 (1922); *People v. Dufur*, 34 Cal.App. 644, 168 Pac. 590 (1917).

<sup>107</sup> *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952); *People v. Burton*, 91 Cal.App.2d 695, 205 P.2d 1065 (1949); *People v. Whinnery*, 55 Cal.App.2d 794, 131 P.2d 33 (1942); *People v. Cowen*, 41 Cal.App.2d 824, 107 P.2d 659 (1940); *People v. Berman*, 117 Cal.App. 334, 4 P.2d 226 (1931); *People v. Wong Hing*, 28 Cal.App. 230, 151 Pac. 1159 (1915).

<sup>108</sup> *People v. Novel*, 118 Cal.App.2d 534, 258 P.2d 46 (1953); *People v. Kobey*, 105 Cal.App.2d 548, 234 P.2d 251 (1951); *People v. Van Bibber*, 96 Cal.App.2d 273, 215 P.2d 106 (1950); *People v. Pettinger*, 95 Cal.App. 297, 271 Pac. 132 (1928).

<sup>109</sup> *People v. Kawamoto*, 216 Cal. 531, 15 P.2d 153 (1932); *People v. Deveny*, 112 Cal.App.2d 767, 247 P.2d 128 (1952); *People v. Young*, 21 Cal.App.2d 423, 69 P.2d 203 (1937); *People v. Williamson*, 134 Cal.App. 775, 26 P.2d 681 (1933); *People v. Tugwell*, 32 Cal.App. 520, 163 Pac. 508 (1917).

<sup>110</sup> *People v. Burns*, 84 Cal.App.2d 18, 189 P.2d 868 (1948); *People v. Morales*, 60 Cal.App.2d 196, 140 P.2d 461 (1943).

<sup>111</sup> *People v. Jordan*, 24 Cal.App.2d 39, 74 P.2d 519 (1937); *People v. Powell*, 83 Cal.App. 62, 256 Pac. 561 (1927).

<sup>112</sup> *People v. Estorga*, 206 Cal. 81, 273 Pac. 575 (1928); *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (1913); *People v. Christman*, 41 Cal.App.2d 158, 106 P.2d 32 (1940); *People v. Bagasol*, 22 Cal.App.2d 327, 70 P.2d 970 (1937); *People v. Beesly*, 119 Cal.App. 82, 6 P.2d 114 (1931); *People v. Rogers*, 94 Cal.App. 470, 271 Pac. 351 (1928).

ure to make an offer of proof upon a disputed evidence point, he loses his right to take issue with the erroneous ruling upon appeal.<sup>113</sup>

While the trial court's ruling may be erroneous at the time it is made, the error is said to be cured if subsequently and independently the same ground is covered.<sup>114</sup> Other excuses utilized by the appellate courts to cure errors will be discussed subsequently.

Consideration will now be given to a discussion of those procedural errors which have been considered sufficiently prejudicial to constitute a miscarriage of justice under article VI, section 4½ without reference to "procedural due process" errors previously discussed.

The consolidation of accusatory pleadings separately charging two or more defendants with the joint commission of a public offense has been the subject of conflicting decisions by the several district courts of appeal. Section 1098 of the Penal Code requires that where two or more defendants are jointly charged with the commission of a public offense, they must be jointly tried, subject to certain exceptions which refer to a defendant's right to a separate trial. No provision has been enacted which authorizes a trial court to consolidate separate accusatory pleadings so that the two or more defendants may be jointly tried. One line of authority holds that an order of consolidation is jurisdictional, there being no legal authority.<sup>115</sup> The opposing authorities agree that while it was error to consolidate, unless the defendant can show prejudice thereby, only a procedural irregularity has occurred. Thus, courts adhering to this theory refuse to reverse convictions for such an error.<sup>116</sup>

Motions for a change of venue are provided for in Section 1033 of the Penal Code, which states that a defendant has a right to a change of venue where he can show that "a fair and impartial trial cannot be had in the County" in which the action is pending. As has been previously indicated, inability to secure a fair and impartial trial is synonymous with the absence of procedural due process.<sup>117</sup> Thus, the cases require a showing of open,

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<sup>113</sup> *People v. Goldberg*, 110 Cal.App.2d 17, 242 P.2d 116 (1952); *People v. Griffin*, 98 Cal. App.2d 1, 219 P.2d 519 (1950); *People v. Patterson*, 58 Cal.App.2d 837, 138 P.2d 341 (1943); *People v. Young*, 136 Cal.App. 699, 29 P.2d 440 (1934); *People v. Martinez*, 57 Cal.App. 771, 208 Pac. 170 (1922); *People v. Slaughter*, 33 Cal.App. 365, 165 Pac. 44 (1917).

<sup>114</sup> *People v. Lee*, 9 Cal.App.2d 99, 48 P.2d 1003 (1935); *People v. Livingston*, 88 Cal.App. 713, 263 Pac. 1036 (1928); *People v. Kilfoil*, 27 Cal.App. 29, 148 Pac. 812 (1915).

<sup>115</sup> *People v. Davis*, 42 Cal.App.2d 70, 108 P.2d 85 (1940); *People v. Foward*, 134 Cal.App. 723, 26 P.2d 532 (1933); *People v. O'Connor*, 81 Cal.App. 506, 254 Pac. 630 (1927).

<sup>116</sup> *People v. Shepherd*, 14 Cal.App.2d 513, 58 P.2d 970 (1936); *People v. Aguinaldo*, 3 Cal. App.2d 254, 39 P.2d 505 (1934). *Accord*, *People v. Van Bibber*, 96 Cal.App.2d 273, 215 P.2d 106 (1950) (defendant tacitly agreed to the consolidation); *People v. Johns*, 69 Cal.App.2d 737, 160 P.2d 102 (1945) (defendant failed to object).

<sup>117</sup> *People v. Sarazzawski*, 27 Cal.2d 7, 161 P.2d 934 (1945); *People v. O'Donnell*, 11 Cal.2d 666, 81 P.2d 939 (1938); *People v. Navarro*, 74 Cal.App.2d 544, 169 P.2d 265 (1946); *People v. Duvernay*, 43 Cal.App.2d 823, 111 P.2d 659 (1941).

public and community hostility against a defendant who seeks removal of his cause.<sup>118</sup>

The right reasonably to examine prospective trial jurors, given to defense counsel by Section 1078 of the Penal Code, has been the subject of conflicting decisions. The basic rule is that counsel have the right to examine into the state of mind of the prospective jurors to determine if they have any mental predilection. To limit voir dire examination may constitute a denial of procedural "due process."<sup>119</sup> Failure to permit reasonable voir dire examination likewise constitutes a miscarriage of justice, particularly where there is substantial conflict in the evidence.<sup>120</sup>

Section 1023 of the Penal Code provides, in part, that where a defendant has been once placed in jeopardy upon a legal indictment or information, such jeopardy is a bar to another indictment or information for the offense charged, or for an attempt to commit the same offense or for an offense necessarily included therein. Jeopardy is said to attach where a trial jury has been duly empanelled, sworn, and is about to receive evidence, and thereafter action is taken which destroys the unity of the trial jury.<sup>121</sup>

As has been previously stated, should the trial court erroneously refuse to defendant his right to exercise a peremptory challenge, such error may constitute a denial of procedural due process<sup>122</sup> or a miscarriage of justice, depending upon the factual situation which developed at the trial. But, where defendant failed to exhaust his peremptory challenges, he may not complain on appeal of such an error.<sup>123</sup>

Should the accusatory pleading separately and in distinct counts set forth the commission of the two or more identical offenses on different dates by a defendant, Section 954 of the Penal Code does not require the prosecution to elect between the different offenses or counts set forth in the accusatory pleading. However, should the accusatory pleading charge but a single offense and evidence be introduced at the time of the trial that a similar

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<sup>118</sup> *People v. McKay*, 37 Cal.2d 792, 236 P.2d 145 (1951). *Accord*, *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952); *People v. Agnew*, 77 Cal.App.2d 748, 176 P.2d 724 (1947).

<sup>119</sup> *People v. Carmichael*, 198 Cal. 534, 246 Pac. 62 (1926); *accord*, *People v. Barrett*, 207 Cal. 47, 276 Pac. 1003 (1929). *Cf.* *People v. Estorga*, 206 Cal. 81, 273 Pac. 575 (1928) (defendant admitted crime); *People v. Kawamoto*, 216 Cal. 531, 15 P.2d 153 (1932) (defendant acquiesced in the court's erroneous ruling).

<sup>120</sup> *People v. Barrett*, 207 Cal. 47, 276 Pac. 1003 (1929).

<sup>121</sup> *People v. Howard*, 211 Cal. 322, 295 Pac. 333 (1930); *People v. Williamson*, 134 Cal. App. 775, 26 P.2d 681 (1933); *People v. Young*, 100 Cal.App. 18, 279 Pac. 824 (1929). *Cf.* *People v. Burns*, 84 Cal.App.2d 18, 189 P.2d 868 (1948); *People v. McNeer*, 8 Cal.App.2d 676, 47 P.2d 813 (1935).

<sup>122</sup> *People v. Diaz*, 105 Cal.App.2d 690, 234 P.2d 300 (1951).

<sup>123</sup> *People v. Goldberg*, 110 Cal.App.2d 17, 242 P.2d 116 (1952); *People v. Griffin*, 98 Cal. App.2d 1, 219 P.2d 519 (1950); *People v. Bugg*, 79 Cal.App.2d 174, 179 P.2d 346 (1947); *People v. Rambaud*, 78 Cal.App. 685, 248 Pac. 954 (1926).

offense was committed at or about the time charged in the accusatory pleading, the prosecution is required to elect upon which cause of action it seeks conviction and failure so to elect may constitute a miscarriage of justice.<sup>124</sup>

Improper use of an interpreter may constitute a miscarriage of justice if the interpretation is not based upon an accepted method of verbal or symbolic communication.<sup>125</sup>

Separation of the jurors after they commence deliberation upon the guilt or innocence of the accused violates Section 1128 of the Penal Code, is a ground for a new trial, according to Subdivision 3 of Section 1181 of the Penal Code, and formed the sole basis for the reversal of one defendant's conviction.<sup>126</sup> To offset and minimize the error, the trial judge and the deputy district attorney questioned each juror under oath. Although all denied that they had violated their oaths, the appellate court brushed this aside, holding that the violation of the statutes constituted a miscarriage of justice.

Section 1191 of the Penal Code provides that sentence must be passed upon a defendant within 21 days after the verdict, provided that the court may extend time of sentence for an additional 10 days for the purpose of hearing a motion for new trial, a motion in arrest of judgment or to consider the report of the probation officer.

An early case, *People v. Barr*,<sup>127</sup> held that failure to pass upon a motion for a new trial within the statutory period is jurisdictional, and reversed defendant's judgment of conviction and sentence thereon. A later case is to the contrary.<sup>128</sup>

Improper denial of defendant's motion for a new trial constitutes reversible error where the trial court announces an erroneous rule of law applicable thereto.<sup>129</sup>

A motion for new trial under Section 1181, Subdivision 8 of the Penal Code, based upon newly discovered evidence and denied by the trial court, was reversed where the district attorney favored the motion, even though the newly discovered evidence was only cumulative.<sup>130</sup>

Should the trial court fail to act upon a motion for probation, meanwhile sentencing the defendant to imprisonment, such omission constitutes

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<sup>124</sup> *People v. Harlan*, 29 Cal.App. 600, 156 Pac. 980 (1916). *Cf. People v. Foster*, 117 Cal. App. 439, 4 P.2d 173 (1931) (defendant failed to deny charge); *People v. Martinez*, 57 Cal. App. 771, 208 Pac. 170 (1922) (counsel failed to demand election).

<sup>125</sup> *People v. Walker*, 69 Cal.App. 475, 231 Pac. 572 (1924).

<sup>126</sup> *People v. Werwee*, 112 Cal.App.2d 494, 246 P.2d 704 (1952).

<sup>127</sup> 55 Cal.App. 321, 203 Pac. 827 (1921).

<sup>128</sup> *People v. Pollock*, 31 Cal.App.2d 747, 89 P.2d 128 (1939).

<sup>129</sup> *People v. Navarro*, 74 Cal.App.2d 544, 169 P.2d 265 (1946).

<sup>130</sup> *People v. Shepherd*, 14 Cal.App.2d 513, 58 P.2d 970 (1936). *Cf. People v. Denton*, 78 Cal.App.2d 540, 178 P.2d 524 (1947); *People v. Pyle*, 44 Cal.App. 130, 185 Pac. 1019 (1919).

reversible error, particularly if the testimony of the prosecution's witnesses is essentially incredible.<sup>131</sup>

Section 950, Subdivision 2 of the Penal Code requires "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." The statement of the charge, according to Section 952 of the Penal Code, may be in the words of the statute, and is sufficient if it gives the accused notice of the offense charged. Failure to allege the essential elements of the crime in the accusatory pleading may constitute reversible error under certain circumstances,<sup>132</sup> and absence of due process under others.<sup>133</sup>

Technical difficulties in pleading are waived according to Section 1012 of the Penal Code unless they are called to the trial court's attention by demurrer, or they may be cured if the deficient pleading is supplemented by evidence on the point.<sup>134</sup>

Violation of Section 825 of the Penal Code, by holding a prisoner incommunicado, may constitute a miscarriage of justice.<sup>135</sup> However, no case which cites article VI, section 4½ is authority for this proposition. As a matter of fact, all cases affirmed convictions where this issue was raised.<sup>136</sup>

As has been previously stated, most procedural errors are not considered to be sufficiently grave to deserve the appellations "denial of due process" or "miscarriage of justice." For example, should a grand juror violate his oath of office taken pursuant to Section 903 of the Penal Code and fail to disclose bias or prejudice against a defendant, this error alone would not be grounds for reversal.<sup>137</sup> Nor is an arraignment in the committing magis-

<sup>131</sup> *People v. Means*, 117 Cal.App.2d 29, 254 P.2d 585 (1953). *Cf. People v. Young*, 88 Cal. App.2d 129, 198 P.2d 384 (1948).

<sup>132</sup> *People v. Ball*, 204 Cal. 241, 267 Pac. 701 (1928); *People v. Arnest*, 133 Cal.App. 114, 23 P.2d 812 (1933); *People v. Kloss*, 130 Cal.App. 194, 19 P.2d 822 (1933); *People v. Frost*, 125 Cal.App.Supp. 794, 12 P.2d 1096 (1932); *People v. Burns*, 75 Cal.App. 84, 241 Pac. 935 (1925); *People v. Rico*, 73 Cal.App. 213, 238 Pac. 814 (1925); *People v. Schiaffino*, 73 Cal.App. 357, 238 Pac. 725 (1925); *People v. Teixeira*, 59 Cal.App. 598, 211 Pac. 470 (1922); *People v. Salisbury*, 59 Cal.App. 299, 210 Pac. 642 (1922).

<sup>133</sup> *People v. Horiuchi*, 114 Cal.App. 415, 300 Pac. 457 (1931).

<sup>134</sup> *People v. Codina*, 30 Cal.2d 356, 181 P.2d 881 (1947); *People v. Rankin*, 10 Cal.2d 198, 74 P.2d 71 (1937); *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521 (1917); *People v. Schoeller*, 96 Cal.App.2d 61, 214 P.2d 572 (1950); *People v. Foogert*, 85 Cal.App.2d 290, 193 P.2d 14 (1948). For additional cases see those cited in footnote 105 *supra*.

<sup>135</sup> CAL. PEN. CODE § 825: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after the arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested."

<sup>136</sup> *People v. Boyden*, 116 Cal.App.2d 278, 253 P.2d 773 (1953); *accord, People v. Stroble*, 36 Cal.2d 615, 226 P.2d 330 (1951).

<sup>137</sup> *People v. McNabb*, 3 Cal.2d 441, 45 P.2d 334 (1935); *People v. Kempley*, 205 Cal. 441, 271 Pac. 478 (1928).

trate's court or in the superior court which violates Sections 859 and 988 of the Penal Code deemed sufficiently grave to warrant reversal.<sup>138</sup> Defendant's failure to plead either in the committing magistrate's court, as required by Penal Code Section 859(a), or in the superior court as required by sections 988, 1017 and 1018, while error, is not reversible, particularly if defendant was otherwise fully and fairly tried as though he had pleaded not guilty.<sup>139</sup>

Failure to conduct a preliminary hearing as required by Part 2, Title 3, Chapter VII of the Penal Code is not sufficiently grave to warrant reversal of a defendant's conviction if his trial is otherwise full and fair.<sup>140</sup> However, no trial judge has the right to refuse a guilty plea. Such refusal may constitute a violation of procedural due process.<sup>141</sup>

Should either the committing magistrate or the superior court judge, in violation of Penal Code Sections 1008 and 1009, permit the district attorney to amend either the accusatory pleading,<sup>142</sup> or erroneously refuse to separate offenses which have been improperly joined in violation of Penal Code Section 954, such errors are not sufficiently grave to warrant reversal.<sup>143</sup>

Procedural due process may be violated if a defendant is not brought to trial within the time limits prescribed by Section 1050 of the Penal Code.<sup>144</sup>

On the other hand, should a defendant or his counsel desire not to go to trial within the sixty-day statutory period and ask for a continuance, the denial of such motion, being discretionary, is not subject to review upon appeal unless defendant-appellant can clearly show that the trial court abused its discretion.<sup>145</sup> Similarly, failure to deliver a copy of the Grand Jury's transcript within the ten-day period of time prescribed by Section

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<sup>138</sup> *People v. Bagasol*, 22 Cal.App.2d 327, 70 P.2d 970 (1937); *People v. Stein*, 23 Cal.App. 108, 137 Pac. 271 (1913).

<sup>139</sup> *People v. Miller*, 140 Cal.App. 241, 35 P.2d 229 (1934); *People v. Bryant*, 101 Cal.App. 84, 281 Pac. 404 (1929); *People v. Tomskey*, 20 Cal.App. 672, 130 Pac. 184 (1912).

<sup>140</sup> *People v. McCalla*, 63 Cal.App. 783, 220 Pac. 436 (1923).

<sup>141</sup> See *People v. Brower*, 92 Cal.App.2d 562, 207 P.2d 571 (1949).

<sup>142</sup> *People v. Haley*, 46 Cal.App.2d 618, 116 P.2d 498 (1941); *People v. Christman*, 41 Cal. App.2d 158, 106 P.2d 32 (1940); *People v. Shepherd*, 14 Cal.App.2d 513, 58 P.2d 970 (1936); *People v. Hill*, 2 Cal.App.2d 141, 37 P.2d 849 (1934); *People v. Nahhas*, 121 Cal.App. 428, 9 P.2d 278 (1932); *People v. Bryant*, 101 Cal.App. 84, 281 Pac. 404 (1929); *People v. Winthrop*, 88 Cal.App. 591, 264 Pac. 263 (1928); *People v. Jensen*, 82 Cal.App. 489, 255 Pac. 781 (1927); *People v. Clawson*, 82 Cal.App. 422, 255 Pac. 552 (1927); *People v. Wallach*, 79 Cal. App. 605, 250 Pac. 578 (1926); *People v. Olsen*, 64 Cal.App. 126, 220 Pac. 444 (1923).

<sup>143</sup> *People v. Ward*, 118 Cal.App.2d 604, 258 P.2d 86 (1953); *People v. Pearson*, 41 Cal. App.2d 614, 107 P.2d 463 (1940); *People v. Shepherd*, 14 Cal.App.2d 513, 58 P.2d 970 (1936); *accord*, *People v. Burton*, 91 Cal.App.2d 695, 205 P.2d 1065 (1949).

<sup>144</sup> *People v. Echols*, 125 Cal.App.2d 810, 271 P.2d 595 (1954).

<sup>145</sup> *People v. Whinnery*, 55 Cal.App.2d 794, 131 P.2d 33 (1942); *People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812 (1915).

925 of the Penal Code, coupled with the trial court's refusal to grant a continuance, is not reversible error.<sup>146</sup>

Errors connected with the formation of the jury panel will be examined next. Should Section 204 of the Code of Civil Procedure, which relates to the manner of selecting the venire, be violated,<sup>147</sup> or should prospective trial jurors be excused contrary to the provisions of Section 246 of the Code of Civil Procedure,<sup>148</sup> these errors will not be considered sufficiently grave to warrant reversal.

Similarly, if a defendant is improperly denied peremptory challenges allowed him by Sections 1070 and 1070.5 of the Penal Code,<sup>149</sup> or is refused the right peremptorily to challenge prospective alternate trial jurors pursuant to Section 1089 of the Penal Code, such errors, while possibly vital to defendant's rights, may be excused if he fails to exhaust such challenges.<sup>150</sup>

After the jury has been sworn, the clerk of the court, pursuant to Section 1093 of the Penal Code, reads to the jury the accusatory pleading. Should he erroneously read admitted prior felony convictions, it will not be considered reversible unless the defendant promptly asks for a mistrial.<sup>151</sup>

Prior to commencement of trial, should a defendant's cause be transferred from one superior court department to another,<sup>152</sup> or he be compelled to undergo contemporaneous trials in different departments of the same superior court,<sup>153</sup> or should he fail personally to waive his right to a jury trial,<sup>154</sup> these errors are non-prejudicial and non-reversible.

Penal Code Section 1122 requires that the jury be admonished at each recess, but failure to do so is not reversible error.<sup>155</sup> Improper and erroneous punishment for direct contempt of court by a defendant is likewise not reversible error.<sup>156</sup>

The use of a witness who cannot be compelled to testify because of an immunity created by Section 1322 of the Penal Code is not a miscarriage of justice,<sup>157</sup> nor is it an abuse of discretion or grounds for reversal to per-

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<sup>146</sup> *People v. Cowen*, 41 Cal.App.2d 824, 107 P.2d 659 (1940).

<sup>147</sup> *People v. Crossan*, 87 Cal.App. 5, 261 Pac. 531 (1927).

<sup>148</sup> *People v. Patterson*, 58 Cal.App.2d 837, 138 P.2d 341 (1943); *People v. Moore*, 64 Cal. App. 328, 221 Pac. 665 (1923).

<sup>149</sup> *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519 (1950); *People v. Bugg*, 79 Cal.App.2d 174, 179 P.2d 346 (1947).

<sup>150</sup> *People v. Diaz*, 105 Cal.App.2d 690, 234 P.2d 300 (1951).

<sup>151</sup> *People v. Rogers*, 94 Cal.App. 470, 271 Pac. 351 (1928).

<sup>152</sup> *People v. Daniels*, 85 Cal.App.2d 182, 192 P.2d 788 (1948).

<sup>153</sup> *People v. Pianezzi*, 42 Cal.App.2d 270, 108 P.2d 685 (1940).

<sup>154</sup> *People v. Garcia*, 98 Cal.App. 702, 277 Pac. 747 (1929).

<sup>155</sup> *People v. Jordan*, 24 Cal.App.2d 39, 74 P.2d 519 (1937).

<sup>156</sup> *People v. Mahach*, 65 Cal.App. 359, 224 Pac. 130 (1924).

<sup>157</sup> *People v. Livingston*, 88 Cal.App. 713, 263 Pac. 1036 (1928).

mit the district attorney to reopen his case in chief pursuant to Section 1093 of the Penal Code.<sup>158</sup> Further, should a limited portion of the proceedings be conducted in defendant's absence violative of Section 1043 of the Penal Code, such error is not sufficiently grave to warrant reversal.<sup>159</sup> Similarly, if the court limits the number of witnesses or the length of argument in its sound discretion, unless defendant clearly shows grave abuse of discretion, this is not sufficiently prejudicial to warrant reversal.<sup>160</sup>

During the course of the trial and during deliberations, individual jurors may be guilty of misconduct. For example, should a trial juror improperly view the scene of the crime<sup>161</sup> or talk to persons with knowledge of the subject matter,<sup>162</sup> such action constitutes improper receipt of evidence. While error, it is not prejudicial, nor is a juror's failure to disclose prejudice against a defendant because of knowledge of some of the facts involved in a criminal prosecution, contrary to Section 1120 of the Penal Code, sufficiently gross to constitute a miscarriage of justice if the trial is otherwise full and fair.<sup>163</sup>

Errors in the form of a verdict<sup>164</sup> (Penal Code Sections 1150-1154), improper recollection of the verdict<sup>165</sup> (Penal Code Section 1164) or failure to arraign a defendant for judgment pursuant to Section 1200 of the Penal Code,<sup>166</sup> have never been considered sufficiently grave to warrant reversal.

Many cases discuss the problem of double punishment. While neither the Constitution of the State of California nor the Penal Code specifically provides for such a situation, many cases discuss the problem and refuse to affirm convictions where sentences imposed upon such convictions will cause a defendant to suffer an extra period of imprisonment.<sup>167</sup>

However, if the sentences upon the separate convictions are concurrent,

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<sup>158</sup> *People v. Berman*, 117 Cal.App. 334, 4 P.2d 226 (1931); *People v. Wong Hing*, 28 Cal. App. 230, 151 Pac. 1159 (1915).

<sup>159</sup> *People v. Morales*, 60 Cal.App.2d 196, 140 P.2d 461 (1943). *But see* *People v. Berling*, 115 Cal.App.2d 255, 251 P.2d 1017 (1953) (due process held denied where defendant "mentally absent" though physically present during taking of testimony).

<sup>160</sup> *People v. Young*, 136 Cal.App. 699, 29 P.2d 440 (1934).

<sup>161</sup> *People v. Tugwell*, 32 Cal.App. 520, 163 Pac. 508 (1917).

<sup>162</sup> *People v. Perez*, 19 Cal.App.2d 472, 65 P.2d 1319 (1937); *accord*, *People v. Hancock*, 1 Cal.App.2d 577, 37 P.2d 120 (1934).

<sup>163</sup> *People v. Kobey*, 105 Cal.App.2d 548, 234 P.2d 251 (1951); *People v. Young*, 21 Cal. App.2d 423, 69 P.2d 203 (1937).

<sup>164</sup> *People v. Cornell*, 29 Cal.App. 430, 155 Pac. 1026 (1916).

<sup>165</sup> *People v. Defer*, 81 Cal.App.2d 732, 184 P.2d 955 (1947). *Cf.* *People v. Bassetti*, 58 Cal. App. 390, 208 Pac. 696 (1922).

<sup>166</sup> *People v. Hawthorne*, 63 Cal.App.2d 262, 146 P.2d 517 (1944); *People v. Swift*, 140 Cal. App. 7, 34 P.2d 1041 (1934).

<sup>167</sup> *People v. Darcy*, 101 Cal.App.2d 665, 226 P.2d 53 (1951); *accord*, *People v. Rhoades*, 93 Cal.App.2d 448, 209 P.2d 33 (1949). And see CAL. PEN. CODE § 654: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one . . ."



there is no reversible error since double punishment is not thereby provided.<sup>168</sup>

#### ADMISSION OF EVIDENCE ERRORS

It is impossible to segregate completely the errors which occur in admitting evidence from errors which relate to the exclusion of evidence, since both forms of error originate from the same group of statutory provisions found in the Code of Civil Procedure.<sup>169</sup>

Issues which relate to the admission of evidence arise from the complaints of defendants that adverse and prejudicial evidence was introduced erroneously by the district attorney. Conversely, defendants complain when courts, at the behest of prosecutors, refuse to admit evidence believed by defendants to be helpful to their respective causes.

With certain minor exceptions, Sections 1102 through 1111 of the Penal Code are all the special evidence rules found in the Penal Code. The rules of evidence are in the Code of Civil Procedure, which must be examined for original authority.

Part 4 of the Code of Civil Procedure is entitled "Evidence" and covers sections 1823 through 2103. Sections 1867 and 1868 of the Code of Civil Procedure state that evidence adduced at the trial ordinarily must be confined to material allegations necessary to determination of defendant's guilt or innocence.<sup>170</sup>

Declarations, acts or omissions which are part of a transaction are admissible under the familiar "res gestae" rule set forth in Section 1850 of the Code of Civil Procedure<sup>171</sup> and are otherwise admissible according to section 1854<sup>172</sup> and section 1870, subdivisions 2, 3, 4, 6, 7, 8, 9 and 16.

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<sup>168</sup> *People v. Bean*, 88 Cal.App.2d 34, 198 P.2d 379 (1948); *People v. Henry*, 86 Cal.App.2d 785, 195 P.2d 478 (1948); *People v. Dallas*, 42 Cal.App.2d 596, 109 P.2d 409 (1941). *Contra*, *People v. Kehoe*, 33 Cal.2d 711, 716, 204 P.2d 321, 324 (1949); *People v. Saltz*, 131 A.C.A. 581, 280 P.2d 900 (1955).

<sup>169</sup> CAL. PEN. CODE § 1102: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code."

<sup>170</sup> CAL. CODE CIV. PROC. § 1867: "None but a material allegation need be proved."; and CAL. CODE CIV. PROC. § 1868: "Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

<sup>171</sup> CAL. CODE CIV. PROC. § 1850: "Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction."

<sup>172</sup> CAL. CODE CIV. PROC. § 1854: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood, may also be given in evidence."

The "res gestae" rule is amplified by Sections 1870 and 1957 through 1963 of the Code of Civil Procedure which relate to facts which may be proved either by direct or indirect evidence. There are numerous other provisions which relate indirectly to the problem. These sections and the sections which relate to impeachment of witnesses, sections 1847, 2049, 2051, 2052 and 2053, however, form the basis of all decisions which relate to the admission and exclusion of evidence.

During the course of a trial, evidence may be introduced which so flagrantly abrogates the statutory rules that it denies to a defendant due process of the law.<sup>173</sup>

Generally speaking, the acts, declarations or omissions of one person cannot bind another.<sup>174</sup> However, if such evidence is admitted improperly, as, for example, if a defendant attempts to bribe a public officer and this evidence is admitted without limitation against his co-defendant, its admission is held to deprive the co-defendant of his right to a fair trial.<sup>175</sup>

Of similar effect is *People v. Duvernay*.<sup>176</sup> Defendant was accused of selling narcotics. One of his witnesses was examined extensively by the district attorney as to the details of his prior police trouble and his use of narcotics.

Another example is to be found in the factual situation described in *People v. Mahoney*.<sup>177</sup> Defendant, charged with manslaughter, was accused of having negligently constructed street-side bleachers which collapsed during a Tournament of Roses parade in Pasadena killing several persons and injuring many. The trial court admitted testimony regarding the screams and groans of the injured and dying under the theory that it was part of the "res gestae." The admission of such evidence was held to deny defendant his right to a fair trial.

Defendant's conviction may be secured by unfair means, so as to constitute absence of due process, if evidence is admitted relating to collateral questions not directly connected with the question in dispute, in violation of Section 1868 of the Code of Civil Procedure.<sup>178</sup>

Derogatory evidence admitted against a defendant may deprive him of a fair trial or result in his conviction without due process of law.<sup>179</sup> For example, details of a prior robbery-murder conviction still on appeal;<sup>180</sup> or

<sup>173</sup> *People v. Sarazzawski*, 27 Cal.2d 7, 161 P.2d 934 (1945). See *People v. Sykes*, 44 A.C. 190, 196, 280 P.2d 769, 773 (1955) (dissent by Schauer, J.).

<sup>174</sup> CAL. CODE CIV. PROC. § 1848: "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them . . ."

<sup>175</sup> *People v. Gilliland*, 39 Cal.App.2d 250, 103 P.2d 179 (1940).

<sup>176</sup> 43 Cal.App.2d 823, 111 P.2d 659 (1941).

<sup>177</sup> 201 Cal. 618, 258 Pac. 607 (1927).

<sup>178</sup> See *supra* note 170.

<sup>179</sup> *People v. Braun*, 14 Cal.2d 1, 92 P.2d 402 (1939).

<sup>180</sup> *People v. Geibel*, 93 Cal.App.2d 147, 208 P.2d 743 (1949).

evidence of prior suspension proceedings against an accused attorney;<sup>181</sup> or evidence that a defendant was committed to reform school and engaged in prize fighting under an assumed name;<sup>182</sup> or that he engaged in adultery, larceny and other illegal acts;<sup>183</sup> result in convictions without due process of law.

While erroneously admitted evidence may be prejudicial to a defendant under certain circumstances, it does not always result in a miscarriage of justice. In other words, as with procedural defects, errors may be cured in many different ways.

Evidence erroneously admitted may be offset and minimized so as not to be prejudicial if the defendant, either upon his cross-examination of the prosecution's witnesses or in his own defense, covers much of the same ground. Obviously, this is invited error of which a defendant cannot complain upon appeal.<sup>184</sup>

The curative process likewise is aided if defendant fails to take the stand. The People's evidence thus stands unimpeached; the sole remaining question then is its legal sufficiency. Defendant being under a duty to speak, his failure to do so necessarily greatly influences appellate courts.<sup>185</sup>

If, either through the inadvertence or incompetency of his counsel, defendant fails to object to the introduction of such erroneous testimony, or fails immediately thereafter to move to strike such testimony, he cannot be heard to complain on appeal. Such a matter of necessity, must be presented first to the trial court for its ruling.<sup>186</sup>

In many instances, the erroneously admitted evidence is cumulative, that is to say, other evidence on the same point has already been introduced. In such a situation, the evidence properly before the jury is said to control its judgment. How fallacious this can be is demonstrated by a close examination of some of the cases where the erroneously introduced cumulative

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<sup>181</sup> *People v. Adams*, 76 Cal.App. 178, 244 Pac. 106 (1926).

<sup>182</sup> *People v. Hudson*, 86 Cal.App. 497, 260 Pac. 887 (1927).

<sup>183</sup> *People v. Baylor*, 47 Cal.App.2d 34, 117 P.2d 425 (1941). See *People v. Darcy*, 101 Cal. App.2d 665, 226 P.2d 53 (1951).

<sup>184</sup> *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29 (1953); *People v. Willmurth*, 77 Cal. App.2d 605, 176 P.2d 102 (1947); *People v. Triplett*, 70 Cal.App.2d 534, 161 P.2d 397 (1945); *People v. James*, 40 Cal.App.2d 740, 105 P.2d 947 (1940); *People v. Smith*, 26 Cal.App.2d 189, 79 P.2d 155 (1938); *People v. Powers*, 23 Cal.App. 447, 138 Pac. 373 (1913); *People v. Kizer*, 22 Cal.App. 10, 133 Pac. 516 (1913).

<sup>185</sup> *People v. Zatzke*, 33 Cal.2d 480, 202 P.2d 1009 (1949); *People v. Watts*, 198 Cal. 776, 247 Pac. 884 (1926); *People v. Willmurth*, 77 Cal.App.2d 605, 176 P.2d 102 (1947); *People v. Yant*, 26 Cal.App.2d 725, 80 P.2d 506 (1938); *People v. Hawley*, 106 Cal.App. 216, 289 Pac. 215 (1930); *People v. Dial*, 28 Cal.App. 704, 153 Pac. 970 (1915).

<sup>186</sup> *People v. Labarbera*, 89 Cal.App.2d 639, 201 P.2d 584 (1949); *People v. Manes*, 42 Cal. App.2d 262, 108 P.2d 683 (1940); *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543 (1932); *People v. Covington*, 121 Cal.App. 61, 8 P.2d 490 (1932); *People v. Fong Sing*, 38 Cal.App. 253, 175 Pac. 911 (1918).

evidence would shock a juror's sensibilities far more than that which previously had been lawfully introduced.<sup>187</sup>

Juries can be lenient. A judgment and conviction of manslaughter, where second degree murder would have been proper from an examination of the record, can likewise cure errors which arise from the erroneous admission of evidence.<sup>188</sup>

The claimed error may be said not to affect a defendant's "substantial rights." This obtuse statement can apply to practically every type of error if a court wishes to use this language. Basically, however, application of this principal is reserved to situations where the claimed error is trivial.<sup>189</sup>

*People v. Sellas*<sup>190</sup> and *People v. Masolini*<sup>191</sup> exemplify the situation which arises where defendant's story is inherently devoid of truth and unworthy of belief. While appellate courts say they do not pass upon credibility of witnesses, obviously they do under the circumstances previously explained.

Occasionally a defendant upon cross-examination will volunteer information about himself or the case. As with the carrot in front of the donkey's nose, the temptation is too great for the district attorney to resist. Quickly seizing the opportunity, he moves in and questions defendant about matters which are neither relevant nor material to the charge or to the trial. Having invited the error by his answer, defendant may not now complain.<sup>192</sup>

Prompt objection to the attempted inclusion in the trial record of in-

<sup>187</sup> See, e.g., *People v. Fox*, 126 Cal.App.2d 560, 272 P.2d 832 (1954); *People v. Perkins*, 75 Cal.App.2d 875, 171 P.2d 919 (1946); *People v. James*, 40 Cal.App.2d 740, 105 P.2d 947 (1940); *People v. Dunn*, 40 Cal.App.2d 6, 104 P.2d 119 (1940); *People v. Watson*, 35 Cal. App.2d 587, 96 P.2d 374 (1939); *People v. Roberts*, 85 Cal.App. 697, 259 Pac. 1009 (1927); *People v. Stewart*, 68 Cal.App. 621, 230 Pac. 221 (1924); *People v. Thompson*, 68 Cal.App. 487, 229 Pac. 896 (1924); *People v. Gonzales*, 66 Cal.App. 646, 226 Pac. 946 (1924); *People v. Wagner*, 65 Cal.App. 704, 225 Pac. 464 (1924); *People v. Wilson*, 61 Cal.App. 611, 215 Pac. 565 (1923); *People v. Ahern*, 56 Cal.App. 572, 206 Pac. 93 (1922).

<sup>188</sup> *People v. Doetschman*, 69 Cal.App.2d 486, 159 P.2d 418 (1945); *People v. Gray*, 52 Cal. App.2d 620, 127 P.2d 72 (1942); *People v. Petrille*, 2 Cal.App.2d 281, 37 P.2d 749 (1934); *People v. Loomis*, 86 Cal.App. 768, 261 Pac. 512 (1927).

<sup>189</sup> *People v. Hughes*, 123 Cal.App.2d 767, 267 P.2d 376 (1954); *People v. Darnell*, 97 Cal. App.2d 630, 218 P.2d 172 (1950); *People v. Rennert*, 95 Cal.App.2d 381, 212 P.2d 525 (1949); *People v. Torrillo*, 60 Cal.App.2d 755, 141 P.2d 472 (1943); *People v. Holquin*, 48 Cal.App.2d 551, 120 P.2d 71 (1941); *People v. Dutton*, 41 Cal.App. 2d 866, 107 P.2d 937 (1940); *People v. Carter*, 130 Cal.App. 95, 19 P.2d 843 (1933); *People v. Albritton*, 110 Cal.App. 188, 294 Pac. 76 (1930); *People v. Hakam*, 99 Cal.App. 147, 277 Pac. 870 (1929); *People v. Morales*, 91 Cal. App. 731, 267 Pac. 570 (1928); *People v. Schmidt*, 79 Cal.App. 413, 249 Pac. 832 (1926); *People v. Allen*, 37 Cal.App. 180, 174 Pac. 374 (1918).

<sup>190</sup> 114 Cal.App. 367, 300 Pac. 150 (1931).

<sup>191</sup> 107 Cal.App. 192, 290 Pac. 77 (1930).

<sup>192</sup> *People v. Mitman*, 122 Cal.App.2d 490, 265 P.2d 105 (1954); *People v. Pollack*, 25 Cal. App.2d 440, 77 P.2d 885 (1938); *People v. Jordan*, 24 Cal.App.2d 39, 74 P.2d 519 (1937); *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945 (1935); *People v. Masolini*, 107 Cal.App. 192, 290 Pac. 77 (1930).

admissible evidence, followed by a request that the court admonish the jury, is said to cure the error.<sup>193</sup>

The most hackneyed catch-all used by appellate courts is that if the erroneously admitted evidence is excluded, there is more than sufficient evidence to sustain the verdict and thus to affirm defendant's conviction. In other words, no jury could arrive at a verdict other than that which expresses defendant's guilt.<sup>194</sup>

Counsel for appellants are often lazy, careless or otherwise negligent in upholding their client's rights. They fail properly to prepare the record on appeal or may even fail to point out and specify to the appellate court the portions of the trial or clerk's transcript which relate to the claimed error. No court, under such circumstances, is compelled to do this job itself. Out of a desire to protect defendant's rights, many courts nevertheless will examine the entire record. Should the court not choose to do so, it may say to an appellant that his claim of error is not supported by any specification.<sup>195</sup>

Perhaps evidence is inadmissible and it is error to admit it at the time when it is first offered. Thereafter, something occurs, as, for example, when the defendant makes a general or partial denial, which permits the admission of that which was previously inadmissible. Such an occurrence cures the error.<sup>196</sup>

If during the prosecution's case in chief erroneously admitted evidence is received and, thereafter, defendant takes the stand in his own behalf and practically admits the commission of the crime of which he is convicted, he has cured the error by his own acts and declarations.<sup>197</sup>

Evidence is often admitted for a limited purpose. The court is not requested to, and, at the time of admission, fails to inform the jury of the

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<sup>193</sup> *People v. Sourisseau*, 62 Cal.App.2d 917, 145 P.2d 916 (1944); *People v. Collins*, 50 Cal. App.2d 281, 123 P.2d 43 (1942); *People v. Hernandez*, 47 Cal.App.2d 132, 117 P.2d 394 (1941); *People v. Haley*, 46 Cal.App.2d 618, 116 P.2d 498 (1941); *People v. Cotton*, 117 Cal.App. 469, 4 P.2d 247 (1931).

<sup>194</sup> *People v. Davis*, 43 Cal.2d 661, 276 P.2d 801 (1954); *People v. Costa*, 40 Cal.2d 160, 252 P.2d 1 (1953); *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18 (1946); *People v. Gormley*, 64 Cal.App.2d 336, 148 P.2d 687 (1944); *People v. Bateman*, 57 Cal.App.2d 585, 135 P.2d 192 (1943); *People v. Pruitt*, 55 Cal.App.2d 272, 130 P.2d 767 (1942); *People v. Curtis*, 36 Cal. App.2d 306, 98 P.2d 228 (1939); *People v. Dal Porto*, 17 Cal.App.2d 755, 62 P.2d 1061 (1936); *People v. Tiracorda*, 8 Cal.App.2d 517, 48 P.2d 116 (1935); *People v. Nahhas*, 121 Cal.App. 428, 9 P.2d 278 (1932); *People v. Hayes*, 72 Cal.App. 292, 237 Pac. 390 (1925); *People v. Wilson*, 61 Cal.App. 611, 215 Pac. 565 (1923); *People v. Spencer*, 58 Cal.App. 197, 208 Pac. 380 (1922); *People v. Ahern*, 56 Cal.App. 572, 206 Pac. 93 (1922).

<sup>195</sup> *People v. McNeil*, 27 Cal.App.2d 353, 81 P.2d 243 (1938); *People v. Nickell*, 22 Cal. App.2d 117, 70 P.2d 659 (1937); *People v. Epstein*, 21 Cal.App.2d 488, 69 P.2d 454 (1937).

<sup>196</sup> *People v. Downs*, 114 Cal.App.2d 758, 251 P.2d 369 (1952); *People v. Jordan*, 24 Cal. App.2d 39, 74 P.2d 519 (1937); *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945 (1935).

<sup>197</sup> *People v. Alexander*, 123 Cal.App.2d 918, 267 P.2d 883 (1954); *People v. Smith*, 26 Cal. App.2d 189, 79 P.2d 155 (1938); *People v. Foster*, 117 Cal.App. 439, 4 P.2d 173 (1931); *People v. Sanders*, 82 Cal.App. 778, 256 Pac. 251 (1927).

limited scope and significance to be attached to evidence of this type. Thereafter, however, if the court fully and completely informs the jury in its formal instructions on the subject, appellant may not claim prejudice thereby.<sup>198</sup>

Many appeals are frivolously taken for a variety of reasons. Trivial errors which do not substantially affect defendant's basic rights occur in long and heated trials. After a review of the evidence, the appellate court may feel that the defendant's guilt has been overwhelmingly demonstrated by the evidence. This subjective language is utilized to affirm judgments of conviction in many cases.<sup>199</sup>

Reference already has been made to Section 1848 of the Code of Civil Procedure relating to the binding effect upon a defendant of acts, declarations or omissions of third persons. Application of the section has given rise to a series of conflicting decisions. For example, if evidence is admitted against a defendant regarding the attempt of a co-defendant to bribe a public officer, such error denies to a defendant the due process of law.<sup>200</sup> Similarly, evidence regarding an assault upon a murder victim prior to his being killed, without showing defendant's participation therein, is reversible.<sup>201</sup> Evidence regarding actions of a co-defendant with relation to a gun without connecting defendant to such actions is prejudicial.<sup>202</sup> Other exam-

<sup>198</sup> *People v. Hernandez*, 47 Cal.App.2d 132, 117 P.2d 394 (1941); *People v. Yant*, 26 Cal. App.2d 725, 78 P.2d 1042 (1938).

<sup>199</sup> *People v. Mehaffey*, 32 Cal.2d 535, 197 P.2d 12 (1948); *People v. Leary*, 28 Cal.2d 740, 172 P.2d 41 (1946); *People v. Leary*, 28 Cal.2d 727, 172 P.2d 34 (1946); *People v. Wolff*, 182 Cal. 728, 190 Pac. 22 (1920); *People v. Lapara*, 181 Cal. 66, 183 Pac. 545 (1919); *People v. Loomis*, 170 Cal. 347, 149 Pac. 581 (1915); *People v. Weston*, 169 Cal. 393, 146 Pac. 871 (1915); *People v. Crawford*, 115 Cal.App.2d 838, 252 P.2d 963 (1953); *People v. Morris*, 110 Cal.App.2d 469, 243 P.2d 66 (1952); *People v. Darcy*, 101 Cal.App.2d 665, 226 P.2d 53 (1951); *People v. Hadley*, 84 Cal.App.2d 687, 191 P.2d 517 (1948); *People v. Savage*, 66 Cal.App.2d 237, 152 P.2d 240 (1944); *People v. Sourisseau*, 62 Cal.App.2d 917, 145 P.2d 916 (1944); *People v. Gray*, 52 Cal.App.2d 620, 127 P.2d 72 (1942); *People v. Pianezzi*, 42 Cal.App.2d 270, 108 P.2d 732 (1940); *People v. Chan Chaun*, 41 Cal.App.2d 586, 107 P.2d 455 (1940); *People v. Wilt*, 40 Cal. App.2d 124, 104 P.2d 387 (1940); *People v. Cowan*, 38 Cal.App.2d 231, 101 P.2d 125 (1940); *People v. Cooper*, 36 Cal.App.2d 6, 96 P.2d 1012 (1939); *People v. Henry*, 23 Cal.App.2d 155, 72 P.2d 915 (1937); *People v. Waters*, 19 Cal.App.2d 455, 65 P.2d 852 (1937); *People v. Wilson*, 19 Cal.App.2d 340, 65 P.2d 834 (1937); *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945 (1935); *People v. Voiler*, 2 Cal.App.2d 724, 38 P.2d 833 (1934); *People v. McBride*, 135 Cal. App. 522, 27 P.2d 776 (1933); *People v. Nahhas*, 121 Cal.App. 428, 9 P.2d 278 (1932); *People v. Foster*, 117 Cal.App. 439, 4 P.2d 173 (1931); *People v. Stefini*, 114 Cal.App. 530, 300 Pac. 112 (1931); *People v. Elliott*, 104 Cal.App. 107, 285 Pac. 401 (1930); *People v. Hakam*, 99 Cal. App. 147, 277 Pac. 870 (1929); *People v. Morales*, 91 Cal.App. 731, 267 Pac. 570 (1928); *People v. Cronevitch*, 86 Cal.App. 646, 261 Pac. 309 (1927); *People v. Avila*, 78 Cal.App. 415, 248 Pac. 693 (1926); *People v. Branch*, 77 Cal.App. 384, 246 Pac. 811 (1926); *People v. Hayes*, 72 Cal. App. 292, 237 Pac. 390 (1925); *People v. Gonzales*, 66 Cal.App. 646, 226 Pac. 946 (1924); *People v. Wagner*, 65 Cal.App. 704, 225 Pac. 464 (1924); *People v. Spencer*, 58 Cal.App. 197, 208 Pac. 380 (1922); *People v. Dunlop*, 27 Cal.App. 460, 150 Pac. 389 (1915).

<sup>200</sup> *People v. Gilliland*, 39 Cal.App.2d 250, 103 P.2d 179 (1940).

<sup>201</sup> *People v. Albertson*, 23 Cal.2d 550, 145 P.2d 7 (1944).

<sup>202</sup> *People v. Mullen*, 69 Cal.App. 548, 231 Pac. 588 (1924).

ples of similar prejudicial error include the admission of evidence that defendant's daughter carried on her work of divine healing during defendant's absence,<sup>203</sup> the admission of evidence of past acts of violence by others in a criminal syndicalism prosecution,<sup>204</sup> or the admission into evidence of an anonymous love letter without proof of its connection with defendant.<sup>205</sup>

However, if the total evidence is not closely balanced, if defendant fails to protect his rights, or if such evidence is merely cumulative, the prejudicial effect of admitting the acts of others not binding on defendant is minimized and convictions will be affirmed.<sup>206</sup>

Hearsay declarations by third parties which are admitted contrary to Section 1848 of the Code of Civil Procedure take several forms. For example, should a defendant be accused of the commission of a public offense and deny the accusation, it is error to admit against him the accusatory statement. Many cases have held the admission of such accusatory statements to be prejudicial, reversing defendant's conviction.<sup>207</sup> Because of the strength of the evidence against defendant or for some other curative reason, most cases hold the admission of a hearsay accusation to be non-prejudicial, therefore not constituting a miscarriage of justice.<sup>208</sup>

Invariably, the victim of a sexual assault complains to third persons about the indecencies to which he or she has been subjected. The fact that the victim makes a complaint is admissible. However, it is erroneous to admit the details or to name the aggressor. Whether the admission of such evidence is prejudicial depends upon the existence of curative factors which minimize the otherwise prejudicial nature of the error.<sup>209</sup>

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<sup>203</sup> *People v. Walker*, 69 Cal.App. 475, 231 Pac. 572 (1924).

<sup>204</sup> *People v. Erickson*, 66 Cal.App. 307, 226 Pac. 637 (1924).

<sup>205</sup> *People v. Lee*, 36 Cal.App. 323, 172 Pac. 158 (1918).

<sup>206</sup> *People v. Sykes*, 44 A.C. 190, 280 P.2d 769 (1955); *People v. Rennert*, 95 Cal.App.2d 381, 212 P.2d 525 (1949); *People v. Labarbera*, 89 Cal.App.2d 639, 201 P.2d 584 (1949); *People v. Cowan*, 38 Cal.App.2d 231, 101 P.2d 125 (1940); *People v. Cooper*, 36 Cal.App.2d 6, 96 P.2d 1012 (1939); *People v. Yant*, 26 Cal.App.2d 725, 78 P.2d 1042 (1938); *People v. Wilson*, 19 Cal.App.2d 340, 65 P.2d 834 (1937); *People v. Dal Porto*, 17 Cal.App.2d 755, 62 P.2d 1061 (1936); *People v. Stewart*, 68 Cal.App. 621, 230 Pac. 221 (1924); *People v. Thompson*, 68 Cal. App. 487, 229 Pac. 896 (1924).

<sup>207</sup> *People v. Bob*, 29 Cal.2d 321, 175 P.2d 12 (1946); *People v. Davis*, 210 Cal. 540, 293 Pac. 32 (1930); *People v. Goltra*, 115 Cal.App. 539, 2 P.2d 35 (1931); *People v. Avila*, 50 Cal. App. 228, 194 Pac. 768 (1920); *People v. Vogel*, 36 Cal.App. 216, 171 Pac. 978 (1918).

<sup>208</sup> *People v. Davis*, 43 Cal.2d 661, 276 P.2d 801 (1954); *People v. Leary*, 28 Cal.2d 740, 172 P.2d 41 (1946); *People v. Leary*, 28 Cal.2d 727, 172 P.2d 34 (1946); *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18 (1946); *People v. Lapara*, 181 Cal. 66, 183 Pac. 545 (1919); *People v. Morris*, 110 Cal.App.2d 469, 243 P.2d 66 (1952); *People v. Tiracorda*, 8 Cal.App.2d 517, 48 P.2d 116 (1935); *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543 (1932); *People v. Garrett*, 93 Cal.App. 77, 268 Pac. 1071 (1928); *People v. Little*, 85 Cal.App. 402, 259 Pac. 458 (1927); *People v. Smith*, 64 Cal.App. 344, 221 Pac. 405 (1923).

<sup>209</sup> *People v. Hubbell*, 54 Cal.App.2d 49, 128 P.2d 579 (1942); *People v. Prietz*, 32 Cal.App. 727, 164 Pac. 13 (1917). *Cf.* *People v. Sourisseau*, 62 Cal.App.2d 917, 145 P.2d 916 (1944);

Should a defendant be identified by his victims through so-called "mug" pictures prior to his arrest or identified in a police "show-up" conducted after his arrest, the declarations of identification made by his victims are inadmissible hearsay. One case holds that the admission of such evidence constitutes a miscarriage of justice.<sup>210</sup> All other cases which discuss the point have held the error to be non-prejudicial.<sup>211</sup>

Despite its obviously prejudicial character, many prosecutors offer, and trial courts permit, the introduction of evidence which gives the details of prior felony convictions suffered by a defendant. Such error may deny to a defendant his right to a fair trial,<sup>212</sup> may result in a miscarriage of justice<sup>213</sup> or may be error without causing a reversal, depending upon the condition of the evidence in the case or the presence of curative factors.<sup>214</sup>

Self-serving hearsay memoranda made by witnesses to refresh their recollections usually are inadmissible against a defendant who had nothing to do with their preparation. However, no cases have been found which hold the admission of such evidence to have been prejudicial.<sup>215</sup>

Testimony of witnesses taken at the preliminary hearing conducted before a committing magistrate may be introduced at the trial if a proper foundation is laid pursuant to Section 1870 of the Code of Civil Procedure, subdivision 8,<sup>216</sup> and should such prior testimony be admitted erroneously, it is not prejudicial.<sup>217</sup>

Section 1868 of the Code of Civil Procedure confines admissible evidence to the material allegations of the accusatory pleading unless inquiry is made into a collateral fact directly connectable with the issue in dispute

People v. Gutierrez, 126 Cal.App. 526, 14 P.2d 838 (1932); People v. Branch, 77 Cal.App. 384, 246 Pac. 811 (1926); People v. Dunlop, 27 Cal.App. 460, 150 Pac. 389 (1915).

<sup>210</sup> People v. Thorp, 104 Cal.App. 379, 285 Pac. 916 (1930).

<sup>211</sup> People v. Savage, 66 Cal.App.2d 237, 152 P.2d 240 (1944); People v. James, 40 Cal. App.2d 740, 105 P.2d 947 (1940); People v. Watson, 35 Cal.App.2d 587, 96 P.2d 374 (1939); People v. Covington, 121 Cal.App. 61, 8 P.2d 490 (1932); People v. Cotton, 117 Cal.App. 469, 4 P.2d 247 (1931).

<sup>212</sup> People v. Darcy, 101 Cal.App.2d 665, 226 P.2d 53 (1951).

<sup>213</sup> People v. Wynn, 44 Cal.App.2d 723, 112 P.2d 979 (1941).

<sup>214</sup> People v. Crawford, 115 Cal.App.2d 838, 252 P.2d 963 (1953); People v. Wilt, 40 Cal. App.2d 124, 104 P.2d 387 (1940); People v. Elliott, 104 Cal.App. 107, 285 Pac. 401 (1930).

<sup>215</sup> See, e.g., People v. Gray, 52 Cal.App.2d 620, 127 P.2d 72 (1942); People v. Dunn, 40 Cal.App.2d 6, 104 P.2d 119 (1940); People v. Curtis, 36 Cal.App.2d 306, 98 P.2d 228 (1939); People v. Smith, 26 Cal.App.2d 189, 79 P.2d 155 (1938); People v. Henry, 23 Cal. App.2d 155, 72 P.2d 915 (1937); People v. Wagner, 65 Cal.App. 704, 225 Pac. 464 (1924); People v. Ahern, 56 Cal.App. 572, 206 Pac. 93 (1922); People v. Allen, 37 Cal.App. 180, 174 Pac. 374 (1918).

<sup>216</sup> CAL. CODE CIV. PROC. § 1870: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: . . .

"8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter . . ."

<sup>217</sup> People v. Weston, 169 Cal. 393, 146 Pac. 871 (1915); People v. Brickman, 119 Cal. App.2d 253, 259 P.2d 917 (1953); People v. Hayes, 72 Cal.App. 292, 237 Pac. 390 (1925).



and essential to its determination. This section authorizes the introduction of evidence that a defendant has committed other similar crimes prior or subsequent to the charge on trial as a collateral fact essential to the determination of the case. Citing *People v. Albertson*,<sup>218</sup> Justice Traynor expressed the latest opinion upon this controversial subject in his dissenting opinion in *People v. Sykes*.<sup>219</sup>

Should the evidence show that defendant has committed crimes other than those charged, it is admissible if it tends to show: (1) consciousness of guilt; (2) existence of a criminal conspiracy; (3) a course of criminal conduct towards the victim; (4) common pattern, scheme or design; (5) modus operandi; (6) defendant's mental condition; (7) defendant's specific intent; (8) defendant's knowledge of facts essential to commit a crime; (9) defendant's malice; (10) defendant's motive; (11) defendant's negligence; (12) defendant's ownership or possession of an object connected with the commission of a crime; (13) when such other crime is inextricably intertwined with the offense charged as to be the part of the "res gestae"; and (14) other sex offenses.

Evidence of a specific crime other than that for which he is on trial, if inadmissible, may violate the due process section of Article I, Section 13 of the Constitution of California,<sup>220</sup> or prevent the defendant from having a fair trial,<sup>221</sup> or may result in a miscarriage of justice.<sup>222</sup>

However, the admission of the collateral evidence of other crimes may not be prejudicial if counter-balanced by any of the previously described curative processes.<sup>223</sup>

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<sup>218</sup> 23 Cal.2d 550, 145 P.2d 7 (1944).

<sup>219</sup> 44 A.C. 190, 197, 280 P.2d 769, 773 (1955), dissent by Justice Traynor as follows: "Although the rule with respect to the admission of evidence of crimes other than the one charged in a criminal prosecution has frequently been stated as one generally excluding evidence of other crimes subject to certain recognized exceptions, . . . it is now 'settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge.'"

<sup>220</sup> *People v. Braun*, 14 Cal.2d 1, 92 P.2d 402 (1939); *People v. Geibel*, 93 Cal.App.2d 147, 208 P.2d 743 (1949).

<sup>221</sup> *People v. Mahoney*, 201 Cal. 618, 258 Pac. 607 (1927); *People v. Baylor*, 47 Cal.App.2d 34, 117 P.2d 425 (1941); *People v. Hudson*, 86 Cal.App. 497, 260 Pac. 887 (1927); *People v. Johnson*, 63 Cal.App. 178, 218 Pac. 449 (1923).

<sup>222</sup> *People v. Albertson*, 23 Cal.2d 550, 145 P.2d 7 (1944); *People v. Van Cleave*, 208 Cal. 295, 280 Pac. 983 (1929); *People v. Coan*, 85 Cal.App. 580, 259 Pac. 998 (1927); *People v. Wyett*, 49 Cal.App. 289, 193 Pac. 153 (1920); *People v. MacPhee*, 26 Cal.App. 218, 146 Pac. 522 (1914).

<sup>223</sup> (1) Other sex acts: *People v. Zatzke*, 33 Cal.2d 480, 202 P.2d 1009 (1949); *People v. Jordan*, 24 Cal.App.2d 39, 74 P.2d 519 (1937); *People v. Foster*, 117 Cal.App. 439, 4 P.2d 173 (1931); *People v. Cassidy*, 86 Cal.App. 45, 260 Pac. 313 (1927).

(2) Other assaults: *People v. Hughes*, 123 Cal.App.2d 767, 267 P.2d 376 (1954); *People v. Wilson*, 61 Cal.App. 611, 215 Pac. 565 (1923).

(3) Other thefts: *People v. Gormley*, 64 Cal.App.2d 336, 148 P.2d 687 (1944); *People v.*

Evidence of the commission of other crimes by a defendant may be introduced into the trial proceedings if a defendant offers evidence as to his good character. The district attorney, when cross-examining his character witnesses, may ask whether the witness' opinion of his character, or knowledge thereof, would be the same if the witness knew that he had committed other acts which exhibit moral turpitude. No case holds the erroneous admission of such evidence to be prejudicial or to result in a miscarriage of justice.<sup>224</sup>

Paraphernalia used by criminals, but unconnected with the crime upon which defendant is tried, may be erroneously admitted. No case has been found where the admission of such paraphernalia has been held to cause miscarriage of justice.<sup>225</sup>

Should a defendant take the witness stand and testify in his own behalf, additional complications ensue. The scope of his cross-examination is limited by Sections 2048<sup>226</sup> and 2065 of the Code of Civil Procedure.<sup>227</sup>

The district attorney may examine either the defendant or witnesses for the defendant about matters unconnected with the crime at issue, or defendant's participation therein but relating to matters which are purely

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Nahhas, 121 Cal.App. 428, 9 P.2d 278 (1932); *People v. Gorman*, 94 Cal.App. 397, 271 Pac. 361 (1928).

(4) Other sales or possession: *People v. Masolini*, 107 Cal.App. 192, 290 Pac. 77 (1930); *People v. Avila*, 78 Cal.App. 415, 248 Pac. 693 (1926); *People v. Dial*, 28 Cal.App. 704, 153 Pac. 970 (1915).

(5) Miscellaneous offenses: *People v. Costa*, 40 Cal.2d 160, 252 P.2d 1 (1953); *People v. Mitman*, 122 Cal.App.2d 490, 265 P.2d 105 (1954); *People v. McCarthy*, 88 Cal.App.2d 883, 200 P.2d 69 (1948); *People v. Stefani*, 114 Cal.App. 530, 300 Pac. 112 (1931); *People v. Hakam*, 99 Cal.App. 147, 277 Pac. 870 (1929); *People v. Wilson*, 61 Cal.App. 611, 215 Pac. 565 (1923); *People v. Fong Sing*, 38 Cal.App. 253, 175 Pac. 911 (1918); *People v. Kizer*, 22 Cal.App. 10, 133 Pac. 516 (1913).

<sup>224</sup> See, e.g., *People v. Beltran*, 94 Cal.App.2d 197, 210 P.2d 238 (1949); *People v. Hernandez*, 47 Cal.App.2d 132, 117 P.2d 394 (1941); *People v. Haley*, 46 Cal.App.2d 618, 116 P.2d 498 (1941).

<sup>225</sup> See, e.g., *People v. Downs*, 114 Cal.App.2d 758, 251 P.2d 369 (1952); *People v. Pianezzi*, 42 Cal.App.2d 265, 108 P.2d 732 (1940); *People v. McBride*, 135 Cal.App. 522, 27 P.2d 776 (1933); *People v. Gonzales*, 66 Cal.App. 646, 226 Pac. 946 (1924). *Semble contra*, *People v. Doetschman*, 69 Cal.App.2d 486, 159 P.2d 418 (1945).

<sup>226</sup> CAL. CODE CIV. PROC. § 2048: "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a directed examination."

<sup>227</sup> CAL. CODE CIV. PROC. § 2065: "A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed."

derogatory to the defendant. The admission of such evidence may constitute denial of due process,<sup>228</sup> may result in a miscarriage of justice<sup>229</sup> or may not be considered prejudicial because of factors which are said to cure the error.<sup>230</sup>

Other examples of cross-examination which exceeded defendant's direct examination but are not reversible therefor are *People v. Roberts*<sup>231</sup> and *People v. Merritt*.<sup>232</sup>

Expert testimony is provided for in Section 1870 of the Code of Civil Procedure, Subdivision 9.<sup>233</sup> Its scope is regulated by section 1872.<sup>234</sup>

Reversible error has occurred if an expert gives opinion testimony upon improper subjects or is permitted to give an opinion that invades the function of the jury to determine the ultimate facts.<sup>235</sup> Other cases have held that such expressions of opinion are not prejudicial if otherwise cured.<sup>236</sup>

Evidence that a defendant on other occasions has used aliases, while normally inadmissible, has not been held sufficiently grave to warrant reversal of his conviction.<sup>237</sup>

Should the testimony of the people's witnesses upon cross-examination reveal that a confession was obtained from defendant by threats, such erroneously admitted evidence constitutes a miscarriage of justice.<sup>238</sup>

<sup>228</sup> *People v. Adams*, 76 Cal.App. 188, 244 Pac. 114 (1926).

<sup>229</sup> *People v. Fleming*, 166 Cal. 357, 136 Pac. 291 (1913); *accord*, *People v. Berg*, 96 Cal. App. 430, 274 Pac. 433 (1929).

<sup>230</sup> *People v. Darnell*, 97 Cal.App.2d 630, 218 P.2d 172 (1950); *People v. Wilmurth*, 77 Cal. App.2d 605, 176 P.2d 102 (1947); *People v. Triplett*, 70 Cal.App.2d 534, 161 P.2d 397 (1945); *People v. Collins*, 50 Cal.App. 2d 281, 123 P.2d 43 (1942); *People v. Manes*, 42 Cal.App.2d 262, 108 P.2d 683 (1940); *People v. Dutton*, 41 Cal.App.2d 866, 107 P.2d 937 (1940); *People v. Waters*, 19 Cal.App.2d 455, 65 P.2d 852 (1937); *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945 (1935); *People v. Loomis*, 86 Cal.App. 768, 261 Pac. 512 (1927).

<sup>231</sup> 85 Cal.App. 697, 259 Pac. 1009 (1927).

<sup>232</sup> 18 Cal.App. 58, 122 Pac. 839 (1912).

<sup>233</sup> CAL. CODE CIV. PROC. § 1870(9): "The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein."

<sup>234</sup> CAL. CODE CIV. PROC. § 1872: "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel."

<sup>235</sup> *People v. Castillo*, 5 Cal.App.2d 194, 42 P.2d 682 (1935); *People v. Crossan*, 87 Cal. App. 5, 261 Pac. 531 (1927); *People v. Salaz*, 66 Cal.App. 173, 225 Pac. 777 (1924).

<sup>236</sup> *People v. Kobey*, 105 Cal.App.2d 548, 234 P.2d 251 (1951); *People v. Bateman*, 57 Cal. App.2d 585, 135 P.2d 192 (1943); *People v. Pruitt*, 55 Cal.App.2d 272, 130 P.2d 767 (1942). *Cf.* *People v. Perkins*, 75 Cal.App.2d 875, 171 P.2d 919 (1946).

<sup>237</sup> *People v. Hawley*, 106 Cal.App. 216, 289 Pac. 215 (1930); *People v. Powers*, 23 Cal. App. 447, 138 Pac. 373 (1913).

<sup>238</sup> *People v. Mellus*, 134 Cal.App. 219, 25 P.2d 237 (1933).

Sections 1847,<sup>239</sup> 2051<sup>240</sup> and 2052 of the Code of Civil Procedure<sup>241</sup> govern impeachment of witnesses.

Improper impeachment may constitute a miscarriage of justice<sup>242</sup> or may be harmless and non-prejudicial error, depending upon the facts of the case or other curative factors.<sup>243</sup>

Under conditions described in Section 2049 of the Code of Civil Procedure,<sup>244</sup> the district attorney may proceed to impeach his own witness. Should he use improper procedure or exceed legally permissible limits, reversible error and a miscarriage of justice may occur.<sup>245</sup> Under similar circumstances, no prejudice occurred in *People v. Sykes*<sup>246</sup> or *People v. Spencer*.<sup>247</sup>

#### EXCLUSION OF EVIDENCE ERRORS

Errors which arise from the improper exclusion of evidence favorable to the defendant have their genesis in the same sections of the Code of Civil Procedure as errors which relate to the admission of evidence. In the former example, defendant complains of omission. In the latter instance, he protests its admission.

Two opinions, both dissents, discuss whether a conviction should be set aside and reversed for absence of due process when evidence properly admissible in defendant's favor was wrongfully excluded from consideration

<sup>239</sup> CAL. CODE CIV. PROC. § 1847: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

<sup>240</sup> CAL. CODE CIV. PROC. § 2051: "A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation."

<sup>241</sup> CAL. CODE CIV. PROC. § 2052: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

<sup>242</sup> *People v. Hamilton*, 33 Cal.2d 45, 198 P.2d 873 (1948); *People v. Washburn*, 104 Cal. App. 662, 286 Pac. 711 (1930).

<sup>243</sup> *People v. Albritton*, 110 Cal.App. 188, 294 Pac. 76 (1930).

<sup>244</sup> CAL. CODE CIV. PROC. § 2049: "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two."

<sup>245</sup> *People v. Newson*, 37 Cal.2d 34, 230 P.2d 618 (1951); *People v. Flores*, 37 Cal.App.2d 282, 99 P.2d 326 (1940).

<sup>246</sup> 44 A.C. 190, 280 P.2d 769 (1955).

<sup>247</sup> 58 Cal.App. 197, 208 Pac. 380 (1922). 7

by the jury. They are associated cases and arise from the same factual situation. The defendant, charged with violation of Section 4500 of the Penal Code, assault by a life-sentenced prisoner, sought to introduce psychiatric evidence regarding his mental condition at the time of the offense. Justice Edmonds in *In re Wells*<sup>248</sup> and *People v. Wells*<sup>249</sup> was of the opinion that refusal to admit such evidence constituted a denial of due process of law. Justices Traynor and Carter concurred. The majority of the supreme court felt constrained to affirm Wells' conviction because of the great weight of the evidence against him and because the evidence sought to be introduced and wrongfully excluded did not go to an issue upon which the evidence was deemed "close".

Many appellate court opinions discuss why the erroneous exclusion of evidence was not prejudicial. Appellant may abandon his attempt to introduce evidence, thus acquiescing in the erroneous ruling of the trial court. Illustrative of this proposition is *People v. Letorneau*.<sup>250</sup>

A defendant may proffer evidence in mitigation of the charged crime calculated to reduce it in degree as, for example, from murder to manslaughter. Although such evidence is wrongfully excluded by the trial court, the error is cured by defendant's conviction of the lesser crime, as in *People v. Conte*.<sup>251</sup>

The subject upon which the excluded evidence was proffered may have been too insignificant to warrant reversal;<sup>252</sup> defendant may have practically admitted the crime;<sup>253</sup> the trial court may have restricted prosecution and defense alike;<sup>254</sup> wide latitude may have been given to defendant upon cross-examination in other particulars;<sup>255</sup> counsel for defendant may have failed to make an offer of proof so that the trial court could properly rule upon admissibility;<sup>256</sup> appellant's brief may have failed to specify the particular errors of exclusion relied upon;<sup>257</sup> the issue upon which defendant originally proffered evidence which was erroneously excluded by the trial court may have become moot because defendant failed to introduce other evidence on the point;<sup>258</sup> or the proffered evidence, being of a negative character, may have been entirely too speculative.<sup>259</sup>

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<sup>248</sup> 35 Cal.2d 889, 221 P.2d 947 (1950).

<sup>249</sup> 33 Cal.2d 330, 202 P.2d 53 (1949).

<sup>250</sup> 34 Cal.2d 478, 211 P.2d 865 (1949).

<sup>251</sup> 17 Cal.App. 771, 122 Pac. 450 (1912).

<sup>252</sup> *People v. Martinez*, 57 Cal.App. 711, 208 Pac. 170 (1922).

<sup>253</sup> *People v. Dyer*, 11 Cal.2d 317, 79 P.2d 1071 (1938).

<sup>254</sup> *Ibid.*

<sup>255</sup> *People v. Mazzurco*, 49 Cal.App. 275, 193 Pac. 164 (1920).

<sup>256</sup> *People v. Burnette*, 39 Cal.App.2d 215, 102 P.2d 799 (1940).

<sup>257</sup> *Ibid.*

<sup>258</sup> *People v. Watts*, 198 Cal. 776, 247 Pac. 884 (1926).

<sup>259</sup> *People v. Misener*, 115 Cal.App.2d 63, 251 P.2d 683 (1952); *People v. Voiler*, 2 Cal. App.2d 724, 38 P.2d 833 (1934); *People v. Kausen*, 133 Cal.App. 327, 23 P.2d 1047 (1933);

The trial court's erroneous exclusion of evidence may be cured in another way. If other evidence on the same point has previously been admitted, appellate courts reason that since that which was rejected is only cumulative, an appellant could not possibly be prejudiced.<sup>200</sup>

If defendant's appeal is frivolous, and if the evidence demonstrates his guilt, the courts say that a defendant could have suffered no prejudice by the erroneous exclusion of evidence offered by him. In the words of Section 475 of the Code of Civil Procedure, he could not have "sustained and suffered substantial injury." Many cases illustrate this proposition.<sup>201</sup>

Section 1850 of the Code of Civil Procedure, as the basis for the so-called *res gestae* rule, permits evidence of spontaneous declarations, acts or omissions which form an integral part of an entire transaction when the transaction is disputed. Accordingly, statements made by a defendant to third persons prior to the commission of an offense as to his motives, intent and state of mind are admissible. To exclude such evidence with reference to motive has been held prejudicial resulting in a miscarriage of justice.<sup>202</sup> To exclude similar evidence with reference to defendant's intent may also be prejudicial.<sup>203</sup> However, failure to admit declarations made by a defendant to third persons has been held not to be prejudicial because it was cumulative.<sup>204</sup>

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People v. Foster, 79 Cal.App. 328, 249 Pac. 231 (1926); People v. Goulding, 60 Cal.App. 542, 213 Pac. 277 (1923).

<sup>200</sup> People v. Pugh, 76 Cal.App.2d 598, 173 P.2d 320 (1946); People v. Young, 70 Cal. App.2d 28, 160 P.2d 132 (1945); People v. Rosa, 10 Cal.App.2d 668, 52 P.2d 542 (1935); People v. Malone, 117 Cal.App. 629, 4 P.2d 287 (1931); People v. Derrick, 85 Cal.App. 406, 259 Pac. 481 (1927); People v. Morhar, 78 Cal.App. 380, 248 Pac. 975 (1926); People v. Stennett, 51 Cal.App. 370, 197 Pac. 372 (1921); People v. Fong Sing, 38 Cal.App. 253, 175 Pac. 911 (1918); People v. Ho Kim You, 24 Cal.App. 451, 141 Pac. 950 (1914).

<sup>201</sup> *In re* Wells, 35 Cal.2d 889, 221 P.2d 947 (1950); People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949); People v. Brophy, 122 Cal.App.2d 638, 265 P.2d 593 (1954); People v. Goldberg, 110 Cal.App.2d 17, 242 P.2d 116 (1952); People v. Merrill, 104 Cal.App.2d 257, 231 P.2d 573 (1951); People v. Curry, 97 Cal.App.2d 537, 218 P.2d 153 (1950); People v. Vollman, 73 Cal. App.2d 769, 167 P.2d 545 (1946); People v. Soules, 41 Cal.App.2d 298, 106 P.2d 639 (1940); People v. Taylor, 31 Cal.App.2d 723, 88 P.2d 942 (1939); People v. Jordan, 24 Cal.App.2d 39, 74 P.2d 519 (1937); People v. Rosa, 10 Cal.App.2d 668, 52 P.2d 542 (1935); People v. Fellows, 139 Cal.App. 337, 34 P.2d 177 (1934); People v. Eli, 131 Cal.App. 482, 21 P.2d 654 (1933); People v. Meadows, 108 Cal.App. 67, 291 Pac. 226 (1930); People v. Bennett, 79 Cal.App. 76, 249 Pac. 20 (1926); People v. Neal, 75 Cal.App. 428, 243 Pac. 52 (1925); People v. Remington, 74 Cal.App. 371, 240 Pac. 526 (1925); People v. Sprado, 72 Cal.App. 582, 237 Pac. 1087 (1925); People v. Burch, 46 Cal.App. 391, 189 Pac. 716 (1920); People v. Flood, 41 Cal.App. 373, 182 Pac. 766 (1919); People v. Kilfoil, 27 Cal.App. 29, 148 Pac. 812 (1915); People v. Haydon, 18 Cal.App. 543, 123 Pac. 1102 (1912).

<sup>202</sup> People v. Geibel, 93 Cal.App.2d 147, 208 P.2d 743 (1949); People v. Chenault, 74 Cal. App.2d 487, 169 P.2d 29 (1946); People v. Taber, 13 Cal.App.2d 27, 55 P.2d 1189 (1936); People v. Mackey, 58 Cal.App. 123, 208 Pac. 135 (1922).

<sup>203</sup> People v. Miles, 37 Cal.App.2d 373, 99 P.2d 551 (1940).

<sup>204</sup> People v. Fong Sing, 38 Cal.App. 253, 175 Pac. 911 (1918).

Section 1854 of the Code of Civil Procedure is authority for the admission of acts, declarations, conversations or writings favorable to a defendant where prosecution witnesses have testified to portions of a transaction. Thus, it has been held prejudicial to exclude evidence of a conversation between decedent and a third person, offered to show defendant's pecuniary interest and his lack of motive for the crime.<sup>265</sup> Other cases recognize the same principle but refuse to reverse a defendant's conviction because of other factors which have been previously referred to under the general descriptive term of "curative process."<sup>266</sup>

Impeachment procedures prescribed in Sections 1847, 2051 and 2052 of the Code of Civil Procedure, if not properly understood, cause evidence to be erroneously excluded which may prejudice a defendant and require reversal of his conviction. If defendant is precluded from developing inconsistent statements or acts made by a prosecution witness which differ from testimony given at the trial, prejudicial error occurs.<sup>267</sup> Such error may be cured, however, so as not to be prejudicial to a defendant.<sup>268</sup>

Proper impeachment permits a defendant to show that the prosecution witnesses are biased and prejudiced against him or have a motive for or interest in testifying as they do. All cases affirmed defendant's conviction, although each opinion recognized that defendant's right of cross-examination had been unduly restricted.<sup>269</sup>

Many crimes require a specific intent to commit them. Where defendant attempted to negate other evidence of his specific intent by showing that he was too intoxicated,<sup>270</sup> or that he was the victim of a mental illness which

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<sup>265</sup> *People v. Weatherford*, 27 Cal.2d 401, 164 P.2d 753 (1945).

<sup>266</sup> *People v. Merrill*, 104 Cal.App.2d 257, 231 P.2d 573 (1951); *People v. Pugh*, 76 Cal. App.2d 598, 173 P.2d 320 (1946); *People v. Berg*, 96 Cal.App. 430, 274 Pac. 433 (1929); *People v. Foster*, 79 Cal.App. 328, 249 Pac. 231 (1926); *People v. Morhar*, 78 Cal.App. 380, 248 Pac. 975 (1926); *People v. Sprado*, 72 Cal.App. 582, 237 Pac. 1087 (1925).

<sup>267</sup> *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *People v. Whitehead*, 113 Cal. App.2d 43, 247 P.2d 717 (1952); *People v. Biescar*, 97 Cal.App. 205, 275 Pac. 851 (1929); *People v. Degnen*, 70 Cal.App. 567, 234 Pac. 129 (1925).

<sup>268</sup> *People v. Watts*, 198 Cal. 776, 247 Pac. 884 (1926); *People v. Misener*, 115 Cal.App.2d 63, 251 P.2d 683 (1952); *People v. Goldberg*, 110 Cal.App.2d 17, 242 P.2d 116 (1952); *People v. Vollman*, 73 Cal.App.2d 769, 167 P.2d 545 (1946); *People v. Young*, 70 Cal.App.2d 28, 160 P.2d 132 (1945); *People v. Taylor*, 31 Cal.App.2d 723, 88 P.2d 942 (1939); *People v. Neal*, 75 Cal.App. 428, 243 Pac. 52 (1925); *People v. Mazzurco*, 49 Cal.App. 275, 193 Pac. 164 (1920); *People v. Kilfoil*, 27 Cal.App. 29, 148 Pac. 812 (1915); *People v. Ho Kim You*, 24 Cal.App. 451, 141 Pac. 950 (1914); *People v. Haydon*, 18 Cal.App. 543, 123 Pac. 1102 (1912).

<sup>269</sup> *People v. Curry*, 97 Cal.App.2d 537, 218 P.2d 153 (1950); *People v. Jordan*, 24 Cal. App.2d 39, 74 P.2d 519 (1937); *People v. Meadows*, 108 Cal.App. 67, 291 Pac. 226 (1930); *People v. Bennett*, 79 Cal.App. 76, 249 Pac. 20 (1926); *People v. Burch*, 46 Cal.App. 391, 189 Pac. 716 (1920).

<sup>270</sup> *People v. Conte*, 17 Cal.App. 771, 122 Pac. 450 (1912).

precluded him from deliberating and forming the requisite specific intent,<sup>271</sup> the error was deemed non-prejudicial.

Character evidence is authorized in civil proceedings according to Section 2053 of the Code of Civil Procedure.<sup>272</sup> In criminal actions, character evidence is admitted to aid the presumption of innocence and to rebut incriminating evidence already offered by the People. Should defendant seek to admit evidence of the bad character of or a propensity for violence by a decedent in a homicide case or a prosecution witness who is the victim of an assault, such evidence is admissible under a theory of self-defense. On the issue of self-defense, if the evidence therefor is said to preponderate in defendant's favor, it is reversible error to exclude it.<sup>273</sup> However, although it is error to exclude it, the error may be cured.<sup>274</sup> Should a defense witness not know the reputation of a defendant this is not a ground for the exclusion of his character evidence, although some trial courts still are of that impression. Such error may be prejudicial<sup>275</sup> or not, depending upon the presence of curative factors.<sup>276</sup>

Defendant, under his plea of not guilty, is permitted to show that another person, in fact, committed the crime of which he is accused, although the exclusion of such proffered evidence may not be prejudicial.<sup>277</sup>

Should a trial court permit the jury to consider defendant's confession when the evidence clearly shows it to be the result of threats, force or promise of immunity, a miscarriage of justice occurs.<sup>278</sup>

#### MISCONDUCT OF THE COURT

Despite many safeguards, judges occasionally will assume the role of prosecutor or so disparage a defendant, his witnesses and his counsel as to indicate to the jury that the judge is convinced of the guilt of the defendant. To engage in such tactics is to deprive a defendant of his right to a fair trial

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<sup>271</sup> *People v. Letourneau*, 34 Cal.2d 478, 211 P.2d 865 (1949); *In re Wells*, 35 Cal.2d 889, 221 P.2d 947 (1950); *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1949).

<sup>272</sup> CAL. CODE CIV. PROC. § 2053: "Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character."

<sup>273</sup> *People v. Alpine*, 81 Cal.App. 456, 254 Pac. 281 (1927).

<sup>274</sup> *People v. Brophy*, 122 Cal.App.2d 638, 265 P.2d 593 (1954); *People v. Soules*, 41 Cal. App.2d 298, 106 P.2d 639 (1940).

<sup>275</sup> *People v. Castillo*, 5 Cal.App.2d 194, 42 P.2d 682 (1935).

<sup>276</sup> *People v. Derrick*, 85 Cal.App. 406, 259 Pac. 481 (1927); *People v. Stennett*, 51 Cal. App. 370, 197 Pac. 372 (1921). *Cf.* *People v. Jones*, 42 Cal.2d 219, 266 P.2d 38 (1954).

<sup>277</sup> *People v. Goulding*, 60 Cal.App. 542, 213 Pac. 277 (1923); *People v. Flood*, 41 Cal.App. 373, 182 Pac. 766 (1919).

<sup>278</sup> *People v. Crowl*, 28 Cal.App.2d 299, 82 P.2d 507 (1938); *People v. Columbus*, 49 Cal. App. 761, 194 Pac. 288 (1920). *Cf.* *People v. Voiler*, 2 Cal.App.2d 724, 38 P.2d 833 (1934); *People v. Eli*, 131 Cal.App. 482, 21 P.2d 654 (1933).



or the due process of the law.<sup>279</sup> Should the court improperly withdraw evidence favorable to the defendant from the jury's consideration, commenting upon the withdrawal in such a way as to deprive the defendant of having the jury consider evidence essential to his defense, his conviction is without due process.<sup>280</sup>

Though a judge engages in conduct normally prejudicial to a defendant's cause, such conduct may be cured by factors similar in character to those described in the sections on procedure, admission of evidence and exclusion of evidence. Should the evidence of defendant's guilt be conclusive or overwhelming,<sup>281</sup> or in the event that the jury would have reached the same conclusion in the absence of the otherwise prejudicial misconduct,<sup>282</sup> no reversal will be ordered by the appellate courts.

Appellant must affirmatively show prejudice to his cause resulting from the court's misconduct. In the event that he fails to demonstrate prejudice or injury, a reversal will not be ordered.<sup>283</sup>

During trial, defendant's counsel may so neglect his duties as to preclude consideration of the trial court's misconduct. At the time of its occurrence, counsel is under an affirmative duty to cite the court for misconduct. Failure to do so is said to cure the error.<sup>284</sup> Similarly, failure to object to the court's misconduct, or to augment the appellate court record so as to afford the appellate court an opportunity to examine the entire situation, precludes reversal.<sup>285</sup> Likewise, the court's misconduct is cured if defendant, at the time of sentence, admits his guilt.<sup>286</sup>

Improper remarks by the trial court directed against defendant which indicate disbelief and an opinion regarding the witnesses' credibility, or a statement by the court which would indicate to the trial jury the belief en-

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<sup>279</sup> *People v. Hooper*, 92 Cal.App.2d 524, 207 P.2d 117 (1949); *People v. Chenault*, 74 Cal. App.2d 487, 169 P.2d 29 (1946); *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943); *People v. Little*, 122 Cal.App. 275, 10 P.2d 171 (1932). *Cf.* *People v. O'Donnell*, 11 Cal.2d 666, 81 P.2d 939 (1938) (dissent by Edmonds, J.) and *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193 (1936).

<sup>280</sup> *People v. Mason*, 72 Cal.App.2d 699, 165 P.2d 481 (1946).

<sup>281</sup> *People v. O'Donnell*, 11 Cal.2d 666, 81 P.2d 939 (1938); *People v. Denton*, 78 Cal. App.2d 540, 178 P.2d 524 (1947); *People v. Richards*, 81 Cal.App. 30, 253 Pac. 162 (1927); *People v. Bennett*, 79 Cal.App. 76, 249 Pac. 20 (1926).

<sup>282</sup> *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193 (1936); *People v. Connors*, 77 Cal.App. 438, 246 Pac. 1072 (1926).

<sup>283</sup> *People v. Hoffman*, 199 Cal. 155, 248 Pac. 504 (1926); *People v. Flores*, 113 Cal.App.2d 813, 249 P.2d 66 (1952); *People v. Savage*, 66 Cal.App.2d 237, 152 P.2d 240 (1944); *People v. Pearson*, 41 Cal.App.2d 614, 107 P.2d 463 (1940); *People v. Busby*, 40 Cal.App.2d 193, 104 P.2d 531 (1940); *People v. North*, 81 Cal.App. 113, 252 Pac. 1063 (1927).

<sup>284</sup> *People v. Cohn*, 94 Cal.App.2d 630, 211 P.2d 375 (1949); *People v. Burnette*, 39 Cal. App.2d 215, 102 P.2d 799 (1940).

<sup>285</sup> *People v. Stewart*, 109 Cal.App.2d 334, 240 P.2d 704 (1952); *People v. Curtis*, 36 Cal. App.2d 306, 98 P.2d 228 (1939); *People v. Heuss*, 95 Cal.App. 680, 273 Pac. 583 (1928).

<sup>286</sup> *People v. Steinfeld*, 38 Cal.App.2d 280, 101 P.2d 89 (1940).

tertained by the court that the defendant was malingering, disparage the defendant in such a way as to result in a miscarriage of justice.<sup>287</sup>

However, as has previously been described, so prejudicial a statement as "I don't believe a word, you are lying" was held not to prejudice defendant or require reversal of his conviction.<sup>288</sup>

Should the trial court evince persistent open hostility towards defendant's counsel, a miscarriage of justice may occur from defendant's conviction, particularly where the evidence preponderates in defendant's favor.<sup>289</sup>

However, evidence of such persistent and flagrant hostility does not always result in a miscarriage of justice, particularly when the evidence against the defendant is overwhelming, or the defendant's rights have not been prejudiced thereby.<sup>290</sup>

Should defendant seek to impeach the credibility of a major prosecution witness, a statement by the court that he could find nothing in the witness' prior testimony upon which to impeach him is improper comment upon the veracity of a witness and may cause reversal of a defendant's conviction.<sup>291</sup> It is doubtful whether the cited case has present validity since article VI, section 19 was added to the Constitution of the State of California in 1934.<sup>292</sup>

Many trial courts express opinions regarding evidence and witnesses. In so doing the court may trespass upon the trial jury's function, thereby indicating to the jury the court's opinion as to the guilt of the defendant. Such expression of opinion, as has been previously set forth, may deny to a defendant the due process of the law, or result in an unfair trial even if defendant failed to object or cite the court for such misconduct.<sup>293</sup>

A miscarriage of justice requiring reversal of defendant's conviction may follow from some indication of belief of defendant's guilt by the trial court.<sup>294</sup> However, less persistent or flagrant misconduct may not be taken

<sup>287</sup> *People v. Patubo*, 9 Cal.2d 537, 71 P.2d 270 (1937); *People v. McNeer*, 8 Cal.App.2d 676, 47 P.2d 813 (1935); *People v. Sheffield*, 108 Cal.App. 721, 293 Pac. 72 (1930).

<sup>288</sup> *People v. Steinfeld*, 38 Cal.App.2d 280, 101 P.2d 89 (1940).

<sup>289</sup> *People v. Reese*, 136 Cal.App. 657, 29 P.2d 450 (1934); *People v. Orosco*, 73 Cal.App. 580, 239 Pac. 82 (1925); *People v. Nichols*, 69 Cal.App. 214, 230 Pac. 997 (1924).

<sup>290</sup> *People v. Denton*, 78 Cal.App.2d 540, 178 P.2d 524 (1947); *People v. Savage*, 66 Cal. App.2d 237, 152 P.2d 240 (1944); *People v. North*, 81 Cal.App. 113, 252 Pac. 1063 (1927); *People v. Bennett*, 79 Cal.App. 76, 249 Pac. 20 (1926); *People v. Svendsen*, 25 Cal.App. 1, 142 Pac. 861 (1914).

<sup>291</sup> *People v. Vogel*, 36 Cal.App. 216, 171 Pac. 978 (1918).

<sup>292</sup> CAL. CONST. art. VI, § 19: "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

<sup>293</sup> *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943).

<sup>294</sup> *People v. Clark*, 59 Cal.App.2d 760, 140 P.2d 440 (1943). *Accord*, *People v. Pokrajac*, 206 Cal. 259, 274 Pac. 63 (1929).

advantage of by appellant unless he shall have timely objected to such misconduct.<sup>295</sup>

Should the trial court actively question defense witnesses in such a manner as to assume the role of prosecuting attorney, such misconduct may be sufficiently gross to deny the defendant his right to a fair trial.<sup>296</sup> Such activity may constitute a miscarriage of justice if sufficiently flagrant and protracted,<sup>297</sup> or may not be sufficiently prejudicial to warrant reversal in the event that the evidence of defendant's guilt is overwhelming.<sup>298</sup>

Should the jurors' deliberations become protracted, the trial court may inquire into their standing. It is prejudicial coercion and a ground for reversal if the trial court urges agreement and a verdict after the court has inquired as to their status numerically and learned that the jury stood 10 to 2 for a conviction.<sup>299</sup>

#### MISCONDUCT OF THE DISTRICT ATTORNEY

Because prosecutors occasionally forget their duties and are moved to act by motives and considerations which violate their public responsibilities, appellate courts must continually warn, and occasionally reverse convictions, to prevent such excesses and abuses. Such abuses and excesses may deny to the defendant his right to a fair trial and result in his conviction without due process of law. As an example, should the prosecutor present in court defendant's brother, who was not charged with commission of the offense, for identification by the complaining witness, the victim of a robbery, in an attempt to bolster a weak identification of defendant by the victim, such conduct violates procedural due process even if the evidence against defendant is otherwise clear and convincing and he fails to take the stand to testify in his own behalf.<sup>300</sup> Should the district attorney argue to the jury that he has personal knowledge of defendant's guilt,<sup>301</sup> or allude to defendant's membership in a minority race,<sup>302</sup> such misconduct is completely unfair and is a denial of due process.

<sup>295</sup> *People v. O'Donnell*, 11 Cal.2d 666, 81 P.2d 939 (1938); *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193 (1936); *People v. Hoffman*, 199 Cal. 155, 248 Pac. 504 (1926); *People v. Stewart*, 109 Cal.App.2d 334, 240 P.2d 704 (1952). *Cf.* *People v. Pearson*, 41 Cal.App.2d 614, 107 P.2d 463 (1940); *People v. Busby*, 40 Cal.App.2d 193, 104 P.2d 531 (1940); *People v. Richards*, 81 Cal.App. 30, 253 Pac. 162 (1927); *People v. Bruno*, 49 Cal.App. 372, 193 Pac. 511 (1920).

<sup>296</sup> *People v. Little*, 122 Cal.App. 275, 10 P.2d 171 (1932).

<sup>297</sup> *People v. Long*, 63 Cal.App.2d 679, 147 P.2d 659 (1944).

<sup>298</sup> *People v. Flores*, 113 Cal.App.2d 813, 249 P.2d 66 (1952). *Accord*, *People v. Heuss*, 95 Cal.App. 680, 273 Pac. 583 (1928); *People v. Connors*, 77 Cal.App. 438, 246 Pac. 1072 (1926).

<sup>299</sup> *People v. Walker*, 93 Cal.App.2d 818, 209 P.2d 834 (1949); *People v. Talkington*, 8 Cal.App.2d 75, 47 P.2d 368 (1935). *Accord*, *People v. Cohn*, 94 Cal.App.2d 630, 211 P.2d 375 (1949).

<sup>300</sup> *People v. Robarge*, 111 Cal.App.2d 87, 244 P.2d 407 (1952).

<sup>301</sup> *People v. Adams*, 92 Cal.App. 6, 267 Pac. 906 (1928).

<sup>302</sup> *People v. Simon*, 80 Cal.App. 675, 252 Pac. 758 (1927).

If the district attorney improperly argues to the jury that the defendant and his counsel have rigged a defense by perjury, such misconduct may result in an unfair trial.<sup>303</sup>

One justice of the district court of appeal was of the opinion that defendant had been deprived of his right to a fair trial where the trial court failed to admonish the jury that the district attorney's opening statement was not evidence.<sup>304</sup>

Persistent improper questioning of defendant by the district attorney, despite numerous warnings by the trial court, may deprive defendant of the due process of the law.<sup>305</sup>

Curative factors may deprive otherwise prejudicial conduct by the district attorney of this effect. Where evidence of defendant's guilt is overwhelming or has been clearly, convincingly and conclusively demonstrated, otherwise flagrant misconduct of the district attorney will not constitute a miscarriage of justice necessitating reversal of a defendant's conviction.<sup>306</sup> Should the appellate court conclude from the evidence that no verdict other than "guilty" could have been reached by the jury, defendant's conviction will not be reversed although the district attorney is guilty of misconduct.<sup>307</sup>

When misconduct of the district attorney is one of the appellate court issues, the defendant may have moved the trial court for a new trial pursuant to Penal Code Sections 1181-1182 to enable that court to pass upon the issue of prejudice caused by the district attorney's misconduct. Should the trial court deny defendant's motion for a new trial, the appellate court will refuse to review the situation unless a clear and manifest abuse of discretion is shown.<sup>308</sup>

<sup>303</sup> *People v. Steelik*, 187 Cal. 361, 203 Pac. 78 (1921).

<sup>304</sup> *People v. Planagan*, 65 Cal.App.2d 371, 150 P.2d 927 (1944).

<sup>305</sup> *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943).

<sup>306</sup> *People v. Wolfe*, 42 Cal.2d 663, 268 P.2d 475 (1954); *People v. Fox*, 126 Cal.App.2d 560, 272 P.2d 832 (1954); *People v. Ochoa*, 118 Cal.App.2d 566, 258 P.2d 104 (1953); *People v. Kristy*, 111 Cal.App.2d 695, 245 P.2d 547 (1952); *People v. Green*, 96 Cal.App.2d 283, 215 P.2d 127 (1950); *People v. Hadley*, 84 Cal.App.2d 687, 191 P.2d 517 (1948); *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943); *People v. Shack*, 55 Cal.App.2d 16, 130 P.2d 197 (1942); *People v. Cooper*, 36 Cal.App.2d 6, 96 P.2d 1012 (1939); *People v. Johnson*, 11 Cal. App.2d 22, 52 P.2d 964 (1935); *People v. Meyer*, 118 Cal.App. 231, 4 P.2d 958 (1931); *People v. Pyler*, 91 Cal.App. 516, 267 Pac. 370 (1928); *People v. Clayton*, 89 Cal.App. 405, 264 Pac. 1105 (1928); *People v. Cassidy*, 86 Cal.App. 45, 260 Pac. 313 (1927); *People v. Piazza*, 84 Cal. App. 58, 257 Pac. 592 (1927); *People v. Collins*, 79 Cal.App. 127, 249 Pac. 60 (1926); *People v. Sprado*, 72 Cal.App. 582, 237 Pac. 1087 (1925); *People v. Vatek*, 71 Cal.App. 453, 236 Pac. 163 (1925); *People v. Simons*, 70 Cal.App. 143, 232 Pac. 772 (1924); *People v. Rollins*, 54 Cal. App. 609, 202 Pac. 475 (1921); *People v. Panagoit*, 25 Cal.App. 158, 143 Pac. 70 (1914); *People v. Bowman*, 24 Cal.App. 781, 142 Pac. 495 (1914); *People v. Kizer*, 22 Cal.App. 10, 133 Pac. 516 (1913).

<sup>307</sup> *People v. Young*, 25 Cal.App.2d 148, 77 P.2d 271 (1938); *People v. Hayes*, 72 Cal.App. 292, 237 Pac. 390 (1925).

<sup>308</sup> *People v. Macias*, 77 Cal.App.2d 71, 174 P.2d 895 (1946).

At the time the misconduct occurs, defendant's counsel is under a duty to cite the district attorney for his misconduct. If the trial court allows the citation, it usually admonishes the trial jury to disregard the misconduct. In the absence of a contrary showing by appellant, it is presumed that the trial jury has obeyed the judge's admonition and disregarded the misconduct. Thus, what would have been prejudicial misconduct now has been cured by the trial court.<sup>309</sup> The error may be too minor to warrant reversal of defendant's conviction.<sup>310</sup>

Since appellant is under the duty to show prejudice or injury, failure so to do will warrant affirmance of his conviction.<sup>311</sup>

As has been previously indicated, defendant's attorney must object, assign as misconduct and cite the district attorney at the time the error occurs, or be precluded from raising the issue on appeal unless the error is so gross as to amount to his denial of a fair trial or result in his conviction without due process of the law.<sup>312</sup>

Defendant, his witnesses or his attorney may cure the district attorney's misconduct. The error may be cured by the defendant himself if he or his

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<sup>309</sup> *People v. Laya*, 123 Cal.App.2d 7, 266 P.2d 157 (1954); *People v. Cohn*, 94 Cal.App.2d 630, 211 P.2d 375 (1949); *People v. Cooper*, 36 Cal.App.2d 6, 96 P.2d 1012 (1939); *People v. Jordan*, 24 Cal.App.2d 39, 74 P.2d 519 (1937); *People v. Ornelas*, 17 Cal.App.2d 608, 62 P.2d 608 (1936); *People v. McClelland*, 10 Cal.App.2d 616, 52 P.2d 604 (1935); *People v. Meyer*, 118 Cal.App. 231, 4 P.2d 958 (1931); *People v. Ridgeway*, 89 Cal.App. 615, 265 Pac. 349 (1928); *People v. Johnson*, 57 Cal.App. 271, 207 Pac. 257 (1922); *People v. Diamond*, 57 Cal.App. 162, 206 Pac. 1010 (1922); *People v. Saenz*, 50 Cal.App. 382, 195 Pac. 442 (1920); *People v. Dye*, 29 Cal.App. 169, 154 Pac. 875 (1915); *People v. Kilfoil*, 27 Cal.App. 29, 148 Pac. 812 (1915); *People v. Ho Kim You*, 24 Cal.App. 451, 141 Pac. 950 (1914).

<sup>310</sup> *People v. Pierson*, 69 Cal.App.2d 285, 159 P.2d 39 (1945); *People v. Black*, 45 Cal. App.2d 87, 113 P.2d 746 (1941); *People v. Amaya*, 44 Cal.App.2d 656, 112 P.2d 942 (1941); *People v. Pollock*, 31 Cal.App.2d 747, 89 P.2d 128 (1939).

<sup>311</sup> *People v. Sampsell*, 34 Cal.2d 757, 214 P.2d 813 (1950); *People v. Kinder*, 122 Cal. App.2d 457, 265 P.2d 24 (1954); *People v. Perez*, 121 Cal.App.2d 347, 263 P.2d 29 (1953); *People v. Kristy*, 111 Cal.App.2d 695, 245 P.2d 547 (1952); *People v. Cossey*, 97 Cal.App.2d 101, 217 P.2d 133 (1950); *People v. Rhoades*, 93 Cal.App.2d 448, 209 P.2d 33 (1949); *People v. Burnette*, 39 Cal.App.2d 215, 102 P.2d 799 (1940); *People v. Perez*, 19 Cal.App.2d 472, 65 P.2d 1319 (1937); *People v. Wortman*, 137 Cal.App. 339, 30 P.2d 565 (1934); *People v. Kelly*, 69 Cal.App. 558, 231 Pac. 767 (1924); *People v. Petrovich*, 67 Cal.App. 405, 227 Pac. 978 (1924); *People v. Chapman*, 55 Cal.App. 192, 203 Pac. 126 (1921); *People v. Dufur*, 34 Cal.App. 644, 168 Pac. 590 (1917).

<sup>312</sup> *People v. Goldberg*, 110 Cal.App.2d 17, 242 P.2d 116 (1952); *People v. Bean*, 88 Cal. App.2d 34, 198 P.2d 379 (1948); *People v. Horowitz*, 70 Cal.App.2d 675, 161 P.2d 833 (1945); *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943); *People v. Pianezzi*, 45 Cal.App.2d 576, 114 P.2d 601 (1941); *People v. Cooper*, 36 Cal.App.2d 6, 96 P.2d 1012 (1939); *People v. Mount*, 30 Cal.App.2d 286, 86 P.2d 132 (1939); *People v. Summar*, 26 Cal.App.2d 439, 79 P.2d 389 (1938); *People v. Johnson*, 11 Cal.App.2d 22, 52 P.2d 964 (1935); *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945 (1935); *People v. Cowling*, 6 Cal.App.2d 466, 44 P.2d 441 (1935); *People v. De Vries*, 52 Cal.App. 705, 199 Pac. 867 (1921); *People v. Charlie*, 34 Cal.App. 411, 167 Pac. 703 (1917); *People v. Stein*, 23 Cal.App. 108, 137 Pac. 271 (1913); *People v. Kizer*, 22 Cal.App. 10, 133 Pac. 516 (1913).

witnesses cover the same material erroneously developed by the district attorney,<sup>313</sup> or subsequent to his conviction he admits his guilt.<sup>314</sup> Defendant's failure to testify and to deny matters which only he can rebut likewise cures the error.<sup>315</sup> Should a defendant be convicted of a crime divided into degrees, the error is cured if the jury's verdict is for the lowest possible degree.<sup>316</sup> Similarly, should defendant be charged with the commission of several offenses and the prejudicial misconduct relates to but one of the several charges, his acquittal of the charge involving the error is said to cure the otherwise prejudicial effect of the misconduct.<sup>317</sup>

Persistent improper questioning by the district attorney may constitute a denial of due process to a defendant,<sup>318</sup> or may cause a miscarriage of justice which warrants reversal of a conviction.<sup>319</sup> However, such misconduct may be neither a denial of due process nor result in a miscarriage of justice if the misconduct is not too flagrant or is otherwise cured.<sup>320</sup>

During trial a district attorney will occasionally demand that defendant's counsel produce evidence, such as documents supposedly in his possession.<sup>321</sup> To do so, in effect, calls upon defendant involuntarily to testify against himself in violation of the constitutional restriction.<sup>322</sup> No case which cites article VI, section 4½ of the constitution has reversed defendant's conviction for such error, however.<sup>323</sup> Further, the district attorney may improperly and erroneously coach his witnesses during the course of trial,<sup>324</sup> testify as a witness against defendant about matters which are in-

<sup>313</sup> *People v. David*, 12 Cal.2d 639, 86 P.2d 811 (1939); *People v. Grace*, 88 Cal.App. 222, 263 Pac. 306 (1928).

<sup>314</sup> *People v. Mount*, 30 Cal.App.2d 286, 86 P.2d 132 (1939); *People v. Wilson*, 19 Cal.App.2d 340, 65 P.2d 834 (1937).

<sup>315</sup> *People v. Wademan*, 38 Cal.App. 116, 175 Pac. 791 (1918).

<sup>316</sup> *People v. Mead*, 126 Cal.App.2d 164, 271 P.2d 619 (1954).

<sup>317</sup> *People v. Steinbridge*, 99 Cal.App.2d 15, 221 P.2d 212 (1950).

<sup>318</sup> *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943).

<sup>319</sup> *People v. Sheffield*, 108 Cal.App. 721, 293 Pac. 72 (1930).

<sup>320</sup> *People v. David*, 12 Cal.2d 639, 86 P.2d 811 (1939); *People v. Kristy*, 111 Cal.App.2d 695, 245 P.2d 547 (1952); *People v. Macias*, 77 Cal.App.2d 71, 174 P.2d 895 (1946); *People v. Doetschman*, 69 Cal.App.2d 486, 159 P.2d 418 (1945); *People v. Shack*, 55 Cal.App.2d 16, 130 P.2d 197 (1942); *People v. Young*, 25 Cal.App.2d 148, 77 P.2d 771 (1938); *People v. Johnson*, 11 Cal.App.2d 22, 52 P.2d 964 (1935); *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945 (1935); *People v. McClelland*, 10 Cal.App.2d 616, 52 P.2d 604 (1935); *People v. Hayes*, 72 Cal.App. 292, 237 Pac. 390 (1925); *People v. Simons*, 70 Cal.App. 143, 232 Pac. 772 (1924); *People v. Rollins*, 54 Cal.App. 609, 202 Pac. 475 (1921); *People v. Kilfoil*, 27 Cal.App. 29, 148 Pac. 812 (1915); *People v. Ho Kim You*, 24 Cal.App. 451, 141 Pac. 950 (1914).

<sup>321</sup> *People v. Chapman*, 55 Cal.App. 192, 203 Pac. 126 (1921); *People v. Dufur*, 34 Cal.App. 644, 168 Pac. 590 (1917).

<sup>322</sup> CAL. CONST. art. I, § 13: "[N]o person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself . . . ."

<sup>323</sup> See note 321 *supra*.

<sup>324</sup> *People v. Hadley*, 84 Cal.App.2d 687, 191 P.2d 517 (1948); *People v. Garrett*, 27 Cal.App.2d 249, 81 P.2d 241 (1938).

admissible,<sup>325</sup> surround the defendant with a number of armed deputy sheriffs inferentially to convey to the jury the impression that the defendant is a desperate and dangerous character,<sup>326</sup> or proffer highly prejudicial and inadmissible evidence in bad faith.<sup>327</sup> In none of these cited instances has the error been considered sufficiently gross to warrant reversal.

Rhetoric produces error. Swayed by the intensity of their emotions, district attorneys often use descriptive adjectives, call names, make statements and do acts which constitute absence of due process or will cause defendant to have an unfair trial, produce a miscarriage of justice or, if cured by other factors, may result in non-prejudicial misconduct. In one instance the district attorney argued defendant's record in World War I and his membership in the American Legion. Such argument was erroneous since defendant had not offered any evidence with reference to his good character. It was held to be a complete departure from a fair trial.<sup>328</sup> In *People v. Simon*,<sup>329</sup> the district attorney commented upon the seeming connection between arson fires and persons of Jewish religious background. Such argument likewise denied to defendant his right to a fair trial and necessitated the reversal of his conviction.

Argument to the jury that the district attorney has personal knowledge of guilt is sufficiently prejudicial to constitute a miscarriage of justice, even in the absence of objection by defendant or his counsel,<sup>330</sup> unless proof of defendant's guilt is clear, convincing and overwhelming.<sup>331</sup>

Should the district attorney argue to the jury about the failure of defendant to produce witnesses having knowledge of the evidence in question, such misconduct may constitute a miscarriage of justice.<sup>332</sup> If the evidence, however, is so overwhelming, similar error may be non-prejudicial.<sup>333</sup>

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<sup>325</sup> *People v. Green*, 96 Cal.App.2d 283, 215 P.2d 127 (1950).

<sup>326</sup> *People v. Bean*, 88 Cal.App.2d 34, 198 P.2d 379 (1948).

<sup>327</sup> *People v. Ornelas*, 17 Cal.App.2d 608, 62 P.2d 608 (1936).

<sup>328</sup> *People v. Adams*, 92 Cal.App. 6, 267 Pac. 906 (1928).

<sup>329</sup> 80 Cal.App. 675, 252 Pac. 758 (1927). *Cf.* *People v. Piazza*, 84 Cal.App. 58, 257 Pac. 592 (1927); *People v. Petrovich*, 67 Cal.App. 405, 227 Pac. 978 (1924); *People v. Charlie*, 34 Cal. App. 411, 167 Pac. 703 (1917).

<sup>330</sup> *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1 (1952); *People v. Hidalgo*, 78 Cal.App.2d 926, 179 P.2d 102 (1947); *People v. Podwys*, 6 Cal.App.2d 71, 44 P.2d 377 (1935).

<sup>331</sup> *People v. Perez*, 121 Cal.App.2d 347, 263 P.2d 29 (1953); *People v. Amaya*, 44 Cal. App.2d 656, 112 P.2d 942 (1941); *People v. Cowan*, 38 Cal.App.2d 231, 101 P.2d 125 (1940); *People v. Cooper*, 36 Cal.App.2d 6, 96 P.2d 1012 (1939); *People v. Mount*, 30 Cal.App.2d 286, 86 P.2d 132 (1939); *People v. Meyer*, 118 Cal.App. 231, 4 P.2d 958 (1931); *People v. Bowman*, 24 Cal.App. 781, 142 Pac. 495 (1914). *Cf.* *People v. Pollock*, 31 Cal.App.2d 747, 89 P.2d 128 (1939).

<sup>332</sup> *People v. Harris*, 80 Cal.App. 328, 251 Pac. 823 (1927).

<sup>333</sup> *People v. Wolfe*, 42 Cal.2d 663, 268 P.2d 475 (1954). *Accord*, *People v. Collins*, 79 Cal. App. 127, 249 Pac. 60 (1926).

Defendant may be called a murderer;<sup>334</sup> a degenerate;<sup>335</sup> a professional crook who would steal from his own relatives;<sup>336</sup> a racketeer;<sup>337</sup> a potential murderer, perjurer and arch-criminal;<sup>338</sup> a criminal desperado and denizen of the under-world;<sup>339</sup> a desperate and heartless criminal;<sup>340</sup> a member of an outlaw organization;<sup>341</sup> possessor of a malignant and abandoned heart;<sup>342</sup> a yellow rat;<sup>343</sup> or an arsonist<sup>344</sup> without causing a miscarriage of justice. Nor will voir dire questions to prospective jurors which insinuate that the defendant has connections with "Porky" Flynn and "Artie" Samish be deemed sufficiently prejudicial to warrant reversal of a defendant's conviction where evidence of defendant's guilt is clear and convincing.<sup>345</sup>

The placement of a young girl in a house of prostitution will not warrant argument by the district attorney to the effect that "young girls are taken for a special and specific clientele," but allowance of such argument is not sufficiently grave to warrant reversal of defendants' conviction.<sup>346</sup>

Perhaps a verdict other than guilty might insult the honor and dignity of the court, but so to state in closing argument is error, though non-prejudicial.<sup>347</sup>

Prejudicial error may occur which results in a miscarriage of justice if the district attorney argues as facts matters upon which no evidence has been introduced.<sup>348</sup>

Non-prejudicial error occurs if the district attorney in a death penalty murder case should discuss the right of a defendant to an automatic supreme court appeal,<sup>349</sup> if defendant on trial for possession of narcotics is accused

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<sup>334</sup> *People v. Mead*, 126 Cal.App.2d 164, 271 P.2d 619 (1954).

<sup>335</sup> *People v. Goldberg*, 110 Cal.App.2d 17, 242 P.2d 116 (1952).

<sup>336</sup> *People v. Summar*, 26 Cal.App.2d 439, 79 P.2d 389 (1938).

<sup>337</sup> *People v. Wilson*, 19 Cal.App.2d 340, 65 P.2d 834 (1937).

<sup>338</sup> *People v. Clayton*, 89 Cal.App. 405, 264 Pac. 1105 (1928).

<sup>339</sup> *People v. Grace*, 88 Cal.App. 222, 263 Pac. 306 (1928).

<sup>340</sup> *People v. Collins*, 79 Cal.App. 127, 249 Pac. 60 (1926).

<sup>341</sup> *People v. Connors*, 77 Cal.App. 438, 246 Pac. 1072 (1926).

<sup>342</sup> *People v. Stein*, 23 Cal.App. 108, 137 Pac. 271 (1913).

<sup>343</sup> *People v. Burnette*, 39 Cal.App.2d 215, 102 P.2d 799 (1940).

<sup>344</sup> *People v. Panagoit*, 25 Cal.App. 158, 143 Pac. 70 (1914).

<sup>345</sup> *People v. Fox*, 126 Cal.App.2d 560, 272 P.2d 832 (1954).

<sup>346</sup> *People v. Busby*, 40 Cal.App.2d 193, 104 P.2d 531 (1940). *Accord*, *People v. Wortman*, 137 Cal.App. 339, 30 P.2d 565 (1934).

<sup>347</sup> *People v. Jordan*, 24 Cal.App.2d 39, 74 P.2d 519 (1937); *People v. Ridgeway*, 89 Cal. App. 615, 265 Pac. 349 (1928).

<sup>348</sup> *People v. Brophy*, 122 Cal.App.2d 638, 265 P.2d 593 (1954). *Cf.* *People v. Westcott*, 86 Cal.App. 298, 260 Pac. 901 (1927); *People v. Alpine*, 81 Cal.App. 456, 254 Pac. 281 (1927); *People v. Clark*, 28 Cal.App. 670, 153 Pac. 719 (1915).

<sup>349</sup> *People v. Sampsell*, 34 Cal.2d 757, 214 P.2d 813 (1950). *Accord*, *People v. Cohn*, 94 Cal. App.2d 630, 211 P.2d 375 (1949); *People v. Dye*, 29 Cal.App. 169, 154 Pac. 875 (1915).



of being a user of narcotics,<sup>350</sup> or if the district attorney argues conversations stricken from the record by the trial court.<sup>351</sup>

Prior to the inclusion of article VI, section 19 into the Constitution of the State of California,<sup>352</sup> convictions were reversed because the district attorney commented upon the failure of the defendant to testify in his own behalf,<sup>353</sup> although other cases affirmed defendant's conviction under similar circumstances.<sup>354</sup>

#### INSTRUCTION ERRORS

Part 2, Title 8, Chapter IV, Article 2 of the Code of Civil Procedure governs the conduct of a jury trial. Section 607, subdivision 6 thereof requires that the court charge the jury at the conclusion of counsels' argument.<sup>355</sup>

Certain instructions must be given by the trial judge on its own motion.<sup>356</sup>

Should the cause require special instructions favorable to the defense,

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<sup>350</sup> *People v. Ochoa*, 118 Cal.App.2d 566, 258 P.2d 104 (1953).

<sup>351</sup> *People v. Cossey*, 97 Cal.App.2d 101, 217 P.2d 133 (1950). *Accord*, *People v. Coleman*, 53 Cal.App.2d 18, 127 P.2d 309 (1942).

<sup>352</sup> See note 292 *supra*.

<sup>353</sup> *People v. Keko*, 27 Cal.App. 351, 149 Pac. 1003 (1915); *People v. Mirandi*, 38 Cal.App. 178, 175 Pac. 653 (1918).

<sup>354</sup> *People v. Cassidy*, 86 Cal.App. 45, 260 Pac. 313 (1927); *People v. Kelly*, 69 Cal.App. 558, 231 Pac. 767 (1924); *People v. Diamond*, 57 Cal.App. 162, 206 Pac. 1010 (1922). *Accord*, *People v. De Vries*, 52 Cal.App. 705, 199 Pac. 867 (1921); *People v. Wademan*, 38 Cal. App. 116, 175 Pac. 791 (1918).

<sup>355</sup> CAL. CODE CIV. PROC. § 607: "When the jury has been sworn, the trial must proceed in the following order, unless the Court, for special reasons otherwise directs:

" . . .

"(6) The Court may then charge the jury."

<sup>356</sup> CAL. CODE CIV. PROC. § 608: "In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party."

CAL. CODE CIV. PROC. § 2061: "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

"1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

"2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds;

"3. That a witness false in one part of his testimony is to be distrusted in others;

"4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution;

"5. That in civil cases the affirmative of the issue must be proved, and when the evidence

Section 609 of the Code of Civil Procedure states that they be furnished to the court by defendant to be read to the jury.<sup>357</sup>

Appellate courts sometimes seek to distinguish between error which results from giving the jury an incorrect instruction and that which results from failure to give certain instructions. This distinction may result in hypertechnical distinctions.

Should defendant request the trial court to give instructions which do not correctly state the applicable legal principles, it has been held that the trial court is under no duty to correct the error.<sup>358</sup> Other and controlling opinions are to the contrary.<sup>359</sup> It is possible to rationalize these seemingly conflicting lines of authority, for if the instruction is one which must be given by the court of its own motion, necessarily, therefore, the trial court must correctly state to the jury the applicable legal principles.

Discussion of instruction errors will be deferred until consideration is given to a restatement of the curative factors applicable thereto. All forms of instruction errors may be cured if the evidence against defendant is strong, clear and overwhelming, unless there is an absence of due process.<sup>360</sup>

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is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt;

"6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

"7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

<sup>357</sup> CAL. CODE CIV. PROC. § 609: "Where either party asks special instructions to be given to the jury, the court must either give such instructions, as requested, or refuse to do so, or give the instruction with a modification, in such a manner that it may distinctly appear what instructions were given in whole or in part."

<sup>358</sup> *People v. Davis*, 64 Cal. 440, 1 Pac. 889 (1884).

<sup>359</sup> *People v. Kane*, 27 Cal.2d 693, 166 P.2d 285 (1946); *People v. Hatchett*, 63 Cal.App.2d 144, 146 P.2d 469 (1944).

<sup>360</sup> *People v. Chessman*, 38 Cal.2d 166, 238 P.2d 1001 (1951); *People v. Liss*, 35 Cal.2d 570, 219 P.2d 789 (1950); *People v. Lopez*, 32 Cal.2d 673, 197 P.2d 757 (1948); *People v. Sanchez*, 30 Cal.2d 560, 184 P.2d 673 (1947); *People v. Honeycutt*, 29 Cal.2d 52, 172 P.2d 698 (1946); *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8 (1945); *People v. Coltrin*, 5 Cal.2d 649, 55 P.2d 1161 (1936); *People v. Goold*, 215 Cal. 763, 12 P.2d 958 (1932); *People v. Eddy*, 123 Cal.App.2d 826, 268 P.2d 47 (1954); *People v. Williams*, 123 Cal.App.2d 226, 266 P.2d 599 (1954); *People v. Cohn*, 94 Cal.App.2d 630, 211 P.2d 375 (1949); *People v. Carson*, 74 Cal.App.2d 834, 169 P.2d 677 (1946); *People v. Vollmann*, 73 Cal.App.2d 769, 167 P.2d 545 (1946); *People v. Planagan*, 65 Cal.App.2d 371, 150 P.2d 927 (1944); *People v. Keys*, 62 Cal.App.2d 903, 145 P.2d 589 (1944); *People v. Norton*, 45 Cal.App.2d 789, 115 P.2d 44 (1941); *People v. Harriman*, 40 Cal.App.2d 487, 104 P.2d 1063 (1940); *People v. Neumen*, 35 Cal.App.2d 82, 94 P.2d 611 (1939); *People v. Shellenberger*, 25 Cal.App.2d 402, 77 P.2d 506 (1938); *People v. Montoya*, 17 Cal.App.2d 547, 62 P.2d 383 (1936); *People v. Woolsey*, 13 Cal.App.2d 54, 56 P.2d 557 (1936); *People v. Arnest*, 133 Cal.App. 114, 23 P.2d 812 (1933); *People v. Miller*, 130 Cal.App. 191, 19 P.2d 814 (1933); *People v. Sinclair*, 129 Cal.App. 320, 19 P.2d 23 (1933); *People v. Thompson*, 123 Cal.App. 726, 12 P.2d 81 (1932); *People v. Myrick*, 112 Cal.App. 117, 296 Pac. 320 (1931); *People v. Elliott*, 104 Cal.App. 107, 285 Pac. 401 (1930); *People v. Jensen*, 82 Cal.

Unless defendant shows that he has been substantially injured or prejudiced from the giving of the erroneous instruction or the failure to give a proper instruction, his conviction will not be reversed.<sup>361</sup>

Even if defendant's properly requested instructions had been given, or if erroneous instructions had not been given, defendant is not prejudiced if he would have been convicted regardless of the errors.<sup>362</sup>

If the trial court's instructions, as a whole, are proper and adequately instruct the jury upon all necessary subjects, no miscarriage of justice occurs should the trial court improperly reject correct instructions proffered by the defendant.<sup>363</sup>

The language of an instruction given by the court to the jury may be erroneous. But, if the significance of the error is minor, it will not warrant reversal of defendant's conviction.<sup>364</sup>

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App. 489, 255 Pac. 781 (1927); *People v. Will*, 79 Cal.App. 101, 248 Pac. 1078 (1926); *People v. Plumeyer*, 54 Cal.App. 786, 202 Pac. 888 (1921); *People v. Bojorquez*, 35 Cal.App. 350, 169 Pac. 922 (1917).

<sup>361</sup> *People v. Chavez*, 37 Cal.2d 656, 234 P.2d 632 (1951); *People v. McGee*, 31 Cal.2d 229, 187 P.2d 706 (1947); *People v. Eggers*, 30 Cal.2d 676, 185 P.2d 1 (1947); *People v. De La Roi*, 23 Cal.2d 692, 146 P.2d 225 (1944); *People v. Brown*, 22 Cal.2d 752, 141 P.2d 1 (1943); *People v. Boggs*, 12 Cal.2d 27, 82 P.2d 368 (1938); *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917 (1913); *People v. Perez*, 128 Cal.App.2d 750, 276 P.2d 72 (1954); *People v. Monteverde*, 111 Cal.App.2d 156, 244 P.2d 447 (1952); *People v. Morris*, 110 Cal.App.2d 469, 243 P.2d 66 (1952); *People v. Agajanian*, 97 Cal.App.2d 399, 218 P.2d 114 (1950); *People v. Garnier*, 95 Cal.App.2d 489, 213 P.2d 111 (1950); *People v. Ekberg*, 94 Cal.App.2d 613, 211 P.2d 316 (1949); *People v. Webster*, 79 Cal.App.2d 321, 179 P.2d 633 (1947); *People v. Carroll*, 79 Cal.App.2d 146, 179 P.2d 75 (1947); *People v. Macias*, 77 Cal.App.2d 71, 174 P.2d 895 (1946); *People v. Baskins*, 72 Cal.App.2d 728, 165 P.2d 510 (1946); *People v. Diaz*, 61 Cal. App.2d 748, 143 P.2d 747 (1943); *People v. Soules*, 41 Cal.App.2d 298, 106 P.2d 639 (1940); *People v. Taylor*, 31 Cal.App.2d 723, 88 P.2d 942 (1939); *People v. Henry*, 23 Cal.App.2d 155, 72 P.2d 915 (1937); *People v. Fellows*, 139 Cal.App. 337, 34 P.2d 177 (1934); *People v. Piburn*, 138 Cal.App. 56, 31 P.2d 470 (1934); *People v. Jarvis*, 135 Cal.App. 288, 27 P.2d 77 (1933); *People v. Williamson*, 134 Cal.App. 775, 26 P.2d 681 (1933); *People v. Brooks*, 79 Cal.App. 519, 250 Pac. 211 (1926); *People v. Albrexstondare*, 71 Cal.App. 339, 235 Pac. 87 (1925); *People v. Hale*, 64 Cal.App. 523, 222 Pac. 148 (1923); *People v. Poo On*, 49 Cal.App. 219, 192 Pac. 1090 (1920).

<sup>362</sup> *People v. Nye*, 38 Cal.2d 34, 237 P.2d 1 (1951); *People v. Kane*, 27 Cal.2d 693, 166 P.2d 285 (1946); *People v. Gonzales*, 24 Cal.2d 870, 151 P.2d 251 (1944); *People v. Pociask*, 14 Cal.2d 679, 96 P.2d 788 (1939); *People v. Haywood*, 109 Cal.App.2d 867, 241 P.2d 665 (1952); *People v. Smith*, 98 Cal.App.2d 723, 221 P.2d 140 (1950); *People v. DeWitt*, 98 Cal.App.2d 709, 220 P.2d 981 (1950); *People v. Brac*, 73 Cal.App.2d 629, 167 P.2d 535 (1946); *People v. Graves*, 137 Cal.App. 1, 29 P.2d 807 (1934).

<sup>363</sup> *People v. Kelso*, 25 Cal.2d 848, 155 P.2d 819 (1945); *People v. Cornett*, 93 Cal.App.2d 744, 209 P.2d 647 (1949); *People v. Ojeda*, 132 Cal.App. 593, 23 P.2d 316 (1933); *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543 (1932); *People v. De Angelo*, 122 Cal.App. 360, 9 P.2d 850 (1932); *People v. Fong*, 58 Cal.App. 675, 208 Pac. 1101 (1922); *People v. Zerate*, 54 Cal. App. 372, 201 Pac. 955 (1921); *People v. Rose*, 42 Cal.App. 540, 183 Pac. 874 (1919); *People v. Charlie*, 34 Cal.App. 411, 167 Pac. 703 (1917); *People v. Dunlop*, 27 Cal.App. 460, 150 Pac. 389 (1915); *People v. Holt*, 22 Cal.App. 697, 136 Pac. 501 (1913).

<sup>364</sup> *People v. Owens*, 79 Cal.App.2d 290, 179 P.2d 401 (1947); *People v. Brown*, 27 Cal. App.2d 612, 81 P.2d 463 (1938); *People v. Ollinger*, 27 Cal.App.2d 381, 80 P.2d 1015 (1938); *People v. Fealy*, 33 Cal.App. 605, 165 Pac. 1034 (1917).

The presence or absence of evidence may cure an otherwise erroneous instruction. As, for example, if the court instructs upon the subject of flight and there is no evidence thereon, it is assumed that the inapplicable instruction will be disregarded by the jury.<sup>365</sup>

Defendants may request instructions without reference to the evidence introduced in their behalf. Should the evidence oppose their theory, or if there is no evidence to support their contention, the trial court is justified in refusing to read to the jury an otherwise correct instruction.<sup>366</sup>

Similarly, in a "sex" case, as for example, rape, oral copulation or pandering, it may be error for the court to refuse to instruct the jury to view with caution the uncorroborated testimony of the complaining witness. If the witness' testimony is corroborated, the error is cured.<sup>367</sup>

Should defendant request an erroneous instruction, he is precluded from raising the issue on appeal.<sup>368</sup> If the charge and the evidence against defendant demand that he give testimony to controvert the People's evidence, failure to do so will operate to his detriment upon appeal and may cure what would otherwise be prejudicial error.<sup>369</sup> Defendant is not the victim of a miscarriage of justice if he admits commission of the crime or some element thereof after his conviction.<sup>370</sup> Should defendant fail to ask for an instruction as required by Section 609 of the Code of Civil Procedure, and it is one which need not be given by the court of its own motion, no prejudicial error has occurred.<sup>371</sup> Defendant may fail to direct the appellate court's atten-

<sup>365</sup> *People v. Russell*, 59 Cal.App.2d 660, 139 P.2d 661 (1943). *Accord*, *People v. Ornelas*, 17 Cal.App.2d 608, 62 P.2d 608 (1936); *People v. Hill*, 2 Cal.App.2d 141, 37 P.2d 849 (1934); *People v. Linehan*, 130 Cal.App. 269, 19 P.2d 863 (1933); *People v. Cotton*, 117 Cal.App. 469, 4 P.2d 247 (1931); *People v. Bell*, 96 Cal.App. 503, 274 Pac. 393 (1929); *People v. Strauss*, 75 Cal.App. 447, 243 Pac. 67 (1925); *People v. Wilson*, 61 Cal.App. 611, 215 Pac. 565 (1923).

<sup>366</sup> *People v. Sanchez*, 30 Cal.2d 560, 184 P.2d 673 (1947); *People v. Coston*, 82 Cal.App.2d 23, 185 P.2d 632 (1947); *People v. Sing Chan*, 64 Cal.App.2d 167, 148 P.2d 81 (1944); *People v. Kausen*, 133 Cal.App. 327, 23 P.2d 1047 (1933); *People v. Finali*, 31 Cal.App. 479, 160 Pac. 850 (1916); *People v. Carroll*, 20 Cal.App. 41, 128 Pac. 4 (1912).

<sup>367</sup> *People v. Bumbaugh*, 48 Cal.App.2d 791, 120 P.2d 703 (1941).

<sup>368</sup> *People v. Stewart*, 73 Cal.App.2d 44, 165 P.2d 725 (1946); *People v. Black*, 73 Cal. App. 13, 238 Pac. 374 (1925); *People v. Goulding*, 60 Cal.App. 542, 213 Pac. 277 (1923); *People v. Bartol*, 24 Cal.App. 659, 142 Pac. 510 (1914).

<sup>369</sup> *People v. Hilton*, 29 Cal.2d 217, 174 P.2d 5 (1946); *People v. Perez*, 19 Cal.App.2d 472, 65 P.2d 1319 (1937); *People v. Cowling*, 6 Cal.App.2d 466, 44 P.2d 441 (1935); *People v. Pickens*, 61 Cal.App. 405, 214 Pac. 1027 (1923); *People v. Burns*, 27 Cal.App. 227, 149 Pac. 605 (1915).

<sup>370</sup> *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543 (1932); *People v. Hammer*, 74 Cal. App. 345, 240 Pac. 56 (1925); *People v. Wong Hing*, 28 Cal.App. 230, 151 Pac. 1159 (1915).

<sup>371</sup> *People v. Alexander*, 123 Cal.App.2d 918, 267 P.2d 883 (1954); *People v. Gompertz*, 103 Cal.App.2d 153, 229 P.2d 105 (1951); *People v. Coleman*, 53 Cal.App.2d 18, 127 P.2d 309 (1942); *People v. Matthew*, 68 Cal.App. 95, 228 Pac. 417 (1924); *People v. Haines*, 64 Cal. App. 628, 222 Pac. 183 (1923); *People v. Martinez*, 57 Cal.App. 771, 208 Pac. 170 (1922); *People v. Hoosier*, 24 Cal.App. 746, 142 Pac. 514 (1914); *People v. Lichtenstein*, 22 Cal.App. 592, 135 Pac. 692 (1913).

tion to the claimed erroneous instruction. Any error which might lurk in the trial court's instruction is thus cured.<sup>372</sup>

Sometimes courts give erroneous instructions which are favorable to the defendant. If such is the case, he may not complain about it upon appeal.<sup>373</sup> If the jury is lenient and convicts defendant of a charge less than that which is authorized by the evidence, defendant cannot show substantial injury and no miscarriage of justice has occurred, as, for example, if the evidence would sustain a charge of armed robbery and defendant is convicted of grand theft from the person.<sup>374</sup>

Finally, if the evidence upon a disputed point is legally sufficient, a failure to instruct thereon is not prejudicial. For example, the trial court may be under a legal duty to instruct that a witness is an accomplice as a matter of law whose testimony under Section 1111 of the Penal Code must be corroborated. However, if the accomplice's testimony is corroborated, the error is cured.<sup>375</sup>

Instruction errors, either of omission or commission, now will be examined. So-called "heart of defense" errors will be considered first.

Many crimes require a specific intent on the part of the perpetrator to commit them. Absence of evidence regarding specific intent will require reversal of the defendant's conviction. Failure properly to instruct upon the subject may result in defendant's conviction without due process of law. For example, *People v. Geibel*<sup>376</sup> was a prosecution for forgery. The trial court gave a series of instructions regarding intent, one of which was quoted directly from Section 20 of the Penal Code that "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." This general instruction was followed by subsequent instructions given by the court, properly requiring that the jury find a specific intent to defraud on defendant's part. Because of the conflict of instructions, defendant was deprived of his right to a fair trial and was convicted without procedural due process. To instruct a jury that "a malicious and guilty intent is conclusively presumed from the deliberate commission

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<sup>372</sup> *People v. Wademan*, 38 Cal.App. 116, 175 Pac. 791 (1918).

<sup>373</sup> *People v. Ghione*, 115 Cal.App.2d 252, 251 P.2d 997 (1953); *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508 (1917).

<sup>374</sup> *People v. Ratterman*, 38 Cal.App.2d 598, 101 P.2d 750 (1940).

<sup>375</sup> *People v. Robinson*, 110 Cal.App.2d 415, 242 P.2d 676 (1952); *People v. Coakley*, 108 Cal.App.2d 223, 238 P.2d 633 (1951); *People v. Burton*, 91 Cal.App.2d 695, 205 P.2d 1065 (1949); *People v. Sourisseau*, 62 Cal.App.2d 917, 145 P.2d 916 (1944); *People v. Hubbell*, 54 Cal.App.2d 49, 128 P.2d 579 (1942); *People v. Heddens*, 12 Cal.App.2d 245, 55 P.2d 230 (1936); *People v. Bonner*, 5 Cal.App.2d 314, 42 P.2d 694 (1935); *People v. Sinclair*, 129 Cal. App. 320, 19 P.2d 23 (1933); *People v. Stewart*, 68 Cal.App. 621, 230 Pac. 221 (1924); *People v. Bailey*, 66 Cal.App. 1, 225 Pac. 752 (1924); *People v. LaRue*, 62 Cal.App. 276, 216 Pac. 627 (1923); *People v. Silbelo*, 61 Cal.App. 92, 214 Pac. 462 (1923); *People v. Northcott*, 45 Cal. App. 706, 189 Pac. 704 (1920); *People v. Lawlor*, 21 Cal.App. 63, 131 Pac. 63 (1913).

<sup>376</sup> 93 Cal.App.2d 147, 208 P.2d 743 (1949).

of an unlawful act for the purpose of injuring another"<sup>377</sup> will cause a miscarriage of justice if the crime requires a specific intent. Evidence, not presumptions, is required.<sup>378</sup> Should the trial court erroneously refuse to instruct upon the law of specific intent in a proper case, prejudicial error may occur which results in a miscarriage of justice.<sup>379</sup>

Because of curative factors, defendant's conviction may not be reversed should the trial court improperly instruct regarding Section 20 of the Penal Code.<sup>380</sup> Nor is it reversible error in a specific intent situation if the court improperly and erroneously instructs in accordance with Section 1962, Subdivision 1 of the Code of Civil Procedure,<sup>381</sup> or in accordance with Section 1963, Subdivisions 2 and 3 of the Code of Civil Procedure.<sup>382</sup>

Should the trial court erroneously refuse to instruct the jury upon the subject of unconsciousness<sup>383</sup> where there is substantial evidence that at the time of the commission of the offense defendant was unconscious, a miscarriage of justice occurs.<sup>384</sup>

A defendant at the time of the commission of the offense may be so intoxicated as to be unable to form the requisite specific intent.<sup>385</sup> Should

<sup>377</sup> CAL. CODE CIV. PROC. § 1962: "The following presumptions, and no others, are deemed conclusive:

"1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another . . ."

<sup>378</sup> *People v. Mock Ming Fat*, 82 Cal.App. 618, 256 Pac. 270 (1927).

<sup>379</sup> *People v. Carnine*, 41 Cal.2d 384, 260 P.2d 16 (1953); *People v. Zerillo*, 36 Cal.2d 222, 223 P.2d 223 (1950); *People v. Sanchez*, 35 Cal.2d 522, 219 P.2d 9 (1950); *People v. Kane*, 27 Cal.2d 693, 166 P.2d 285 (1946); *People v. Snyder*, 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Whitney*, 121 Cal.App.2d 515, 263 P.2d 449 (1953).

<sup>380</sup> CAL. PEN. CODE § 20: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." See also *People v. Smith*, 98 Cal.App.2d 723, 221 P.2d 140 (1950).

<sup>381</sup> See note 377 *supra*. See also *People v. Wong*, 83 Cal.App.2d 60, 187 P.2d 828 (1947); *People v. Holland*, 82 Cal.App.2d 310, 186 P.2d 58 (1947).

<sup>382</sup> CAL. CODE CIV. PROC. § 1963: "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be contraverted by other evidence. The following are of that kind:

" . . .

"2. That an unlawful act was done with an unlawful intent;

"3. That a person intends the ordinary consequence of his voluntary act . . ." See also *People v. Owens*, 79 Cal.App.2d 290, 179 P.2d 401 (1947); *People v. Quinn*, 77 Cal.App.2d 734, 176 P.2d 404 (1947); *People v. Brown*, 27 Cal.App.2d 612, 81 P.2d 463 (1938); *People v. Ojeda*, 132 Cal.App. 593, 23 P.2d 316 (1933); *People v. Jensen*, 82 Cal.App. 489, 255 Pac. 781 (1927); *People v. Dunlop*, 27 Cal.App. 460, 150 Pac. 389 (1915).

<sup>383</sup> CAL. PEN. CODE § 26: "All persons are capable of committing crimes except those belonging to the following classes:

" . . .

"Five. Persons who committed the act charged without being conscious thereof."

<sup>384</sup> *People v. Cox*, 67 Cal.App.2d 166, 153 P.2d 362 (1944).

<sup>385</sup> CAL. PEN. CODE § 22: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute

the trial court erroneously refuse to instruct upon the subject of intoxication relative to the formation of a specific intent, prejudicial error occurs and defendant's conviction may be reversed therefor.<sup>386</sup>

Should the defendant fail to act in a manner prescribed by law, having knowledge of the existence of certain facts, he may commit a crime. The best example of such crime is violation of Section 480 of the Vehicle Code, which occurs if the defendant after an accident with an automobile fails to comply with Sections 482, 483 and 484 of the Vehicle Code. Another example is Section 702 of the Welfare and Institutions Code. Failure properly to instruct the jury upon the subject of knowledge may constitute reversible error,<sup>387</sup> but, because of the existence of curative factors, the error may not be considered sufficiently grave to constitute a miscarriage of justice.<sup>388</sup>

If, on behalf of the defendant, evidence is admitted that at the time of the commission of the alleged offense he was elsewhere (alibi), the trial court's failure to instruct the jury that the defense of alibi, if believed, is sufficient to raise a reasonable doubt, may cause a miscarriage of justice to occur.<sup>389</sup> However, failure so to instruct may not be prejudicial or cause a miscarriage of justice if, on the evidence, proof of defendant's guilt is clear and convincing.<sup>390</sup>

Defense of habitation or person permits reasonable force to be utilized to repel the attack.<sup>391</sup> Should a defendant introduce credible evidence that

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any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

<sup>386</sup> *People v. Cowl*, 28 Cal.App.2d 299, 82 P.2d 507 (1938); *People v. Romo*, 24 Cal.App.2d 119, 74 P.2d 306 (1937).

<sup>387</sup> *People v. Rallo*, 119 Cal.App. 393, 6 P.2d 516 (1931); *People v. Connors*, 70 Cal.App. 315, 233 Pac. 362 (1924).

<sup>388</sup> *People v. Henry*, 23 Cal.App.2d 155, 72 P.2d 915 (1937).

<sup>389</sup> *People v. Visconti*, 31 Cal.App. 169, 160 Pac. 410 (1916).

<sup>390</sup> *People v. Haywood*, 109 Cal.App.2d 867, 241 P.2d 665 (1952).

<sup>391</sup> CAL. PEN. CODE § 197: "Homicide is also justifiable when committed by any person in either of the following cases:

"1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

"2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

"3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

"4. When necessarily committed in attempting by lawful ways and means, to apprehend

he was lawfully engaged in the defense of person or habitation, the failure of the trial court properly to instruct with reference thereto may result in a miscarriage of justice necessitating reversal of defendant's conviction.<sup>302</sup>

On the other hand, should the evidence fail to support defendant's claim of self-defense, the failure to give or the giving of inaccurate self-defense instructions will not be considered prejudicial.<sup>303</sup>

The trial court's failure to give instructions of its own motion vital to the heart of appellant's defense may constitute denial of due process.<sup>304</sup> *People v. Skaggs*<sup>305</sup> is an example. Defendant, a police officer, was accused of soliciting a bribe contrary to the provisions of Section 68 of the Penal Code. Defendant claimed that in so doing he was a feigned accomplice and was seeking to effect the arrest of criminal offenders. The court's refusal to instruct upon the subject of feigned accomplices, in a close case on the evidence, denied to defendant his right to a fair trial.

Under certain circumstances, defendant is entitled to instructions upon the subject of lesser included offenses. For example, if he is charged with murder and it is his contention that death occurred under circumstances which would make the offense voluntary manslaughter, he is entitled to instructions upon a voluntary manslaughter theory. Failure so to instruct results in a miscarriage of justice necessitating a reversal of defendant's conviction.<sup>306</sup>

If, upon the evidence, defendant is entitled only to an acquittal or is found guilty of the crime charged, as, for example, should he be accused of murder and have denied the killing, it is not error for the trial court to refuse to give to the jury his proffered instructions upon the subject of manslaughter.<sup>307</sup>

The various forms of cautionary instructions cause appellate courts to

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any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace."

<sup>302</sup> *People v. Moore*, 43 Cal.2d 517, 275 P.2d 485 (1954); *People v. Post*, 208 Cal. 433, 281 Pac. 618 (1929); *People v. Roe*, 189 Cal. 548, 209 Pac. 560 (1922); *People v. Reese*, 65 Cal. App.2d 329, 150 P.2d 571 (1944); *People v. Slater*, 60 Cal.App.2d 358, 140 P.2d 846 (1943); *People v. Orosco*, 73 Cal.App. 580, 239 Pac. 82 (1925).

<sup>303</sup> *People v. Lopez*, 32 Cal.2d 673, 197 P.2d 757 (1948); *People v. Sanchez*, 30 Cal.2d 560, 184 P.2d 673 (1947); *People v. Carson*, 74 Cal.App.2d 834, 169 P.2d 677 (1946); *People v. Charlie*, 34 Cal.App. 411, 167 Pac. 703 (1917); *People v. Finali*, 31 Cal.App. 479, 160 Pac. 850 (1916).

<sup>304</sup> *People v. Geibel*, 93 Cal.App.2d 147, 208 P.2d 743 (1949).

<sup>305</sup> 80 Cal.App.2d 83, 181 P.2d 390 (1947).

<sup>306</sup> *People v. Carmen*, 36 Cal.2d 768, 228 P.2d 281 (1951).

<sup>307</sup> *People v. McCoy*, 25 Cal.2d 177, 153 P.2d 315 (1944). *Accord*, *People v. Stewart*, 109 Cal.App.2d 334, 240 P.2d 704 (1952); *People v. Stembridge*, 99 Cal.App.2d 15, 221 P.2d 212 (1950); *People v. Macias*, 77 Cal.App.2d 71, 174 P.2d 895 (1946); *People v. Coleman*, 53 Cal. App.2d 18, 127 P.2d 309 (1942); *People v. Montoya*, 17 Cal.App.2d 547, 62 P.2d 383 (1936); *People v. Kausen*, 133 Cal.App. 327, 23 P.2d 1047 (1933); *People v. Pickens*, 61 Cal.App. 405, 214 Pac. 1027 (1923).



render seemingly irreconcilable opinions. Section 2061, Subdivision 4 of the Code of Civil Procedure in effect, states that the testimony of an accomplice ought to be viewed with distrust.<sup>398</sup> Failure to give this cautionary instruction may constitute a miscarriage of justice requiring reversal of defendant's conviction.<sup>399</sup> However, if there is other evidence to corroborate the accomplice's testimony, failure to give the required instructions is not prejudicial.<sup>400</sup>

From the number of decisions on the subject it would seem that trial courts in California have been prone in the past to instruct juries that while "alibi" was a valid defense, it should be viewed with caution because of defendant's temptation to fabricate such evidence. The supreme court<sup>401</sup> and the various district courts of appeal<sup>402</sup> have ended this practice by reversing convictions where such error occurred.

Where defendant is charged with a sex offense, for example rape, assault with intent to commit rape, oral copulation, lewdly fondling minor children or pandering, defendant is entitled to an instruction that the jury is to view with caution the testimony of the complainant. Failure so to instruct may deny to defendant his right to a fair trial<sup>403</sup> or necessitate reversal of his conviction because a miscarriage of justice has occurred.<sup>404</sup> Where the complaining witness' testimony is corroborated, failure to give the cautionary instruction is not reversible error.<sup>405</sup>

Failure of the defendant to request such an instruction, likewise, prevents the occurrence of a miscarriage of justice.<sup>406</sup>

In the past, some trial courts felt obligated to instruct the jury to scrutinize the defense of insanity with care lest an ingenious counterfeit protect

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<sup>398</sup> CAL. CODE CIV. PROC. § 2061: "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

" . . .

"4. That the testimony of an accomplice ought to be viewed with distrust . . . ."

<sup>399</sup> *People v. Bemis*, 33 Cal.2d 395, 202 P.2d 82 (1949); *People v. Dobkin*, 74 Cal.App.2d 269, 168 P.2d 729 (1946).

<sup>400</sup> *People v. Rose*, 42 Cal.App. 540, 183 Pac. 874 (1919).

<sup>401</sup> *People v. Costello*, 21 Cal.2d 760, 135 P.2d 164 (1943).

<sup>402</sup> *People v. Pierson*, 69 Cal.App.2d 285, 159 P.2d 39 (1945); *People v. Thorp*, 104 Cal. App. 379, 285 Pac. 916 (1930); *People v. Nichols*, 69 Cal.App. 214, 230 Pac. 997 (1924); *People v. Barr*, 55 Cal.App. 321, 203 Pac. 827 (1921). *Accord*, *People v. Hammer*, 74 Cal.App. 345, 240 Pac. 56 (1925).

<sup>403</sup> *People v. Garrett*, 27 Cal.App.2d 249, 81 P.2d 241 (1938).

<sup>404</sup> *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367 (1942).

<sup>405</sup> *People v. Nye*, 38 Cal.2d 34, 237 P.2d 1 (1951); *People v. Bumbaugh*, 48 Cal.App.2d 791, 120 P.2d 703 (1941).

<sup>406</sup> *People v. Haines*, 64 Cal.App. 628, 222 Pac. 183 (1923); *People v. Hoosier*, 24 Cal.App. 746, 142 Pac. 514 (1914). *Accord*, *People v. Martinez*, 57 Cal.App. 771, 208 Pac. 170 (1922).

the defendant. Should the trial court give such an instruction, it is not reversible error.<sup>407</sup>

If evidence is offered by the prosecution that on occasions, other than that for which he is on trial, defendant committed other similar offenses, such evidence is admitted for a limited purpose only, and the jury should be so instructed. The proper procedure is for the court to give such instructions to the jury at the time when it is first offered by the prosecution. The court, likewise, should fully instruct on the subject in its formal instructions to the jury at the conclusion of the trial. Failure so to instruct may result in a miscarriage of justice.<sup>408</sup> Not so to instruct may be prejudicial to defendant's basic rights, but the trial court must be requested to do so in order that a miscarriage of justice result.<sup>409</sup>

Pursuant to Section 2061, Subdivision 4 of the Code of Civil Procedure, the trial court should instruct the jurors that they are to view with caution the oral admissions of the defendant.<sup>410</sup> Failure so to instruct, however, may not be prejudicial.<sup>411</sup>

Occasionally, persons under the age of 18 years will be criminally prosecuted rather than having proceedings instituted against them under provisions of the Welfare and Institutions Code which relate to delinquent children. Under such circumstances it is proper for the defense to request the trial court to give an instruction to the effect that in view of the defendant's age, his course of conduct is not to be viewed by the jurors as they would that of an adult. However, failure so to instruct may not cause a miscarriage of justice.<sup>412</sup>

The judge must clearly state to the trial jury all principles of law applicable to the charge of which defendant stands accused and is on trial. Should the trial court fail to define all necessary elements of the corpus delicti, reversible error may occur. As an example, failure properly to define possession necessitated the reversal of defendant's conviction in the case of *People v. Patterson*.<sup>413</sup>

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<sup>407</sup> *People v. Boggs*, 12 Cal.2d 27, 82 P.2d 368 (1938); *People v. Stein*, 23 Cal.App. 108, 137 Pac. 271 (1913).

<sup>408</sup> *People v. Albertson*, 23 Cal.2d 550, 145 P.2d 7 (1944).

<sup>409</sup> *People v. Alexander*, 123 Cal.App.2d 918, 267 P.2d 883 (1954); *People v. Cohn*, 94 Cal. App.2d 630, 211 P.2d 375 (1949); *People v. Lichtenstein*, 22 Cal.App. 592, 135 Pac. 692 (1913).

<sup>410</sup> CAL. CODE CIV. PROC. § 2061: "The jury, subject to the control of the court, in the cases specified in this code are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

" . . .

"4. . . and the evidence of the oral admissions of a party with caution . . ."

<sup>411</sup> *People v. Macias*, 77 Cal.App.2d 71, 174 P.2d 895 (1946).

<sup>412</sup> *People v. Planagan*, 65 Cal.App.2d 371, 150 P.2d 927 (1944).

<sup>413</sup> 102 Cal.App.2d 675, 228 P.2d 51 (1951).

Because of the presence of curative factors, many opinions may be rationalized with those described in the preceding paragraph where the trial court erroneously instructs the jury on the substantive law applicable to the charge. If there is substantial evidence relative to defendant's guilt, he has not been prejudiced by such erroneous instruction.<sup>414</sup>

Section 189 of the Penal Code, dividing murder into first and second degree, has caused difficulty to trial courts. Failure properly to distinguish between degrees of murder may cause a miscarriage of justice<sup>415</sup> or require the reduction of judgment from first degree murder to second degree.<sup>416</sup>

The presence of curative factors has saved other judgments from reversal where defendant's guilt was clearly shown.<sup>417</sup>

Assumedly, all trial judges, district attorneys and defense counsel ought to know that the prosecution must prove defendant's guilt of the charge beyond a reasonable doubt and to a moral certainty.<sup>418</sup> Failure to appreciate and understand defendant's position and the law applicable to his defenses causes greater difficulty than the application of the doctrine of proof "beyond a reasonable doubt and to a moral certainty." Juries have been instructed that defendant must prove self-defense or justifiable homicide by a preponderance of the evidence in a prosecution for murder. Such an instruction required reversal.<sup>419</sup>

However, erroneous instructions relative to proof of degree in a robbery prosecution where the court used expressions such as "thinking," "find," and "feel" were held not to constitute a miscarriage of justice be-

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<sup>414</sup> *People v. Pociask*, 14 Cal.2d 679, 96 P.2d 788 (1939); *People v. Chan Chaun*, 41 Cal. App.2d 586, 107 P.2d 455 (1940); *People v. Harrman*, 40 Cal.App.2d 487, 104 P.2d 1063 (1940); *People v. Woolsey*, 13 Cal.App.2d 54, 56 P.2d 557 (1936); *People v. Pahner*, 10 Cal.App.2d 294, 51 P.2d 1143 (1935); *People v. Piburn*, 138 Cal.App. 56, 31 P.2d 470 (1934); *People v. Jarvis*, 135 Cal.App. 288, 27 P.2d 77 (1933); *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543 (1932); *People v. Thompson*, 123 Cal.App. 726, 12 P.2d 81 (1932); *People v. Myrick*, 112 Cal. App. 117, 296 Pac. 320 (1931); *People v. Stewart*, 68 Cal.App. 621, 230 Pac. 221 (1924); *People v. Bailey*, 66 Cal.App. 1, 225 Pac. 752 (1924); *People v. Profumo*, 23 Cal.App. 376, 138 Pac. 109 (1913).

<sup>415</sup> *People v. Valentine*, 28 Cal.2d 121, 169 P.2d 1 (1946); *People v. Thomas*, 25 Cal.2d 880, 156 P.2d 7 (1945).

<sup>416</sup> *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8 (1945).

<sup>417</sup> *People v. McGee*, 31 Cal.2d 229, 187 P.2d 706 (1947); *People v. Hilton*, 29 Cal.2d 217, 174 P.2d 5 (1946); *People v. Honeycutt*, 29 Cal.2d 52, 172 P.2d 698 (1946).

<sup>418</sup> CAL. CODE CRV. PROC. § 2061: "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

" . . .

"5. . . . that in criminal cases guilt must be established beyond reasonable doubt . . ."

<sup>419</sup> *People v. Post*, 208 Cal. 433, 281 Pac. 618 (1929); *People v. Roe*, 189 Cal. 548, 209 Pac. 560 (1922).

cause the judge had sufficiently and formally covered this matter in other instructions.<sup>420</sup>

A miscarriage of justice may result if the court refuses to instruct the jury that proof of alibi may create a reasonable doubt;<sup>421</sup> however, prejudicial error may not result from such erroneous instructions.<sup>422</sup>

Should the defendant plead not guilty by reason of insanity, he is not required to prove his insanity to a moral certainty,<sup>423</sup> or by a preponderance of the evidence.<sup>424</sup> So to instruct may cause a miscarriage of justice. Defendant's burden is to introduce evidence so as to rebut the presumption of sanity.<sup>425</sup> Such erroneous instructions may not cause a miscarriage of justice if the evidence on the whole points to him sanity.<sup>426</sup>

Inasmuch as the jury is the sole judge of the effect and value of evidence addressed to it, according to Section 2061 of the Code of Civil Procedure,<sup>427</sup> the trial court must properly instruct as to how to judge the effect of the evidence. Accordingly, section 2061, subdivision 1 states that the power of judging the effect of the evidence shall be exercised with legal discretion and subordinate to the rules of evidence. Subdivision 2, while stating a commonplace, informs the jurors that they are not to judge defendant's guilt by the simple expedient of counting the number of witnesses who have appeared on behalf of the contestants. Subdivision 3 instructs them that a witness, false in a material portion of his testimony, may be distrusted by them in other particulars. Subdivision 4 of that section requires that they view with distrust the testimony of an accomplice and consider with caution evidence relative to the oral admissions of a defendant. Subdivisions 6 and 7 state that the jury must determine the value of the evidence offered by both sides. Pursuant to Section 1847 of the Code of Civil Procedure,<sup>428</sup> the jury is instructed that all witnesses are presumed to speak the truth, but that this presumption may be rebutted by such factors as motive, bias, interest or prejudice. Further, in judging the credibility of witnesses, the jury is usually instructed pursuant to Sections 2051 and 2052 of the Code of Civil

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<sup>420</sup> *People v. Williams*, 123 Cal.App.2d 226, 266 P.2d 599 (1954). *Accord*, *People v. Fealy*, 33 Cal.App. 605, 165 Pac. 1034 (1917).

<sup>421</sup> *People v. Chenault*, 74 Cal.App.2d 487, 169 P.2d 29 (1946); *People v. Parker*, 135 Cal. App. 761, 27 P.2d 921 (1933); *People v. Vasquez*, 93 Cal.App. 448, 269 Pac. 549 (1928); *People v. Garrett*, 93 Cal.App. 77, 268 Pac. 1071 (1928).

<sup>422</sup> *People v. Fong*, 58 Cal.App. 675, 208 Pac. 1101 (1922); *People v. Bartol*, 24 Cal.App. 659, 142 Pac. 510 (1914).

<sup>423</sup> *People v. Miller*, 171 Cal. 649, 154 Pac. 468 (1916).

<sup>424</sup> *People v. Preciado*, 31 Cal.App. 519, 160 Pac. 1090 (1916).

<sup>425</sup> *People v. Hickman*, 204 Cal. 470, 268 Pac. 909 (1928).

<sup>426</sup> *People v. Busby*, 40 Cal.App.2d 193, 104 P.2d 531 (1940).

<sup>427</sup> See note 356 *supra*.

<sup>428</sup> See note 239 *supra*.

Procedure that testimony may be impeached in ways specifically described therein.<sup>429</sup>

Examples are many where courts have erroneously instructed concerning the weight of evidence and the credibility of witnesses. In no case, however, was a defendant's conviction reversed because of such error. Non-prejudicial error occurs if the court gives an instruction to the jurors singling out the defendant in telling them how to judge his testimony.<sup>430</sup> However, such an instruction may cause a miscarriage of justice under certain circumstances.<sup>431</sup>

To secure defendant's conviction of certain crimes, "corroboration" is required, as that expression is defined in Section 1839 of the Code of Civil Procedure. Examples are perjury (Penal Code Section 1103a); abortion (Penal Code Section 1108); and theft by false pretences (Penal Code Section 1110). Failure so to instruct may cause a miscarriage of justice.<sup>432</sup> Should defendant's conviction result from the testimony of an accomplice, Section 1111 of the Penal Code requires that the accomplice's testimony be corroborated.<sup>433</sup> Failure to corroborate results in the evidence not being sufficient to sustain the defendant's conviction and causes a miscarriage of justice.<sup>434</sup>

Conflicting instructions relative to Section 1111 of the Penal Code may cause a miscarriage of justice.<sup>435</sup>

If the witness for the People is an accomplice as a matter of law, the failure of the court so to instruct may result in a miscarriage of justice, inasmuch as legal sufficiency of the evidence to affirm defendant's conviction

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<sup>429</sup> See notes 240 and 241 *supra*.

<sup>430</sup> *People v. Keys*, 62 Cal.App.2d 903, 145 P.2d 589 (1944); *People v. Gutierrez*, 126 Cal. App. 526, 14 P.2d 838 (1932); *People v. Allen*, 95 Cal.App. 60, 272 Pac. 349 (1928); *People v. Will*, 79 Cal.App. 101, 248 Pac. 1078 (1926); *People v. Bojorquez*, 35 Cal.App. 350, 169 Pac. 922 (1917).

<sup>431</sup> *People v. Romo*, 24 Cal.App.2d 119, 74 P.2d 306 (1937).

<sup>432</sup> *People v. Katcher*, 97 Cal.App.2d 209, 217 P.2d 757 (1950).

<sup>433</sup> CAL. PEN. CODE § 1111: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

<sup>434</sup> *People v. Hubbell*, 54 Cal.App.2d 49, 128 P.2d 579 (1942); *People v. Heddens*, 12 Cal. App.2d 245, 55 P.2d 230 (1936); *People v. Haack*, 86 Cal.App. 390, 260 Pac. 913 (1927); *People v. Dillon*, 68 Cal.App. 457, 229 Pac. 974 (1924).

<sup>435</sup> *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828 (1943). *Accord*, *People v. Burnett*, 39 Cal.2d 556, 247 P.2d 828 (1952); *People v. Smittcamp*, 70 Cal.App.2d 741, 161 P.2d 983 (1945); *People v. Fuller*, 73 Cal.App. 183, 238 Pac. 809 (1925); *People v. MacPhee*, 26 Cal.App. 218, 146 Pac. 522 (1914).

tion is in issue. Under such circumstances, prejudicial error occurs even if the defendant has not requested applicable instructions on the subject.<sup>436</sup> However, failure to instruct upon the law of accomplices is non-prejudicial if there is ample corroborative evidence.<sup>437</sup>

Decisions applicable to the admissibility of confessions and its associated problem, the weight to be given to false statements or confessions, have resulted in seemingly conflicting appellate court opinions. The trial court, as a matter of law, passes upon the admissibility of the confession preliminarily. If, as a matter of law, the confession was obtained by the use of threats, force and promises, it is inadmissible. The trial court, under such circumstances, should prevent such evidence from being considered by the jury. On the other hand, if there is conflicting evidence as to whether the confession was obtained by force, threats or promises, the court, on its own motion, must promptly instruct the jury on the subject. Failure to do so may result in a miscarriage of justice.<sup>438</sup> However, failure properly to instruct on this subject may be non-prejudicial if curative factors are found in the appellate record.<sup>439</sup>

Under no circumstances may a confession obtained by force, threats or promises be considered by the jury under the theory of "false statements."<sup>440</sup> Such a confession has no probative value. However, it is admissible for the limited purpose of proving something other than the matters contained within the false confession, or to discredit the honesty of a witness.<sup>441</sup> Such false statements may be admitted to show consciousness of guilt.<sup>442</sup>

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<sup>436</sup> *People v. Warren*, 16 Cal.2d 103, 104 P.2d 1024 (1940); *People v. Dobkin*, 74 Cal.App.2d 269, 168 P.2d 729 (1946); *People v. Heddens*, 12 Cal.App.2d 245, 55 P.2d 230 (1936); *People v. Carter*, 131 Cal.App. 177, 21 P.2d 129 (1933); *People v. Albrexstondare*, 71 Cal.App. 339, 235 Pac. 87 (1925).

<sup>437</sup> *People v. Robinson*, 110 Cal.App.2d 415, 242 P.2d 676 (1952); *People v. Conkley*, 108 Cal.App.2d 223, 238 P.2d 633 (1951); *People v. Burton*, 91 Cal.App.2d 695, 205 P.2d 1065 (1949); *People v. Sourisseau*, 62 Cal.App.2d 917, 145 P.2d 916 (1944); *People v. Bonner*, 5 Cal.App.2d 314, 42 P.2d 694 (1935); *People v. LaRue*, 62 Cal.App. 276, 216 Pac. 627 (1923); *People v. Silbelo*, 61 Cal.App. 92, 214 Pac. 462 (1923); *People v. Northcott*, 45 Cal.App. 706, 189 Pac. 704 (1920); *People v. Lawlor*, 21 Cal.App. 63, 131 Pac. 63 (1913). *Accord*, *People v. Johns*, 69 Cal.App.2d 737, 160 P.2d 102 (1945).

<sup>438</sup> *People v. Rogers*, 22 Cal.2d 787, 141 P.2d 722 (1943); *People v. Hubbell*, 54 Cal.App.2d 49, 128 P.2d 579 (1942); *People v. Black*, 73 Cal.App. 13, 238 Pac. 374 (1925).

<sup>439</sup> *People v. Gonzales*, 24 Cal.2d 870, 151 P.2d 251 (1944); *People v. Goold*, 215 Cal. 763, 12 P.2d 958 (1932); *People v. Cowling*, 6 Cal.App.2d 466, 44 P.2d 441 (1935); *People v. Zarate*, 54 Cal.App. 372, 201 Pac. 955 (1921).

<sup>440</sup> *People v. Chessinan*, 38 Cal.2d 166, 238 P.2d 1001 (1951).

<sup>441</sup> *People v. Liss*, 35 Cal.2d 570, 219 P.2d 789 (1950).

<sup>442</sup> *People v. Taylor*, 31 Cal.App.2d 723, 88 P.2d 942 (1939). *Accord*, *People v. Elliott*, 104 Cal.App. 107, 285 Pac. 401 (1930).

Pursuant to Section 2053 of the Code of Civil Procedure<sup>443</sup> and defendant's plea of "not guilty," evidence of his good character may be offered. Evidence with respect to a witness' character may be introduced if his testimony has been otherwise impeached in accordance with Section 1847 of the Code of Civil Procedure<sup>444</sup> and Sections 2051 and 2052 of the Code of Civil Procedure.<sup>445</sup> Non-prejudicial error occurs if the court fails properly to instruct the jury that the testimony of prosecution witnesses may be impeached by showing that their reputation for truth is bad.<sup>446</sup> Where evidence of defendant's good character has been properly introduced, should the trial court refuse fully to instruct the jury as to how it is to judge character evidence, a miscarriage of justice may result.<sup>447</sup> Under such circumstances, where curative factors are present, failure so to instruct is not prejudicial.<sup>448</sup>

Under certain circumstances the opinions of experts are admissible.<sup>449</sup> Should experts testify in a criminal case, Section 1127b of the Penal Code requires that the jury be instructed as to how it is to consider such testimony.<sup>450</sup> No case has been found wherein defendant's conviction was reversed for failure to give such an instruction.<sup>451</sup>

Penal Code Section 1127c requires that juries be instructed as to how

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<sup>443</sup> See note 268 *supra*.

<sup>444</sup> See note 233 *supra*.

<sup>445</sup> See notes 234 and 235 *supra*.

<sup>446</sup> *People v. Ratterman*, 38 Cal.App.2d 598, 101 P.2d 750 (1940).

<sup>447</sup> *People v. Wilson*, 23 Cal.App. 513, 138 Pac. 971 (1913).

<sup>448</sup> *People v. Neumen*, 35 Cal.App.2d 82, 94 P.2d 611 (1939); *People v. Ollinger*, 27 Cal. App.2d 381, 80 P.2d 1015 (1938).

<sup>449</sup> CAL. CODE CIV. PROC. § 1870: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

" . . .

"9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein . . . ."

<sup>450</sup> CAL. PEN. CODE § 1127b: "When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows:

"Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion if it shall be found by them to be unreasonable.

"No further instruction on the subject of opinion evidence need be given."

<sup>451</sup> See, e.g., *People v. Morris*, 110 Cal.App.2d 469, 243 P.2d 66 (1952); *People v. DeWitt*, 98 Cal.App.2d 709, 220 P.2d 981 (1950); *People v. Agajanian*, 97 Cal.App.2d 399, 218 P.2d 114 (1950); *People v. Brac*, 73 Cal.App.2d 629, 167 P.2d 535 (1946); *People v. Ornelas*, 17 Cal. App.2d 608, 62 P.2d 608 (1936); *People v. Fellows*, 139 Cal.App. 337, 34 P.2d 177 (1934); *People v. Williamson*, 134 Cal.App. 775, 26 P.2d 681 (1933).

to consider evidence of flight by a defendant.<sup>452</sup> Failure so to instruct, however, is not prejudicial to a defendant.<sup>453</sup>

The court may assume the existence of disputed facts in its instructions to the jury. For example, it may instruct with reference to the subject of criminal acts committed by the defendant other than those for which he is on trial. If there is no such evidence, or the occurrence of other acts is disputed, a miscarriage of justice may result necessitating reversal of a defendant's conviction.<sup>454</sup> Such error, however, may not be prejudicial nor cause a miscarriage of justice if otherwise cured.<sup>455</sup>

Consideration now will be given to errors which result when the trial court gives to the jury instructions which correctly state principles of law inapplicable to the trial issues. For example, should the court in a manslaughter case improperly instruct regarding Section 1105 of the Penal Code,<sup>456</sup> a miscarriage of justice occurs necessitating a reversal of defendant's conviction.<sup>457</sup> Similarly, to instruct the jury upon an inapplicable theory of conspiracy may cause a miscarriage of justice.<sup>458</sup> Should defendant be charged with the theft of a sheep, the commission of such an act may only constitute grand theft as defined by Section 487, Subdivision 3 of the Penal Code. If the trial court erroneously gives instructions to the jury with reference to petty theft (Penal Code Section 488), a miscarriage of justice

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<sup>452</sup> CAL. PEN. CODE § 1127c: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

"No further instruction on the subject of flight need be given."

<sup>453</sup> *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917 (1913).

<sup>454</sup> *People v. Harlan*, 29 Cal.App. 600, 156 Pac. 980 (1916). *Accord*, *People v. Lynch*, 60 Cal.App.2d 133, 140 P.2d 418 (1943); *People v. Haack*, 86 Cal.App. 390, 260 Pac. 913 (1927); *People v. Dufur*, 34 Cal.App. 644, 168 Pac. 590 (1917).

<sup>455</sup> *People v. Linchan*, 130 Cal.App. 269, 19 P.2d 863 (1933); *People v. Zarate*, 54 Cal.App. 372, 201 Pac. 955 (1921); *People v. Poo On*, 49 Cal.App. 219, 192 Pac. 1090 (1920); *People v. Parrish*, 25 Cal.App. 314, 143 Pac. 546 (1914).

<sup>456</sup> CAL. PEN. CODE § 1105: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

<sup>457</sup> *People v. Turner*, 93 Cal.App. 133, 269 Pac. 204 (1928). *Cf.* *People v. Diaz*, 61 Cal. App.2d 748, 143 P.2d 747 (1943); *People v. Russell*, 59 Cal.App.2d 660, 139 P.2d 661 (1943); *People v. Perez*, 19 Cal.App.2d 472, 65 P.2d 1319 (1937); *People v. Wilson*, 61 Cal.App. 611, 215 Pac. 565 (1923).

<sup>458</sup> *People v. Sheffield*, 108 Cal.App. 721, 293 Pac. 72 (1930). *Accord*, *People v. Sica*, 76 Cal.App. 648, 245 Pac. 461 (1926).



occurs if the jury finds defendant guilty under section 488.<sup>459</sup> Under other circumstances, because of curative factors, non-prejudicial error may occur if the trial court gave abstractly correct, although inapplicable, instructions.<sup>460</sup>

Under certain circumstances, the Penal Code gives to the trial jury the right to state in its verdict what punishment defendant will suffer upon his conviction of the charged offense. For example, should defendant be convicted of murder in the first degree, the jury may recommend that he suffer imprisonment in a state penitentiary for life. Failure so to recommend requires his execution.<sup>461</sup> Similar authority is given to the trial jury, according to Section 193 of the Penal Code, when there is violation of section 192, subdivision 3a (vehicle manslaughter with gross negligence). The jury may likewise recommend that defendant be imprisoned in the county jail for violation of section 261, subdivision 1 (statutory rape).<sup>462</sup> Should the trial court fail properly to instruct, a miscarriage of justice may result.<sup>463</sup>

Trial courts have instructed juries in so-called "capital punishment"

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<sup>459</sup> *People v. Piazza*, 115 Cal.App.2d 811, 252 P.2d 947 (1953).

<sup>460</sup> *People v. Eggers*, 30 Cal.2d 676, 185 P.2d 1 (1947); *People v. Brown*, 22 Cal.2d 752, 141 P.2d 1 (1943); *People v. Boggs*, 12 Cal.2d 27, 82 P.2d 368 (1938); *People v. Deibert*, 117 Cal.App.2d 410, 256 P.2d 355 (1953); *People v. Ghione*, 115 Cal.App.2d 252, 251 P.2d 997 (1953); *People v. Wilson*, 111 Cal.App.2d 940, 245 P.2d 671 (1952); *People v. Garnier*, 95 Cal. App.2d 489, 213 P.2d 111 (1950); *People v. Ekberg*, 94 Cal.App.2d 613, 211 P.2d 316 (1949); *People v. Cornett*, 93 Cal.App.2d 744, 209 P.2d 647 (1949); *People v. Coston*, 82 Cal.App.2d 23, 185 P.2d 632 (1947); *People v. Shellenberger*, 25 Cal.App.2d 402, 77 P.2d 506 (1938); *People v. Ornelas*, 17 Cal.App.2d 608, 62 P.2d 608 (1936); *People v. DeAngelo*, 122 Cal.App. 360, 9 P.2d 850 (1932); *People v. Cotton*, 117 Cal.App. 469, 4 P.2d 247 (1931); *People v. Bell*, 96 Cal.App. 503, 274 Pac. 393 (1929); *People v. Burns*, 27 Cal.App. 227, 149 Pac. 605 (1915).

<sup>461</sup> CAL. PEN. CODE § 190: "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; or, upon the plea of guilty, the court shall determine the same; and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life; provided, however, this section is to apply to all persons now serving sentence in a state prison for murder of the second degree and the sentence of such persons may be modified or reduced to conform to this section; provided, however, that the death penalty shall not be imposed or inflicted upon any person for murder committed before such person shall have reached the age of eighteen years; provided, further, that the burden of proof as to the age of said person shall be upon the defendant."

<sup>462</sup> CAL. PEN. CODE § 264: "Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision one of section two hundred sixty-one of the Penal Code, in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty of an offense under subdivision one of section 261 of the Penal Code the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years."

<sup>463</sup> *People v. Thompson*, 123 Cal.App. 726, 12 P.2d 81 (1932). *Cf.* *People v. Smith*, 206 Cal. 235, 273 Pac. 789 (1929).

cases that they may recommend life imprisonment only if they find extenuating circumstances. Such an instruction is error. However, because of the strength of the evidence against defendant, it may not be prejudicial.<sup>464</sup>

California Jury Instructions Criminal 27 and 28,<sup>465</sup> which concern circumstantial evidence, cause conflicting appellate opinions. Recognition of two problems is required. Respectively, they are: (1) is either the corpus delicti or defendant's connection therewith wholly or chiefly based upon circumstantial evidence; or (2) does circumstantial evidence merely corroborate, and is it incidental or supplemental to, direct evidence which proves the charge against defendant?

Within the first category, two opposing lines of authority exist. Basically, on its own motion, the trial court must instruct generally upon the law applicable to the case at issue.<sup>466</sup> The majority rule in California supports the proposition that instructions similar to Instructions 27 and 28 must be given by the court of its own motion or error has occurred. Many cases support this proposition, but affirm convictions because of the existence of curative factors.<sup>467</sup>

An equally long line of cases may be cited where appellate courts have felt that the state of the evidence required reversal for failure to give Instructions 27 and 28.<sup>468</sup>

The opposing or minority line of authority is said to have its origin in *People v. Klinkenberg*.<sup>469</sup> However, other cases may be cited which pre-

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<sup>464</sup> *People v. Williams*, 32 Cal.2d 78, 195 P.2d 393 (1948).

<sup>465</sup> Recommended Instruction No. 27: "I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the [any] crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." CALIFORNIA JURY INSTRUCTIONS, CRIMINAL 30 (1946).

Recommended Instruction No. 28: "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt." *Id.* at 31.

<sup>466</sup> *People v. Warren*, 16 Cal.2d 103, 104 P.2d 1024 (1940); *People v. Scofield*, 203 Cal. 703, 265 Pac. 914 (1928).

<sup>467</sup> *People v. Koenig*, 29 Cal.2d 87, 173 P.2d 1 (1946); *People v. Bender*, 27 Cal.2d 164, 163 P.2d 2 (1945); *People v. Borrego*, 211 Cal. 759, 297 Pac. 17 (1931); *People v. Perez*, 128 Cal.App.2d 750, 276 P.2d 72 (1954); *People v. Candiott*, 128 Cal.App.2d 347, 275 P.2d 500 (1954); *People v. Webster*, 79 Cal.App.2d 321, 179 P.2d 633 (1947); *People v. Owens*, 79 Cal. App.2d 290, 179 P.2d 401 (1947).

<sup>468</sup> *People v. Zerillo*, 36 Cal.2d 222, 223 P.2d 223 (1950); *People v. Garnier*, 95 Cal.App.2d 489, 213 P.2d 111 (1950); *People v. Tholke*, 75 Cal.App.2d 857, 171 P.2d 904 (1946); *People v. Navarro*, 74 Cal.App.2d 544, 169 P.2d 265 (1946); *People v. Chenault*, 74 Cal.App.2d 487, 169 P.2d 29 (1946); *People v. Rayol*, 65 Cal.App.2d 462, 150 P.2d 812 (1944); *People v. Hatchett*, 63 Cal.App.2d 144, 146 P.2d 469 (1944).

<sup>469</sup> 90 Cal.App.2d 608, 204 P.2d 47 (1949).

dated *People v. Klinkenberg*, including *People v. Webster*,<sup>470</sup> *People v. Carroll*,<sup>471</sup> *People v. Nunn*,<sup>472</sup> and *People v. Parker*.<sup>473</sup> The appellate courts which follow this line of authority, based upon pure dictum in *People v. Klinkenberg*, contend that there is no particular reason for giving Instruction 28. Their basic proposition is that the jury must judge the case from an entire comparison of all of the evidence. According to this view, the law is satisfied if Instructions 21 (reasonable doubt and burden of proof), 24 (direct and circumstantial evidence) and 26 (evidence susceptible of two constructions) are given.<sup>474</sup>

Penal Code Section 1096, which defines reasonable doubt and the presumption of innocence, was taken bodily from *Commonwealth v. Webster*,<sup>475</sup> Chief Justice Shaw writing for the court. This case is likewise authority for the necessity of instructions similar to Instructions 27 and 28. A thorough knowledge of the propositions enunciated by Chief Justice Shaw would do much to resolve the conflicting lines of California authority.

Many cases illustrate the thesis that instructions similar to Instructions 27 and 28 are not required if the circumstantial evidence is corroborative, incidental or supplemental to direct evidence on all elements necessary to convict a defendant.<sup>476</sup>

To secure defendant's conviction of a criminal offense, the trial jury's

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<sup>470</sup> 79 Cal.App.2d 321, 179 P.2d 633 (1947).

<sup>471</sup> 79 Cal.App.2d 146, 179 P.2d 75 (1947).

<sup>472</sup> 65 Cal.App.2d 188, 195, 150 P.2d 476, 480 (1944) (dictum).

<sup>473</sup> 119 Cal.App. 246, 6 P.2d 82 (1931).

<sup>474</sup> *People v. Eddy*, 123 Cal.App.2d 826, 268 P.2d 47 (1954); *People v. Brophy*, 122 Cal. App.2d 638, 265 P.2d 593 (1954); *People v. Mansour*, 103 Cal.App.2d 592, 230 P.2d 52 (1951).

<sup>475</sup> 59 Mass. (5 Cush.) 295 (1850).

<sup>476</sup> *People v. Jerman*, 29 Cal.2d 189, 173 P.2d 805 (1946); *People v. Simeone*, 26 Cal.2d 795, 161 P.2d 369 (1945); *People v. Lapara*, 181 Cal. 66, 183 Pac. 545 (1919); *People v. Lonn*, 139 Cal. 634, 73 Pac. 586 (1903); *People v. Ybarra*, 127 Cal.App.2d 74, 273 P.2d 284 (1955); *People v. Brophy*, 122 Cal.App.2d 638, 265 P.2d 593 (1954); *People v. Candalaria*, 121 Cal.App.2d 686, 264 P.2d 71 (1953); *People v. Freudenberg*, 121 Cal.App.2d 564, 263 P.2d 875 (1953); *People v. Shaheen*, 120 Cal.App.2d 629, 261 P.2d 752 (1953); *People v. Stenbridge*, 99 Cal.App.2d 15, 221 P.2d 212 (1950); *People v. Agajanian*, 97 Cal.App.2d 399, 218 P.2d 114 (1950); *People v. Dargo*, 93 Cal.App.2d 193, 207 P.2d 1091 (1949); *People v. Shah*, 91 Cal. App.2d 716, 205 P.2d 1081 (1949); *People v. Klinkenberg*, 90 Cal.App.2d 608, 204 P.2d 47 (1949); *People v. Harmon*, 89 Cal.App.2d 55, 200 P.2d 32 (1948); *People v. Owens*, 79 Cal. App.2d 290, 179 P.2d 401 (1947); *People v. Carson*, 74 Cal.App.2d 834, 169 P.2d 677 (1946); *People v. Vollmann*, 73 Cal.App.2d 769, 167 P.2d 545 (1946); *People v. Corlett*, 67 Cal.App.2d 33, 153 P.2d 595 (1944); *People v. Nunn*, 65 Cal.App.2d 188, 150 P.2d 476 (1944); *People v. Marvich*, 44 Cal.App.2d 858, 113 P.2d 223 (1941); *People v. Graves*, 137 Cal.App. 1, 29 P.2d 807 (1934); *People v. Williams*, 134 Cal.App. 232, 25 P.2d 259 (1933); *People v. DeVoe*, 123 Cal.App. 233, 11 P.2d 26 (1932); *People v. Harvey*, 109 Cal.App. 111, 292 Pac. 654 (1930); *People v. Heuss*, 95 Cal.App. 680, 273 Pac. 583 (1928); *People v. Bailey*, 82 Cal.App. 700, 256 Pac. 281 (1927); *People v. Ortiz*, 63 Cal.App. 662, 219 Pac. 1024 (1923); *People v. Gorman*, 31 Cal.App. 762, 161 Pac. 757 (1916); *People v. Holden*, 13 Cal.App. 354, 109 Pac. 495 (1910).

verdict must be unanimous,<sup>477</sup> and the jury ought to be so instructed.<sup>478</sup>

A miscarriage of justice may result from a failure of the trial court to instruct the jury that the defendant was entitled to the individual opinion of each juror.<sup>479</sup> If defendant is clearly guilty of the crime charged, failure so to instruct does not violate defendant's substantial rights.<sup>480</sup>

#### CONCLUSION

Uniformity of application and operation of the law is desired. Instead, the Bench and Bar face the almost insurmountable obstacle of analyzing and applying a welter of conflicting decisions upon the same or similar subjects. Uncertainty and lack of understanding result. Is there a solution, or is that definiteness which we seek akin to the mirage that rises to taunt the desert traveller?

The alternatives to article VI, section 4½ are many. We may leave it alone, on the theory that the present system has worked reasonably well. We can return to the pre-1911 situation where prejudice was presumed and reversals were many, or we might modify article VI, section 4½ to bring it in line with the language recommended by the American Bar Association quoted in the introduction. Another possibility would be to empower appellate courts to review errors of law claimed to be prejudicial and the portions of the evidence applicable to these errors. But it is possible, and even probable, that conflicting decisions will continue to plague us as long as we tie our appellate rules to a review of the evidence. How do other states approach their problem of the scope of appellate review?

The constitutions and statutes of the several states, as they pertain to appellate review, have been examined. Arizona, Kentucky, Louisiana, Michigan, Nebraska, Oklahoma, Rhode Island and Wisconsin have review provisions identical in scope to article VI, section 4½. (See Appendix "A"—Louisiana.) They permit appellate tribunals to examine the entire record, including the evidence, to determine whether the appellant has been the victim of a miscarriage of justice. Other states, likewise, vest appellate courts with the power to review errors of law and the evidence. Included within this group are Connecticut, Delaware, and Illinois at the intermediate appellate court level; Maryland, Massachusetts, Minnesota, Mississippi, and Missouri, at the district court level; Ohio, at the intermediate

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<sup>477</sup> CAL. CONST. art. I, § 7: "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel . . . ."

<sup>478</sup> *People v. Kelso*, 25 Cal.2d 848, 155 P.2d 819 (1945).

<sup>479</sup> *People v. Harris*, 80 Cal.App. 328, 251 Pac. 823 (1926).

<sup>480</sup> *People v. Brooks*, 79 Cal.App. 519, 250 Pac. 211 (1926). *Cf. People v. Hill*, 2 Cal.App.2d 141, 37 P.2d 849 (1934).

court of appeals level; South Carolina, Virginia, Washington and Wyoming.

Many other states, including Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas and Vermont, provide that appellate courts may review a record as to errors of law alone.

A third group permits appellate courts to review evidence relative to the claimed errors of law. Included within this group are the following states: Alabama, Colorado, Georgia, Idaho, New Jersey, New Mexico, South Dakota, Utah and West Virginia.

For a detailed analysis of the source of appellate review power see Appendix "A".

California is one of the minority group of states which provides that an appellate court shall examine the entire record, including the evidence, and, for all practical purposes, redetermine therefrom the fundamental issue of defendant's guilt or innocence. This function is performed from a cold record, without seeing the witnesses and observing either their demeanor or manner of presentation.

The problems which confront judges and lawyers alike are clouded by the descriptive language used by appellate courts to delineate and categorize the various forms and types of error that occur at the trial court level.

For certain errors, article I, section 13, the due process clause, finds application. Thus, no trial court or law enforcement agency may deprive a defendant of his basic constitutional or statutory rights, or deprive him of his right to a fair trial. Regardless of his guilt, for the commission of such gross errors, reversal or modification of the judgment of his conviction is a certainty. Similarly, many errors are regarded as being of so little moment or consequence as not to be worthy of reversal under any condition. Article VI, section 4½ applies to the great area of error that lies between due process and insignificance. Essentially, its application is negative, preventing reversals unless a miscarriage of justice has occurred. Contrast this negativism with the positive injunction to reverse described in cases that interpret article I, section 13.

The approach herein has been to examine the decisions of the appellate courts of California, first to determine what errors will always result in reversal or modification. Next, those errors have been sought out which may cause reversals. Finally, those errors have been described which have been considered legally insignificant. Directing attention to the great middle zone, stress and emphasis has been laid upon curative factors utilized by appellate courts to excuse errors and, thus, ultimately to affirm judgments of conviction which might have been reversed but for the existence of such curative factors.

Perhaps the use of curative factors by appellate courts is largely responsible for the seeming conflict between decisions that have discussed identical errors. Trial court judges, quite naturally, may throw up their hands in despair at the apparent existing confusions and adopt a policy of going along with the prosecution in all of its requests, regardless of constitutional or statutory directions or the positive mandate of an appellate court decision. Appellate courts should reverse convictions where substantial error has occurred which may have contributed to the conviction.

What approach is needed to prevent trial courts and district attorneys from knowingly permitting error to occur? The attitude and conduct of trial judges and district attorneys might be changed. Reversals have their own salutary effect and have a direct tendency to eliminate existing abuses.

In order fully to understand what has happened in California since the adoption of article VI, section 4½, the record of reversals and affirmances should be examined. In this regard, reference is made to an article in the *Southern California Law Review* entitled "The Reversal of Criminal Cases in the Supreme Court of California."<sup>481</sup> A portion of this is excerpted and may be found in Appendix "B". One may conclude from the material presented by the writers of that article that the enactment of article VI, section 4½, and its resulting application by our appellate courts, has resulted in substantially diminishing the number of reversals in criminal cases.

To determine what has happened since 1926, a spot check was made. The decisions involving criminal appeals rendered by the district courts of appeal from 1949 through 1953 were examined. A similar examination for the same period was made of the decisions of the supreme court. From such examinations, certain statistics have been secured and may be found in Appendix "C". Excluded from the statistical review were cases which did not directly adjudge trial court errors. Motions to dismiss appeals, motions to recall remittiturs, motions relating to changes in the place of confinement, habeas corpus, appeals from orders which granted or denied motions to dismiss pursuant to Section 995 of the Penal Code, vehicle forfeiture cases, applications for bail and certificates of probable cause, corrupt practice in office proceedings, eminent domain and appeals from orders granting new trials were excluded.

Approximately ten per cent of the cases appealed to the district courts of appeal are reversed. With the supreme court, the statistical reversal level is somewhat higher, ranging from a low in 1949 of 14.2 per cent to a high in 1952 of 75 per cent reversals. Since almost all criminal appeals taken directly to the supreme court involve the automatic review of death sen-

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<sup>481</sup> Vernier & Selig, *The Reversal of Criminal Cases in the Supreme Court of California*, 2 So. CALIF. L. REV. 21 (1928).

tences, we conclude that error in such cases is more seriously weighed than similar errors considered at the district court of appeal level.

The enactment of article VI, section 4½ has resulted in a decrease in the number of reversals. This was its proponents' hope. However, it has created new and difficult problems of its own which may outweigh the benefits achieved. With the experience of more than forty years upon which to evaluate and appraise, perhaps now is the time for the profession to engage in an examination of the section. If changes are needed, those persons charged with its daily application should be the first advocates of its enlightened revision.

## APPENDIX "A"

## CRIMINAL APPEALS: EVIDENCE CONSIDERED IN REACHING DECISION

STATE and Reference to Authority	REMARKS  (Pertaining to evidence reviewable for limited purpose — and — * Statement concerning Appeals in Civil matters)	SCOPE OF APPELLATE REVIEW			STATE HIGH APPELLATE COURTS  (Basically State Supreme Court and other Appellate Court of State with Juris. in Felony Appeals and in Civil matters appealable to like tribunal)
		(1) LAW AND EVIDENCE	(2) LAW ALONE	(3) EVIDENCE RELATIVE TO ERROR	
ALABAMA Code 1940, Title 15, Section 389	<i>Crim.</i> : Evidence reviewable but not considered in reaching decision. <i>Civ.</i> : Evidence and assignment of error reviewed to decide question(s).			X	Appellate Court
				X	Supreme Court
†ARIZONA Code 1939, Section 44-2535	<i>Civ.</i> : Evidence reviewable; also technical errors may be regarded to greater degree than in a criminal appeal.	X			Supreme Court
		X			Appellate Court
ARKANSAS Decisions have set the precedent	<i>Civ.</i> and <i>Crim.</i> review identical.		X		Supreme Court
CALIFORNIA CONST. ART. VI, Sec. 4½	<i>Civ.</i> and <i>Crim.</i> review identical.	X			Supreme Court
		X			Dist. Courts of Appeal
COLORADO Gen. Stats. 495 and 500	<i>Civ.</i> and <i>Crim.</i> review identical; consideration of evidence necessary to a decision of law mandatory.			X	Supreme Court
CONNECTICUT Gen. Stats. Tit. 95, Chapter 429	<i>Civ.</i> and <i>Crim.</i> review identical.	X			Supreme Court of Errors
		X			Superior Courts
DELAWARE Const. Art. 4 Sec. 11	<i>Civ.</i> and <i>Crim.</i> review identical. *—Law alone in matters involving election offences.	X*			Supreme Court

NOTE: †—indicates Legislative provisions contain language similar to California provision

STATE and Reference to Authority	REMARKS (Pertaining to evidence reviewable for limited purpose — and — * Statement concerning Appeals in Civil matters)	SCOPE OF APPELLATE REVIEW			STATE HIGH APPELLATE COURTS (Basically State Su- preme Court and other Appellate Court of State with Juris. in Felony Appeals and in Civil matters appealable to like tribunal)
		(1) LAW AND EVIDENCE	(2) LAW ALONE	(3) EVIDENCE RELATIVE TO ERROR	
FLORIDA Supreme Court Rules of Practice: Rules 11, 12, and 36	<i>Civ.</i> : Sufficiency of evidence only may be reviewed when all evidence is certi- fied to Appeals Court; Appellate Court decides on law alone.		X*		Supreme Court *Evidence in capital case only
			X*		Appellate Court *Evidence in capital case only
GEORGIA Const. Tit. 4, Pt. I, Chapters 6-8	<i>Civ.</i> and <i>Crim.</i> review identical; so much of evidence pertaining to error complained of and for clear under- standing only reviewed.			X	Supreme Court
				X	Court of Appeals
IDAHO Code 1932, Sec. 19, Para. 2801	<i>Civ.</i> : Evidence reviewable insofar as it substantiates the error claimed. <i>Crim.</i> : Review of evidence when insuf- ficiency claimed; conflicting evidence cannot be weighed.			X	Supreme Court
ILLINOIS Practice Act of 1907, Sec. 122	<i>Civ.</i> and <i>Crim.</i> review identical. (Su- preme Ct. invalidated a Statute Amend- ment which permitted that Court power to review evidence.)	X	X		Supreme Court
					Appellate Court
INDIANA Const. Art. 7, Sec. 4; Rules of Su- preme and Appel- late Cts. Rule 22 and 29½.	<i>Civ.</i> and <i>Crim.</i> review identical.		X		Supreme Court
			X		Appellate Court
IOWA Const. Prov. and Code 1946 Rule Crim. Proc. Sec. 793.18 and Civ. Proc. Sec. 334.	<i>Civ.</i> and <i>Crim.</i> review identical. (*-Except in equity cases where trial by jury waived, then Appeals Court re-tries the facts.)		X-*		Supreme Court
			X-*		District Court
KANSAS Gen. Stats. 1935, Sections 62-1701 and 60-3317.	<i>Civ.</i> : Procedure provides for review of the whole record, including the evi- dence.		X		Supreme Court
			X		District Courts
†KENTUCKY Code of Crim. Proc. Tit. IX, Ch. 1 and Code of Civ. Proc. Tit. XVIII, Ch. 3.	<i>Civ.</i> and <i>Crim.</i> review identical.		X		Court of Appeals
†LOUISIANA Const. Art. 7, Sec. 10. Also see Code of Crim. Proc., 1943, page 352.	<i>Civ.</i> and <i>Crim.</i> review identical.		X		Supreme Court
			X		Dist. Courts of Appeal
MAINE Rev. Stats. 1954, Vol. 3, Ch. 103 and 119.	<i>Civ.</i> and <i>Crim.</i> review identical. (Evidence shall be reported but cannot be considered in reaching a decision.)		X		Supreme Judicial Ct.
			X		Law Court



STATE and Reference to Authority	REMARKS (Pertaining to evidence reviewable for limited purpose — and — * Statement concerning Appeals in Civil matters)	SCOPE OF APPELLATE REVIEW			STATE HIGH APPELLATE COURTS (Basically State Su- preme Court and other Appellate Court of State with Juris. in Felony Appeals and in Civil matters appealable to like tribunal)
		(1) LAW AND EVIDENCE	(2) LAW ALONE	(3) EVIDENCE RELATIVE TO ERROR	
MARYLAND Gen. Rules of Prac- tice and Procedure, Part 3, Sec. 3, Rule 9(c).	<i>Civ. and Crim.</i> review identical. (Judgment shall not be set aside on the evidence unless clearly erroneous.)	X			Court of Appeals
MASSACHUSETTS Gen. Stats. Sec. 250-33.	<i>Civ. and Crim.</i> review identical. (No evidence is required where error is apparent on the record.)	X			Supreme Judicial Ct.
†MICHIGAN Court Rules; Stats. 28-1906 and 27-2618. Const. requires statement of facts in reasoning decision.	<i>Civ. and Crim.</i> review identical.	X			Supreme Court
MINNESOTA Rules of Procedure of the Supreme Court—Decisions have set the precedent.	<i>Civ. and Crim.</i> review identical.	X			Supreme Court
MISSISSIPPI Code Stats. Vol. 2, Sections 1150, 1153 and 1987.	<i>Civ. and Crim.</i> review identical. (Only question of law is appealable, based on fact erroneously ruled upon.)		X		Supreme Court
MISSOURI Rev. Stats. 1939, Section 4155.	<i>Civ. and Crim.</i> review identical.		X		Supreme Court
		X			District Courts
MONTANA Rev. Code Sections 94-7506 and 93-5503.	<i>Civ. and Crim.</i> review identical. (Bill of Exceptions need contain only evidence required to present question to which exception was taken.)		X		Supreme Court (Authority exists for Court to empanel jury to decide question of fact in dispute.)
NEVADA Const. Art. VI, Sec. 4. Also Comp. Laws 1929 Sec. 105-2520 and 2527.	<i>Civ. and Crim.</i> review identical.		X		Supreme Court
†NEBRASKA Comp. Stats. 1943, Ch. 23, Sec. 29-2308.	<i>Civ.</i> : Review of law and evidence. <i>Crim.</i> : Evidence cannot save judgment when substantial injury has occurred.	X			Supreme Court
NEW HAMPSHIRE Rev. Laws 1942, Vol. 2, Ch. 369, Sec. 1747, (Sub- sec. 2 page 1595).	<i>Civ. and Crim.</i> review identical. (*—Exception when question of fact arises and lower court ruling is adverse and contrary to common law.)		X-*		Supreme Court

NOTE: †—indicates Leg-  
islative provisions con-  
tain language similar to  
California provision

STATE and Reference to Authority	REMARKS (Pertaining to evidence reviewable for limited purpose — and — * Statement concerning Appeals in Civil matters)	SCOPE OF APPELLATE REVIEW			STATE HIGH APPELLATE COURTS  (Basically State Su- preme Court and other Appellate Court of State with Juris. in Felony Appeals and in Civil matters appealable to like tribunal)
		(1) LAW AND EVIDENCE	(2) LAW ALONE	(3) EVIDENCE RELATIVE TO ERROR	
NEW JERSEY Practice Act of 1912, Rule 81 and Rules of Ct. of Er- ror and Appeal, Rules 19 and 35b.	<i>Civ. and Crim.</i> review identical. (Evidence necessary to present ques- tion of law raised on appeal.)			X	Supreme Court
				X	Court of Errors and Appeal
NEW MEXICO Stats. 1953, Proce- dural Rules of the Supreme Court.	<i>Civ. and Crim.</i> review identical. (Evidence which supports or contra- dicts the assignment of error.)			X	Supreme Court
NEW YORK Thompson's Laws 1939, Crim. Sec. 542-547 and Civ. Sec. 557-631.	* <i>Civ.</i> : Review of contraverted ques- tions of fact. * <i>Crim.</i> : Review of evidence mandatory only when sentence is death or when determining degree of offense.		X-*		Supreme Court
			X-*		Appellate Court
NORTH CAROLINA Const. Act. VI, Sec. 8. Also Gen. Stats. 1-277 and 7-10.	<i>Civ. and Crim.</i> review identical. (Alleged errors of law or legal in- ferences.)		X		Supreme Court
NORTH DAKOTA Rev. Code 1943, Sec. 29-2826 and decisions which have set the precedent.	<i>Civ. and Crim.</i> review identical. (Evidence may be reviewed when a controversial subject on appeal in <i>criminal</i> cases only.)		X		Supreme Court
OHIO Crim. Practice Stats. Sec. 13459-1 and Rules of Practice Established by the Supreme Court.	<i>Civ. and Crim.</i> review identical. (Court of Appeals may inquire into the weight of the evidence.)		X		Supreme Court
		X			Court of Appeals
†OKLAHOMA Stats. 1941, Tit. 22, Section 1068.	<i>Civ. and Crim.</i> review identical.	X			Supreme Court
		X			Crim. Ct. of Appeals
OREGON Rev. Stats. Sec. 138- 220 and 138-230 and Sec. 46-260.	<i>Civ. and Crim.</i> review identical.		X		Supreme Court
PENNSYLVANIA Decisions have set the precedent.	<i>Civ. and Crim.</i> review identical. (Evidence must be set out on appeal but its weight does not effect the de- cision.)		X		Supreme Court
			X		Court of Quarter Sessions
†RHODE ISLAND Crim. Pleadings, Practice, and Pro- cedure, Ch. 625, Section 15.	<i>Civ.</i> : Law alone. <i>Crim.</i> : (Practice providing for review of entire cause, including the evidence.)	X			Supreme Court

STATE and Reference to Authority	REMARKS (Pertaining to evidence reviewable for limited purpose — and — * Statement concerning Appeals in Civil matters)	SCOPE OF APPELLATE REVIEW			STATE HIGH APPELLATE COURTS (Basically State Su- preme Court and other Appellate Court of State with Juris. in Felony Appeals and in Civil matters appealable to like tribunal)
		(1) LAW AND EVIDENCE	(2) LAW ALONE	(3) EVIDENCE RELATIVE TO ERROR	
SOUTH CAROLINA Const. Art. V, Sec. 8; Rules of the Su- preme Court, Rules 15-122 and 123.	<i>Civ.</i> : Review of evidence. <i>Crim.</i> : Law alone, but evidence sup- porting finding below may be consid- ered.	X			Supreme Court
SOUTH DAKOTA Judicial Code, Sec- tions 34-4001, 4002, 4109 and 33-0701, 0710 and 0743.	<i>Civ.</i> and <i>Crim.</i> review identical. Only evidence as pertains to com- plained of error of law.			X	Supreme Court
TENNESSEE Rules of Supreme Court, Rule 14, Subpara. 1-7.	<i>Civ.</i> and <i>Crim.</i> review identical. (*— <i>Crim.</i> appeal may not consider facts unless evidence preponderates in favor of appellant.)	X-*			Supreme Court
		X-*			Courts of Appeal
TEXAS Const. Art. V, Secs. 3 and 5.	<i>Civ.</i> and <i>Crim.</i> review identical.	X			Supreme Court
		X			Courts of Crim. Ap- peals and Courts of Civil Appeals
UTAH Rev. Stats. 1953, Civil Proc. Rule 72 and Crim. Proc. Sec. 77-37-3.	<i>Civ.</i> and <i>Crim.</i> review identical. (Evidence necessary to present errors of law alleged only, or on agreed state- ment of fact.)			X	Supreme Court
VERMONT Stats. 2117-2120, 2453 and 3089.	<i>Civ.</i> and <i>Crim.</i> review identical.		X		Supreme Court
VIRGINIA Code of 1950, Tit. 19, Sec. 19-261; also Rules of Proc. Tit. 5 and 8.	<i>Civ.</i> and <i>Crim.</i> review identical.	X			Supreme Court of Appeals
WASHINGTON Comp. Stats. Supp. 1927, Section 1736.	<i>Civ.</i> and <i>Crim.</i> review identical.	X			Supreme Court
WEST VIRGINIA Rules of Practice in the Supreme Court: Rules 1(1) and 1(3).	<i>Civ.</i> and <i>Crim.</i> review identical. (Evidence necessary to sustain alleged error on appeal; weight of evidence not considered as to guilt or innocence of appellant.)			X	Supreme Court
†WISCONSIN Stats. 1953, Ch. 251, Sections 251.2531; also Ch. 274, Sec. 274-37.	<i>Civ.</i> and <i>Crim.</i> review identical.	X			Supreme Court
WYOMING Civil Proc. Sec. 3-3306; Crim. Proc. Sec. 10-1307.	<i>Civ.</i> and <i>Crim.</i> review identical.	X			Supreme Court

## APPENDIX "B"

Vernier and Selig, *The Reversal of Criminal Cases in the Supreme Court of California*, 2 So. CALIF. L. REV. 21 (1928):

... Of the 4,438 appeals taken, 1,202, or 27.07 per cent, were reversed. In this number are included a few cases which were actually affirmances, but were affirmances of an order granting a new trial. In substance, these are reversals because the effect is to require the work of trial to be done again. Likewise, among the 3,236 affirmances are some cases which are reversals of orders granting new trials. In substance, these are affirmances as no new trial is required.

Table 1. SHOWING THE NUMBER OF CASES AFFIRMED AND REVERSED AND THE PERCENTAGE OF CASES REVERSED, BY DECADES.

<i>Years</i>	<i>Number Affirmed</i>	<i>Number Reversed</i>	<i>Per Cent Reversed</i>
1850-1859	56	57	50.5
1860-1869	115	96	45.5
1870-1879	124	137	52.4
1880-1889	322	200	38.3
1890-1899	389	247	38.9
1900-1909	407	135	24.9
1910-1919	894	169	15.9
1920-1926	929	161	14.7
Totals	3236	1202	27.0%

Mean Average Percentage of Reversals—35.1%.

## APPENDIX "C"

*Disposition of Criminal Appeals, 1949-1953**District Courts of Appeal*

<i>Year</i>	<i>Number of Appeals Affirmed</i>	<i>Number of Appeals Reversed</i>	<i>Per Cent of Reversals</i>
1949	130	14	9.7
1950	147	13	8.1
1951	163	19	10.4
1952	147	20	12
1953	187	20	9.7

*Supreme Court*

<i>Year</i>	<i>Number of Appeals Affirmed</i>	<i>Number of Appeals Reversed</i>	<i>Per Cent of Reversals</i>
1949	14	2	12.5
1950	19	4	17.4
1951	16	4	20
1952	8	6	42.9
1953	4	2	33.3