Supreme Court of California
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S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B296639

MOTION FOR JUDICIAL NOTICE EXHIBITS 1 – 6

VOLUME 2 OF 14, PAGES 234-515 OF 3537

[FILED CONCURRENTLY WITH REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS]

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FORD MOTOR COMPANY

Date of Meeting: November 27-28, 1959

Date of Memo: November 1, 1959.

Memorandum No. 1

Subject: Uniform Rules of Evidence - Hearsay Evidence Division

In addition to the summary contained in Appendix B, (attached), you may refer for a detailed step by step summary of action taken by the Commission and the Bar Committee on the Hearsay Evidence division of Uniform Rules of Evidence to the summary dated November 13, 1958 (a copy of which is enclosed with this memorandum).

In considering these materials, two general comments should be kept in mind:

(1) The phrase "action or proceeding" has been substituted in the revised rules for the word "proceeding" or "action." This is in accord with a decision of the Commission that the phrase "action or proceeding" should be used in the Uniform Rules of Evidence where appropriate.

(2) Rule 65A, a new rule, should be studied before considering the other rules in the Hearsay Evidence Division since Rule 65A is referred to in a number of the exceptions to Rule 63.

Respectfully submitted,

John H. DeMoully
Executive Secretary

(34(L))

A P P E N D I X A

TEXT OF

Revised Uniform Rules of Evidence - Hearsay Evidence Division

November 1, 1959

Note: This is Uniform Rule 62 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 62. DEFINITIONS.

As used in [~~Rule 63 and its exceptions and in the following rules,~~] Rules 62 to 66, inclusive:

(1) [~~(2)~~] "Declarant" is a person who makes a statement.

(2) [~~(3)~~] "Perceive" means acquire knowledge through one's own senses.

(3) [~~(4)~~] "Public [~~Official~~"] officer or employee of a state or territory of the United States" includes: [~~an official of a political subdivision of such state or territory and of a municipality.~~]

(a) In this State, an officer or employee of the State or of any county, city, city and county, district, authority, agency or other political subdivision of the State.

(b) In other states and in territories of the United States, an officer or employee of any public entity that is substantially equivalent to those included under subparagraph (a) of this paragraph.

(4) [~~(5)~~] "State" includes each of the United States and the District of Columbia.

(5) [~~(1)~~] "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(6) [~~(7)~~] "Unavailable as a witness" includes situations where

the witness is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. [~~,~~ ~~or~~]

(b) Disqualified from testifying to the matter. [~~,~~ ~~or~~]

(c) Dead or unable [~~to be present~~] to testify at the hearing because of [~~death or then existing~~] physical or mental illness. [~~,~~ ~~or~~]

(d) Absent beyond the jurisdiction of the court to compel appearance by its process. [~~,~~ ~~or~~]

(e) Absent from the [~~place of~~] hearing [~~because~~] and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable:

(a) If the judge finds that [~~his~~] the exemption, disqualification, inability or absence of the witness is due to (i) the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying [~~,~~] or [~~to~~] (ii) the culpable act or neglect of such [~~party~~] proponent; [~~,~~] or

(b) If unavailability is claimed [~~under clause (d) of the preceding paragraph~~] because the witness is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship [~~,~~] or expense. [~~and that the probable importance of the testimony is such as to justify the expense of taking such deposition.~~]

[~~(6) "A business as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.~~]

Note: This is Uniform Rule 63 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(1) ~~[A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;]~~ When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts

recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

(2) [~~Affidavits to the extent admissible by the statutes of this State;~~] To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

(c) Testimony given by a witness in a prior trial or preliminary hearing of the action or proceeding in which it is offered.

(3) [~~Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;~~] Subject to the same limitations and objections as though the declarant were testifying in person, testimony

given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the present defendant was a party to the other action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action or proceeding in which the testimony is offered except that the testimony given at a preliminary hearing in the other action or proceeding is not admissible.

(4) Subject to Rule 65A, a statement:

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; [,] or

(b) Which the judge finds [~~was made while the declarant was~~

~~under-the-stress-of-a-nervous-excitement-caused-by-such-perception,-or~~] (i) purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

~~[(c)--if-the-declarant-is-unavailable-as-a-witness,-a-statement narrating,-describing-or-explaining-an-event-or-condition-which-the-judge finds-was-made-by-the-declarant-at-a-time-when-the-matter-had-been recently-perceived-by-him-and-while-his-recollection-was-clear,-and-was made-in-good-faith-prior-to-the-commencement-of-the-action;~~]

(5) Subject to Rule 65A, a statement by a [~~person-unavailable as-a-witness-because-of-his-death~~] decedent if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, voluntarily and in good faith and [~~while-the declarant-was-conscious-of-his-impending-death-and-believed~~] in the belief that there was no hope of his recovery. [~~;~~]

(6) [~~In-a-criminal-proceeding-as-against-the-accused,-a-previous statement-by-him-relative-to-the-offense-charged-if,-and-only-if,-the judge-finds-that-the-accused-when-making-the-statement-was-conscious-and was-capable-of-understanding-what-he-said-and-did,-and-that-he-was-not induced-to-make-the-statement-(a)-under-compulsion-or-by-infliction-or threats-of-infliction-of-suffering-upon-him-or-another,-or-by-prolonged interrogation-under-such-circumstances-as-to-render-the-statement-involuntary,-or-(b)-by-threats-or-promises-concerning-action-to-be-taken-by-a~~

~~public-official-with-reference-to-the-crime,-likely-to-cause-the-accused-to-make-such-a-statement-falsely,-and-made-by-a-person-whom-the-accused-reasonably-believed-to-have-the-power-or-authority-to-execute-the-same;~~] Subject to Rule 65A, in a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, unless the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:

(a) Under circumstances likely to cause the defenant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

(7) Subject to Rule 65A and except as provided in paragraph (6) of this rule, as against himself, a statement by a person who is a party to the action or proceeding in his individual or [a] representative capacity. [~~and-if-the-latter,-who-was-acting-in-such-representative capacity-in-making-the-statement;~~]

(8) Subject to Rule 65A, as against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; [,] or

(b) Of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth. [;]

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship; [,] or

(b) [~~the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,~~] The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability. [;]

(10) [~~Subject to the limitations of exception (6),~~] Subject to Rule 65A, if the declarant is not a party to the action or proceeding and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the [~~assertion~~] statement so far contrary to the declarant's pecuniary or proprietary interest or so far

subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [;]

[~~(11)--A-statement-by-a-voter-concerning-his-qualifications-to vote-or-the-fact-or-content-of-his-vote;~~]

(12) Subject to Rule 65A, unless the judge finds it was made in bad faith, a statement of the declarant's:

(a) Then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [~~,-or~~]

(b) Previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [;]

(13) [~~Writings-offered-as-memoranda-or-records-of-acts,-conditions-or-events-to-prove-the-facts-stated-therein,-if-the-judge-finds-that they-were-made-in-the-regular-course-of-a-business-at-or-about-the-time of-the-act,-condition-or-event-recorded,-and-that-the-sources-of-information-from-which-made-and-the-method-and-circumstances-of-their-preparation~~

~~were such as to indicate their trustworthiness;~~ A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this paragraph, "a business" includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(14) Evidence of the absence [~~of a memorandum or record~~] from the [~~memoranda or~~] records of a business (as defined in paragraph (13) of this rule) of a record of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make [~~such memoranda~~] records of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them; and

(b) The records of that business were prepared from such sources of information and by such methods as to indicate their trustworthiness.

(15) Subject to Rule 64, statements of fact contained in a written report [~~or findings of fact~~] made by a public [~~official~~] officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if the judge finds

that the making thereof was within the scope of the duty of such [~~official~~] officer or employee and that it was his duty to:

(a) [~~to~~] Perform the act reported; [,] or

(b) [~~to~~] Observe the act, condition or event reported; [,] or

(c) [~~to~~] Investigate the facts concerning the act, condition or event. [~~and to make findings or draw conclusions based on such investigations;~~]

(16) Subject to Rule 64, writings made by persons other than public officers or employees as a record, report or finding of fact, if the judge finds that:

(a) The maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions; [,] and

(b) The writing was made and filed as so required by the statute. [;]

(17) Subject to rule 64: [,]

(a) If meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein. [,]

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by

the official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

(18) Subject to Rule 64, [~~certificates~~] a certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) The maker of the certificate was, at the time and place certified as the time and place of the marriage, [was] authorized by law to perform marriage ceremonies; [;] and

(b) The certificate was issued at that time or within a reasonable time thereafter. [;]

(19) Subject to Rule 64, the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; [;] and

(b) An applicable statute authorized such a document to be recorded in that office. [;]

(20) Subject to Rule 64, evidence of a final judgment adjudging a person guilty of a felony, to prove, against such person, any fact essential to sustain the judgment. [;]

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if:

(a) Offered by a judgment debtor in an action or proceeding in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment; and [~~,-provided~~]

(b) The judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action or proceeding. [;]

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental subdivision thereof in land, if offered by a party in an action or proceeding in which any such fact or such interest or lack of interest is a material matter. [;]

(23) Subject to Rule 65A, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable as a witness. [~~;~~]

(24) Subject to Rule 65A, a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person

other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) [~~finds that~~] The declarant was related to the other by blood or marriage; or

(b) [~~finds that he~~] The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared [~~,~~] and made the statement (i) as upon information received from the other or from a person related by blood or marriage to the other [~~,~~] or (ii) as upon repute in the other's family. [~~,and (b) finds that the declarant is unavailable as a witness;~~]

(25) [~~A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;~~]

(26) Evidence of reputation among members of a family, if:

(a) The reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage; and

(b) The evidence consists of (i) a witness testifying to his knowledge of such reputation or (ii) entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts and tombstones and similar evidence.

(27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if [~~(a)~~] the reputation concerns:

(a) Boundaries of, or customs affecting, land in the community [,] and the judge finds that the reputation, if any, arose before controversy. [~~,-or~~]

(b) [~~the reputation concerns~~] An event of general history of the community or of the state or nation of which the community is a part [,] and the judge finds that the event was of importance to the community. [~~,-or~~]

(c) [~~the reputation concerns~~] The date or fact of birth, marriage, divorce [,] or death[~~,legitimacy,-relationship-by-blood-or-marriage, or-race-ancestry~~] of a person resident in the community at the time of the reputation. [~~,-or-some-other-similar-fact-of-his-family-history-or of-his-personal-status-or-condition-which-the-judge-finds-likely-to-have been-the-subject-of-a-reliable-reputation-in-that-community;~~]

(28) If a person's character or a trait of a person's character at a specified time is material, evidence of his general reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed. [;]

(29) Subject to Rule 64, evidence of a statement relevant to a material matter, contained in:

(a) A deed of conveyance or a will or other [~~document~~] writing purporting to affect an interest in property, offered as tending to prove

the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property [,] and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. [;]

(b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter, if the writer could have been properly allowed to make such statement as a witness.

(30) Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical [,] or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them. [;]

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject.

Note: This is Uniform Rule 64 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO HEARSAY RULE TO EXCLUDE EVIDENCE.

Any writing admissible under exception [s] (15), (16), (17), (18), [and] (19), (20) or (29) of Rule 63 shall be received only if ~~the~~ party offering such writing has delivered a copy of it, or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy. Nothing in this section is intended to affect or limit the provisions of Sections 2016 to 2035, inclusive, of the Code of Civil Procedure, relating to depositions and discovery.

Note: This is Uniform Rule 65 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 65. CREDIBILITY OF DECLARANT.

Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 [,] is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

Note: This is a new rule proposed by the Law Revision Commission.

RULE 65A. QUALIFICATION OF DECLARANT. [NEW]

Any statement otherwise admissible under paragraph (4), (5), (6), (7), (8), (10), (12), (23) or (24) of Rule 63 is inadmissible if the judge finds that at the time of making the statement the declarant did not possess the capacities requisite to qualify as a witness under Rule 17. The burden of establishing that a statement is inadmissible because of the provisions of this section is upon the person objecting to the admission of the evidence.

Note: This is Uniform Rule 66 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 66. MULTIPLE HEARSAY.

A statement within the scope of an exception to Rule 63 [~~shall~~] is not [be] inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

(34(L))

A P P E N D I X B

ACTION TAKEN

on

Uniform Rules of Evidence -- Hearsay Evidence Division

This summary indicates the action taken on the Uniform Rules of Evidence (Hearsay Evidence Division) by (1) the California Law Revision Commission and (2) the State Bar Committee to Consider the Uniform Rules of Evidence.

November 1, 1959

10/26/59

RULE 62 DEFINITIONS

Commission: The Commission has not finally approved paragraphs (3) and (4) of the revised rule.

The Commission considered deletion of sub-paragraph (b) of the first paragraph of paragraph (6) of the revised rule but deferred final decision pending receipt of a report from our research consultant. This report, entitled "Whether Rules Which Disqualify Certain Persons as Witnesses Also Disqualify Hearsay Declarants" (Sept. 29, 1958), was distributed at the last meeting. Our consultant does not recommend the deletion of paragraph (6) (b) of the revised rule; he does recommend some changes in Rule 63 because of the provisions of revised rule 62(6) (first paragraph) (b) and in substance recommends the new rule 65A.

ACTION BY STATE BAR COMMITTEE AND BY COMMISSION REQUIRED

The Commission has not considered the transfer of the definition of "a business" from Uniform Rule 62 to exception (13) of revised rule 63 (to which this definition applies).

Bar Committee: The State Bar Committee has not finally approved the final form of the revised rule and has not considered the transfer of the definition of "a business" from Uniform Rule 62 to exception (13) of revised rule 63 (to which this definition applies).

Note: The staff made a number of changes in the form of this rule. The definitions are arranged in alphabetical order and the entire rule is put in tabulated form to improve readability. The sections to which the definitions apply have been clearly specified in the revised rule. The definition of "a business" has been transferred from Rule 62 to exception (13) of revised rule 63.

RULE 63 HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS

The General Rule

Commission: Approved without change.

Bar Committee: Approved without change.

Paragraph (1) - Previous Statements of Witnesses at Hearing.

Commission: All members present (three) voted in favor of revised rule. The Commission has not, however, approved the revised rule. ACTION BY COMMISSION REQUIRED

Bar Committee: Approved as revised (in substance).

Note: The Commission staff has made a revision in form of subparagraph (c) of revised rule 63(1). Some changes in form of rule have been made by the staff.

Paragraph (2) - Affidavits; Depositions and Prior Testimony in Same Prceeding.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has inserted "or proceeding" after "action" in two places.

Paragraph (3) - Depositions and Prior Testimony in Another Proceeding.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has substituted "action or proceeding" for "proceeding" in this rule and has improved the form of the revised rule.

Paragraph (4) - Spontaneous Statements.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below) EXCEPT Bar Committee would insert prior to "a statement" in the introductory clause BAR COMMITTEE AND COMMISSION NOT IN AGREE-

the words "if the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved."

MENT; ACTION BY BOTH BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The Commission does not agree with the Bar on the insertion of the words indicated under the prior action of the Bar Committee.

The Commission staff has improved the form of the rule.

Paragraph (5) - Dying Declarations.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

Paragraph (6) - Confessions and Other Admissions in Criminal Proceedings.

Commission: Approved as revised (but see note below).

Bar Committee: Has not acted on revised rule.

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The Bar Committee has not considered this revised rule.

"Action or proceeding" has been substituted for "proceeding" and "defendant" has been substituted for "accused" and the form of the rule has otherwise been improved.

Paragraph (7) - Admissions by Parties in Civil Proceedings.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The staff has made changes to improve the form of the rule.

Paragraph (8) - Authorized and Adoptive Admissions.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

Paragraph (9) - Vicarious Admissions.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The words "or proceeding" have been inserted after the word "action."

Paragraph (10) - Declarations Against Interest.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised but Northern Section not sufficiently represented to consider action taken as final action of State Bar Committee (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The words "or proceeding" have been inserted after the word "action."

Paragraph (11) - Voter's Statements.

Commission: Disapproved.

Bar Committee: Disapproved.

Paragraph (12) - Statements of Physical or Mental Condition of Declarant.

Commission: Approved (but see note below).

Bar Committee: Approved; then determined to reconsider insofar as precludes declarations relating to declarant's donative intent at a prior time (cf. William v. Kidd, 170 Cal. 631). Referred to Messrs. Baker,

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Kaus, Kadison and Selvin for further study and report. (see note below)

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

Paragraph (13) - Business Entries and the Like.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar nor the Commission has approved the transfer of the definition of "a business" from Rule 62 to Rule 63(13).

Paragraph (14) - Absence of Entry in Business Records.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Note that the definition of "a business" is specifically incorporated by reference in the revised rule - this has not been approved by either the Bar Committee or the Commission. The section has been tabulated to improve readability.

Paragraph (15) - Reports of Public Officers and Employees.

Commission: Approved as revised.

Bar Committee: Has not considered revised rule.

ACTION BY BAR COMMITTEE REQUIRED

Paragraph (16) - Filed Reports, Made by Persons Exclusively Authorized.

Commission: Approved as revised.

Bar Committee: Has not considered revised rule.

ACTION BY BAR COMMITTEE REQUIRED

Paragraph (17) - Content of Official Record.

Commission: Approved (but see note below).

Bar Committee: Approved (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: The words "if meeting the requirements of authentication under Rule 69" have been inserted - this has not been approved by the Bar or Commission.

Paragraph (18) - Certificate of Marriage.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Paragraph (19) - Records of Documents Affecting an Interest in Property.

Commission: Approved.

Bar Committee: Approved.

Paragraph (20) - Judgment of Previous Conviction.

Commission: Approved as revised.

Bar Committee: Disapproved. State Bar Committee suggests that if Commission does recommend paragraph (20), it should be revised to make it clear that a judgment admitted thereunder is not conclusive but merely evidence. It was suggested that this might be done by inserting "as tending" before "to prove."

BAR COMMITTEE AND COMMISSION DISAGREE

Paragraph (21) - Judgment Against Persons Entitled to Indemnity.

Commission: Approved.

Bar Committee: Disapproved in present form; Messrs. Hayes and Patton to redraft for Committee's further consideration.

BAR COMMITTEE AND COMMISSION DISAGREE

Note: The words "or proceeding" have been inserted after the word "action."

Paragraph (22) - Judgment Determining Public Interest in Land.

Commission: Approved.

Bar Committee: Approved.

Note: The words "or proceeding" have been inserted after the word "action."

Paragraph (23) - Statement Concerning One's Own Family History.

Commission: Approved (but see note below).

Bar Committee: Approved (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: The words "as a witness" have been inserted at the end of this paragraph to conform to the definition in Rule 62 and to the following paragraphs of Rule 63. This insertion has not been approved by either the Commission or the Bar Committee. Neither has the insertion of the words "Subject to Rule 65A" been approved.

Paragraph (24) - Statement Concerning Family History of Another.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

ACTION BY BAR COMMITTEE AND COMMISSION REQUIRED

Note: Neither the Bar Committee nor the Commission has approved the insertion of the words "Subject to Rule 65A."

Paragraph (25) - Statement Concerning Family History Based on Statement of Another Declarant.

Commission: Disapproved.

Bar Committee: Disapproved.

Paragraph (26) - Reputation in Family Concerning Family History.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has improved the form of the revised rule.

Paragraph (27) - Reputation -- Boundaries, General History, Family History.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has improved the form of the revised rule.

Paragraph (28) - Reputation as to Character.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Paragraph (29) - Recitals in Writings.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Paragraph (30) - Commercial Lists and the Like.

Commission: Approved.

Bar Committee: Disapproved as proposed; referred to Messrs. Hayes, Hoberg, Kaus and Selvin for further study and report to consider, among other things, whether paragraph (30) should be made subject to Rule 64.

ACTION BY BAR COMMITTEE REQUIRED

Paragraph (31) - Learned Treatises.

Commission: No action taken.

Bar Committee: Disapproved as proposed; referred to Messrs. Hayes, Hoberg, Kaus and Selvin for further study and report to consider, among other things, whether paragraph (31) should be made subject to Rule 64.

ACTION BY COMMISSION AND BAR COMMITTEE REQUIRED

RULE 64 DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO HEARSAY RULE TO EXCLUDE EVIDENCE

Commission: Approved in principle only.

Bar Committee: No action taken on revised rule.

ACTION BY COMMISSION AND BAR COMMITTEE REQUIRED

RULE 65 CREDIBILITY OF DECLARANT

Commission: Approved as revised.

Bar Committee: No final action taken; referred to Messrs Baker and Patton to consider whether rule should be modified as proposed in Patton memorandum on paragraph (10) of Rule 63, dated June 25, 1958.

ACTION BY BAR COMMITTEE REQUIRED

RULE 65A QUALIFICATION OF DECLARANT [New Rule]

Commission: No action taken (see note below).

Bar Committee: No action taken (see note below).

ACTION BY COMMISSION AND BAR COMMITTEE REQUIRED

Note: This is a new rule. It is referred to in paragraphs (4), (5), (6), (7), (8), (10), (12), (23) and (24) of Rule 63, as revised.

RULE 66 MULTIPLE HEARSAY

Commission: Approved.

Bar Committee: Approved.

ACTION BY COMMISSION AND BAR COMMITTEE REQUIRED

Note: The Commission staff has improved the form of this rule.

November 13, 1958

SUMMARY OF ACTION TAKEN BY THE CALIFORNIA LAW REVISION COMMISSION AND THE STATE BAR COMMITTEE TO CONSIDER THE UNIFORM RULES OF EVIDENCE.

Rule 3

1. As proposed:

> Preliminary Inquiry by Judge. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

2. Action of Commission:

> Not yet considered.

3. Action of Northern Section:

> Has not yet considered Rule itself but approved Professor Chadbourn's proposal to add following at end of Rule: "In the determination of the issue aforesaid, exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege."

4. Action of Southern Section:

> Not yet considered.

Revised
July 28, 1958

Rule 19

1. As proposed:

> Prerequisites of Knowledge and Experience. As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

2. Original Action of Commission:

> Has not considered Rule as proposed. In connection with consideration of opening paragraph of Rule 63, proposed to add following paragraph to Rule 19:
>
> As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in 62(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

3. Action of State Bar Committee:

> Did not consider Rule itself. Disapproved amendment proposed by Commission.

4. Action of Northern Section:

> Approved first two sentences of Rule as proposed. Disapproved last two sentences.

5. Action of Southern Section:

> Considered Rule as proposed preliminarily and referred to Messrs. Patton and Selvin for redraft.

Revised
July 28, 1958

Rule 19 (cont.)

6. Action of Commission 7/19/58:

Withdrew proposed amendment of Rule 19.

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

Evidence Generally Affecting Credibility. ~~Subject to Rules 21 and 22~~ Except as otherwise provided in Rules 21 and 22 or any other of these Rules, for the purpose of impairing or, when the credibility of the witness has been attacked, supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

3. Action Northern Section:

Found rule acceptable in principle except for inclusion of words "or supporting"; would limit supporting evidence to cases where credibility has been attacked. Referred Rule 20 to Mr. Baker to draft an amendment or a separate rule to cover admissibility of evidence to support the credibility of a witness.

4. Action Southern Section:

Not yet considered.

Rule 21

1. As proposed:

> Limitations on Evidence of Conviction of Crime as Affecting Credibility. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

2. Action of Commission:

Discussed but final action not taken.

3. Action Northern Section:

Proposed following as substitute for first sentence:

> Evidence of the conviction of a witness of a misdemeanor, or of a felony not involving dishonesty or false statement, shall be inadmissible for the purpose of impairing his credibility.

Made several suggestions for changes in second sentence; referred to Mr. Baker to draft revision.

4. Action Southern Section:

Not yet considered.

1. As proposed:

Further Limitations on Admissibility of Evidence Affecting Credibility. As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved (a) by divided vote.

Concluded subdivision (b) unclear and referred to Mr. Baker to redraft for clarification.

Approved subdivision (c) with amendment to insert "reputation for" after "than".

Approved subdivision (d).

4. Action Southern Section:

Not yet considered.

Rule 45

1. As proposed:

> Discretion of Judge to Exclude Admissible Evidence. Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

2. Action of Commission:

Approved insofar as applies to Rules 20 and 22.

3. Action of Northern Section:

Not yet considered.

4. Action of Southern Section:

Not yet considered.

Revised
July 15, 1958
9/24/58

Rule 62

1. As proposed:

See "Action of State Bar Committee."

2. Original Action of Commission:

Approved subdivision (1)

3. Action of State Bar Committee:

a) Approved all but paragraph numbered (6) as proposed with modifications as shown:

Definitions. As used in Rule 63 and its exceptions and in Rules 64, 65 and 66 ~~the following rules~~,

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's own senses.

(4) "Public Official" of a state or territory of the United States includes an official of a political subdivision of such state or territory and of a municipality.

(5) "State" includes the District of Columbia.

(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(7) "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant,

Rule 62 (cont.)

or (b) disqualified from testifying to the matter, or (c) dead or unable to be present to testify at the hearing because of ~~death or~~ then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the ~~place of~~ hearing ~~because~~ and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such proponent ~~party~~, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship, or expense~~, and that the probable importance of the testimony is such as to justify the expense of taking such deposition~~.

b) Decided that the paragraph of Rule 62 numbered (6) should be approved subject to such revision as may be necessary to conform it to final action taken on subdivisions (13) and (14) of Rule 63.

4. Action of Commission (9/6/58):

a) Approved as modified by State Bar Committee, with further proposed modification of Subdivision (7) as shown:

(7) "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) dead or unable to be present to testify at the hearing because of ~~then existing~~ physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel

appearance by its process, or (e) absent from the hearing and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable act or neglect of such proponent, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship, or expense.

b) Considered deletion of Subdivision (4) but deferred final decision pending receipt of staff report. (See Minutes 9/6/58)

c) Considered modification of Subdivision (5) but deferred final decision pending receipt of staff report. (See Minutes 9/6/58)

d) Considered deletion of subsection (b) of Subdivision 7 but deferred final decision pending receipt of report from Research Consultant.

e) Agreed with State Bar Committee that final form of Subdivision (6) will have to be determined after Subdivision (13) of Rule 63 is put in final form.

N.B. The California Law Revision Commission staff has ascertained that the definition of "business" in Subdivision (6) is identical with that in C.C.P. § 1953e; hence no modification of Subdivision (6) is necessary.

N.B. The California Law Revision Commission staff proposes that Subdivision (4) be approved in the following form:

(4) "Public officer or employee of a state or territory of the United States" includes (1) in this State, an officer or employee of any county, city, city and county, district, authority, agency or other political subdivision of the State and (2) in other

states and in territories of the United States, an officer or employee of any substantially equivalent public entity.

The Staff suggests that Subdivision (5) be approved in the following form:

(5) "State" includes each of the United States and the District of Columbia.

It would be difficult to frame a definition which would state what other areas under the jurisdiction of the United States in one sense or another should or should not be included. This should be left to the courts to do in defining "territory of the United States" where used in the Rules.

Revised
July 15, 1958
9/24/58

Rule 63

1. As proposed:

Hearsay Evidence Excluded--Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

2. Action of Commission:

Approved but in connection therewith recommended following addition to Rule 19:

[Same as one set forth on page entitled "Rule 19"]

3. Action of State Bar Committee:

Approved.

Note: It was the view of the State Bar Committee that consideration should be given to the desirability of stating affirmatively at an appropriate point in the Rules (possibly in Rule 7) that the following kinds of evidence are not excluded by Rule 63:

1) Extrajudicial statements not offered to prove the truth of the matter stated.

2) Non-verbal conduct not intended by the actor as a substitute for words - i.e., as a communication.

4. Action of Commission 7/19/58:

Withdrew proposed amendment of Rule 19

Revision
July 28, 1958

Subdivision (1), Rule 63

1. As proposed:

(1) Previous Statements of Persons Present and Subject to Cross Examination. A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

2. Original Action of Commission:

Disapproved; proposed substitute, to read:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have been admissible if made by him while testifying and provided further:

(a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
(b) The statement is offered following an attempt to impair his testimony as being recently fabricated and the statement is one made prior to the alleged fabrication and is consistent with his testimony at the hearing, or
(c) The statement concerns a matter as to which the witness has no present recollection.

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have

Subdivision (1), Rule 63 (cont.)

been admissible if made by him while testifying and provided further:

(a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or

(b) The statement is offered following an attempt to impair his testimony as being recently fabricated or when his testimony has been impeached by evidence of a prior inconsistent statement and the statement is one made prior to the alleged fabrication or prior inconsistent statement and is consistent with his testimony at the hearing, or

(c) The statement concerns a matter as to which the witness has no present recollection and is a writing which (i) was made by the witness himself or under his direction, (ii) was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory, and (iii) is verified by the witness as having been true and correct when made.

4. Action of Commission 7/19/58:

1. Proposed new subsection (b) to read:

(b) The statement is offered after evidence of a prior inconsistent statement or supporting a charge of recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing, or

2. Declined to accept view of State Bar Committee on subsection (c); held to original action.

5. Joint Meeting in Coronado 10-8-58:

After discussion, a proposal was made that Subdivision (1) be approved in the following form:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have been admissible if made by him while testifying and provided further

(a) the statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or

(b) the statement is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing, or

(c) the statement concerns a matter as to which the witness has no present recollection and is a writing which was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness's statement at the time it was made and (3) at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory.

The State Bar Committee approved Subdivision (1) in this form. A motion that the Commission approve Subdivision (1) was made. Although all members of the Commission present voted in favor of the motion, it failed to carry because only three members were present.

Note by Law Revision Commission Staff: If the proposal made at the Coronado meeting is adopted, should Subsection (c) not read as follows:

(c) the statement concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness's statement at the time it was made.

Revised
November 13, 1958

Subdivision (2), Rule 63

1. As proposed:

(2) Affidavits. Affidavits to the extent admissible by the statutes of this State;

2. Original Action of Commission:

Proposed following substitute:

(2) To the extent otherwise admissible by the law ~~statutes~~ of this State:
(a) Affidavits.
(b) Depositions taken in the action in which they are offered.
(c) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

3. Action of State Bar Committee:

(a) Approved as proposed; disapproved Commission substitute.

(b) Proposed following new subdivision 2.1:

(2.1) To the extent admissible by the statutes of this State:

(a) Depositions taken in the action in which they are offered.

(b) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

4. Action of Commission 7/19/58:

Declined to accept view of State Bar Committee that should have separate subsection (2.1); reaffirmed original action with two modifications:

1. Substituted "under the law" for "by the statutes."

2. Added "taken in the action in which they are offered" after "depositions."

5. Joint Meeting in Coronado 10/8/58:

State Bar Committee concurred in Commission action of 7/19/58.

Revised
July 28, 1958

Subdivision (3), Rule 63

1. As proposed:

(3) Depositions and Prior Testimony. Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

2. Original Action of Commission:

Proposed following as substitute (part of substance having been incorporated in Commission substitute for Subdivision (2):

(3) If the judge finds that the declarant is unavailable as a witness at the hearing and subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action is admissible in the present action when

(a) The testimony is offered against a party who offered it in his own behalf on the former occasion or against the successor in interest of such party, or

(b) In a civil action, the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or

(c) In a criminal action, the present defendant was a party to the prior action and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action in which the testimony is offered; provided, however, that testimony given at a preliminary hearing in the prior action is not admissible.

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

(3) Depositions and Prior Testimony in Another Proceeding. ~~If the judge finds that the declarant is unavailable as a witness at the hearing and~~ Subject to the same limitations and objections as though the declarant were testifying in person, testimony given under oath or affirmation as a witness in another ~~action~~ proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or in a deposition taken in compliance with law in another ~~action~~ such a proceeding, ~~is admissible in the present action~~ provided the judge finds that the declarant is unavailable as a witness at the hearing, and when:

~~(a)~~ (i) ~~The~~ Such testimony is offered against a party who offered it in evidence on his own behalf ~~on the former occasion~~ in the other proceeding or against the successor in interest of such party, or

~~(b)~~ (ii) In a civil action, the issue is such that the adverse party ~~on the former occasion~~ in the other proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the ~~action~~ proceeding in which the testimony is offered, or

~~(c)~~ (iii) In a criminal ~~action~~ proceeding the present defendant was a party to the ~~prior action~~ other proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the ~~action~~ proceeding in which the testimony is offered; provided, however, that the testimony given at a preliminary hearing in the ~~prior action~~ other proceeding is not admissible.

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Subdivision (3), Rule 63 (cont.)

4. Action of Commission 7/19/58:

Approved substitute proposed by State Bar Committee except that will designate subparagraphs (a), (b) and (c) rather than (i), (ii) and (iii).

5. Joint Meeting in Coronado 10-8-58:

State Bar Committee concurred in Commission action of 7/19/58.

Revised
July 28, 1958

Subdivision (4), Rule 63

1. As proposed:

See "Action of Commission".

2. Original Action of Commission:

Approved as proposed with modifications as shown:

(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the judge finds that the declarant is unavailable as a witness, a statement written or otherwise recorded at the time the statement was made narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

3. Action of State Bar Committee:

Proposed following as substitute:

(4) Spontaneous Statements. If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved, a statement (a) which the judge finds was made spontaneously and while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains, and was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

4. Action of Commission 7/19/58:

1. Did not accept State Bar Committee proposal to add "If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved" to Subdivision (4).

2. Disapproved clause (a) of State Bar Committee substitute for Uniform Rules of Evidence Subdivision (4).

3. Accepted clause (b) of State Bar Committee substitute for Subdivision (4).

4. Concurred with State Bar Committee view that subsection (c) of Uniform Rules of Evidence Subdivision (4) should not be adopted in this State.

5. Joint Meeting in Coronado 10-8-58.

After discussion the Commission by unanimous vote reaffirmed its intention, as presently advised, to recommend that Subdivision (4) be enacted in the following form:

(4) Spontaneous Statements. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains, and was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

The State Bar Committee concurred with the action of the Commission except that it would insert prior to "A statement" the words "If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved."

Revised
July 28, 1958

Subdivision (5), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(5) Dying Declarations. A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant and that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery.

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

(5) Dying Declarations. A statement by a decedent ~~person unavailable as a witness because of his death~~ if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, ~~and that it was made~~ voluntarily and in good faith, and ~~while the declarant was conscious of his impending death and believed~~ in the belief that there was no hope of his recovery.

4. Action of Commission 7/19/58:

Approved in form proposed by State Bar Committee.

Revised
July 28, 1958
9/24/58

Subdivision (6) , Rule 63

1. As proposed:

See "Action of State Bar Committee."

2. Original Action of Commission:

Disapproved; substituted amendment of subdivision (7).

3. Action of State Bar Committee:

Approved as proposed with modification as shown:

(6) Confessions. In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a putlic official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same, or (c) under such other circumstances that the statement was not freely and voluntarily made;

Note: At its meeting of July 11 and 12 in San Francisco the State Bar Committee did not discuss specifically whether the word "reasonably" should be deleted from clause (b)

4. Action of Commission 9/6/58:

Proposed following as substitute for Subdivision 6:

(6) Confessions and Other Admissions in Criminal Proceedings. In a criminal proceeding, as against the accused, a previous statement by him relative to the offense charged, unless the judge finds, pursuant to the procedures set forth in Rule 8, (a) that the statement was made under circumstances likely to cause the defendant to make a false statement, or (b) that the statement was made under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

Revised
November 17, 1958

Subdivision (7), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(7) Confessions and Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement; provided, however, that if the statement was made by the defendant in a criminal proceeding it shall not be admitted if the judge finds, pursuant to the procedures set forth in Rule 8, that the statement was made under circumstances likely to cause the defendant to make a false statement.

3. Action of State Bar Committee:

Rejected modification proposed by Commission and approved as proposed in Uniform Rules of Evidence with modifications as shown:

(7) Admissions by Parties in Civil Actions. Except as provided in exception (6), as against himself a statement by a person who is a party to the action in his individual or representative capacity ~~and if the latter, who was acting in such representative capacity in making the statement.~~

4. Action of Commission 7/19/58:

1. Deleted "and if the latter, who was acting in such representative capacity in making the statement"

2. Discussed but did not take final action on other differences between the Commission and State Bar Committee views re form of Subdivision (7).

5. Action of Commission 9/6/58:

Approved as proposed to be modified by State Bar, with further modification of title to read: "Admissions by Parties in Civil Actions."

6. Joint Meeting in Coronado 10-8-58.

State Bar Committee concurred in Commission action of 9/6/58.

Revised
July 28, 1958

Subdivision (8), Rule 63

1. As proposed:

(8) Authorized and Adoptive Admissions. As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with insertion of "matter" after "subject" in (a).

4. Action of Commission 7/19/58:

Inserted "matter" after "subject" in clause (a).

Revised
July 15, 1958

Subdivision (9), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) in a civil action one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

3. Action of State Bar Committee:

Approved (a) and (c).

Disapproved (b) and proposed, in lieu thereof, the following as subdivision 9.1:

(9.1) Admissions of Co-conspirators. After proof by independent evidence of the existence of the conspiracy and that declarant and the party against whom the statement is offered were both then parties to the conspiracy, against his co-conspirator, the statement of a conspirator in furtherance of the common object of the conspiracy and prior to its termination.

4. Action of Commission 9/6/58:

Re: State Bar Committee proposal re. statements of co-conspirators:

a) Approved in principle.

b) Should be incorporated in Subdivision 9 if possible and requested staff to submit draft for consideration.

c) Decided if to be 9.1 should be revised to read as follows:

(9.1) Admissions of Co-conspirators. As against a party, after proof by independent evidence of the existence of ~~the~~ a conspiracy and that declarant and the party against whom the statement is offered were both then parties to the conspiracy, against his co-conspirator, the statement of a conspirator in furtherance of the common object of the conspiracy and prior to its termination, provided the statement would be admissible if made by the declarant at the hearing.

N.B. The following is the staff's suggestion of a form in which the substance of proposed Subdivision 9.1 could be made subsection (b) of Subdivision (9):

(b) the statement is that of a co-conspirator of the party and (1) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof, and (2) the statement is offered after or subject to proof by independent evidence of the existence of the conspiracy and that declarant and the party were both parties to the conspiracy at the time the statement was made.

5. Joint Meeting in Coronado 10-8-58:

The Commission and the State Bar Committee agreed to approve Subdivision (9) in the following form:

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if

(a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or

(b) the statement is that of a co-conspirator of the party and (1) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof, and (2) the statement is offered after proof by independent evidence of the existence of the conspiracy and that declarant and the party were both parties to the conspiracy at the time the statement was made, or

(c) in a civil action, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

(Revised 7/28/58)

Subdivision (10), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(10) Declarations against Interest. Subject to the limitations of exception (6), a statement made by a declarant who is unavailable as a witness which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

(10) Declarations Against Interest. ~~Subject to the limitations of Exception (6) a statement made by a~~ Except as against the accused in a criminal proceeding, if the declarant who is unavailable as a witness ~~which~~ and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the ~~assertion~~ statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another ~~or created such risk of making him an object of hatred, ridicule or social disapproval in the community~~ that a reasonable man in his position would not have made the statement unless he believed it to be true.

Revised
July 28, 1958
9/24/58

Subdivision (10), Rule 63 (cont.)

4. Action of Commission 7/19/58:

1. Approved substitution of "statement" for "assertion."

2. Disapproved deletion of clause re making object of hatred, ridicule etc.

3. Discussed but did not take final action on other amendments proposed by State Bar Committee.

5. Action of Commission 9/6/58:

Approved proposal of State Bar Committee with modifications as shown:

(10) Declarations Against Interest. Subject to the limitations of Exception (6), ~~Except as against the accused in a criminal proceeding,~~ if the declarant is unavailable as a witness and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

November 13, 1958

6. Joint Meeting in Coronado 10-8-58:

After discussion all present agreed that Subdivision (10) should be approved in the following form:

(10) Declarations Against Interest. If the declarant is not a party to the action and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

A motion that the Commission approve the insertion of "Except as against the accused in a criminal proceeding" at the beginning of Subdivision 10, did not carry.

Inasmuch as the Northern Section of the State Bar Committee was not sufficiently represented the action taken with respect to Subdivision (10) is not to be deemed the final action of the State Bar Committee.

Revised
July 15, 1958

Subdivision (11), Rule 63

1. As proposed:

(11) Voter's Statements. A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

2. Action of Commission:

Disapproved.

3. Action of State Bar Committee:

Disapproved.

Revised
July 15, 1958

Subdivision (12), Rule 63

1. As proposed:

(12) Statements of Physical or Mental Condition of Declarant. Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view of treatment, and relevant to an issue of declarant's bodily condition;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved; then determined to reconsider insofar as precludes declarations relating to declarant's donative intent at a prior time (cf. Williams v. Kidd 170 Cal. 631). Referred to Messrs. Baker, Kaus, Kadison and Selvin for further study and report.

Revised
July 28, 1958
9/24/58

Subdivision (13), Rule 63

1. As proposed:

(13) Business Entries and the Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved; would substitute an exception embodying the present California Business Records as Evidence Act, subject to such textual modification as may be necessary to conform to the Uniform Rules of Evidence.

4. Action of Commission 7/19/58:

Agreed to substitute for Subdivision (13) a provision embodying the present California Business Records as Evidence Act with such formal textual modifications as may be necessary to conform it to the Uniform Rules of Evidence.

N. B. The following (the text of present C.C.P. Section 1953f with deletions as shown) is proposed by the California Law Revision Commission staff as language to be substituted for Subdivision (13) to accomplish the stated objective of the Commission and the Committee:

(13) Business Records. A record of an act, condition or event ~~shall, insofar as relevant, be competent evidence~~ if the custodian or other qualified witness testifies to

its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

5. Joint Meeting in Coronado 10-8-58:

The Law Revision Commission and the State Bar Committee approved Subdivision (13) in the following form:

(13) Business Records. A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness.

Revised
July 28, 1958
9/24/58

Subdivision (14), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(14) Absence of Entry in Business Records. Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, and that the memoranda and the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness;

3. Action of State Bar Committee:

Approved as modified by Commission subject to such textual modification as may be necessary to conform to subdivision (13) as eventually approved.

4. Action of Commission 7/19/58:

Reaffirmed original action and agreed to make such textual modification as may be necessary to conform to Subdivision (13) as eventually approved.

N. B. The following is proposed by the CLRC Staff as necessary modifications in Subdivision (14) (as previously modified) to accomplish the stated objective of the Commission and the Committee:

(14) Absence of ~~Entry in~~ Business Record. Evidence of the absence ~~of a memorandum or record~~ from the ~~memoranda or~~ records of a business of a record of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make ~~such memoranda~~ records of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, and that ~~the memoranda and~~ the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness;

5. Joint Meeting in Coronado 10-8-58:

The Commission and the State Bar Committee agreed to approve Subdivision (14) in the following form:

(14) Absence of Business Record. Evidence of the absence from the records of a business of a record of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make records of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, and that the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness;

N.B. The Commission stated that in its explanatory notes to Subdivision (14) it would report that it has omitted mention of a "memorandum" because the definition of "writing" in Subdivision (13) of Rule 1 is so broad as to make "memorandum" surplusage in Subdivision (14) of Rule 63.

Revised
July 15, 1958
9/24/58

Subdivision (15), Rule 63

1. As proposed:

(15) Reports and Findings of Public Officials. Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions 15 and 16 which will embody the substance of C.C.P. § 1920.

3. Action of State Bar Committee:

Disapproved; will consider Commission redraft.

4. Action of Commission 9/6/58:

Approved with modifications as shown:

(15) Reports ~~and Findings~~ of Public ~~Officials~~ Officers and Employees. Subject to Rule 64, statements of fact contained in a written reports ~~or findings of fact~~ made by a public ~~official~~ officer or employee of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such ~~official~~ officer or employee and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event, ~~and to make findings or draw conclusions based on such investigation;~~

Revised
July 15, 1958
9/24/58

Subdivision (16), Rule 63

1. As proposed:

(16) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions (15) and (16) which will embody the substance of C.C.P. § 1920.

3. Action of State Bar Committee:

No final action taken; will consider new subdivision to be prepared by Commission.

4. Action of Commission 9/6/58:

(16) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made by persons other than public officers or employees as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

Revised
July 15, 1958

Subdivision (17), Rule 63

1. As proposed:

(17) Content of Official Record. Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved on understanding that Rule 68 will be amended as proposed by Professor Chadbourn (Re latter, believes amendment to Rule 68(d) should read "and is not an office of the United States Government.")

Revised
July 28, 1958

Subdivision (18), Rule 63

1. As proposed:

(18) Certificate of Marriage. Subject to Rule 64 certificates that the maker thereof performed a marriage ceremony to prove the truth of the recitals thereof, if the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved in substance; suggests form be changed as follows:

(18) Certificate of Marriage. Subject to Rule 64 a certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) the maker of the certificate was, at the time and place certified as the time and place of the marriage, authorized by law to perform marriage ceremonies, and
(b) the certificate was issued at that time or within a reasonable time thereafter.

4. Action of Commission 7/19/58:

Approved as redrafted by State Bar Committee.

Revised
July 15, 1958

Subdivision (19), Rule 63

1. As proposed:

(19) Records of Documents Affecting an Interest in Property. Subject to Rule 54 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved.

Revised
July 28, 1958
9-24-58
11/13/58

Subdivision (20), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(20) Judgment of Previous Conviction. Evidence of a final judgment adjudging a person guilty of a felony to prove, against such person, any fact essential to sustain the judgment;

3. Action of State Bar Committee:

Disapproved.

4. Action of Commission 7/19/58:

Discussed but did not take final action on recommendation of State Bar Committee.

5. Joint Meeting in Coronado 10-8-58:

The Commission reaffirmed action of 9/6/58. State Bar Committee declined to concur. The State Bar Committee suggested that if the Commission does recommend Subdivision (20) of Rule 63, it should be revised to make it clear that a judgment admitted thereunder is not conclusive but merely evidence; it was suggested that this might be done by inserting "as tending" before "to prove."

Revised
July 15, 1958

Subdivision (21), Rule 63

1. As proposed:

(21) Judgment against Persons Entitled to Indemnity. To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved in present form; Messrs. Hayes and Patton to redraft for Committee's further consideration.

(Revised 7/15/58)

Subdivision (22), Rule 63

1. As proposed:

(22) Judgment Determining Public Interest in Land. To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

2. Action of Commission:

Approved

3. Action of State Bar Committee:

Approved.

(Revised 7/15/58)

Subdivision (23), Rule 63

1. As proposed:

(23) Statement Concerning One's Own Family History. A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved

(Revised 7/28/58)

Subdivision (24), Rule 63

1. As proposed:

(24) Statement Concerning Family History of Another. A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (b) finds that the declarant is unavailable as a witness;

2. Original Action of Commission:

Approved with following punctuation changes in clause (a) to make clear that clause beginning "and made the statement as upon" does not apply to a declarant related by blood or marriage: (1) inserted comma after "marriage"; (2) deleted comma after "declared".

3. Action of State Bar Committee:

Approved as proposed to be punctuated by Commission; suggestion made that might be even clearer if redrafted.

4. Action of Commission 7/19/58:

Approved with changes in form as follows:

(24) Statement Concerning Family History of Another. A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and

(a) finds that the declarant was related to the other by blood or marriage or

(b) finds that he the declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family ~~and (b) finds that the declarant is unavailable as a witness;~~

5. Joint Meeting in Coronado 10-8-58:

State Bar Committee concurred in Commission's action of 7/19/58.

Revised
July 28, 1958

Subdivision (25), Rule 63

1. As proposed:

(25) Statement Concerning Family History Based on Statement of Another Declarant. A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapprcved.

4. Action of Commission 7/19/58:

Disapproved.

Revised
July 28, 1958

Subdivision (26), Rule 63

1. As proposed:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

Such reputation may be proved only by a witness testifying to his knowledge of such reputation or by entries in family bibles or other family books or charts, by engravings on rings, by family portraits, by engravings on urns, crypts and tombstones, and the like.

4. Action of Commission 7/19/58:

Approved as proposed to be modified by State Bar Committee.

(Revis... 7/28/58)

Subdivision (27), Rule 63

1. As proposed:

(27) Reputation--Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

(27) Reputation -- Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the date or fact of birth, marriage, divorce or death~~, legitimacy, relationship by blood or marriage, or race ancestry~~ of a person resident in the community at the time of the reputation; ~~or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;~~

Revised
July 28, 1958
9/24/58

Subdivision (27), Rule 63 (cont.)

4. Action of Commission 7/19/58:

Discussed but did not take final action on modifications proposed by State Bar Committee.

5. Action of Commission 9/6/58:

Approved as modified by State Bar Committee.

Revised
July 28, 1958

Subdivision (28), Rule 63

1. As proposed:

(28) Reputation as to Character. If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

2. Original Action of Commission:

Approved with addition of "a person's character or" after "If."

3. Action of State Bar Committee:

Approved as amended by Commission and with further amendment to add "general" before "reputation."

4. Action of Commission 7/19/58:

Reaffirmed original action and added "general" before "reputation."

(Revised 7/28/58)

Subdivision (29), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with amendment as shown:

(29) Recitals in Documents Affecting Property. Evidence of a statement relevant to a material matter: (a) Contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement; or (b) Contained in a document or writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter provided the writer could have been properly allowed to make such statement as a witness;

3. Action of State Bar Committee:

Approved as proposed to be amended by Commission with further modification as shown:

(29) Recitals in Writings ~~Documents Affecting Property~~. Subject to Rule 54, evidence of a statement relevant to a material matter (a) contained in a deed of conveyance or a will or other ~~document~~ writing purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement or (b) contained in a ~~document or~~ writing more than thirty years old when the statement has been since generally acted upon as true by persons having an interest in the matter, provided the writer could have been properly allowed to make such statement as a witness.

Revised
July 28, 1958

Subdivision (29), Rule 63 (cont.)

4. Action of Commission 7/19/58:

1. Concurred in State Bar Committee proposals for amendment of Subdivision (29).

2. Redrafted to read:

(29) Recitals in Writings Subject to Rule 64, evidence of a statement relevant to a material matter

(a) contained in a deed of conveyance or a will or other writing purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement or,

(b) contained in a writing more than thirty years old when the statement has been since generally acted upon as true by persons having an interest in the matter, provided the writer could have been properly allowed to make such statement as a witness.

5. Joint Meeting in Coronado 10-3-58:

State Bar Committee concurred in Commission action of 7/19/58.

Revised
July 28, 1958

Subdivision (30), Rule 63

1. As proposed:

(30) Commercial Lists and the Like. Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved as proposed; referred subject matter of subdivisions (30) and (37) to Messrs. Hayes, Hoberg, Kaus and Selvin for further study and report. Suggested study should consider, inter alia, whether any subdivision proposed should be made subject to Rule 64.

Subdivision (31), Rule 63

1. As proposed:

(31) Learned Treatises. A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

2. Action of Commission:

Discussed but did not take final action.

3. Action of State Bar Committee:

See report on subdivision (30)

Rule 64 (Revised 7/15/58)
9/24/58

1. As proposed:

Discretion of Judge under Exceptions (15), (16), (17), (18) and (19) to Exclude Evidence. Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

2. Action of Commission:

Not yet considered.

3. Action of State Bar Committee:

Approved with amendment to refer to subdivision (29).

4. Action of Commission 9/6/58:

Approved as modified with further amendment to refer to Subdivision (20) and proposed amendment to make clear that does not affect discovery powers conferred by 1957 legislation.

Rule 65 (Revised 7/15/58)

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

Credibility of Declarant. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

3. Action of State Bar Committee:

Did not take final action; referred to Messrs. Baker and Patton to consider whether Rule should be modified as proposed in Patton memorandum on Subdivision (10) of Rule 63, dated June 25, 1958.

(Revised 7/15/58)

Rule 66

1. As proposed:

Multiple Hearsay. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved.

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

RULE 68. Authentication of Copies of Records. A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state or is an office of the United States government whether within or without this state, and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, or is not an office of the United States government, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular

agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

3. Action Northern Section:

Concurred in Commission action except would make first word in underlined part of (d) "and" instead of "or".

4. Action Southern Section:

Not yet considered.

Rule 69 September 24, 1958

1. As proposed:

RULE 69. Certificate of Lack of Record. A writing admissible under exception (17)(b) of Rule 63 is authenticated in the same manner as is provided in clause (c) or (d) of Rule 68.

2. Action of Commission:

No final action taken; requested Professor Chadbourne to redraft Rule 69.

Date of Meeting: November 27-28, 1959

Date of Memo: November 5, 1959

Memorandum No. 1-a

Subject: Qualification of Declarant Under Proposed Rule 65-A.

Proposed Rule 65-A, as contained in Memorandum No. 1 (11/1/59) is intended to present certain policy questions to the Commission for decision. The second sentence of Rule 65-A contains the following provision:

> The burden of establishing that a statement is inadmissible because of the provisions of this section is upon the person objecting to the admission of the evidence.

Because the sentence quoted above indicates only one of several alternative ways of phrasing the second sentence of Rule 65-A, the following provisions are also submitted for consideration:

> The burden of establishing that a statement is not inadmissible because of the provisions of this section is upon the person offering the evidence of the statement.

> If objection is made to the admission of the evidence of a statement on the grounds that the declarant at the time of making the statement did not possess the capacities requisite to qualify as a witness under Rule 17, the burden of establishing that the statement is not inadmissible because of the provisions of this section is upon the person offering the evidence of the statement.

Finally, the Commission may decide to omit the second sentence of Rule 65-A and make no provision concerning who has the burden of establishing that the hearsay declarant possessed the qualifications of a witness.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Date of Meeting: November 27-28, 1959

Date of Memo: November 18, 1959

Memorandum No. 4

Subject: Uniform Rules of Evidence - Report on activities of Bar Committees on medical treatises and medical panels.

The Commission may not want to take action on paragraph (31) of Rule 63 at the November meeting. The Commission originally deferred action on paragraph (31) of Rule 63 (Hearsay exception for Learned Treatises) until the Commission was advised as to what action the Bar was taking on medical treatises and medical panels.

The California State Bar has been studying for some time a statute providing for the admissibility in evidence of a statement of fact or opinion on a subject of science or art, in the discretion of the court, in an action on contract or tort for malpractice. At the same time the Bar has been considering a plan to set up a system of panels and other procedures to be used in connection with malpractice claims. The Board of Governors of the Bar has referred the proposed statute on admission of evidence of medical treatises, etc., to the Committee to Consider Uniform Rules of Evidence. The Southern Section of that Committee is now working on this problem and may have a report available for our December meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

INTRODUCTION

This memo is a study of Rule 63 subdivision (31) providing as follows:

> "Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
> . . .
>
> "(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject."

Learned Treatises - Common-Law

There is a common-law exception to the hearsay rule dealing with "scientific books" or "books of science and art".[1] The scope of the exception is, however, imprecise. Wigmore states that the exception clearly embraces tables of mortality and almanacs but it "is doubtful whether a general rule in favor of standard tables of scientific calculations of all sorts can be regarded as established."[2] He states further that "it is doubtful [whether] there is yet any general exception in favor of works of history,"[3] and that the limits within which the use is allowable of dictionaries and works of general literature are "undefined"[4] (W. §1699). He concludes, therefore, that the exception does not extend broadly to all learned treatises. He finds that the exception exists in this broad form only in the state of Alabama[5] and cites many cases from other jurisdictions rejecting a wide variety of medical and other professional works.[6]

Learned Treatises - California Statutory Exception

In California we have a statute which, on its face, seems to liberalize and clarify the scope of the common-law exception. This enactment is C.C.P. §1936 providing as follows:

> "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."

This seems to be both reasonably precise and liberal. The appearance is, however, deceiving. The leading California case construing §1936 is Gallagher v. Market St. Ry. Co.,[7] a personal injury case. Plaintiff's attorney called a Doctor and had him testify that "Gross on Surgery" is a standard authority on the subject. The Doctor was then excused and the attorney proposed "to read from said book, as though the author were a witness then and there present in court, and testifying in the case before the jury." Defendant's objections being overruled, plaintiff's attorney "read the book, at great length, to the jury as evidence." This was held to be error on the following grounds:

> "Under common-law procedure it was not competent to read books of science to a jury as evidence, because the statements therein contained were not only wanting in the sanctity of an oath, but were made by one who was not present, and was not liable to cross-examination. For that reason they were excluded, notwithstanding the opinion under oath of scientific men, that they were books of authority. . . .

"But it is contended that the common-law rule has been changed by the Code law. Section 1936 of the Code of Civil Procedure makes 'historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, . . . prima facie evidence of facts of general notoriety and interest,' and the question arises, whether such books, which were not regarded before the adoption of the Codes as competent evidence, are not, by force of that provision of the Code, made competent. Doubtless the intention of that legislation was to extend the rule of evidence rather than to restrict it. But the extension is limited by the terms 'facts of general notoriety and interest.'

"What are 'facts of general notoriety and interest?' We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause that, under the provisions of the Code, proof may be made by the production of books of standard authority. . . .

"Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences founded upon conclusions reached from certain and constant data by processes too intricate to be elucidated by witnesses when on examination. . . . Thus mortuary tables for estimating the probable duration of the life of a party at a given age, chronological tables, tables of weights, measures and currency, annuity tables, interest tables, and the like, are admissible to prove facts of general notoriety and interest in connection with such subjects as may be involved in the trial of a cause. . . .

> "But medicine is not considered as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that, what is considered a sound induction last year may be considered an unsound one this year, and the very book which evidences the induction, if it does not become obsolete may be altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects. . . . 'if such treatises were to be held admissible, the question at issue might be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories.'"

"Science", then, in the §1936 sense means "exact science". Medicine is not such a science. Therefore, medical texts are not within the statutory designation of "books of science". Furthermore, medical facts are not "facts of general notoriety and interest" in the sense of §1936. For these two reasons §1936 is inapplicable to medical literature and to the literature of other "inexact" sciences. Such literature, therefore, remains inadmissible hearsay, as it was at common-law. It is thus improper to read a medical text as substantive evidence;[8] to have a witness quote from the text on direct examination;[9] or to read the text in the course of arguing to the jury.[10] However, to some extent which is more or less uncertain the treatise may be used upon cross-examination.[11]

Learned Treatises - URE Exception (31)

Subdivision (31) excepts from exclusion under Rule 63 a "published treatise, periodical or phamphlet on a subject of

history, science or art" [Italics added.] which treatise etc. is "a reliable authority". Undoubtedly the Commissioners intend to repudiate the notion that "science" means only "exact science" and they intend to include medicine and comparable disciplines under the head of "science or art".[12] Yet their choice of language is ill-adapted to their purpose. "Science or art" is the phrasing of the California statute and of the Iowa statute on which the California enactment is based. Both jurisdictions have held that this phrasing does not embrace medicine.[13] This phrasing is not, therefore, the clear-cut designation of medicine and like disciplines that the new rule should contain. Especially is this so if the new rule is to be adopted in this state. Hence, we suggest that (31) be amended to insert the words "medicine or other" immediately before the word "science".

Is (31), as thus amended, a desirable exception? In support of an affirmative answer the following arguments may be advanced: (1) If proponent's objective is to give the jury Doctor-Author X's views as substantive evidence (so that the jury may reason: X said it; it's true) proponent will in most cases need this exception. The alternative (calling X as witness) will in most cases be either downright impossible or inordinately inconvenient and expensive. There is, therefore, a necessity here in the sense that such necessity is an element of other recognized exceptions to the hearsay rule.[14] (2) There is, moreover, a special trustworthiness of this kind of hearsay arising from scientific nature of the work. Whatever elements of bias or partisanship there may be in a given work are apt to be in relation to scientific theory. This kind of slanting should no

more discredit a book than it discredits a specialist-witness who espouses a particular scientific school of thought.[15] (3) Today (without the exception) we freely allow the expert to testify though (if he is <u>really</u> qualified) his opinion will practically always be compounded in part of his book-learning.[16] If the book-background is thus indirectly brought before the jury, why not allow it directly? Consider, for example, the extent to which the Freudian psychiatrist testifying as expert will, of necessity, rely on Freud's works. If we accept, as we do, the witness' opinion so based, why not the books themselves?

There is (in our opinion) sufficient force in these considerations to justify the new rule dispensing with cross-examination of an author who is found to be a "reliable authority" on "a subject of history, medicine or other science or art."

If it be objected that the jury will be confused by technical terms and concepts, the answer is that proponent's self-interest may be trusted to prompt him to place an expert on the stand for whatever exposition is necessary under the circumstances. If it be objected that text-extracts may be distorted by lifting them out of context, the answer is that opponent's self-interest may be trusted to prompt him to expose the distortion.[17] If it be objected that under the new rule the trial may degenerate into a "battle of books" the answer is that under Rule 45 the trial judge possesses a discretion adequate to guard against this danger.[18]

In sum, (in our opinion) Exception (31), amended as proposed above, is desirable[19] and is recommended for approval.[20]

FOOTNOTES

1. Wigmore §1690.
2. Wigmore §1698.
3. Wigmore §1700.
4. Wigmore §1699.
5. Wigmore §1693.
6. Wigmore §1696 note 1.
7. 67 Cal. 13 (1885).
8. Gallagher, supra note 7.
9. Lilley v. Parkinson, 91 Cal. 655 (1891); Baily v. Kruetzmann, 141 Cal. 519 (1904).
10. People v. Wheeler, 60 Cal. 581 (1882).
11. Gluckstein v. Lipsett, 93 C.A. 2d 391 (1949); Lewis v. Johnson, 12 C. 2d 558 (1939); 23 S.C. L. Rev. 403; 2 U.C.L.A. L. Rev. 252; Wigmore §1700.
12. (31) is based on the A.L.I. Rule of which it is substantially a copy. Morgan says of the A.L.I. Rule that it "has long been advocated by Mr. Wigmore." 18 A.L.I. Proceedings, 195. The rule advocated by Wigmore would, of course, include medical texts. See Wigmore §§1691-1692 and his reference in §1693 note 3 to the "California heresy" of the Gallagher case, supra, note 7.
13. Wigmore §1693, note 3.
14. Wigmore §1691:

> ". . . there are certain matters upon which the conclusions of two or three leaders in the scientific world are always preeminently desirable; and it is highly unsatisfactory that, except in the region where they happen to live, the opinions of world-famous investigators should have no standing of their own. Whether such persons are legally unavailable, or whether it is merely a question of

relative expense, the principle of Necessity is equally satisfied; and we should be permitted to avail ourselves of their testimony in the printed form in which it is most convenient."

15. Wigmore §1692:

"(a) There is no need of assuming a higher degree of sincerity for learned writers as a class than for other persons; but we may at least say that in the usual instance their state of mind fulfils the ordinary requirement for the Hearsay exceptions, namely, that the declarant should have 'no motive to misrepresent'. They may have a bias in favor of a theory, but it is a bias in favor of the truth as they see it; it is not a bias in favor of a lawsuit or of an individual. Their statement is made with no view to a litigation or to the interests of a litigable affair. When an expert employed by an electric company using the alternating or the single current writes an essay to show that the alternating current is or is not more dangerous to human life than a single current, the probability of his bias is plain; but this is the exceptional case, and such an essay could be excluded, just as any Hearsay statement would be if such a powerful counter-motive were shown to exist.

"(b) The writer of a learned treatise publishes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of method and of accuracy of results. The motive, in other words, is precisely the same in character and is more certain in its influence than that which is accepted as sufficient in some of the other Hearsay exceptions, namely, the unwelcome probability of a detection and exposure of errors.

"(c) Finally, the probabilities of accuracy, such as they are, at least are greater than those which accompany the testimony of so many expert witnesses on the stand. The abuses of expert testimony, arising from the fact that such witnesses are too often in effect paid to take a partisan view and are practically untrustworthy, are too well-known to repeat. It must be conceded that those who

write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants.

"It may be concluded, then, that there is in these cases a sufficient circumstantial probability of trustworthiness. The Court in each instance should in its discretion exclude writings which for one reason or another do not seem to be sufficiently worthy of trust."

16. McCormick §296.

17. Wigmore §1690:

"Another objection sometimes raised is the danger of confusing the jury by technical passages without oral comment and simplification. A number of answers to this will suggest themselves; it is enough to point out that, so far as it is an appreciable danger, the counsel may be trusted to protect themselves, where necessary, against this danger by calling also an expert to take the stand.

"Another objection, once made, is that the treatises may be used unfairly, by taking passages which are explained away or contradicted in other books or in other parts of the book. Here, again, so far as the possibility is appreciable, the opposing counsel may be trusted to protect his client's interests, exactly as he does, by bringing to the stand one expert to oppose another, and with much less difficulty and expense."

18. See Morgan's statement in 18 A.L.I. proceedings 195:

"[T]he danger that has been suggested to us is that there will be a battle of the books if you do adopt this Rule. The answer to that is, of course, the answer Judge Hand made - the control of the trial judge."

The battle-of-books objection was long ago made by Alderson, B. though with a different figure of speech. "We must", he said, "have the evidence of individuals, not their written opinions. We should be inundated with books if we were to hold otherwise." Queen v. Crouch, 1 Cox's Cr. Cases 94,

quoted in People v. Wheeler, 60 Cal. 581, 586 (1882).

19. One desirable feature is stated as follows by the Commissioners:

> ". . . The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This exception will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose."

On this point consider the references in note 11 supra.

20. The provisions of Exception (30) could be regarded as broad enough to include Scientific Treatises. If (31) is approved it is, of course, of no importance that there is this possible overlap. If (31) is disapproved, it may be advisable to qualify (30) to exclude its possible application to Scientific Treatises.

Date of Meeting: December 18-19, 1959
Date of Memo: December 10, 1959

Memorandum No. 3

Subject: Uniform Rules of Evidence - Hearsay Evidence Division.

Attached is the text of the Uniform Rules of Evidence -- Hearsay Evidence Division -- as revised to date by the Commission.

This material is to be used with Memorandum No. 4 (December 10, 1959). Memorandum No. 4 indicates the action already taken on each of the rules in the Hearsay Evidence Division and the problems still to be resolved by the Commission.

Respectfully submitted,

John H. DeMoully
Executive Secretary

(34(L))

Revised 12/10/59
10/20/59

Note: This is Uniform Rule 62 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 62. DEFINITIONS.

As used in [~~Rule 63 and its exceptions and in the following rules,~~] Rules 62 to 66, inclusive:

(1) [~~(2)~~] "Declarant" is a person who makes a statement.

(2) [~~(3)~~] "Perceive" means acquire knowledge through one's own senses.

(3) [~~(4)~~] "Public [~~Official~~"] officer or employee of a state or territory of the United States" includes: [~~an official of a political subdivision of such state or territory and of a municipality.~~]

(a) In this State, an officer or employee of the State or of any county, city, district, authority, agency or other political subdivision of the State.

(b) In other states and in territories of the United States, an officer or employee of any public entity that is substantially equivalent to those included under subparagraph (a) of this paragraph.

(4) [~~(5)~~] "State" includes each of the United States and the District of Columbia.

(5) [~~(1)~~] "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(6) [~~(7)~~] Except as otherwise provided in paragraph (7) of this rule, "unavailable as a witness" includes situations where the witness is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. [,-or]

(b) Disqualified from testifying to the matter. [,-or]

(c) Dead or unable [to-be-present] to testify at the hearing because of [death-or-then-existing] physical or mental illness. [,-or]

(d) Absent beyond the jurisdiction of the court to compel appearance by its process. [,-or]

(e) Absent from the [place-of] hearing [because] and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

(7) For the purposes of paragraph (6) of this rule, [But] a witness is not unavailable:

(a) If the judge finds that [his] the exemption, disqualification, death, inability or absence of the witness is due to (i) the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying [,] or [to] (ii) the culpable act or neglect of such [party] proponent; [,] or

(b) If unavailability is claimed [under-clause-(d)-of-the-preceding paragraph] because the witness is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship [,] or expense. [and-that-the-probable-importance-of-the-testimony-is-such-as-to justify-the-expense-of-taking-such-deposition.]

[(6)--"A-business"-as-used-in-exception-(13)-shall-include-every kind-of-business,-profession,-occupation,-calling-or-operation-of-institutions,-whether-carried-on-for-profit-or-not.]

Note: This is Uniform Rule 63 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(1) [~~A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;~~] When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts

recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

(2) [~~Affidavits to the extent admissible by the statutes of this State;~~] To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

(c) Testimony given by a witness in a prior trial or preliminary hearing of the action or proceeding in which it is offered.

(3) [~~Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;~~] Subject to the same limitations and objections as though the declarant were testifying in person, testimony

given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the present defendant was a party to the other action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action or proceeding in which the testimony is offered except that the testimony given at a preliminary hearing in the other action or proceeding is not admissible.

(4) Subject to Rule 65A, a statement:

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; [,] or

(b) Which the judge finds [~~was made while the declarant was~~

~~under-the-stress-of-a-nervous-excitement-caused-by-such-perception,-or~~]

(i) purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

[~~(c)--if-the-declarant-is-unavailable-as-a-witness,-a-statement narrating,-describing-or-explaining-an-event-or-condition-which-the-judge finds-was-made-by-the-declarant-at-a-time-when-the-matter-had-been recently-perceived-by-him-and-while-his-recollection-was-clear,-and-was made-in-good-faith-prior-to-the-commencement-of-the-action,~~]

(5) Subject to Rule 65A, a statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, voluntarily and in good faith and [~~while-the declarant-was-conscious-of-his-impending-death-and-believed~~] in the belief that there was no hope of his recovery. [~~,~~]

(6) [~~In-a-criminal-proceeding-as-against-the-accused,-a-previous statement-by-him-relative-to-the-offense-charged-if,-and-only-if,-the judge-finds-that-the-accused-when-making-the-statement-was-conscious-and was-capable-of-understanding-what-he-said-and-did,-and-that-he-was-not induced-to-make-the-statement-(a)-under-compulsion-or-by-infliction-or threats-of-infliction-of-suffering-upon-him-or-another,-or-by-prolonged interrogation-under-such-circumstances-as-to-render-the-statement-involuntary,-or-(b)-by-threats-or-promises-concerning-action-to-be-taken-by-a~~

~~public-official-with-reference-to-the-crime,-likely-to-cause-the-accused-to-make-such-a-statement-falsely,-and-made-by-a-person-whom-the-accused-reasonably-believed-to-have-the-power-or-authority-to-execute-the-same;~~]

Subject to Rule 65A, in a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, unless the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

(7) Subject to Rule 65A and except as provided in paragraph (6) of this rule, as against himself, a statement by a person who is a party to the action or proceeding in his individual or [a] representative capacity. ~~[and-if-the-latter,-who-was-acting-in-such-representative capacity-in-making-the-statement,]~~

(8) Subject to Rule 65A, as against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; [,] or

(b) Of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth. [,]

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship; [,] or

(b) [~~the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,~~] The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability. [;]

(10) [~~Subject to the limitations of exception (6),~~] Subject to Rule 65A, if the declarant is not a party to the action or proceeding and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the [~~assertion~~] statement so far contrary to the declarant's pecuniary or proprietary interest or so far

subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [;]

[~~(11)--A statement by a voter concerning his qualifications to vote or the fact or content of his vote;~~]

(12) Subject to Rule 65A, unless the judge finds it was made in bad faith, a statement of the declarant's:

(a) Then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [~~,or~~]

(b) Previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [;]

(13) [~~Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation~~

~~were-such-as-to-indicate-their-trustworthiness;~~ A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this paragraph, "a business" includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(14) Evidence of the absence [~~of-a-memorandum-or-record~~] from the [~~memoranda-or~~] records of a business (as defined in paragraph (13) of this rule) of a record of an asserted act, [~~event-or~~] condition [,] or event, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make [~~such memoranda~~] records of all such acts, [~~events-or~~] conditions or events, at or near the time [~~thereof-or-within-a-reasonable-time-thereafter~~] of the act, condition or event, and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business are such as to indicate the trustworthiness of the records.

(15) Subject to Rule 64, statements of fact contained in a written report [~~s-or-findings-of-fact~~] made by a public [~~official~~] officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if the judge finds

that the making thereof was within the scope of the duty of such [~~official~~] officer or employee and that it was his duty to:

(a) [~~to~~] Perform the act reported; [,] or

(b) [~~to~~] Observe the act, condition or event reported; [,] or

(c) [~~to~~] Investigate the facts concerning the act, condition or event. [~~and to make findings or draw conclusions based on such investigations;~~]

(16) [~~Subject to Rule 64,~~] Writings made by persons other than public officers or employees as a record, report or finding of fact, if the judge finds that:

(a) The maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions; [,] and

(b) The writing was made and filed as so required by the statute. [~~,~~]

(17) [~~Subject to rule 64,~~] (a) If meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein. [,]

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by

the official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

(18) [~~Subject to Rule 64, certificates~~] A certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) The maker of the certificate was, at the time and place certified as the time and place of the marriage, [was] authorized by law to perform marriage ceremonies; [,] and

(b) The certificate was issued at that time or within a reasonable time thereafter. [;]

(19) [~~Subject to Rule 64~~] The official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; [,] and

(b) An applicable statute authorized such a document to be recorded in that office. [;]

(20) Evidence of a final judgment adjudging a person guilty of a felony, to prove, against such person, any fact essential to sustain the judgment unless such fact is admitted. [,]

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if:

(a) Offered by a judgment debtor in an action or proceeding in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment; and [~~,-provided~~]

(b) The judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action or proceeding. [;]

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental subdivision thereof in land, if offered by a party in an action or proceeding in which any such fact or such interest or lack of interest is a material matter. [;]

(23) Subject to Rule 65A, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable as a witness. [~~;~~-]

(24) Subject to Rule 65A, a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person

other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) [~~finds that~~] The declarant was related to the other by blood or marriage; or

(b) [~~finds that he~~] The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared [,] and made the statement (i) as upon information received from the other or from a person related by blood or marriage to the other [,] or (ii) as upon repute in the other's family. [~~, and (b) finds that the declarant is unavailable as a witness;~~]

(25) [~~A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;~~]

(26) Evidence of reputation among members of a family, if:

(a) The reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage; and

(b) The evidence consists of (i) a witness testifying to his knowledge of such reputation or (ii) such evidence as entries in family bibles or other family books or charts, engravings on rings, family portraits or engravings on urns, crypts or tombstones.

(27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if [~~(a)~~] the reputation concerns:

(a) Boundaries of, or customs affecting, land in the community [,] and the judge finds that the reputation, if any, arose before controversy. [~~,-or~~]

(b) [~~the reputation concerns~~] An event of general history of the community or of the state or nation of which the community is a part [,] and the judge finds that the event was of importance to the community. [~~,-or~~]

(c) [~~the reputation concerns~~] The date or fact of birth, marriage, divorce [,] or death[~~,legitimacy,-relationship by blood or marriage, or race ancestry~~] of a person resident in the community at the time of the reputation. [~~,-or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community,~~]

(28) If a person's character or a trait of a person's character at a specified time is material, evidence of his general reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed. [;]

(29) Subject to Rule 64, evidence of a statement relevant to a material matter, contained in:

(a) A deed of conveyance or a will or other [~~document~~] writing purporting to affect an interest in property, offered as tending to prove

the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property [,] and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. [;]

(b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter, if the writer could have been properly allowed to make such statement as a witness.

(30) Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical [,] or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them. [;]

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject.

Note: This is Uniform Rule 64 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO HEARSAY RULE TO EXCLUDE EVIDENCE.

Any writing admissible under [~~exceptions~~] paragraph (15) [~~, (16), (17), (18), and (19)~~] or (29) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it, or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

Note: This is Uniform Rule 65 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 65. CREDIBILITY OF DECLARANT.

Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 [,] is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

(34(L))

Revised 12/10/59
10/22/59

Note: This is a new rule proposed by the Law Revision Commission.

RULE 65A. QUALIFICATION OF DECLARANT. [NEW]

Any statement otherwise admissible under paragraph (4), (5), (6), (7), (8), (10), (12), (23) or (24) of Rule 63 is inadmissible if the judge finds that at the time of making the statement the declarant was incapable of understanding the duty of a witness to tell the truth. The burden of establishing that a statement is inadmissible because of the provisions of this section is upon the person objecting to the admission of the evidence.

Note: This is Uniform Rule 66 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 66. MULTIPLE HEARSAY.

A statement within the scope of an exception to Rule 63 [~~shall~~] is not [be] inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

Date of Meeting: December 18-19, 1959

Date of Memo: December 10, 1959

MEMORANDUM NO. 4

Subject: Uniform Rules of Evidence - Hearsay Evidence Division.

The attached material indicates the action already taken by the Commission on each of the rules in the Hearsay Evidence Division and the problems still to be resolved by the Commission.

This material is to be used with Memorandum No. 3 (December 10, 1959) which contains the text of the rules as revised to date by the Commission.

Respectfully submitted,

John H. DeMoully
Executive Secretary

December 10, 1959

ACTION TAKEN BY COMMISION ON

HEARSAY EVIDENCE PORTION OF UNIFORM RULES OF EVIDENCE

Rule 62

Rule 62 is set out as approved by the Commission at the November meeting. The Commission suggested but has not, however, approved the retabulation of Rule 62(6) into two numbered paragraphs.

Rule 63

Introductory Clause

Approved.

Exception (1)

Approved as revised.

Exception (2)

Approved as revised.

Exception (3)

Approved as revised.

Exception (4)

Approved as revised, except as to whether Rule 65A should apply.

Exception (5)

Approved as revised, except as to whether Rule 65A should apply.

Exception (6)

Approved as revised, except as to whether Rule 65A should apply.

Exception (7)

Approved as revised, except as to whether Rule 65A should apply.

Exception (8)

Approved as revised, except as to whether Rule 65A should apply.

Exception (9)

Approved as revised.

Exception (10)

Approved as revised, except as to whether Rule 65A should apply. Also, why is the phrase "Subject to the limitations of exception (6)" deleted?

Exception (11)

Disapproved.

Exception (12)

Approved as revised, except as to whether Rule 65A should apply.

Exception (13)

Approved as revised.

Exception (14)

Approved in principle - staff to revise to make consistent in form with exception (13). Commission has not approved revised form.

Exception (15)

Approved as revised.

Exception (16)

Approved as revised. Note that the reference to Rule 64 is deleted.

Exception (17)

Approved as revised. Note that the reference to Rule 64 is deleted.

Exception (18)

Approved as revised. Note that the reference to Rule 64 is deleted.

Exception (19)

Approved as revised. Note that the reference to Rule 64 is deleted.

Exception (20)

Approved as revised. Note that the words "Subject to Rule 64" which had been inserted at the beginning of this exception are deleted.

Exception (21)

Approved as revised.

Exception (22)

Approved as revised.

Exception (23)

Approved as revised, except as to whether Rule 65A should apply.

Exception (24)

Approved as revised, except as to whether Rule 65A should apply.

Exception (24)

Approved as revised, except as to whether Rule 65A should apply.

Exception (25)

Disapproved.

Exception (26)

Approved as revised.

Exception (27)

Approved as revised.

Exception (28)

Approved as revised.

Exception (29)

Approved as revised.

Exception (30)

Approved as revised.

Exception (31)

No action taken. Will consider after Bar Committee has taken action on this exception.

Rule 64

Approved as revised.

Rule 65

Approved as revised.

Rule 65A

Approved, except that the application of this rule to specific paragraphs of Rule 63 will be considered at a subsequent meeting.

Rule 66

Approved as revised.

April 1, 1960

Memorandum No. 39 (1960)

Subject: Uniform Rules of Evidence - Hearsay Division

Attached are the Uniform Rules of Evidence (Hearsay Division) as revised to date by the Commission. You may want to refer to this material in connection with Chadbourn's memo concerning the problem of incorporating the Uniform Rules in the Hearsay Division (Rules 62-66) into the California Codes.

Respectfully submitted,

John H. DeMoully
Executive Secretary

JHD:gl

UNIFORM RULES OF EVIDENCE

HEARSAY DIVISION

Revised March 1, 1960
Revised 12/10/59
10/20/59

(34(L))

Note: This is Uniform Rule 62 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 62. DEFINITIONS.

As used in [~~Rule 63 and its exceptions and in the following rules,~~] Rules 62 to 66, inclusive:

(1) [~~(2)~~] "Declarant" is a person who makes a statement.

(2) [~~(3)~~] "Perceive" means acquire knowledge through one's own senses.

(3) [~~(4)~~] "Public [~~Official~~"] officer or employee of a state or territory of the United States" includes: [~~an official of a political subdivision of such state or territory and of a municipality.~~]

(a) In this State, an officer or employee of the State or of any county, city, district, authority, agency or other political subdivision of the State.

(b) In other states and in territories of the United States, an officer or employee of any public entity that is substantially equivalent to those included under subparagraph (a) of this paragraph.

(4) [~~(5)~~] "State" includes each of the United States and the District of Columbia.

(5) [~~(1)~~] "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(6) [~~(7)~~] Except as otherwise provided in paragraph (7) of this rule, "unavailable as a witness" includes situations where the witness is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. [,-or]

(b) Disqualified from testifying to the matter. [,-or]

(c) Dead or unable [to be present] to testify at the hearing because of [death or then existing] physical or mental illness. [,-or]

(d) Absent beyond the jurisdiction of the court to compel appearance by its process. [,-or]

(e) Absent from the [place of] hearing [because] and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

(7) For the purposes of paragraph (6) of this rule, [But] a witness is not unavailable:

(a) If the judge finds that [his] the exemption, disqualification, death, inability or absence of the witness is due to (i) the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying [,] or [to] (ii) the culpable act or neglect of such [party] proponent; [,] or

(b) If unavailability is claimed [under clause (d) of the preceding paragraph] because the witness is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship [,] or expense. [and that the probable importance of the testimony is such as to justify the expense of taking such deposition.]

[(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.]

Note: This is Uniform Rule 63 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(1) [~~A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;~~] When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts

recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

(2) [~~Affidavits to the extent admissible by the statutes of this State;~~] To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

(c) Testimony given by a witness in a prior trial or preliminary hearing of the action or proceeding in which it is offered.

(3) [~~Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;~~] Subject to the same limitations and objections as though the declarant were testifying in person, testimony

given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the present defendant was a party to the other action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action or proceeding in which the testimony is offered except that the testimony given at a preliminary hearing in the other action or proceeding is not admissible.

(4) A statement:

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; [,] or

(b) Which the judge finds [~~was made while the declarant was~~

~~under-the-stress-of-a-nervous-excitement-caused-by-such-perception,-or~~] (i) purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

~~[(c)--if-the-declarant-is-unavailable-as-a-witness,-a-statement narrating,-describing-or-explaining-an-event-or-condition-which-the-judge finds-was-made-by-the-declarant-at-a-time-when-the-matter-had-been recently-perceived-by-him-and-while-his-recollection-was-clear,-and-was made-in-good-faith-prior-to-the-commencement-of-the-action;~~]

(5) A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, voluntarily and in good faith and ~~[while-the declarant-was-conscious-of-his-impending-death-and-believed]~~ in the belief that there was no hope of his recovery. ~~[;]~~

(6) ~~[In-a-criminal-proceeding-as-against-the-accused,-a-previous statement-by-him-relative-to-the-offense-charged-if,-and-only-if,-the judge-finds-that-the-accused-when-making-the-statement-was-conscious-and was-capable-of-understanding-what-he-said-and-did,-and-that-he-was-not induced-to-make-the-statement-(a)-under-compulsion-or-by-infliction-or threats-of-infliction-of-suffering-upon-him-or-another,-or-by-prolonged interrogation-under-such-circumstances-as-to-render-the-statement-involuntary,-or-(b)-by-threats-or-promises-concerning-action-to-be-taken-by-a~~

~~public-official-with-reference-to-the-crime, likely-to-cause-the-accused-to-make-such-a-statement-falsely, and-made-by-a-person-whom-the-accused-reasonably-believed-to-have-the-power-or-authority-to-execute-the-same;~~]

In a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, unless the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

(7) Except as provided in paragraph (6) of this rule, as against himself, a statement by a person who is a party to the action or proceeding in his individual or [a] representative capacity. ~~[and-if-the-latter,-who-was-acting-in-such-representative capacity-in-making-the-statement;]~~

(8) As against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; [,] or

(b) Of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth. [;]

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(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship; [,] or

(b) [~~the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,~~] The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability. [,]

(10) [~~Subject to the limitations of exception (6),~~] If the declarant is not a party to the action or proceeding and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the [~~assertion~~] statement so far contrary to the declarant's pecuniary or proprietary interest or so far

subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [;]

[~~(11)--A statement by a voter concerning his qualifications to vote or the fact or content of his vote;~~]

(12) Unless the judge finds it was made in bad faith, a statement of the declarant's:

(a) Then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [~~,or~~]

(b) Previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [;]

(13) [~~Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation~~

~~were such as to indicate their trustworthiness;~~ A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this paragraph, "a business" includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(14) Evidence of the absence [~~of a memorandum or record~~] from the [~~memoranda or~~] records of a business (as defined in paragraph (13) of this rule) of a record of an asserted act, [~~event or~~] condition [~~,~~] or event, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make [~~such memoranda~~] records of all such acts, [~~events or~~] conditions or events, at or near the time [~~thereof or within a reasonable time thereafter~~] of the act, condition or event, and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business are such as to indicate the trustworthiness of the records.

(15) Subject to Rule 64, statements of fact contained in a written report [~~s or findings of fact~~] made by a public [~~official~~] officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if the judge finds

that the making thereof was within the scope of the duty of such [~~official~~] officer or employee and that it was his duty to:

(a) [~~to~~] Perform the act reported; [,] or

(b) [~~to~~] Observe the act, condition or event reported; [,] or

(c) [~~to~~] Investigate the facts concerning the act, condition or event. [~~and to make findings or draw conclusions based on such investigations,~~]

(16) [~~Subject to Rule 64,~~] Writings made by persons other than public officers or employees as a record, report or finding of fact, if the judge finds that:

(a) The maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions; [,] and

(b) The writing was made and filed as so required by the statute. [;]

(17) [~~Subject to rule 64,~~] (a) If meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein. [,]

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by

the official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

(18) [~~Subject to Rule 64, --certificates~~] A certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) The maker of the certificate was, at the time and place certified as the time and place of the marriage, [was] authorized by law to perform marriage ceremonies; [;] and

(b) The certificate was issued at that time or within a reasonable time thereafter. [;]

(19) [~~Subject to Rule 64~~] The official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; [;] and

(b) An applicable statute authorized such a document to be recorded in that office. [;]

(20) Evidence of a final judgment adjudging a person guilty of a felony, to prove, against such person, any fact essential to sustain the judgment unless such fact is admitted. [;]

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if:

(a) Offered by a judgment debtor in an action or proceeding in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment; and [~~,-provided~~]

(b) The judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action or proceeding. [~~;~~]

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental subdivision thereof in land, if offered by a party in an action or proceeding in which any such fact or such interest or lack of interest is a material matter. [~~;~~]

(23) A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable as a witness. [~~-;-~~]

(24) A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person

other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) [~~finds that~~] The declarant was related to the other by blood or marriage; or

(b) [~~finds that he~~] The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared [,] and made the statement (i) as upon information received from the other or from a person related by blood or marriage to the other [,] or (ii) as upon repute in the other's family. [~~, and (b) finds that the declarant is unavailable as a witness;~~]

(25) [~~A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;~~]

(26) Evidence of reputation among members of a family, if:

(a) The reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage; and

(b) The evidence consists of (i) a witness testifying to his knowledge of such reputation or (ii) such evidence as entries in family bibles or other family books or charts, engravings on rings, family portraits or engravings on urns, crypts or tombstones.

(27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if [~~(a)~~] the reputation concerns:

(a) Boundaries of, or customs affecting, land in the community [,] and the judge finds that the reputation, if any, arose before controversy. [~~,~~]

(b) [~~the reputation concerns~~] An event of general history of the community or of the state or nation of which the community is a part [,] and the judge finds that the event was of importance to the community. [~~,~~]

(c) [~~the reputation concerns~~] The date or fact of birth, marriage, divorce [,] or death[~~,legitimacy, relationship by blood or marriage, or race ancestry~~] of a person resident in the community at the time of the reputation. [~~, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;~~]

(28) If a person's character or a trait of a person's character at a specified time is material, evidence of his general reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed. [;]

(29) Subject to Rule 64, evidence of a statement relevant to a material matter, contained in:

(a) A deed of conveyance or a will or other [~~document~~] writing purporting to affect an interest in property, offered as tending to prove

the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property [,] and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. [;]

(b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter, if the writer could have been properly allowed to make such statement as a witness.

(30) Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical [,] or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them. [;]

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject.

Note: This is Uniform Rule 64 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO HEARSAY RULE TO EXCLUDE EVIDENCE.

Any writing admissible under [~~exceptions~~] paragraph (15) [~~, (16), (17), (18), and (19)~~] or (29) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it, or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

Note: This is Uniform Rule 65 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 65. CREDIBILITY OF DECLARANT.

Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 [,] is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

Note: This is Uniform Rule 66 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 66. MULTIPLE HEARSAY.

A statement within the scope of an exception to Rule 63 [~~shall~~] is not [~~be~~] inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

MEMORANDUM IN RE INCORPORATING

RULES 62-66 IN THE CALIFORNIA CODES

PART ONE

Introduction

This memo is predicated upon the following assumptions:

1. That the Commission will recommend that the Legislature enact the Uniform Rules of Evidence, as revised by the Commission.

2. That the recommendation will be to incorporate the Rules in Part IV of the Code of Civil Procedure.

Comment: C.C.P. § 1 provides as follows:

> "This act shall be known as The Code of Civil Procedure of California, and is divided into four parts, as follows:
>
> Part I Of Courts of Justice.
> II Of Civil Actions.
> III Of Special Proceedings of a Civil Nature.
> IV Of Evidence."

Penal Code § 1102 provides:

> "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code."

Probate Code § 1230 provides in part as follows:

> "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions."

Thus Part IV of The C.C.P. is the principal source of statutory rules of evidence applicable to civil, criminal and probate proceedings. It seems, therefore, that any large-scale revision of such statutes belongs in Part IV.

3. That the Commission will publish a series of interim, tentative reports on such divisions of the U.R.E. as Hearsay, Privileges, etc.

4. That each such interim report should include suggestions as to adjustments in the C.C.P. and other Codes relevant to the subject matter of the particular report.

On the basis of the above assumptions we propose in this study to explore the problems incident to and to make recommendations concerning the incorporation in The California Codes of Rules 62-66 as revised by the Commission as of December 20, 1959. This study is thus a proposed part of the interim report on the Hearsay Division of the U.R.E.

General comparison of present statutory hearsay law and Rules 62-66

Rules 62-66 purport to provide a complete system governing the admission and exclusion of hearsay evidence. The format of the Rules is (a) Definitional provisions (Rules 62 and 63, introductory paragraph) (b) Statement of general rule that hearsay is inadmissable (Rule 63, introductory paragraph) (c) Statement of thirty-one exceptions to the general rule (Rule 63, subdivisions (1) - (31)).

Although we have today in California numerous code provisions respecting hearsay, these provisions are not organized in any structure comparable to the orderly format of Rules 62-66. Thus, although we have a multiplicity of statutory exceptions to the hearsay rule, we do not have any statutory definition of hearsay evidence, nor any statutory statement of the general rule. Moreover the statutory exceptions are not stated as such, nor are

they collected together in any one place, nor are they inconsiderable in number. In consequence, our present mass of legislative hearsay law can scarcely be called a system. It is in fact so disorganized and so disorderly that, taken as a whole, it is entirely unsystematic.

Nevertheless, we shall now attempt a general description of our present hearsay code provisions and a comparison, in general terms, of such provisions with Rule 63.

Practically all of our hearsay statutes consist of exceptions to the hearsay rule. For descriptive purposes we may call them "general" and "special" exceptions. In this context a general exception means a principle of general application, like the principle of dying declarations, declarations against interest, etc. A special exception means a narrow ad hoc exception in the nature of a rule of thumb directed only to a specially limited situation.

To illustrate:

C.C. P. § 1870 provides in part as follows:

> "...evidence may be given upon a trial of ...[t]he act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person ..."

Under the classification we have in mind this is a "general" exception. On the other hand Agricultural Code § 920 provides in part as follows:

> "Any sample taken by an enforcement officer in accordance with rules and regulations promulgated under the provisions

> of this article for the taking of official samples shall be prima facie evidence, in any court in this State, of the true condition of the entire lot from which the sample was taken. A written report issued by the State Seed Laboratory showing the analysis of any such sample shall be prima facie evidence, in any court in this State, of the true analysis of the entire lot from which the sample was taken."

This we regard as a "special" exception.

Analogues of the general exceptions are found in the subdivisions of Rule 63. For example, the pedigree exception above quoted is roughly analogous to subdivisions (23) - (26) of Rule 63. On the other hand, since the subdivisions of the Rule for the most part fashion the exceptions in general terms and since the statutory special exceptions deal with minutiae, we find in the subdivisions of the Rule no counterparts of the special exceptions, (except, of course, to the extent that a special exception is a minute application of a general principle stated in a subdivision).

A general program for adjusting the present hearsay code provisions to the adoption of Rules 62-66.

Of course, the proposed adoption of Rules 62-66 must be accompanied by appropriate recommendations concerning adjustments in the present statutes. Ideally and logically, since the Rules are a total system, the appropriate adjustment would be a total repeal of all statutes now dealing with hearsay. It is believed, however, that as the study progresses, this ideal will appear to be impossible of accomplishment.

The program proposed herein is therefore something less

than the ideal which the demands of abstract logic and considerations of symmetry require.

Speaking generally the program is as follows:

1. Repeal specifically all of the present code provisions which are general hearsay exceptions and which are either inconsistent with or substantially coextensive with the Rule 63 counterparts of such provisions.

2. Leave intact the remainder of our present statutory hearsay law.

We now turn to the analysis and discussion of the code provisions which we submit in support of this program.

The Four Groups of Statutes.

The thirty-one subdivisions of Rule 63 are exceptions to the hearsay rule whereby certain evidence is declared to be admissible nothwithstanding such evidence is hearsay. Virtually all of our statutory law relating to hearsay likewise declares the admissibility of hearsay evidence and, like the subdivisions of Rule 63, these statutes therefore operate as exceptions to the hearsay rule.

Comparing our statutory exceptions with the exceptions stated in the subdivisions of Rule 63, we find that the statutory exceptions fall into the following four groups:

1. Those which are more restrictive than the Rule 63 exceptions.

Illustration: C.C.P. § 1870 provides in part as follows:

"... evidence may be given upon a trial of the following facts: ... in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death ..."

On the other hand, subdivision (5) of Rule 63 makes dying declarations admissible in civil as well as criminal actions and does not limit the subject matter of the declaration to the cause of the declarant's death.

2. Those which are substantially coextensive with the Rule 62 exceptions.

Illustration: C.C.P. §§ 1953e-1953h (the Uniform Business Records as Evidence Act) is coextensive with subdivision (13) of Rule 63, as revised by the Commission.

3. Those which are more liberal than the Rule 63 exceptions.

Illustration: C.C.P. § 1849 provides in part as follows:

"Where ... one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former."

Under this the declaration is admissible irrespective of the availability of the declarant. Per contra under subdivision (10) of Rule 63 (as revised by the Commission) such declaration is admissible only if the declarant is unavailable as a witness.

Further illustration: Penal Code § 1107 provides that in a prosecution for forging the note of a corporation, the fact of incorporation may be proved by reputation. Per contra subdivision (28) of Rule 63 permits reputation evidence only to establish a person's character or trait of character.

4. Those which are minute applications of a principle stated in a Rule 63 subdivision.

Illustration: Subdivision (17) of Rule 63 makes admissible a writing purporting to be a copy of an official record or of an entry therein. Business and Professions Code § 8923 provides for admissibility of copies of records and papers in the office of the Yacht and Ship Brokers Commissioner. The latter is, of course, a miniscule application of the principle of the former.

It is believed that practically all of our statutory hearsay law falls within the above classification. There is, however, a small residuum which is not included. Thus, we have a few special statutes which operate in this fashion: they forbid the application of a principle stated in a Rule 63 subdivision to a particular situation.

To illustrate: Under Vehicle Code § 20013 a person's accident report is not admissible against him. This forbids the application

to this particular situation of the admissions principle stated in subdivision (7) of Rule 63.

Such legislation is, so to speak, an exception to an exception stated in a Rule 63 subdivision.

Each of these groups of our present hearsay statutes presents special problems of adjustment in connection with incorporating Rules 62-66 into our Codes. We shall now explore these problems with reference to each group and, then, we shall attempt to formulate appropriate recommendations.

Groups One and Two (General Statutory Exceptions More Restrictive Than or Coextensive With the Subdivisions of Rule 63).

The problems here are not acute. It seems self-evident that, to the extent that our present statutory statements of the traditional hearsay exceptions are more restrictive than their Rule 63 counterparts, such statutes should be repealed. For example, in proposing subdivision (5) of Rule 63 covering the dying declaration exception, we would certainly propose repeal of that portion of C.C.P. § 1870 which states this exception in more restrictive form than subdivision (5).

The only problem we find in this area grows out of a few statutes currently in force which operate to forbid the application of a traditional hearsay exception to a particular situation, as Vehicle Code § 20013 cited above. This, however, does not (we think) require any special adjustment. Presently, this Vehicle Code section operates as an exception to the general admissions principle stated in § 1870(2) ("...evidence may be given ... of ... [the] declaration of a party, as

evidence against such party ..."). The substitution of the Rule 63 admissions principle (i.e. the substitution of subdivision (7)) for C.C.P. § 1870(2) would not (we think) be interpreted as intended to affect the Vehicle Code section.

As to group two: again it seems self-evident that in proposing something coextensive with a present code section or sections we should recommend repeal of the section or sections

Group Three (Statutory Exceptions More Liberal Than the Subdivisions of Rule 63)

Above we have partially illustrated this type of statute. We now proceed to develop the illustrations more fully. Penal Code § 315 provides in part:

> "... in all prosecutions for keeping or resorting to [a house of ill-fame] common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it."

As pointed out above Penal Code § 1107 provides in part:

> "Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company ... the incorporation of such ... company ... may be proved by general reputation ... "

These, it seems, are two instances of reputation evidence which would now be admissible but which would be inadmissible under Rule 63. Reputation evidence is hearsay under Rule 63 and the exceptions to Rule 63 relating to reputation (subdivisions (26) - (28) do not cover the two kinds of reputation specified in the two sections of the Penal Code.

Probate Code § 372 provides that subject to certain conditions the court may "as evidence of the execution" of a

contested will "admit proof of the handwriting ... of any of the subscribing witnesses." Such proof seems to involve a hearsay statement by the subscribing witness (namely, that he saw the will executed), [See Wigmore § 1505 et seq.]. We find nothing in the subdivisions of Rule 63 which would make such evidence admissible.

Another illustration is the following: C.C.P. § 1870, subdivision 5, which provides in part as follows:

> "... evidence may be given ... of the following facts: ... 5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party. ..." [italics added].

We note the following as to the second sentence. Subdivision (10) of Rule 63 as originally drafted would have made admissible against a party the declaration of a person jointly interested with the party provided such declaration was against the interest of the declarant (as usually it would be). Such declaration would be admissible even though the declarant is available. That is, Rule 63 (10) in its original form would have covered most of the ground embraced by C.C.P. § 1870 (5), second sentence. Rule 63 (10) as amended by the Commission to require the unavailability of the declarant would not, however, cover, as § 1870 (5) now does, declarations of an available declarant.

Other instances are as follows: Civil Code § 224m (written statement by person relinquishing child prima facie

evidence of facts recited); § 1263 (declaration of homestead prima facie evidence of facts stated); § 2924 (certain recitals in deed prima facie evidence of facts recited).

The foregoing constitutes a partial collection of present statutory exceptions which are more liberal than the subdivisions of Rule 63. (See infra Part Two of this memo for a full collection.) These exceptions, it seems, admit that which Rule 63 would exclude altogether.

Now we turn to those present exceptions which are more liberal than Rule 63 in that the exceptions admit unconditionally that which the Rule admits only conditionally.

Subdivision (15) of Rule 63 (as revised by the Commission) provides:

> "Subject to Rule 64, statements of fact contained in a written report made by a public officer or employee of the United States or by a public officer or employee of a state or territory of the United States [are admissible], if the judge finds that the making thereof was within the scope of the duty of such officer or employee and that it was his duty to:
>
> (a) Perform the act reported; or
> (b) Observe the act, condition or event reported; or
> (c) Investigate the facts concerning the act, condition or event."

Presently we have an enormous number of code provisions which constitute minute applications of this principle to narrowly confined situations (Example: Government Code § 26662 which provides:

> "The return of the sheriff upon process or notices is prima facie evidence of

the facts stated in the return.").

However, none of our numerous present code provisions of this character is subject to any condition such as Rule 64 to which subdivision (15) of Rule 63 is subject. It is in this respect that all of these code provisions are more liberal than subdivision (15).

The above review shows that code provisions in the third group are more liberal than Rules 62-66 in either of two respects:

1. The provisions either admit what the Rules exclude altogether, or 2. The provisions admit without condition what the Rules admit only conditionally.

This seems to raise the following questions for decision:

1. Should the code provisions be repealed or continued in operation?
2. If they should be contined, how should this be accomplished?

With reference to the first question, it is recommended that the decision be to continue the provisions in force. We perceive no reason to narrow the present scope of admissible hearsay. Therefore (we think) present law should be preserved to the extent that it makes admissible what the Rules would make altogether inadmissible.

What, however, is the situation as respects the unconditional exceptions vis-a-vis subdivision (15) of Rule 63 which is subject to the condition stated in Rule 64? Logically, if we accept the rationale of this condition, we should change all present

law which is within the scope of the rationale and which does not now impose the condition. Yet, from a practical standpoint, this seems to be entirely infeasible. The code provisions in question are as vast in number as they are minute in scope. To attempt to alter them either by repealing them (so that the general principle of Rule 63(15) would become operative in the areas they now cover) or by amending them (so that each would provide that it is subject to the conditions of Rule 64)--such attempt would be an extraordinarily complex effort. Moreover, in view of the fact that liberal discovery and pretrial procedures reduce the significance of Rule 64, the effort would be out of all proportion to the more or less dubious profit that it would yield.

Turning then to the second question (viz, how to continue present law in force), the answer is (we think) to amend Rule 63 by adding thereto a new subdivision to be numbered (32) and to read as follows:

> (32) Any hearsay evidence not admissible under the foregoing provisions of this Rule but declared by other law of this State to be admissible.

Group 4 (Statutory Exceptions Which are Minute Applications of Rule 63 Principles)

The provisions which fall under this head are narrow provisions making admissible certain copies of certain documents and records. Such provisions are simply small applications of the large principle stated in subdivision (17) of Rule 63 (as revised by the Commission, eliminating the subject-to-Rule-64 feature). It may be thought, therefore, that to leave

these statutes in the books would make the codes needlessly prolix and untidy. It is our belief, however, that specific repeal of these provisions would be an intricate operation which would not be worth the man-hours it would require to produce repeal and to make the adjustments incident to such repeal. We advise, therefore, against any attempt to effect specific repeal of the provisions in question.

If such provisions are not to be repealed specifically, what then? Our idea is to incorporate in the U.R.E. an amendment whereby such provisions are identified in terms of general reference and whereby in such terms it is provided for continuing the provisions in force. For this purpose we suggest adding Rule 63A as follows:

> When hearsay evidence is declared to be admissible by any of subdivisions (1)-(31) of Rule 63 and when such evidence is also declared to be admissible by some law of this state other than the subdivision, the subdivision shall not be construed to repeal such other law.

In evaluating this proposal it should be remembered that Rule 63A would have no effect on those general code provisions which are coextensive or substantially coextensive with Rule 63 subdivisions, since under our proposed program such provisions would be specifically repealed. The sole purpose and proposed effect of 63A is to clarify the status of the numerous special code provisions which are consistent with Rule 63 subdivisions. As pointed out above, in our opinion these are too numerous

and too much enmeshed with the various acts of which they are a part to make specific repeal a feasible venture. Moreover, it seems (to us) unwise to have the status of all such provisions in doubt. The only course remaining is (we think) to declare the continued vitality of these provisions. The purpose and intent of proposed Rule 63A to make such declaration.

PART TWO

In this Part we propose (a) to indicate all of the California legislation touching hearsay which our research has disclosed, and (b) to indicate how such legislation would be affected by the proposals set forth in Part One of the memo.

All of the Codes have been examined and also Deering's General Laws.

We shall first give the relevant provisions of the C.C.P., next those of the Civil, Penal and Probate Codes, and thereafter those of the other codes in the alphabetical order of such other codes.

CODE OF CIVIL PROCEDURE

§ 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; therefore, proceedings against one cannot affect another."

§ 1849. "Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former."

COMMENT: No repeal. Remains in effect under 63(32). Suppose A deeds Blackacre to B. Later B declares that he had agreed with A that the deed should operate as a mortgage. Still later B deeds the property to C. A now sues C to redeem the property. A wishes to prove B's declaration. B is available. Under § 1849 the evidence is admissible. Under Rule 63 (10) as originally drafted the evidence would be admissible. However, under that rule as amended by the Commission to require that declarant be unavailable the evidence would be inadmissible. § 1849 is therefore retained as a provision more liberal than Rule 63 (10) as revised.

> § 1850. "Where also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of the fact, such declaration, act, or omission is evidence, as part of the transaction."

COMMENT: Repeal. This, it seems, is the 19th Century version of the so-called Res Gestae doctrine. It should be regarded as superseded by URE Rule 63 (4) and should be repealed.

> § 1851. "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties."

COMMENT: Repeal. Superseded by 63 (9) (c).

> § 1852. "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible."

COMMENT: Repeal. Superseded by URE Pedigree Rules - 63 (23) - (27).

§ 1853. "The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

COMMENT: Repeal. Superseded by 63 (10).

§ 1855a. "When, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; (b) any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of title, to real estate whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstracts and notes, or either, taken from such records in the preparation and upkeeping of its, or his, plant in the ordinary course of its business, the same may, without further proof, be admitted in evidence for the purpose aforesaid. No proof of the loss of the original document or instrument shall be required other than the fact that the same is not known to the party desiring to prove its contents to be in existence; provided, nevertheless, that any party so desiring to use said evidence shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof."

COMMENT: No repeal. Remains in effect under 63 (32) or 63A. The destruction or loss of a document excuses non-production of the document as proof of its terms and lays a foundation for secondary evidence under both C.C.P. § 1855 and URE Rule 70. If, however, such secondary evidence is hearsay e.g., a certificate or an affidavit (cf. viva voce testimony of a witness who testifies from present memory as to the terms of the document,) we must find some exception to the hearsay rule to make it admissible. When the hearsay is in the form of a purported certificate, i.e., a certified copy by the custodian of the public document, the evidence (the hearsay) is admissible under Rule 63 (17) and its C.C.P. counterparts. § 1855a, however, deals with a special and different kind of hearsay, viz, the abstracts therein specified. These abstracts would not be made admissible by 63 (17). Possibly they would be admissible under 63 (13). In any event it seems wise to leave § 1855a intact in order to be sure that the method of proof therein provided for continues in force.

> § 1870. "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: ...
>
> > 2. The act, declaration, or omission of a party, as evidence against such party;
> > 3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;
> > 4. The act or declaration, verbal or written, of a deceased person in respect to the

relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;
5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;
6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;
7. The act, declaration, or omission forming part of a transaction, as explained in Section 1850;
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; ...
11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary; ...
13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree; ..."

COMMENT:

§ 1870 (2). Repeal. Superseded by 63 (7). Note: 63 (7) refers only to "statement." On the other hand § 1870 (2) refers to "act, declaration or omission." However, under Rule 62 (1) "statement" includes assertive acts or conduct. Under Rule 63

only statements are hearsay. Thus non-assertive acts or omissions are admissible as non-hearsay. Thus Rule 62 (1) plus Rule 63 plus 63 (7) would cover the area of "act, declaration or omission" of a party now embraced by § 1870 (2).

§ 1870 (3). Repeal. Superseded by 63 (8) (b).

§ 1870 (4). Repeal. Clause one superseded by 63 (23); clause two superseded by 63 (10); clause three superseded by 63 (5).

§ 1870 (5), first sentence. Repeal. Superseded by 63 (8) (a) and (9) (a).

§ 1870 (5), second sentence. No repeal. Continues in effect under 63 (32). See text at p. 10 .

§ 1870 (6). Repeal. Superseded by 63 (9) (b).

§ 1870 (7). Repeal. Superseded by 63 (4) (b).

§ 1870 (8). No repeal. Continues in effect under 63 (2) (6).

§ 1870 (11). Repeal. Superseded by 63 (27).

§ 1870 (13). Repeal. Superseded by 63 (26).

> § 1893. "Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

COMMENT: Repeal second clause. Second clause superseded by 63 (17).

§ 1901. "A copy of a public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such writing."

COMMENT: Repeal. Superseded by 63 (17).

§ 1905. "A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form."

COMMENT: Repeal. Superseded by 63 (15) and (17).

§ 1906. "A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country."

§ 1907. "A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;
2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,
3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original."

COMMENT: Repeal. Superseded by 63 (15) and (17).

§ 1918. "Other official documents may be proved, as follows:

1. Acts of the executive of this state, by the records of the state department of the state; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the legislature or congress, or either house thereof.

2. The proceedings of the legislature of this state, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or soverign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a county or municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the

authority of such county or corporation.

6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and the copy is duly certified by the officer having the legal custody of the original, provided, that in any foreign country which is composed of or divided into sovereign and/or independent states or other political subdivisions, the certificate of the country or sovereign herein mentioned may be executed by either the chief executive or the head of the state department of the state. or other political subdivision of such foreign country in which said documents are lodged or kept, under the seal of such state or other political subdivision; and provided, further, that the signature of the sovereign of a foreign country or the signature of the chief executive or of the head of the state department of a state or political subdivision of a foreign country must be authenticated by the certificate of the minister or ambassador or a consul, vice consul or consular agent of the United States in such foreign country.

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof."

COMMENT: Repeal. Superseded by 63 (15) and (17) and 68.

§ 1919. "A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record."

COMMENT: Repeal. Superseded by 63 (15),(17) and (19).

§§ 1919a--1919b.

COMMENT: No repeal. Continues in effect under 63 (32). These sections set up an elaborate system for proof by certified copy of the contents of church records. Rule 63 (17) does not seem to apply because church records are not "official" records and 63 (17) applies to proof by certified copy only of official records. 1919a and b gives us a means of proof not supplied by the URE and these sections should be retained.

§ 1920. "Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein."

COMMENT: Repeal. Superseded by 63 (15).

§ 1920a. "Photographic copies of the records of the Department of Motor Vehicles when certified by the department shall be admitted in evidence with the same force and effect as the original records."

COMMENT: No repeal. Continues in effect under 63A. A "photographic copy" described in § 1920a would under 63 (17) and 1 (13) be "a writing purporting to be a copy of an official record." Rules 1 (13) and 63 (17) therefore make such photographic copy admissible. However, this is the type of

miniscule provision consistent with Rule 63 which Rule 63A is intended to continue in effect. See text at pp.13-15 .

> § 1920b. "A print, whether enlarged or not, from any photographic film including any photographic plate, microphotographic film, or photostatic negative, of any original record, document, instrument, plan, book or paper may be used in all instances that the original record, document, instrument, plan, book or paper might have been used, and shall have the full force and effect of said original for all purposes; provided, that at the time of the taking of said photographic film, microphotographic, photostatic or similar reproduction, the person or officer under whose direction and control the same was taken, attached thereto, or to the sealed container in which the same was placed and has been kept, or incorporated in said photographic film, microphotographic photostatic or similar reproduction, a certification complying with the provisions of Section 1923 of this code and stating the date on which, and the fact that, the same was so taken under his direction and control.

COMMENT: No repeal. Continues in effect under 63 (32). This is much broader than 63 (17). That does cover certified photographic copies (see above under § 1920a) but only such copies of official records. § 1920b, however, extends to certified photographic copies of any record, document or paper.

§ 1920b is a highly desirable provision, not incorporated in any of the URE provisions. It should be retained intact.

> § 1921. "A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the

justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein."

COMMENT: Repeal. Superseded by 63 (17).

§ 1925. "A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States, or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes."

COMMENT: No repeal. Continues in effect under 63 (32).

§ 1926. "An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry."

COMMENT: Repeal. Superseded by 63 (15).

§ 1927. "Whenever any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be prima facie evidence of the date of such location."

COMMENT: No repeal. Continues in effect under 63 (32).

§ 1927.5. "Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of the Archives, authenticated by the Surveyor-General or his successor and by the Keeper of the Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as prima facie evidence in all the courts of this State with like force and effect as the originals and without proving the executing of such originals."

COMMENT: No repeal. Continues in effect under 63 (32).

§ 1928. "A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed."

COMMENT: No repeal. Continues in effect under 63 (32).

§§ 1928.1 - 1928.4. (These sections make admissible certain federal records or certified copies thereof respecting the status of certain persons as dead, alive, prisoner of war, interned, etc.)

COMMENT: No repeal. Continues in effect under 63 (32) and 63A.

§ 1936. "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."

COMMENT: Query. What adjustment, if any, is required here depends on what finally becomes of 63 (30) and (31).

§ 1946. "The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was amde against the interest of the person making it.
2. When it was made in a professional capacity and in the ordinary course of professional conduct.
3. When it was made in the performance of a duty specially enjoined by law."

COMMENT: Repeal. § 1946 (1) is superseded by 63 (10). § 1946 (2) is superseded by 63 (13). § 1946 (3) is superseded by 63 (16).

§ 1947. "When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals."

COMMENT: Repeal. Superseded by 63 (13).

§ 1948. "Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgement or proof is

prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property."

COMMENT: No repeal. Continues in force under 63 (32).

§ 1951. "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgement or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

COMMENT: No repeal. Continues in effect under 63 (32) and 63A.

§§ 1953e - 1953h. (Uniform Business Records as Evidence Act.)

COMMENT: Repeal. Superseded by 63 (13).

§§ 2009 - 2015. (Use of Affidavits.)

COMMENT: No repeal. Continues in effect under 63 (2) (a).

§ 2047. "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced,

and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

COMMENT: Repeal second sentence, which is superseded by 63 (1) (c).

CIVIL CODE

(See below for comment on all the hearsay provisions of this Code.)

§ 166 (inventory prima facie evidence)

§ 224m (written statement relinquishing child reciting maker entitled to sole custody prima facie evidence of sole custody)

§ 1263 (declaration of homestead prima facie evidence of facts stated)

§ 2924 (certain recitals in deed prima facie evidence of facts recited)

COMMENT: No repeal of any of above provisions of the Civil Code. All continue in effect under 63 (32).

PENAL CODE

§ 315 (in prosecution for keeping house of ill-fame, character of house and inmates provable by reputation)

COMMENT: No repeal. Continues in effect under 63 (32).

§ 476a. (notice of protest admissible as proof of presentation, nonpayment and protest)

COMMENT: No repeal. Continues in effect under 63 (32).

§ 686 (former testimony)

COMMENT: No repeal. Continues in effect under 63 (2) (c).

§ 969(b) (judicial and penitentiary records to establish prior conviction)

COMMENT: No repeal. Continues in effect under 63 (32) and 63A.

§ 1107 (in prosecution for forging note of corporation, incorporation provable by reputation)

COMMENT: No repeal. Continues in effect under 63 (32).

§§ 1334.2 - 1334.3 (certificate prima facie evidence under Uniform Act to secure the attendance of witnesses from without the state in criminal cases)

COMMENT: No repeal. Continues in effect under 63 (32).

§ 4852.1 (records admissible in application for restoration of rights)

COMMENT: No repeal, Continues in effect under 63 (32) and 63 A.

PROBATE CODE

§§ 329 and 372 (proof of execution of will by establishing signature of subscribing witness)

COMMENT: No repeal. Continue in force under 63 (32). See discussion in text at p. 9-10.

§§ 351 and 374 (certain former testimony admissible)

COMMENT: No repeal. Continued in force by 63 (2) (c).

§ 712. (Claim presented by notary, certificate prima facie evidence of presentation and date)

COMMENT: No repeal. Continues in force under 63 (32).

§ 853 (decree directing executor or administrator to execute conveyance prima facie evidence of correctness of proceedings and authority to make conveyance)

COMMENT: No repeal. Continues in force under 63 (32).

§ 1192 (decree determining identity of heir prima facie evidence of fact determined)

COMMENT: No repeal. Continues in force under 63 (32).

§ 1233 (affidavits admissible in uncontested probate proceedings)

COMMENT: No repeal. Continues in force under 63 (2) (a).

AGRICULTURAL CODE

(See below for comment on all hearsay sections of this Code.)

§ 160.97 (proof of failure to file report creates presumption of no damage)

§ 438 (certain records, reports, audits, certificates, findings, prima facie evidence)

§ 746.4 (certain certificates prima facie evidence)

§ 751 (like § 746.4 supra)

§ 768 (like § 746.4 supra)

§ 772 (like § 746.4 supra)

§ 782 (like § 746.4 supra)

§ 892.5 (certificates as to grade, quality and condition of barley prima facie evidence of truth)

§ 893 (like § 746.4 supra)

§ 920 (written analysis of state Seed Laboratory prima facie evidence of true analysis)

§ 1040 (like § 746.4 supra)

§ 1272 (like 746.4 supra)

COMMENT: No repeal of any of foregoing sections of Agricultural Code. All continue in force by virtue of 63 (32) or 63A or both.

BUSINESS AND PROFESSIONS CODE

(See below for comment on all hearsay provisions of this Code.)

§ 162 (certificate of custodian of records of Department of Professional and Vocational Standards prima facie evidence of certain facts)

§ 1001 (like § 4809 infra)

§ 2376 (clerk's record of suspension or revocation of certificate to practice medicine prima facie evidence)

§ 4809 (register of Board of Examiners in Veterinary Medicine prima facie evidence of matters contained therein)

§ 4881 (like § 2376 supra)

§ 6766 (certificate of registration presumptive evidence of fact)

§ 8532 (like § 8923 infra)

§ 8923 (certified copies of records in office of Yacht and Ship Brokers Commission)

§ 10078 (like § 8923 supra)

§ 14271 (trade-mark registration prima facie evidence of ownership)

§ 20768 (motor fuel pump license tag evidence of payment of license fee)

COMMENT: No repeal of any of foregoing sections of Business and Professions Code. All continue in force by virtue of 63 (32) or 63A or both.

CORPORATIONS CODE

See below for comment on all hearsay provisions of this Code.)

§ 832 (original or copy of by-laws or minutes prima facie evidence of adoption of by-laws, holding of meetings and action taken)

§ 833 (corporate seals as prima facie evidence of execution)

§ 3904 (certificate annexed to corporate conveyance prima facie evidence of facts authorizing conveyance)

§ 6500 (copy of designation of process agent sufficient evidence of appointment)

§ 6503 (certificate of Secretary of State of receipt of process prima facie evidence of such receipt)

§ 6600 (copy of articles of foreign corporation prima facie evidence of incorporation)

COMMENT: No repeal of any of foregoing sections of Corporation Code. All continue in force by virtue of 63 (32) or 63A or both.

EDUCATION CODE

(See below for comment on all hearsay provisions of this Code.)

§ 12913 (record of conviction admissible)

§§ 23258 and 23260 (deed to Regents of University prima facie evidence of certain facts)

§ 16958 (copy of resolution declaring need for student transportation district admissible)

COMMENT: No repeal of any of foregoing provisions of Education Code. All continue in force by virtue of 63 (32) or 63A or both.

FINANCIAL CODE

(See below for comment on all hearsay provisions of this Code.)

§ 252 (papers executed by Superintendent admissible)

§ 255 (reports by Superintendent prima facie evidence of facts stated in such reports)

§ 3010 (certificate by Superintendent of Banks prima facie evidence of certain facts)

§ 9303 (verified copies of minutes presumptive evidence of holding and action of meeting)

§ 9616 (Commissioner's written statement of his determination of assets prima facie evidence of correctness of determination)

COMMENT: No repeal of any of foregoing sections of Financial Code. All continue in force by virtue of 63 (32) or 63A or both.

(See below for comment on all hearsay provisions of this Code)

§ 23211 (verified petition prima facie evidence of facts stated)

§ 23326 (like § 23211 supra)

§ 25172 (sheriff's return upon subpoena prima facie evidence)

§ 26662 (return of sheriff on process or notices prima facie evidence of facts stated in return)

§ 27335 (certified copy of record prima facie evidence of original stamp)

§ 38009 (certain affidavit prima facie evidence of facts stated)

§ 39341 (deed of street superintendent prima facie evidence of facts recited)

§ 40807 (record with certificate prima facie evidence of contents, passage and publication of ordinance)

§ 50113 (certain certified copies admissible)

§ 50433 (proof of publication of notice by affidavit)

§ 50443 (resolution prima facie evidence of facts stated)

§ 53874 (deed prima facie evidence)

COMMENT: No repeal of any of foregoing sections of Government Code. All continue in force by virtue of 63 (2) (a) or 63 (32) or 63A.

HEALTH AND SAFETY CODE

(See below for comment on all hearsay provisions of this Code.)

§ 10577 (birth, death, marriage record prima facie evidence of facts stated)

§ 14840 (certificate prima facie evidence of facts stated)

§ 24207 (copy of resolution declaring need for air pollution control district, admissible)

§ 26339 (certificate of Chief of Division of Laboratories and Chief of Bureau of Food and Drug Inspections prima facie evidence of facts therein stated)

§ 26563 (like § 26339 supra)

COMMENT: No repeal of any of foregoing sections of Health and Safety Code. All continue in force by virtue of 63 (32) or 63A or both.

INSURANCE CODE

(See below for comment on all hearsay provisions of this Code.)

§ 38	(like § 11022 infra)
§ 772	(certain written statement prima facie evidence of certain facts)
§ 1740	(certificate of Commissioner certifying facts found after hearing prima facie evidence of facts)
§ 1819	(like § 1740 supra)
§ 11014	(Commissioner's certificate prima facie evidence of existence of society)
§ 11022	(affidavit of mailing admissible to show mailing)
§ 11028	(like § 11022 supra)
§ 11030	(printed copies of constitution of society prima facie evidence of legal adoption thereof)
§ 11139	(Commissioner's report prima facie evidence of facts stated)

COMMENT: No repeal of any of foregoing sections of Insurance Code. All continue in force by virtue of 63 (2) (a) or 63 (32) or 63A.

LABOR CODE

(See below for comment on all hearsay provisions of this Code.)

§ 1304	(failure to produce permit or certificate prima facie evidence of illegal employment)
§ 1813	(failure to file report prima facie evidence of no emergency)

§ 1851 (like § 1813 supra)

§ 6507 (admissibility of safety orders)

COMMENT: No repeal of any of foregoing provisions of Labor Code. All continue in force by virtue of 63 (32) or 63A or both.

PUBLIC RESOURCES CODE

(See below for comment on all hearsay provisions of this Code.)

§ 2311 (certificate of surveyor prima facie evidence)

§ 2318 (notice and affidavit prima facie evidence of certain facts)

§ 2320 (like § 2318 supra)

§ 2322 (record of location of mining claim admissible)

§ 2323 (copy of record admissible)

§ 2606 (grubstake contracts and prospecting agreements prima facie evidence)

§ 3234 (classified records)

§ 3428 (record of assessment prima facie evidence)

§ 5559 (like § 2318 supra)

COMMENT: No repeal of any of foregoing sections of Public Resources Code. All (save § 3234) continue in force by virtue of 63 (32) or 63A or both. § 3234 would continue effective in same way as Vehicle Code § 20013. See text at p. 8-9.

PUBLIC UTILITIES CODE

(See below for comment on all hearsay provisions of this Code.)

§ 1901 (copies of documents and orders evidence in like manner as originals)

§ 14358 (copy of order of exclusion prima facie evidence of exclusion)

§ 15531 (great register sufficient evidence)

§ 17510 (like § 14358 supra)

§ 27258 (like § 14358 supra)

COMMENT: No repeal of any of foregoing provisions of Public Utilities Code. All continue in force by virtue of 63 (32) or 63A or both.

REVENUE AND TAXATION CODE

(See below for comment on all hearsay provisions of this Code.)

§ 1842 (statement of secretary of board prima facie evidence of certain facts)

§ 1870 (copy of order prima facie evidence of regularity of proceedings)

§ 2634 (like § 2862 infra)

§ 2862 (roll showing unpaid taxes prima facie evidence of assessment, etc.)

§ 3004 (like § 2862 supra)

§ 3517 (deed prima facie evidence of certain facts)

§ 3520 (deed prima facie evidence)

§ 4376 (abstract list showing unpaid taxes prima facie evidence of certain facts)

§ 6714 (like § 10075 infra)

§ 7981 (copy of return prima facie evidence of certain facts)

§ 10075 (board's certificate prima facie evidence of certain facts)

§ 11473 (like § 10075 supra)

§ 12682 (controller's certificate prima facie evidence of certain facts)

§ 12834 (controller's lists prima facie evidence of certain facts contained therein)

§ 15576 (appraiser's report prima facie evidence of value of gift)

§ 16122 (controller's certificate prima facie evidence of imposition of tax)

§ 18600 (certificate of Franchise Tax Board prima facie evidence of assessment)

§ 18647 (certificate of Franchise Tax Board prima facie evidence of certain facts)

§ 18834 (like § 18647 supra)

§ 19403 (like § 18647 supra)

§ 23302 (certificate of Secretary of State prima facie evidence of suspension or forfeiture)

§ 25669 (certificate of Franchise Tax Board prima facie evidence of certain facts)

§ 25761b (findings of Franchise Tax Board prima facie evidence of certain facts)

§ 26252 (like § 25669 supra)

§ 30303 (certificate of board prima facie evidence of certain facts)

COMMENT: No repeal of any of foregoing sections of Revenue and Taxation Code. All continue in force by virtue of 63 (32) or 63A.

UNEMPLOYMENT INSURANCE CODE

§ 1854 (certificate prima facie evidence of certain facts)

COMMENT: No repeal. Continues in force under 63 (32).

VEHICLE CODE

§ 20013 (accident report not admissible)

COMMENT: No repeal. See text at pp. 8-9.

§ 40806 (on plea of guilty court may consider police report, giving defendant notice and opportunity to be heard)

COMMENT: No repeal. Continues in force under 63A.

§ 40832 (revocation or suspension of license by department not admissible in any civil action)

COMMENT: No repeal. See text at pp. 8-9.

§§ 40833 and 16005 (departmental action not evidence on issue of negligence)

COMMENT: No repeal. See text at pp. 8-9.

§ 41103 (proof of notice by certificate or affidavit)

COMMENT: No repeal. Continues in force by virtue of 63 (2) (a) and 63 (32).

WELFARE AND INSTITUTIONS CODE

(See below for comment)

§ 5355 (evidence of bad repute in proceedings to commit drug addict)

§ 6738 (certificate prima facie evidence of sanity)

COMMENT: No repeal. These sections continue in force by virtue of 63 (32).

Respectfully submitted,

James H. Chadbourn

SUPPLEMENTAL MEMORANDUM IN RE INCORPORATING

RULES 62-66 IN THE CALIFORNIA CODES

This supplemental memo discusses several code provisions which are germane to the subject of the original memo but which had not been discovered when that memo was written.

References herein to 63(32) and 63(A) mean subdivision (32) of Rule 63 proposed in the original memo as a new subdivision (See p. 13 of the original memo) and Rule 63(A) proposed in the original memo as a new Rule (See p. 14 of the original memo).

CODE OF CIVIL PROCEDURE

> § 17. "... The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context: ... 7. The word 'state,' when applied to the different parts of the United States, includes the District of Columbia and the territories ..."

COMMENT: Rule 62(5) provides "'State' includes the District of Columbia." Rule 63(15) refers to "state or territory of the United States" Rule 63(19) refers to "state or nation".

Recommendation: omit subdivision (5) of Rule 62, as not needed in view of the provisions of C.C.P. § 17(7). Although the latter defines "state" to include both D.C. and the territories, this would not change the scope of 63(15) which expressly includes territories. Nor would it change what we suspect to be the intent of 63(19), namely that it is intended to apply to territorial records.

§ 273. "The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings."

COMMENT: NO repeal. Continues in force under proposed Rule 63A.

§ 1846. "A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine."

COMMENT: NO repeal. Possibly a witness's statements made at a hearing upon private or ex parte examination of the witness would not fall within the Rule 63 definition of hearsay. Therefore, § 1846 had better remain as a protection against such private or ex parte examination.

§ 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."

COMMENT: NO repeal. To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.

Under proposed new exception 63(32), § 1854 would be continued in operation.

CIVIL CODE

§ 226 (statement of person in connection with adoption proceedings that person is entitled to custody of child prima facie evidence of fact)

§ 1183.5 (certain recitals in military certificate or jurat prima facie evidence of truth thereof)

§ 1189 (out-of-state certificate of acknowledgment prima facie evidence of facts stated in certificate)

§ 1190.1 (certificate of acknowledgment by corporation prima facie evidence instrument act of corporation pursuant to by-laws)

§ 1207 (certified copy of record of defectively executed instrument admissible)

§ 1810.2 (certain record notation of mailing and date prima facie evidence of such mailing)

§ 2471 (certain certified copies of entries by clerk and certain affidavits by printer presumptive evidence of facts stated)

COMMENT: NO repeal of any of foregoing. All continue in operation by virtue of 63(32) or 63A or both.

PENAL CODE

§ 269b (recorded certificate of marriage or certified copy "proves the marriage" for purposes of prosecution for adultery)

§ 939.6 (grand jury shall receive "none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.")

§ 1192.4 (withdrawn plea of guilty may not be received in evidence)

COMMENT: NO repeal of § 269b. That is continued in operation by 63(A).

PENAL CODE

§ 939.6. In the investigation of a charge, the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before the grand jury, furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in subdivision 3 of Section 686. The grand jury shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Repeal § 939.6. Under Rule 2, the Uniform Rules seem to apply to grand jury investigations. Since this seems to be so and since § 939.6 may be more restrictive than the Uniform Rules on the question of what is "legal evidence", it seems desirable to repeal the section.

No repeal of § 1192.4. This qualifies the admissions principle as stated in subdivision (7) of Rule 63. However, no adjustment of the Rule seems necessary. (See original memo at pp. 8-9.)

PROBATE CODE

§ 545	(certain entries in register of actions prima facie evidence)
§ 1174	(judgment establishing death prima facie evidence of death)
§ 1435.7	(certain medical certificate prima facie evidence of facts stated therein)
§ 1461	(certain affidavits prima facie evidence of facts stated therein)
§§ 1653-1654, 1662.5, and 1664	(certain certificates prima facie evidence)

COMMENT: NO repeal of any of foregoing. All continue in operation by virtue of 63(32) or 63A or both.

CORPORATIONS CODE

§ 15011	("An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.")

COMMENT: NO repeal. Continues in force under 63(A).

STREETS AND HIGHWAYS CODE

§ 6614	(bond prima facie evidence)
§§ 6768 and 6790	(certificate prima facie evidence)
§ 10423	(deed of tax collector prima facie evidence of matters it recites)
§ 22178	(like § 10423)

COMMENT: NO repeal of any of foregoing. All continue in operation by virtue of 63(32) or 63(A) or both.

Respectfully submitted,

James H. Chadbourn

4/4/60

Memorandum No. 38(1960)

Subject: Uniform Rules of Evidence -- Hearsay Evidence Division

This memorandum concerns Rule 63(31) -- Medical, historical, scientific and other treatises.

Professor Chadbourn discusses this exception to the hearsay rule in the attached memorandum. He approves Exception (31) with the following amendment:

> (31) A published treatise, periodical or pamphlet on a subject of history, medicine or other science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

The Northern Section of the State Bar Committee, at its December 8, 1959, meeting, decided to disapprove subdivision (31) and to substitute for it the present language of C.C.P. § 1936 which provides as follows:

> Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

The Southern Section of the State Bar Committee, at its January 1960 meeting, concluded that the language of C.C.P. § 1936 would be too confining and that learned treatises should be admissible if they are sufficiently authoritative. However, it was conceded that subdivision (31) of the URE draft is dangerous, because it apparently would make learned treatises admissible if "a witness expert in the subject" testifies that the treatise is a reliable authority. It probably is possible to get some such testimony with respect to almost any treatise. The conclusion was reached, however, that this

difficulty could be obviated by striking the phrase "if the judge takes judicial notice, or a witness expert in the subject testifies" and substituting therefor the phrase "if the trial judge finds." This would have the effect of placing admissibility within the control of the trial judge. The Southern Section was of the opinion, therefore, that subdivision (31) should be approved is amended to read as follows:

> (31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the [~~judge takes judicial notice, or a witness expert in the subject testifies,~~] trial judge finds that the treatise, periodical or pamphlet is a reliable authority on the subject.

With respect to the above amendment, note that it fails to include Chadbourn's suggested addition of "medicine or other" before the word "science." A perhaps better phrasing of Chadbourn's suggested amendment would be "science, including but not limited to medicine, or art." In addition, the use of the phrase "trial" judge is inconsistent with other provisions of the U.R.E. where only the word "judge" is used and obviously means the trial judge.

Respectfully submitted,

John H. DeMoully
Executive Secretary

6/8/60

Memorandum No. 55 (1960)

Subject: Study No. 34(L) - Uniform Rules of Evidence.

The Commission has completed a tentative revision of the Hearsay Division of the Uniform Rules of Evidence. The Commission will, of course, be reconsidering some of these decisions when it receives the comments and suggestions from the State Bar Committee on the Uniform Rules of Evidence. But it is anticipated that most of the tentative revision will not be changed as a result of these comments and suggestions.

Some time ago the Commission decided that it would publish a pamphlet containing its interim tentative recommendation and revision of the Hearsay Division together with the consultant's studies pertaining to the Hearsay Division. This publication would include the rules as revised after the Comments and suggestions of the State Bar are received. It was anticipated that another such pamphlet would be published containing the interim recommendation and revision of the Privileges Division of the Uniform Rules of Evidence and the consultant's studies on privileges and also that several other similar pamphlets would be published to complete the coverage of the Uniform Rules. A final pamphlet would be published containing the Uniform Rules integrated into the code with code section numbers assigned and this pamphlet would represent the final recommendation of the Law Revision Commission on the Uniform Rules of Evidence.

John McDonough has agreed to prepare an initial text of the recommenda-

tion on the Hearsay Division based on his recollection of the reasons that influenced the Commission to make the revisions it did in the Hearsay Division. John and I felt that the recommendation should be brief and should indicate the existing California law and the change to be made by the revised Uniform Rule. If a Uniform Rule was revised or rejected, the reason should be indicated.

John McDonough has prepared some samples of the form of recommendation we contemplate. These are attached as Exhibit I. They are in rough draft form and are not now presented for consideration as to their substance; we only want to get the Commission's reaction to this form of recommendation before John McDonough goes ahead and prepares similar recommendations for the rest of the Hearsay Division rules. However, if the recollection of any of the members of the Commission as to the reason for the recommendation differs from the reason given in the attached comment, John would appreciate knowing this at the June meeting so he can take this information into account when he polishes up the attached rought drafts. These recommendations probably will be presented to the Commission for approval at the same time the Commission considers the comments and suggestions of the State Bar.

The samples attached would, of course, be preceded by a general statement outlining the assignment and how we have proceeded and making reference to the research consultant's report for more detailed analysis. Assuming this was done, do the "Comments" attached seem adequate? Or is considerably more by way of detail and analysis necessary? Do the members of the Commission have any suggestions for improvement in the format?

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

COMMENT

This language, prior to the word "except," states the hearsay rule in its classical form, with one qualification: because the word "statement" as used herein is elsewhere defined (Rule 62(1)) to mean only oral or written expression and assertive nonverbal conduct - i.e., nonverbal conduct intended by the actor as a substitute for words in expressing a matter, it excludes from hearsay at least some types of nonassertive conduct which our courts today would probably regard as amounting to extrajudicial declarations and thus hearsay -- e.g., the flight of X as evidence that he committed a crime. The Commission agrees with the draftsmen of the URE that evidence of nonassertive conduct should not be regarded as hearsay for two reasons.

First, such evidence, being nonassertive, does not involve the veracity of the declarant and one of the principal purposes of the hearsay rule is to subject the veracity of the declarant to cross-examination. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct in that the conduct itself evidences the actor's own belief in and hence the validity of the inference. To put it another way, these are cases in which actions speak louder than words.

The word "except" introduces thirty-two clauses which define various exceptions to the hearsay rule which the Commission recommends be enacted. These are commented upon individually below.

(1) ~~[A-statement-previously-made-by-a-person-who-is-present at-the-hearing-and-available-for-cross-examination-with-respect-to the-statement-and-its-subject-matter,-provided-the-statement-would be-admissible-if-made-by-declarant-while-testifying-as-a-witness;]~~ When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

COMMENT

The Commission recommends against adoption of Rule 63(1) of the URE, which would make admissible any extrajudicial statement which was made by a declarant who is present at the hearing and available for cross-examination. URE Rule 63(1) would permit a party to put in his case through written statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination of the declarant. Even if the declarant were then called to the stand by the adverse party and cross-examined the net impact of his testimony would often, the Commission believes, be considerably stronger than it would have been had the witness's story been told on the stand in its entirety. Inasmuch as the declarant is, by definition, available to testify in open court the Commission does not believe that so broad an exception to the hearsay rule is warranted.

The Commission recommends, instead, that the present law respecting the admissibility of out-of-court declarations of trial witnesses be codified with some revisions. Accordingly, paragraph (a) restates the present law respecting the admissibility of prior inconsistent statements and paragraph (b) restates the present law regarding the admissibility of prior consistent statements except that in both instances the extrajudicial declarations are admitted as substantive evidence

in the cause rather than, as at the present, solely to impeach the witness in the case of prior inconsistent statements and to rebut a charge of recent fabrication in the case of prior consistent statements. The Commission believes that it is not realistic to expect a jury to understand and apply the subtle distinctions taken in the present law as to the purposes for which the extrajudicial statements of a trial witness may and may not be used. In any event, no great harm is likely to be done by the broader rule of admissibility proposed inasmuch as the declarant is available for cross-examination. It is implicit in paragraphs (a) and (b), of course, that the witness must take the stand and tell his story initially on vive voce examination before the extrajudicial statements covered by these exceptions are admissible.

Paragraph (c) restates and hence preserves the present rule making admissible what is usually referred to as "past recollection recorded." The language stating the circumstances under which such evidence may be introduced is taken largely from and embodies the substance of the language of C.C.P. § 2047. At the present time, as under the proposed provision, such writings are admitted as substantive evidence in the action or proceeding.

(2) [~~Affidavits to the extent admissible by the statutes of this state;~~] To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

(c) Testimony given by a witness at the preliminary examination in the criminal action or proceeding in which it is offered.

(d) Testimony given by a witness at a former trial of the criminal action or proceeding in which it is offered.

COMMENT

Paragraph (a) embodies the substance of subdivision (2) of the URE. Both simply preserve the existing law respecting the admissibility of affidavits which, being extrajudicial statements, are technically hearsay. The Commission is not aware of any defects in or dissatisfaction with the existing law on this subject.

Paragraph (b) preserves the existing law concerning the admissibility of depositions taken in the action or proceeding in which they are offered. The Commission recommends against the adoption of subdivision (3) of the URE insofar as it would make admissible as substantive

evidence any deposition "taken for use as testimony in the trial of the action in which it is offered," without the necessity of showing the existence of any such special circumstances as the nonavailability of the deponent. In 1957 the Legislature enacted a statute (C.C.P. §§ 2016-2035) dealing comprehensively with discovery, including provisions relating to the taking and admissibility of depositions (C.C.P. § 2016 et seq.). The provisions then enacted respecting admissibility of depositions are narrower than URE Rule 63(3). The Commission believes that it would be unwise to recommend revision of the 1957 legislation at this time, before substantial experience has been had thereunder.

Paragraph (c) preserves the existing law (Penal Code § 686) insofar as it makes admissible in a criminal action testimony taken at the preliminary examination therein. There is no equivalent provision in the URE but there is no indication that the draftsmen expressly intended Rule 63 to make such evidence inadmissible; rather, it would appear that the omission of an exception to the hearsay rule for such evidence was an oversight.

Paragraph (d) preserves the existing law (Penal Code § 686) insofar as it makes admissible testimony given by a witness at a former trial of the criminal action or proceeding in which it is offered. There is no equivalent provision in the URE but, again, this appears to be due to oversight rather than to deliberate omission.

(2a) In a civil action or proceeding, testimony of a witness given in a former action or proceeding between the same parties, relating to the same matter, if the judge finds that the declarant is unavailable as a witness.

COMMENT

There is no equivalent provision in the URE but its absence appears to be due to oversight rather than deliberate omission.

The proposed provision would permit such evidence to be introduced in a wider range of cases than does existing law (C.C.P. § 1870(8)) which conditions admissibility of testimony in a former action upon the witness's being deceased, out of the jurisdiction or unable to testify. "Unavailable as a witness" is defined in Rule 62 and includes, in addition to these cases, situations in which the witness is exempted from testifying on the ground of privilege or is disqualified from testifying. The Commission perceives no reason why the general definition of unavailability which it has recommended for the purpose of exceptions to the hearsay rule should not be applicable here.

(3) ~~[Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;]~~ Subject to the same limitations and objections as though the declarant were testifying in person, testimony given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the

adverse party has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the present defendant was a party to the other action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action or proceeding in which the testimony is offered except that the testimony given at a preliminary examination in the other action or proceeding is not admissible.

COMMENT

This proposed provision is a modification of Rule 63(3)(b) of the URE. The modifications narrow the scope of the exception to the hearsay rule which is proposed by the Commissioners on Uniform State Laws.

At the same time this provision goes beyond existing California law which admits testimony taken in another legal proceeding only if the other proceeding was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered. It should be noted that there are two substantial preliminary qualifications of admissibility in the proposed rule: (1) the declarant must be unavailable as a witness and (2) the testimony is subject to the same limitations and objections as though the declarant were testifying in person. In addition, the testimony is made admissible only in the quite limited circumstances

delineated in paragraphs (a), (b) and (c). The Commission believes that with these limitations and safeguards it is better to admit than to exclude the former testimony because it may in particular cases be of critical importance to a just decision of the cause in which it is offered.

(4) A statement:

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; [,] or

(b) Which the judge finds [~~was made while the declarant was under the stress of a nervous excitement caused by such perception, or~~] (i) purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

[~~(c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;~~]

COMMENT

Paragraph (a) appears to go beyond existing law except to the extent that statements of this character would be admitted by trial judges today "as a part of the res gestae." The Commission believes that there is an adequate guarantee of the trustworthiness of such statements in the contemporaneaty of the declarant's perception of the event and his narration of it; in such a situation there is obviously no problem of recollection and virtually no opportunity for fabrication.

Paragraph (b) is a codification of the existing exception to the hearsay rule which makes excited statements admissible. The rationale of this exception is that the spontaneity of such statements and the declarant's state of mind at the time when they are made provide an adequate guarantee of their trustworthiness.

After very considerable thought and discussion the Commission decided to recommend against the enactment of Rule 4(c) of the URE. Its decision was not an easy one to reach. URE Rule 4(c) would make the statements with which it is concerned admissible only when the declarant is unavailable as a witness; hence its rejection will doubtless exclude the only available evidence in some cases where, if admitted and believed, such evidence might have resulted in a more just decision. The Commission was substantially influenced in reaching its decision by the fact that URE Rule 4(c) would make routinely taken statements of witnesses in physical injury actions admissible whenever such witnesses were, for any reason, unavailable at the trial. Both the authorship (in the sense of reduction to writing) and the accuracy of such statements are open to considerable doubt, the Commission believes. Moreover, as such litigation and preparation therefor is routinely handled it seems likely that defendants would far more often be in possession of statements meeting the specifications of Rule 4(c) than would plaintiffs and it seems undesirable to the Commission thus to weight the scales in a type of action which is so predominant in our courts.

(5) A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, voluntarily and in good faith and [~~while the declarant was conscious of his impending death and believe~~] in the belief that there was no hope of his recovery. [;]

COMMENT

This is a broadened form of the well-established exception to the hearsay rule which makes dying declarations admissible. The existing law (C.C.P. § 1870(4)) as interpreted by our courts makes such declarations admissible only in criminal homocide actions and only when they relate to the immediate cause of the declarant's death. The Commission believes that the rationale of the present exception--that men are not apt to be untruthful in the shadow of death--is as applicable to any other declaration that a dying man might make as it is to a statement regarding the immediate cause of his death. Moreover, it perceives no rational basis for differentiating, for the purpose of the admissibility of dying declarations between civil and criminal actions or among various types of criminal actions.

The Commission has rearranged and restated the language relating to the declarant's state of mind regarding the impendency of death, substituting the language of C.C.P. § 1870(4) for that of the draftsmen of the URE. It has also added the requirement that the statement be one made upon the personal knowledge of the

declarant. The Commission's research consultant suggests that the omission of this language from Rule 63(5) of the URE was probably an oversight; in any event it seems desirable to make it clear that "double hearsay" and the declarant's surmise as to the matter in question are not admissible.

(6) [~~In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;~~] In a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, unless the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

COMMENT

This provision states a rule governing the admissibility of the defendant's confession and admissions in a criminal action or proceeding. While the Commission has departed rather widely from the language of Rule 63(6) of the URE, it is believed that paragraph (a) states a principle which is not only broad enough to encompass all the situations covered by URE Rule 63(6) but

also has the additional virtue of covering as well analogous situations which, though not within the letter of the more detailed language proposed by the draftsmen of the URE is neverthless within its spirit.

Paragraph (b) is technically unnecessary inasmuch as the ground is already covered by the Constitutions of this State and of the United States. It seems desirable to restate the proposition here, however, both for the sake of completeness and to make it clear that the Commission has no thought that the Legislature, in enacting this provision, would be asserting that the matter of the admissibility of the confessions and admissions of defendants in criminal actions and proceedings is a matter solely within the competence of the Legislature to determine.

The proposed provision is believed to restate existing law in respect of the admissibility of confessions. In treating admissions of criminal defendants in the same way as confessions, however, the proposed provision states a much more restrictive rule respecting admissibility than presently obtains. The virtue of this proposed change is that (1) it applies the same rule of law to types of evidence which are virtually identical in substance, thus eliminating a very questionable distinction in the existing law and (2) it will make it unnecessary in the future to attempt to make the often difficult, if not impossible, determination whether a particular extrajudicial statement is a confession or only an admission.

mtg

1/2/61

Memorandum No. 7 (1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence
(Hearsay Evidence)

Background. Some time ago the Commission decided that it would publish a pamphlet containing its tentative recommendation on Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence and the research consultant's studies pertaining to this Article. This pamphlet will include the rules in the Hearsay Evidence Article as revised after the joint meeting with the State Bar Committee has been held. (The date of this joint meeting, which will be held sometime early in 1961, has not yet been set.)

It was anticipated that another such pamphlet would be published containing the tentative recommendation on Article V (Privileges) and the consultant's research studies on that Article and that several other similar pamphlets would be published to complete the coverage of the Uniform Rules.

This piecemeal publication is intended to give interested members of the bench and bar an early opportunity to review and comment on the Commission's tentative recommendations. After considering comments from these persons, the Commission plans to publish a pamphlet that will include a proposed statute setting out (1) all of the Uniform Rules as revised with code section numbers assigned and (2) the amendments and repeals of existing statute sections that will be made necessary if the revised rules are enacted as law. This pamphlet will represent the final

recommendation of the Law Revision Commission on the Uniform Rules of Evidence.

The procedure outlined above is somewhat similar to the procedure we have followed for the study on condemnation except that our tentative recommendations and the research consultant's studies will be distributed in printed form rather than in mimeographed form.

Description of Attached Material. The attached material (pink pages) includes a draft of a letter of transmittal and a draft of a tentative recommendation on Article VIII. This material is presented to the Commission for approval as to its form and content. It will, of course, be necessary to revise the material to incorporate any changes resulting from the joint meeting with the State Bar Committee.

The text of the revised rules is set out in the attached material in the form in which the text was approved by the Commission except for a few minor revisions hereinafter specifically noted. Below the text of each rule or subdivision of a rule is a comment. These comments have not been approved by the Commission. The initial draft of most of the comments was prepared by Commissioner McDonough and is based on his recollection of the reasons that influenced the Commission to make the revisions it did in the Hearsay Article.

Matters Noted for Special Attention. Each comment explaining a rule or subdivision of a rule should, of course, be carefully studied by the members of the Commission. In addition, a number of matters are noted below for special attention in connection with this tentative recommendation. Also, where the Commission and the State Bar Committee are not in agreement, that fact is noted. It is suggested that these areas of disagreement be

reconsidered by the Commission. The Commission and the State Bar Committee can then devote the time at the joint meeting to those matters on which we cannot reach an agreement prior to the joint meeting. Unless otherwise noted, the Commission and the State Bar Committee are in agreement.

Special attention is called to the following matters:

Rule 62

(1) State Bar Committee Objection. The Commission and the Committee are in agreement on this Rule except that the Committee believes that the definition of "statement" should be subdivision (1) of the Rule rather than subdivision (5) where the Commission placed it. The definition is contained in subdivision (1) of the Uniform Rule. The attached tentative recommendation adopts the suggestion of the State Bar Committee and places this definition in subdivision (1). The staff believes that this is desirable for two reasons. First, there will then be no need to distinguish between the URE text of the rule and the revised rule when making a specific reference to this definition. Second, this matter can more appropriately be considered when the draft statute for all the Rules is considered and code section numbers are assigned to the various sections of the revised rules.

(2) Staff revision. The staff has revised subdivisions (6) and (7) to uniformly refer to the person who made the statement as the "declarant." Under the URE text of these subdivisions, the declarant is sometimes referred to as the "declarant" and other times is referred to as the "witness." This revision has been incorporated in the attached tentative recommendation.

(3) Suggested staff revision. The objective of subdivision (7), as stated in the Comment thereto, "is to assure that unavailability is honest and not planned in order to gain an advantage." Hence the subdivision provides that physical absence of a person or his incapacity to testify do not make that person "unavailable" insofar as proponent is concerned unless such absence or incapacity is "due to procurement or wrongdoing of the proponent . . . for the purpose of preventing the [person] . . . from attending or testifying" or, is due to "the culpable neglect of" proponent. For example, if on the day of the hearing proponent gives declarant drugged whisky for the purpose of preventing him from testifying, proponent may not prove declarant's out-of-court statement under any hearsay exception which requires declarant's unavailability.

Moreover, if at the hearing the whereabouts of a declarant are unknown, but it appears that proponent had notice of declarant's intended disappearance and had opportunity to place him under subpoena but neglected so to do, this would probably be regarded as a case of declarant's absence due to proponent's "culpable neglect" and, as such, a case in which proponent could not make use of any hearsay exception requiring declarant's unavailability.

In such a case, the "culpable neglect" of proponent is, of course, neglect with reference to formal process to secure declarant's attendance as witness. Probably no other kind of neglect is intended by the expression "culpable neglect." Thus neglect to provide food for declarant thereby causing his death from malnutrition or

neglect to exercise due care thereby causing declarant's death from negligence, not being neglect directly related to securing declarant's attendance as a witness, is probably not within the meaning of the term as used in the subdivision.

The above is believed to be the proper interpretation of subdivision (7), although the expression "culpable neglect" is considered to be somewhat ambiguous.

However, the Law Revision Commission has amended the subdivision to change its meaning as above stated. The Commission has added language so that a witness is not "unavailable" if the "exemption, disqualification, death, inability or absence" of the declarant is due to the procurement or wrongdoing of the proponent for the purpose of preventing the witness from attending or testifying or to the "culpable act or neglect" of the proponent. The Commission, by thus adding "act or" has changed the probable meaning of the URE subdivision so that the out-of-court statement cannot be used even though the proponent's "culpable act" was not for the purpose of preventing the declarant from appearing and testifying. Thus, a defendant charged with first degree murder would be unable to introduce the decedent's dying declaration showing circumstances that would reduce the degree of the crime (such as lack of premeditation). Under the Commission's revision, the dying declaration would be excluded because defendant's "culpable act" caused the declarant's death and therefore declarant is not "unavailable" insofar as defendant is concerned. Other examples can be imagined insofar as other exceptions that depend on "unavailability" are concerned.

To preserve the original intent of the URE provision (that 62(7) is merely intended to assure that unavailability is honest and not due to an intent to keep the declarant from testifying or to a negligent failure to produce the declarant), the staff recommends that subdivision (7)(a) be revised to read:

(7) For the purposes of subdivision (6) of this rule, a declarant is not unavailable as a witness:

(a) If the judge finds that the exemption, disqualification, death, inability or absence of the declarant is due to [~~(i)~~] the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying; or [~~(ii) the culpable act, or neglect of such proponent, or~~]

(b) If the judge finds that the proponent because of culpable neglect failed to secure the presence of the declarant at the hearing; or

[~~(b)~~] (c) If unavailability is claimed because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense.

The above revision has not been incorporated in the attached tentative recommendation.

Rule 63 - Opening Paragraph

The opening paragraph defines hearsay evidence as evidence of an out-of-court statement which is "offered to prove the truth of the matter stated" and provides that hearsay evidence is inadmissible. In several of the following subdivisions, the exceptions to this general rule repeat the language "offered to prove the truth of the matter stated." For instance, in subdivision (1), the rule is stated that hearsay evidence is inadmissible except "When a person is a witness at the hearing, a statement made by him though not made at the hearing, is admissible to prove the truth of the matter stated. . . ." The underscored phrase is redundant, for if the evidence were not offered for this purpose it would not be hearsay under the opening paragraph and would not be inadmissible under the opening paragraph.

The underscored language is also defective in that it provides that the statements concerned are "admissible." None of the other subdivisions of Rule 63 provide that a statement "is admissible"; they merely provide that Rule 63 does not exclude the statement. The subdivisions are merely exceptions to Rule 63's rule of inadmissibility. Hence, if there is any other provision of law which would make the evidence involved inadmissible, the subdivisions would not make the evidence admissible.

The staff recommends, therefore, that "is admissible to prove the truth of the matter stated" be deleted from subdivision (1). The staff also recommends that the following language be deleted from the following subdivisions:

Subdivision (18): "to prove the truth of the recitals thereof."

(27): "as tending to prove the truth of the matter reputed."

(28): "to prove the truth of the matter reputed."

(29): "offered as tending to prove the truth of the matter stated."

(30): " to prove the truth of any relevant matter so stated."

There is similar language in several other subdivisions, but the staff believes the language serves a purpose in these subdivisions and should be retained. For your consideration, though, the language and subdivisions are:

Subdivision (14): "to prove the non-occurence of the act or event, or the non-existence of the condition."

(17): "to prove the content of the record"; "to prove the absence of a record in a specified office."

(19): "to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed."

(20): "to prove, against such person, any fact essential to sustain the judgment."

(21): "To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor."

(22): "To prove any fact which was essential to the judgment."

(31): "to prove facts of general notoriety and interest."

Rule 63(1)

Professor Chadbourn has prepared a supplemental memorandum on Rule 63(1). This memorandum notes the recent case of People v. Gould and suggests that the Commission's previous action on Rule 63(1) be reconsidered in light of the Gould case. The questions presented for decision by the Commission are stated on pages 4 and 5 of the supplemental memorandum prepared by Professor Chadbourn.

As Professor Chadbourn points out in his supplemental memorandum,

under Rule 63(1) as revised by the Commission, a statement (whether or not in writing) of a person who is a witness at the hearing is admitted (as substantive evidence) to prove the truth of the matter stated if inconsistent with the testimony of the witness at the hearing. However, under the revised rule, a statement of a witness at the hearing is not admissible to prove the truth of the matter stated where the witness testifies that he has no present recollection of the matter even if he testifies that the statement that he made was true (unless, of course, the statement falls under revised Rule 63(1)(c)).

Take this case: W is a witness in a criminal case. M, a male, and F, a female, are the defendants and are charged with robbing W. W testifies at the trial that M was not the man who robbed her and that, although she has no present recollection as to the identity of the woman who robbed her, she made an identification of the woman shortly after the robbery and that she was sure of the identity of the woman at that time. P, a police officer, is offered to testify that W identified M as one of the robbers and also identified F as the other robber. No written record was made of the identification. Testimony concerning M would come in as evidence of the identity of the criminal -- it is inconsistent with W's testimony at the hearing; testimony concerning F would be excluded -- it is not inconsistent with W's testimony and does not meet the requirement of a "writing" under revised Rule 63(1)(c).

It can be argued that a hearsay statement that is inconsistent with the declarant's testimony on the stand is less trustworthy than a hearsay statement which the declarant is willing to say was true when made. As to the inconsistent statement, there is neither a circumstantial guarantee

of trustworthiness nor testimonial support for its trustworthiness. As to the forgotten statement, there is at least testimonial support by the declarant for the truth of the statement. Yet the Commission would admit the inconsistent statement as substantive evidence but exclude the latter statement unless it is in writing. It would seem that if the law is to be changed to make the inconsistent statement substantive evidence, the Commission should go the whole way and also make the latter statement admissible as substantive evidence.

Accordingly, the staff suggests that the Commission consider the addition of the following paragraph to Rule 63(1);

> (d) Concerns a matter as to which the witness has no present recollection and is offered after the witness testifies that the statement he made was true.

Professor Chadbourn's supplemental memorandum suggests other alternatives for consideration of the Commission.

In connection with the staff suggestion, it should be recognized that the primary justification for the "past recollection recorded" exception to the hearsay rule (if it is to be regarded as a hearsay exception) is that there is an element of trustworthiness in the written record of the statement made at the time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory. This element of a written record does not exist under the staff's suggested language. But, as noted above, there is no such requirement as a condition to the use of a prior inconsistent statement -- and under the revised rule such a statement is substantive evidence even if it was not in writing and not made under oath.

If the staff suggestion were adopted, a prior statement made by a witness who is available at the hearing could be used if:

(1) The statement is inconsistent with his testimony at the hearing (Statement need not be in writing); or

(2) The statement is a prior consistent statement offered to rebut a charge of recent fabrication (Statement need not be in writing); or

(3) The statement concerns a matter as to which the witness has no present recollection and the witness testifies that the statement he made was true (Statement need not be in writing); or

(4) The statement concerns a matter as to which the witness has no present recollection and is a writing made while the matter was fresh in the witness's memory.

If the Commission's concern with the adoption of Rule 63(1) of the URE was that it would permit a party to put in his case through written statements carefully prepared in his attorney's office, the statutory scheme outlined above would accomplish the apparent object of the URE subdivision without permitting the practice the Commission believed to be objectionable.

Rule 63(2)

The staff recommends that all of Rule 63(2) be deleted from the Uniform Rules. Rule 63(32) and Rule 63A will accomplish the same thing as Rule 63(2). If Rule 63(2) is deleted, Rule 63(2a) should be redesignated as Rule 63(2).

Rule 63(2a)

(1) Suggested staff revision. Rule 63(2a), as approved by the Commission, reads:

(2a) In a civil action or proceeding, testimony of a witness given in a former action or proceeding between the same parties,

relating to the same matter, if the judge finds that the declarant is unavailable as a witness.

Rule 63(2a) is based on Section 1870(8) of the Code of Civil Procedure which reads:

> 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.

The words "former action or proceeding" appearing in Rule 63(2a) are ambiguous. The staff recommends that subdivision (2a) be revised so that the subdivision will clearly indicate that it applies both to a former action between the same parties or their predecessors in interest and also to a former trial of the same action or proceeding. The revised subdivision is set out in the tentative recommendation. Section 1870(8) has been interpreted to permit the introduction of evidence introduced at a former trial of the same action or proceeding in which it is offered (Gates v. Pendleton, 71 C.A. 752 (1925), hg. den.) as well as in another action between the parties. Section 1870(8) has also been interpreted to permit the introduction of evidence introduced in a former action between the parties' predecessors in interest. (Briggs v. Briggs, 80 Cal. 253 (1889).)

The revised subdivision is consistent with Rule 63(2)(d) and Rule 63(3).

(2) State Bar Committee objection. The Southern Section of the State Bar Committee objects to subdivision (2a). The following is an extract from the Minutes of the Southern Section (August 2, 1960):

> As to the Commission's proposed new subdivision (2a), the Southern Section is of the opinion that this new subdivision would broaden the scope of admissibility over what the Committee and the Commission previously had agreed upon. The

Southern Section is unaware of the Commission's motivation in suggesting this new subdivision. In its previously approved form, subdivision (2) would have made admissible the testimony of a witness, without further safeguards, only in a situation where such testimony was given in a prior trial of the same action. The Southern Section accepted this concept, but it did not then, and still does not, accept the principle that the testimony of a witness given in what could be an entirely different action should be admissible without further safeguards, which is what the Commission's new clause (2a) may accomplish. While it is true that the Commission's proposed new clause (2a) requires that the parties to both actions be the same and that the testimony relate to the "same matter", it seems to the Southern Section that these conditions may not impose adequate safeguards. For example, A sues B for divorce. In that action, a property settlement agreement is involved, and there is brief testimony concerning it. Some time later, an entirely different action arises between A and B, in which the status of one of their former assets may be a key issue. Although testimony in the first action technically may be related to the same matter that is involved in the second action, the two actions may have an entirely different character and emphasis, and there may be good reasons for the testimony to have been much less precise and exact in the first action than in the second.

Also, it seems to the Southern Section that the Commission's proposed new clause (2a) would make admissible some of the same testimony which subdivision (3) of Rule 63 purports to cover, but without imposing the same safeguards that subdivision (3) requires.

Rule 63(4)

The Commission and the State Bar Committee are in agreement on this subdivision except that the Committee would insert at the beginning of the paragraph prior to the word "statement," the words "if the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved."

Rule 63(5)

(1) State Bar Committee objection. The State Bar Committee would

substitute the words "statement by a decedent" for the words in the URE subdivision "statement by a person unavailable as a witness because of his death." The Commission adopted the State Bar's suggestion by action on July 19, 1958, but later decided to return to the original language of the URE provision. The term "statement by a person unavailable as a witness because of his death" incorporates the definition of "unavailable as a witness" in Rule 62(6), (7).

The defendant as well as the prosecution may offer a dying declaration in evidence. But, as previously pointed out in connection with Rule 62(7), the language in Rule 63(5) will make impossible a dying declaration where the death of the declarant is due to the culpable act or neglect of the proponent of the evidence. This result would be avoided, though, if Rule 62(7) were revised as previously recommended.

(2) Possible revision suggested by staff. Note that this exception -- Rule 63(5) -- as now revised applies only when the declarant is unavailable "because of his death." Logically, there is no reason for the limitation just quoted. If the guarantees of trustworthiness -- voluntary declaration, sense of impending death, etc. -- are sufficient, the evidence is no less competent because the declarant is unavailable for some other reason. If the statement is trustworthy, it does not become less so merely because the declarant survives. Therefore, the staff suggests that the Commission consider deleting the limiting words "because of his death."

Rule 63(6)

(1) State Bar Committee objection. The Commission and the State Bar Committee are in disagreement on this subdivision. The Committee

would accept the original URE subdivision but would add at the end of the subdivision the words "or (c) under such other circumstances that the statement was not freely and voluntarily made." In addition, the Committee would change the words "public official" to "public officer" in subparagraph (b) and would eliminate the word "reasonably" in subparagraph (b).

(2) Suggested staff revision. Subdivision (6), as revised by the Commission, may eliminate the foundation showing now required before a confession may be introduced. The California cases have required that, before offering the confession, the prosecution must first lay a foundation by preliminary proof of its free and voluntary nature. Revised subdivision (6) would appear to make this foundation unnecessary. In addition, revised subdivision (6) creates a doubt as to whether the prosecution will still have the burden of proof of showing that the confession was free and voluntary. Accordingly, the staff suggests that subdivision (6) be revised to read:

> (6) In a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, [unless] if the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:
>
> (a) Under circumstances not likely to cause the defendant to make a false statement; [or] and
>
> (b) Under such circumstances that it is not inadmissible under the Constitution of the United States or the Constitution of this State.

The above suggestion has not been incorporated into the attached tentative recommendation.

Rule 63(7)

The staff believes that the words "as against himself" in subdivision (7) are ambiguous. Do these words mean against "himself" in his "individual capacity" or do they permit admission of a statement made in an "individual capacity" against, for example, an estate represented by the declarant?

It is suggested that the subdivision would be clearer if it were phrased as follows:

(7) Except as provided in subdivision (6) of this rule, as against himself in either his individual or representative capacity, a statement by a person who is a party to the action or proceeding irrespective of whether such statement was made in his individual or a representative capacity, ~~[and if the latter, who was acting in such representative capacity in making the statement;]~~

Rule 63(9)

The Commission and the State Bar Committee are in agreement on this subdivision except that the Committee feels that if it is advisable to require independent evidence of the existence of a conspiracy under subparagraph (b), there should likewise be a requirement of independent proof of agency under subparagraph (a) in order to avoid any implication as a result of the amendment of subparagraph (b) that no such proof is necessary. Accordingly, the Committee would amend subparagraph (a) to read as follows:

> (a) The statement is offered after, or in the judge's discretion, subject to, proof by independent evidence that an agency existed and that the declarant was an agent of the party at the time the statement was made, and the statement concerned a matter within the scope of the agency or employment of the declarant for the party and was made before the termination of such relationship.

C.C.P. Section 1848 provides:

> 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; therefore, proceedings against one cannot affect another.

C.C.P. Section 1870(5) reads:

> In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> * * *
>
> 5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

Under C.C.P. Section 1870(5) and Section 1848, declarations of the partner or agent cannot prove the <u>fact</u> of the agency or authority; the existence of the relationship must be shown independently, e.g., by the

testimony of the agent or another.

Witkin, California Evidence, § 230, after stating the above rule, suggests this qualification:

> In practice, however, this rule is subject to some evasion: (a) The agent's statement, though not affirmative evidence, may be used to impeach his testimony that he was not an agent (Carter v. Carr (1934) 139 C.A. 15, 25, 33 P.2d 852; see 4 Wigmore, § 1078, p. 125.) (b) The agent's statement may perhaps be offered as affirmative circumstantial evidence, e.g., to show that the other party dealt with him as an agent, or to show his own intent to act for his principal rather than for himself. (See Carter v. Carr, supra, 139 C.A. 24; McCormick, p. 519; 4 Wigmore, § 1078, p. 124; cf. Rest., Agency §§ 284, 289.

See the comment to Rule 63(9)(a) which points out the changes this paragraph will make in the existing California law.

If it is desired to incorporate a requirement that the relationship of agent, partner or employee be established by independent evidence, it is suggested that the following revision be made in Subdivision (9)(a), rather than adopting the revision suggested by the State Bar Committee:

> (9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:
>
> (a) The statement is that of an agent, partner or employee of the party and (i) the statement was made prior to the termination of the relationship and concerned a matter within the scope of the agency, partnership or employment of the declarant for the party and (ii) the statement is offered after proof by independent evidence of the existence of the relationship between the declarant and the party.

Rule 63(10)

The Commission and the State Bar Committee are not in agreement on this subdivision.

The Committee agrees with the Law Revision Commission except that the northern section would change the words "social disapproval" to "social disgrace." The southern section has indicated that it has no strong feeling one way or another on this but felt that it would be advisable to follow the Commission.

The southern section has also suggested that the following words be inserted at the beginning of the section "except as against an accused in a criminal proceeding." The northern section has not as yet come to a conclusion on this proposal.

Rule 63(12)

The Commission adopted this section as originally proposed.

The State Bar Committee would add a paragraph (c) to read as follows:

> (c) State of mind at a prior time, when the prior state of mind of the declarant is in issue, provided that no assertion of fact contained in such statement is competent to prove the truth of the fact asserted and provided, further, that the declarant is unavailable as a witness.

If the State Bar's revision is acceptable to the Commission, it is suggested that it be rephrased to read as follows:

> (c) State of mind at a prior time when the prior state of mind of the declarant is in issue and the declarant is unavailable as a witness, but no assertion of fact contained in such statement is competent to prove the truth of the fact asserted.

The following is an extract from the Minutes of the February 13, 1960 meeting of the Southern Section of the State Bar Committee:

> Messrs. Kaus and Kadison submitted a report in which they suggested a revision of subdivision (12) in the light of Williams vs. Kidd, 170 Cal. 631, and other California cases dealing with the admissibility of extra judicial declarations as to state of mind. The matter was discussed at considerable length. The members generally were of the opinion that where state of mind actually is in issue, it is artificial and illogical to limit the admissibility of state of mind declarations only to those declarations involving existing state of mind; that by limiting admissibility only to declarations involving existing state of mind we are adopting an artificial measuring rod; namely, the manner of expression rather than the substance of what is said. For example, assume a gift case where state of mind at the time of delivery is in issue. Assume two alternative declarations: (1) "I gave my property to my sister last year"; and (2) "I don't own the property now." Although (1) and (2) mean the same thing in substance, (1) presumably would not come in under the existing state of mind doctrine whereas (2) would.
>
> The committee members were in agreement that there is a real danger in admitting declarations of past intent in situations where the relevancy of the declarations is their use as an inference to prove that some other relevant fact occurred; that, however, there is no similar danger where the actual issue is what the declarant's state of mind was at a given time, and where the declarations of his intent at that time is not going to be used simply as one relevant fact to prove something else.
>
> Subdivision (12) finally was approved in the . . . form [set out above].
>
> All of the members present were in general agreement as to the desirability of the revision of subdivision (12) as it reads above, except that there was a substantial difference of opinion (4 to 3 in favor) as to whether unavailability of the declarant as a witness should be a requirement under clause (c).

Subdivision (12)(a) Admits many declarations which are germane to declarant's state of mind at a prior time. To illustrate: suppose T's will is contested on the ground of alleged undue influence of X. The will was executed on June 1. On June 15 T said to W "I am afraid of X." Under subdivision (12)(a), W may testify to T's statement. The statement relates T's state of mind as of the time the statement is made (June 15). Such statement is relevant to the state of mind pre-existing on June 1, because it is reasonable to infer that T's mental state on June 15 was likewise his mental state on June 1.

In the above respects subdivision (12)(a) merely declares common-law doctrines. This is made clear by the following explanation which McCormick gives (p. 567 and pp. 569-570):

> As a later outgrowth of the exception for declarations of bodily pain or feeling, there evolved the present exception to the hearsay rule admitting statements or declarations of a presently existing mental state, attitude, feeling or emotion of the declarant. . . .
>
> The . . . declaration must describe a then-existing state of mind or feeling, but this doctrine is not as restrictive in its effect as might be supposed. Another principle widens the reach of the evidence. This is the notion of the continuity in time of states of mind. If a declarant on Tuesday tells of his then intention to go on a business trip the next day for his employer, this will be evidence not only of his intention at the time of speaking but of a similar purpose the next day when he is on the road. And so of other states of mind.
>
> Moreover, the theory of continuity looks backward too. Thus, when there is evidence that a will has been mutilated by the maker his subsequent declarations of a purpose inconsistent with the will are received to show his intent to revoke at the time he mutilated it Accordingly, we find the courts saying that whether a payment of money or a conveyance was intended by the donor

as a gift may be shown by his declarations made before, at the time of, or after the act of transfer.

This rationale is followed in California. For example, in Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921) decedent's will was contested on the ground of undue influence of her aunt. Evidence was offered that after executing the will decedent expressed fear of her aunt. The evidence was held admissible, the court reasoning as follows:

> The only exception to the rule against hearsay within which [the evidence] . . . could come is the exception which admits declarations indicative of the declarant's intention, feeling, or other mental state, including his bodily feelings. But such declarations are competent only when they are indicative of the declarant's mental state at the very time of their utterance, and only for the purpose of showing that mental state. . . . As may be seen from the foregoing statement of the exception, in order that a declaration be within it two things are requisite: (a) the declaration must be indicative of the mental state of the declarant at the very time of utterance, and (b) his or her mental state at that time must be material to an issue in the cause, i.e., have a reasonable evidentiary bearing upon such issue. . . . [The evidence] meets both the requirements necessary in order to bring a declaration within the exception. It (a) indicated her then state of mind toward her aunt, and (b) her then state of mind as so indicated was material, since the fact that she then feared her aunt had a reasonably direct bearing on what her mental attitude toward her aunt may have been at a previous and not far distant time, when she executed the will.

See also Whitlow v. Durst, 20 C.2d 523 (1942) (issue: were H and W reconciled on July 16; evidence: thereafter H said they would never be reconciled; held, admissible, because "When intent is a material element of a disputed fact, declarations of a decedent made after[wards] that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule . . ."); Watenpaugh v. State Teachers' Retirement, 51 C.2d 675 (1959) (issue: intent with which decedent executed designation of

beneficiary; evidence: thereafter decedent told his wife she was beneficiary; held admissible because "The declarations of a decedent may be admissible under certain circumstances to prove a state of mind at a given time although uttered . . . after that time, on the theory that under these circumstances the 'stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distances up or down the current,'" citing, inter alia, Estate of Anderson, supra.)

Moreover, the holding in Williams v. Kidd is explainable and supportable on the basis of this rationale. (McCormick, p. 750, note 13; McBain, 19 Calif. L. Rev. at p. 252) There, declarations of the decedent showing that at the time of the declarations he regarded himself as the owner of certain property were admitted to show that he delivered a deed to the property at a previous time without the intent requisite to pass title.

Let us now suppose, however, that on June 15 X spoke as follows to W: "I remember that I was afraid of X last June 1." This, it seems, is in the words of subdivision (12)(a) "a statement of the declarant's . . . memory or belief to prove the fact remembered or believed," As such, the statement is inadmissible under subdivision (12)(a). However, it seems that the statement would be admissible under the State Bar Committee's proposed subdivision (12)(c).

In the opinion of the staff subdivision (12)(c) is not necessary to preserve the rule of Williams v. Kidd (see above). However, the Commission should consider whether in its opinion there are other valid reasons to approve proposed subdivision (12)(c).

As just noted, subdivision (12)(a) and the present law provide for admitting evidence of a statement showing an existing state of mind or intent to show the existence of a state of mind or intent before or after the declaration where such state of mind or intent is sought to be proved. Wattenbaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959). Also, as provided both in the rule and by present law, a declaration showing an existing state of mind or intent is admissible to prove future acts or conduct of the declarant. People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944). Generally, too, as provided in the rule, a declaration showing an existing state of mind is not admissible to prove past acts or conduct of the declarant. If this limitation did not exist, the hearsay rule would be repealed insofar as the declarant's statements relate to his own conduct. (His statement, "I went to Boston," would be admissible to show his state of mind -- that he thought he went to Boston -- which is relevant to show that he actually went there.)

However, there is a major exception to the restriction that existing state of mind is not admissible to prove past acts or conduct. In will cases, the declaration of a decedent that he has made a will is admissible to show that he actually made a will. Estate of Morrison, 198 Cal. 1, 242 P. 939 (1926). Also, the declaration of a decedent that he has a will in existence is admissible to show that the decedent did not do an act, i.e., did not revoke the will. Estate of Thompson,

44 Cal. App.2d 774, 112 P.2d 397 (1941). The Uniform Rule would exclude such evidence as it is presently worded. It provides that the declarant's statement of "memory or belief" is not admissible "to prove the fact remembered or believed." Hence, a decedent's statement that he has or has not made a will or revoked or did not revoke a will would be inadmissible to prove that fact, even though such a statement might be admissible to show the intent with which the disputed fact was done if there was independent evidence that the disputed fact was done.

It is true that the rule in the will cases is not based on a logical analysis. But it is a well established rule in California and elsewhere. Therefore, the staff has revised Rule 63(12) to add language to codify the rules set forth in the will cases. To be perfectly consistent, the language might be broadened to apply to the deed and gift cases. But this would go beyond the existing law and the staff believes that the exception dealing with declarations against interest will deal adequately with the deed and gift cases. Language has been added to Rule 63(12) as set out in the attached tentative recommendation to codify the exception relating to will cases.

Rule 63(13)

The Commission and State Bar are in agreement on this subdivision which, as revised, embodies the present Uniform Business Records as Evidence Act as enacted in California. Since the approval of this rule, though, the Legislature added Section 1953f.5 to the Uniform Act in

1959. This section provides:

> Subject to the conditions imposed by Section 1953f, open book accounts in ledgers, whether bound or unbound, shall be competent evidence.

Assemblyman Hanna, who introduced the bill to enact this section, has explained that it was introduced

> "because of certain trial court determinations which raised the question whether or not card files used in business machines came within the accepted definition of 'open book accounts'; the technical distinction being made on the basis that a book would be bound in some manner. We felt that this section of the code should keep pace with the business procedures being utilized by a large number of wholesale and retail merchants. We are advised that our bill made this inclusion clear."

A related bill was also introduced by Assemblyman Hanna which resulted in the enactment of Section 337a of the Code of Civil Procedure. This section now defines "book account" to mean a detailed record of transactions between a debtor and creditor entered in the regular course of business and kept in a reasonably permanent form such as a bound book, sheets fastened in a book or cards of a permanent character.

The staff believes that Section 337a of the Code of Civil Procedure adequately solves the problem revealed by Assemblyman Hanna. The staff believes the problem is primarily a limitation of actions problem, for there is no requirement in the Uniform Business Records as Evidence Act requiring the business records to be in an "open book." At the most, all Section 1953f.5 does is make explicit the liberal case-law rule. It may, however, have the unintended effect of limiting the provisions of the Uniform Act as it was construed by prior cases. Witkin's California Evidence at pages 323-324 states:

> The common law rule called for "original entries" or "books of original entry," on the theory that these were

more likely to be accurate than copies subsequently entered. Business practices, however, often made literal compliance with this requirement impossible. And modern cases, both before and after the Uniform Act (which eliminates the requirement), tend to admit records kept under any kind of bookkeeping system, whether original or copied, and whether in book, looseleaf, card or other form. [citing many cases -- automobile repair shop; work cards transcribed by bookkeeper); (construction job; foreman's daily report sheets); contractor's time-book for construction work); (pumper's daily gauge reports, run tickets, etc.); (lien claimant's informal "composition book" containing his entries of hours worked and materials used); (duplicate sales tag entered on permanent "hard sheet" comparable to ledger leaf -- Burroughs Bookkeeping Machine System); (linen service; duplicate delivery tag or ticket showing amounts delivered on particular dates); (ambulance company "trip ticket" and "log book"); (Veterans Loan appraisal file kept by bank); (chain store produce clerk's tally sheet)]

The Uniform Act refers to the record of "an act, condition or event," i.e., its coverage goes beyond bookkeeping entries of debit and credit. A special report, or report of a nonrecurring act or event, may be received if it was made in the course of business or professional duty. [citing cases]

Accordingly, the staff does not recommend the amendment of subdivision (13) of Rule 63 to include the matter added to the Uniform Act in 1959. The matter is brought to your attention, though, for the Rule as approved does not include the 1959 addition to the Uniform Act.

Rule 63(15)

The northern section of the State Bar Committee has approved this subdivision as proposed by the Commission. The southern section, however, would prefer the language contained in the U.R.E. with the following language added at the end:

> . . . provided that such findings could have been testified to by said public officer or employee had he been called as a witness. The fact that a public officer

or employee has made findings of fact or drawn conclusions shall constitute prima facie proof that he was qualified to do so, provided, however, that no such reports or findings of fact shall be admissible if offered in evidence by or on behalf of any such public officer or employee making or participating in the making of such investigation or written report, or by or on behalf of any party, government or governmental authority under whose jurisdiction, authority, control, or supervision, or at whose request such investigation or written report was made, unless such report or finding of fact is admissible under a statute or ordinance or rule expressly authorizing its admissibility.

The northern section has not reached a final conclusion on this proposal by the southern section.

The language suggested by the southern section appears to be directed at an ambiguity in the Commission's draft. The meaning of "statements of fact" is somewhat unclear. Does it mean a statement of "a thing done" (Webster's) whether or not the declarant perceived the thing reported? Or does it refer only to those things which the declarant perceived? Is the declarant's statement that the green car went through the red light any less a statement of fact because it is based upon his conclusions from the statements of witnesses, the location of the cars, skid marks and other matters which he perceived?

The language proposed by the southern section answers this important question by extending the exception only to findings that the declarant

could have testified to if he had been called as a witness.

This is in accord with the existing California law, as is indicated by the following quote from Witkin, California Evidence, p. 333:

> The usual official statement received in evidence is one which is based upon the performance of duty or personal observation of facts by the official, and this satisfies the knowledge requirement . . . . On the other hand, the official report of an investigation may be based in whole or in part on information gained from others or conclusions of the official. Although Uniform Rule 63(15)(c) approves the admission of such a report, the general tendency of the courts is to exclude matters which would not be permitted as testimony of the officer on the stand. (See Unif. Rule 63(15), Comment [pointing out that proposed rule goes beyond common law, and justifying departure by requirements of notice to adverse party]; . . . .)

So far as the "conclusions" of a public officer or employee are concerned (his opinion based on the facts he observed), the southern section's proposal would make the report itself prima facie evidence of the qualifications of the declarant to draw such conclusions (i.e., give such opinion evidence).

Under the southern section's language, the question arises whether the court should exclude reports if it cannot determine whether the declarant perceived the events reported. In MacLean v. San Francisco, 151 Cal. App.2d 133, 311 P.2d 158 (1957), the trial court excluded a police accident report because it did not show whether the facts reported were based upon the declarant's observations or upon the statements of bystanders; but the officers who prepared the report were called and testified on the matters of which they had knowledge, using the report to refresh recollection. Under the Commission's proposed language, it might be held that such a report should be received, for it contained a statement of facts and the officer who prepared the report had the duty

to investigate the facts and prepare the report. But apparently the southern committee's language would require the court to determine that the declarant could competently testify to the matters reported before the report could be received.

If the Commission did not intend to let reports into evidence unless the reporting officer had first-hand knowledge of the reported facts or was qualified to form an opinion from the facts he personally observed, the staff suggests that this subdivision be modified as follows to make this intent clear:

> (15) Subject to Rule 64, a statement[s] [of fact] contained in a written report made by a public officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if such statement would be admissible if made by him at the hearing and the judge finds that the making [thereof] of the report was within the scope of the duty of such officer or employee and that it was his duty to:
>
> (a) Perform the act reported; or
>
> (b) Observe the act, condition or event reported; or
>
> (c) Investigate the facts concerning the act, condition or event.

One further revision to subdivision (15) should be considered by the Commission. Subdivision (15) is, of course, intended to include official records made by a public officer or employee. However, the section applies only to "reports" made by a public officer or employee. It might be desirable to insert after "written report" the words "or

official record" and after the word "reported" in paragraphs (a) and (b) the words "or recorded."

Rule 63(16)

The southern section of the State Bar Committee concurred with the Commission except for the elimination of the reference to Rule 64. The northern section objects to the elimination of the reference to Rule 64 and recommends that the subdivision be limited specifically to the types of reports that are made for vital statistics purposes, such as birth certificates, marriage certificates and death certificates. Unless the subdivision is so limited, the northern section recommends that the subdivision be limited to "statements of fact" contained in the writing. The northern section, too, believes that the language, ". . . authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing . . .", is unclear.

Concerning the elimination of the reference to Rule 64, see the comment below relating to subdivision (17), (18) and (19).

One further revision of subdivision (16) should be considered by the Commission. The staff believes that subdivision (16) would be improved if it were revised as follows:

(16) A statement contained in a written report [~~writings~~] made by a person [~~persons~~] other than a public [~~officers or employees~~] officer or employee [~~as a record, report or finding of fact~~], if such statement would be admissible if made by him at the hearing and the judge finds that:

(a) The maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the [writing] report, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions; and

(b) The [writing] report was made and filed as required by the statute.

Rule 63 (17), (18) and (19)

The State Bar Committee does not agree with the elimination of "Subject to Rule 64" from these three exceptions. As a practical matter, it is difficult to understand why the introduction of an original official record should be subject to Rule 64 [under Rule 15] when the introduction of a copy of the record is not subject to Rule 64 [under Rule 17]. The Bar states that it "has found itself unable to understand this action."

Rule 63(20)

The State Bar Committee disapproves of this rule. It further recommends that, if the Commission recommends the rule, the rule should be amended to indicate the judgment is not conclusive but "tends" to prove the necessary facts.

Rule 63(21)

The State Bar Commitee believes the subdivision is somewhat unintelligible. The Committee states that it believes that any change in

the rules set forth in Civil Code Section 2778 (governing the relationships between indemnitors and indemnitees) would be unwise. The Committee suggests a revision which would read as follows:

> (21) Where under the law of this State a judgment against a person who is entitled to be indemnified or exonerated by another against a liability is not conclusive in any subsequent action which the former may bring against the latter for indemnity or exoneration, such judgment may be offered in evidence by the former in any such action as prima facie evidence of the facts determined thereby.

Rule 63 (23) and (24)

The Bar Committee had approved these rules as originally proposed and has not taken a position on the language relating to ante litem motem which has been added. The Southern Section has reservations about the precise language with which the ante litem motem qualification has been added. It comments that "to exceed or fall short of the truth" seems to be meaningful only with respect to statements concerning age. In addition, the Southern Section believes that "existing controversy" is too vague and can be interpreted to include backyard arguments. It believes that the subdivision should be reworded so that it clearly refers to a legal controversy of some sort.

The Southern Committee also reports that there is substantial opinion among its members that the ante litem motem qualification should go to the weight of the evidence, not its admissibility.

The complaint concerning the words "to exceed or fall short of the truth" might be met by revising them to read "to deviate from the truth."

Rule 30.

The State Bar Committee suggests that the subdivision be revised to read as follows:

(30) Evidence of [~~statements of~~] matters, other than opinions, which are of general interest to persons engaged in an occupation, contained in a tabulation, list, directory, register, [~~periodical~~] or other published compilation [~~to prove the truth of any relevant matter so stated~~] if the judge finds that the [~~compilation is published for use~~] information is generally used and relied upon by persons engaged in that occupation [~~and is generally used and relied upon by them~~] for the same purpose or for purposes for which the information is offered in evidence.

The phrase "to prove the truth of any relevant matter so stated" which the Bar has stricken in its suggestion is probably unnecessary, for under the basic statement of Rule 63 the evidence is not hearsay if it is not introduced for that purpose.

Rule 63(31).

The Bar Committee reports that its northern section approves of the action of the Commission, but the southern section prefers the original proposal contained in the URE with the following modifications:

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge [~~takes judicial notice or a witness expert in the subject testifies~~] finds that the treatise, periodical or pamphlet is a reliable authority in the subject.

However, the southern section reports that, in the interest of unanimity, it is willing to accept the action of the Commission and the northern section.

Rule 63(32).

The northern section of the State Bar Committee has not considered this addition to the Uniform Rules. The southern section believes that the language is inexact. It states that "any hearsay evidence not admissible under subdivisions (1) through (31)" indicates that these subdivisions state rules of inadmissibility. Actually, it is Rule 63 that declares certain evidence is not admissible and subdivisions (1) through (31) merely declare that certain evidence is not inadmissible. The southern section suggests the following revision of subdivision (32):

(32) Any hearsay evidence not admissible under [~~subdivisions (1) through (31) of~~] this Rule 63 but declared by some other law of this State to be admissible.

The revision suggested above is not technically accurate because subdivision (32) will be a part of Rule 63 and will provide that the hearsay rule does not prevent the admission of certain hearsay evidence.

A technically accurate subdivision that will meet the objection of the southern section is set out below:

(32) Any hearsay evidence [~~not admissible under~~] that does not fall within an exception provided by subdivisions (1) through (31) of this rule, but is declared by some other law of this State to be admissible.

The changes shown above are directed to subdivision (32) as approved by the Commission.

However, it is difficult to see why it is necessary to determine that the hearsay sought to be introduced is inadmissible under Rule 63 before reliance may be placed on another law. The same result might be achieved if the subdivision were revised to read:

> (32) Hearsay evidence declared to be admissible by any other law of this State.

This suggested revision has been incorporated in the tentative recommendation.

Rule 63A.

Rule 63A was approved by the Commission in substantially the following form:

> 63A. Where hearsay evidence falls within an exception provided by subdivisions (1) through (31) of Rule 63 and when such evidence is also declared to be admissible by some law of this State other than such subdivision, such subdivision shall not be construed to repeal such other law.

The northern section of the Bar Committee has not considered this rule. The southern section has approved it.

The staff suggests that Rule 63A be revised to save other laws both consistent and inconsistent with subdivisions (1) through (31) of Rule 63. The following language is suggested:

> 63A. Where hearsay evidence is declared to be admissible by any law of this State, nothing in Rule 63 shall be construed to repeal such law.

This suggested revision has been incorporated in the tentative recommendation.

Rule 64.

The Bar Committee has agreed to the inclusion of a reference to Rule 63(29) in this rule. But it reports that it is unable to understand the action of the Commission in deleting the references to subdivisions (16), (17), (18) and (19). As pointed out previously, there does seem to be some inconsistency in this action of the Commission. An original official record must be served under Rule 64, but a copy of the same record is admissible without such service. A record of an action by a public official must be served under Rule 64, but an official report of an action by someone other than a public official is not subject to this requirement. Under Rule 63(15) a report of a marriage performed by a judge is inadmissible unless Rule 64 is complied with, but under Rule 63(16) a report of a marriage performed by a minister is admissible without complying with Rule 64.

Rule 66.

The second paragraph of the proposed Law Revision Commission comment to Rule 66 is not in accordance with Professor Chadbourn's analysis of this Rule. Professor Chadbourn does not believe that the rule applies to any more than "double hearsay." His study on this rule raises the possibility that the rule may be construed to exclude triple hearsay. The staff, however, believes that multiple hearsay may be reached by repeated applications of Rule 66. For instance, if former testimony (Rule 63(3)) is to an admission (Rule 63(7)) and is sought to be proved by a properly authenticated copy (Rule 63(17)) of the official report (Rule 63(15)) of such testimony, the copy is within an exception and is not inadmissible on the ground that it is offered to prove the official report of the testimony, for the official report is within an exception. The official report is not inadmissible on the ground that it relates prior testimony, for the prior testimony is

within an exception. The former testimony is not inadmissible on the ground that it includes an admission, for the admission is within an exception.

However, if the Commission believes that Rule 66 is not sufficiently clear, the staff believes that it may be clarified by revising it to read as follows:

> Rule 66. A statement within the scope of an exception to Rule 63 is not inadmissible on the ground that [~~it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself~~] the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to Rule 63.

Professor Chadbourn included in his study another suggested revision of Rule 66 in order to solve the problem. However, he did not recommend its approval because he believed the courts would work out the solution to the problem without legislative guidance. His proposed revision is as follows:

> 66. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes [~~a statement made by another declarant~~] one or more statements by an additional declarant or declarants and is offered to prove the truth of the included statement or statements if such included statement [~~itself~~] meets or such included statements meet the requirements of an exception or exceptions.

Adjustments and Repeals of Existing Statutes

The adjustments and repeals set out in the draft of the tentative recommendation are in accord with decisions previously made by the Commission except as noted below.

C.C.P. Section 1951 has been revised to conform it to Rule 63(19). This is in accord with a previous decision by the Commission but the Commission has never considered what changes should be made in Section 1951 to conform it to Rule 63(19).

C.C.P. Section 2047 has been revised to make it consistent with Rule 63(1)(c) and to delete the last sentence which is superseded by Rule 63(1)(c). The Commission has never considered the specific revision suggested in the draft of the tentative recommendation.

Additional adjustments of existing statutes will be recommended in the Supplement to Memorandum No. 7(1961) (to be sent).

Respectfully submitted,

John H. DeMoully
Executive Secretary

mg.

2/6/61

Supplement to Memorandum No. 7(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence
(Hearsay Evidence)

REPEAL AND ADJUSTMENT OF ADDITIONAL CODE SECTIONS

In Memorandum No. 7(1961) the staff indicated that a further recommendation would be made relating to the revision of existing code sections. The sections discussed in the present memorandum have not been previously considered by the Commission. The staff believes that certain adjustments are needed in the sections hereinafter mentioned in order to make them consistent with the actions taken by the Commission on the Uniform Rules. Attached to this memorandum on blue paper are the staff's suggested additions to the Commission's tentative recommendation.

REVISION OF CODE SECTIONS RELATING TO
THE ADMISSION OF DEPOSITIONS IN CIVIL ACTIONS

Subdivision (d)(3) of Section 2016 of the Code of Civil Procedure sets forth certain conditions under which a deposition may be used as evidence in a civil action. These conditions are almost, but not quite, identical with the conditions which must be met to qualify a person as "unavailable as a witness" under Rule 62(6). The staff believes that the conditions for the admissibility of depositions taken in the same action should be no different -- and certainly no more stringent -- than the conditions for the admissibility of testimony taken in a former action

under Rule 63(2a) and Rule 63(3). Therefore, the staff recommends the substitution of the "unavailable as a witness" standard for the language used in subparagraphs (i) through (iii) of paragraph (3) of subdivision (d) of Section 2016.

REVISION OF CODE SECTIONS RELATING TO CONFRONTATION, DEPOSITIONS AND FORMER TESTIMONY IN CRIMINAL ACTIONS

Penal Code Sections 686, 882, 1345 and 1362 relate to the right of a defendant to confront witnesses and the conditions under which depositions and former testimony may be admitted in criminal actions. These sections are not only inconsistent with the Commission's actions on the Uniform Rules, they are inconsistent with each other.

The standard of unavailability

Section 686

Section 686 grants the defendant in a criminal trial the right to confront the witnesses against him. Three exceptions are stated:

(1) Where the charge has been preliminarily examined and the testimony taken down in the presence of the defendant and subject to the defendant's right of cross-examination, "the deposition of the witness may be read, upon its being satisfactorily shown to the court that he is dead or insane or cannot with due diligence be found within the state";

(2) Where the testimony of a prosecution witness who is unable to give security for his appearance has been taken conditionally in the presence of the defendant and subject to the defendant's right of cross-examination, "the deposition of the witness may be read, upon its being satisfactorily

shown to the court that he is dead or insane or cannot with due diligence be found within the state"; and

(3) Where testimony has been given on a former trial of the action in the presence of the defendant and subject to the defendant's right of cross-examination, such testimony may be admitted if the witness is "deceased, insane, out of jurisdiction" or "cannot with due diligence, be found within the state."

These standards for the admission of depositions and former testimony are inconsistent with the Uniform Rules as approved by the Commission. Rule 63(3) provides that the former testimony of a person who is unavailable as a witness may be admitted in criminal proceedings (a) where the defendant offered the testimony on his own behalf in the former action, or (c) where the former action was a criminal proceeding against the defendant and he had the right and opportunity to cross-examine the witness at that time with a similar motive.

Thus, if Section 686 is left unmodified, the testimony of a witness at the preliminary examination of the same action and the testimony of a witness unable to give security for his appearance taken by deposition in the same action will be admissible only if such witness is dead or insane or cannot be found within the State; but the testimony of a witness in a former action (including a former civil action) may be admissible if the witness is unavailable for any of the reasons specified in Rule 62(6) -- e.g., privilege, disqualification, death, physical or mental disability, absent beyond the reach of the court's process, or the proponent can't find him.

Similarly, if Section 686 is left unmodified, the testimony of a

witness at a former trial of the same action is admissible only if the witness is dead, insane or out of jurisdiction; but the testimony of the witness at a trial of a different action may be admissible if the witness is unavailable for any of the reasons stated in Rule 62.

For the sake of consistency, the staff recommends that Section 686 be amended to provide that the former testimony referred to therein is admissible when the declarant is "unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence."

Sections 882, 1345 and 1362

There is a further difficulty with Section 686. It is inconsistent with Sections 1345 and 1362 even though all of these sections were enacted in 1872. Section 1345 appears in a chapter dealing with the taking of depositions of witnesses who may be unable to appear at the trial (the taking of the deposition is referred to as a "conditional examination" of the witness). Section 1345 provides that the deposition, or a certified copy thereof, may be read in evidence if the witness is unable to attend by reason of "death, insanity, sickness," "infirmity" or "continued absence from the state." Section 686 recognizes only death, insanity and absence from the State as grounds for reading a deposition.

Section 1362 appears in a chapter dealing with the depositions of material witnesses for the defendant who are out of the State. Here, the deposition may be read if the witness is unable to attend from "any cause whatever."

So far the differences between Section 686 and Sections 1345 and 1362 have merely been inconsistencies in principle. However, by virtue of the provisions of Section 882, there is a direct conflict between Section 686

and Section 1345. Section 882 appears in a chapter dealing with the taking of depositions of material witnesses who cannot give security for their appearance. It provides that the deposition of such a witness may be used upon the trial "except in cases of homicide, under the same conditions as mentioned in section thirteen hundred and forty-five." Thus, 882 and 1345 provide that a deposition of a witness who cannot give security may be read where the witness is dead, insane, sick, infirm or absent from the State; but 686 provides that such a deposition may be read only where the witness is dead, insane or absent.

The staff recommends that these inconsistencies be eliminated by substituting the standard used in Rule 63(3) -- that the declarant is "unavailable as a witness" -- in both Sections 1345 and 1362. This change will also prevent a defendant from using a deposition under these sections if the defendant caused the unavailability to prevent the deponent from appearing.

Cases in which depositions may be used.

Another matter should be noted also. Section 882 provides that the deposition of a witness for the people who is unable to give security for his appearance may be read "except in cases of homicide." Section 686, in referring to the reading of such a deposition, does not mention any limitation as to the nature of the case in which the deposition may be read. Section 1345, which deals with depositions of material witnesses who are about to leave the State or who will be unable to attend the trial because of sickness or infirmity, is subject to the provisions of Section 1335, which provides that the people may not take the deposition of such

a witness in death penalty cases. The staff recommends that the "homicide" limitation contained in Section 882 be incorporated in the portion of Section 686 that deals with the reading of the deposition of a witness unable to give security for his appearance. The staff does not recommend any other adjustment of these sections insofar as the "homicide" or "death penalty" limitations are concerned, for there is no direct conflict between the sections even though the principles are somewhat inconsistent.

Former testimony in another action.

Another matter should also be noted. Section 686 purports to list all of the situations in which a defendant does not have the right to confront the witnesses against him. It makes no exception for the situations that are covered by Rule 63(3)(a) and (c) -- testimony in a former action introduced by the defendant and testimony in a former criminal action in which the defendant had the right and opportunity to cross-examine with a similar motive. The enactment of Rule 63(3) will not, of its own force, make the evidence listed therein admissible. Rule 63(3) merely states an exception to Rule 63. That is, subdivision (3) merely provides that nothing in Rule 63 will make the evidence mentioned in subdivision (3) inadmissible. Hence, it is possible that Section 686 would render such evidence inadmissible despite the enactment of Rule 63(3). Therefore, the staff recommends that Section 686 be amended to permit Rule 63(3) to operate as an exception to the right of confrontation as well as an exception to the hearsay rule.

Use of depositions taken in the same action under Sections 1345 and 1362.

Section 686, too, does not refer to the deposition evidence which is

admissible under Sections 1345 and 1362. For some reason, insofar as depositions are concerned it refers only to the type of deposition taken under Section 882. If Sections 1345 and 1362 mean what they say -- that the depositions there mentioned may be read by either party at the trial -- Section 686 should also be amended to indicate that this may be done despite the right of confrontation.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

If the recommendations made in the Supplement to Memorandum No. 7 (1961) are approved, the following material should be added to the section on Adjustments and Repeals of Existing Statutes that is contained in the tentative recommendation on hearsay evidence:

Code of Civil Procedure

Section 2016. This section should be revised so that it conforms to the Uniform Rules. The revision merely substitutes "unavailable as a witness" for the more detailed language in Section 2016 and makes no significant substantive change in the section. The revised portion of the section would read as follows:

(d) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party to the record of any civil action or proceeding or of a person for whose immediate benefit said action or proceeding is prosecuted or defended, or of anyone who at the time of taking the deposition was an officer, director, superintendent, member, agent, employee, or managing agent of any such party or person may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence; or ~~[dead; or (ii) that the witness is at a greater distance than 150 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v)]~~ (ii) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Penal Code

Section 686. This section should be revised to read:

686. In a criminal action the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except [~~that~~] :

(a) Where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the testimony of such witness at the preliminary examination may be read if the judge finds that he is unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. [~~;-or~~]

(b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this State. [~~where-the-testimony-of-a-witness-on-the part-of-the-people,-who-is-unable-to-give-security-for-his appearance,-has-been-taken-conditionally-in-the-like-manner-in the-presence-of-the-defendant,-who-has,-either-in-person-or-by counsel,-cross-examined-or-had-an-opportunity-to-cross-examine the-witness,-the-deposition-of-such-witness-may-be-read,-upon its-being-satisfactorily-shown-to-the-court-that-he-is-dead-or insane-or-cannot-with-due-diligence-be-found-within-the-state,-and~~]

(c) [~~except-also-that-in-the-case-of-offenses-hereafter committed~~] The testimony on behalf of the people or the defendant of a witness [~~deceased,-insane,-out-of-jurisdiction,-or-who cannot-with-due-diligence,-be-found-within-the-state,~~] given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted if the judge finds that the witness is unavailable as a witness

within the meaning of Rule 62 of the Uniform Rules of Evidence.

(d) The testimony given in a former action or proceeding may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this State.

(e) Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this State.

The amendments to subdivisions (a) and (c) (which substitute the phrase "unavailable as a witness" for the phrase "dead or insane or cannot with due diligence be found within the state" or a similar phrase) would make the standard for the admission of former testimony in the same action identical with the standard for admitting former testimony in a prior action under the provisions of Rule 63(3).

Subdivision (b) has been revised to reflect existing law. The provision which has been deleted from this subdivision inaccurately states the conditions under which a deposition may be admitted under the provisions of Penal Code Section 882 and entirely fails to provide for the admission of depositions as provided in Penal Code Sections 1345 and 1362.

Subdivisions (d) and (e) have been added so that Penal Code Section 686 will completely and accurately cover the subject of confrontation.

Sections 1345 and 1362. These sections should be revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in a former action under Rule 63(3). The revised sections would read:

1345. The deposition, or a certified copy thereof, may be read in evidence by either party on the trial [~~,-upon-its-appearing~~] if the judge finds that the witness is [~~unable-to-attend,-by-reason of-his-death,-insanity,-sickness,-or-infirmity,-or-of-his-continued absence-from-the-state~~] unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. [~~Upon-reading-the deposition-in-evidence,~~] The same objections may be taken to a question or answer contained [~~therein~~] in the deposition as if the witness had been examined orally in court.

1362. The depositions taken under the commission may be read in evidence by either party on the trial [~~,-upon-it-being-shown~~] if the judge finds that the witness is [~~unable-to-attend-from-any cause-whatever,-and~~] unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. The same objections may be taken to a question in the interrogatories or to an answer in the deposition [,] as if the witness had been examined orally in court.

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Frederic Cohen

Signature

Cohen, Frederic (56755)

Last Name, First Name (PNum)

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