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 3 OF 14, PAGES 516-758 OF 3537

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

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ATTORNEYS FOR REAL PARTY IN INTEREST
FORD MOTOR COMPANY

Meeting

3/1/61

Memorandum No 10 (1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence
(Hearsay Article)

Description of Attached Material. The attached material (green pages) includes a draft of a letter of transmittal and a draft of a tentative recommendation on Article VIII of the Uniform Rules of Evidence. This material incorporates the changes made by the Commission at its February 1961 meeting.

The text of the revised rules is set out 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.

We have made the changes in the text of the rules that were adopted by the Commission at its February 1961 meeting. These changes can be determined by an examination of the minutes of the February meeting already distributed to you. We have revised the comments to conform to these changes. If you noted defects in the earlier version of the tentative recommendation it is suggested that you examine the attached version to determine if the defect still exists. Also, please read the attached version of the tentative recommendation carefully because we have made a number of changes from the earlier version.

Matters Noted for Special Attention. Each comment explaining a rule or subdivision of a rule should, of course, be carefully studied. In addition a number of matters are noted below for special attention in connection with this tentative recommendation.

Rule 63(30)

This subdivision has been revised according to the decision of the Commission at its February 1961 meeting.

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)

This subdivision has been revised according to the decision of the Commission at its February 1961 meeting.

The northern section of the State Bar Committee has not considered this addition to the Uniform Rules. The sourthern 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 the 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.

This rule has been revised to insert the words "other than Rule 7" according to the decision of the Commission at its February 1961 meeting. The staff believes this addition is both unnecessary and confusing.

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 Chadbcurn 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

mtg

[COVER]

State of California

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

July 1961

LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN

Governor of California

and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn of the School of Law, University of California at Los Angeles. This report covers the portion of the Uniform Rules upon which preliminary work has been completed by the Commission. Other portions of the Uniform Rules will be covered in subsequent reports.

The tentative recommendation of the Law Revision Commission concerning Article VIII of the Uniform Rules of Evidence is being released at this time so that interested members of the bench and bar will have an opportunity to study the tentative recommendation carefully and give the Commission the benefit of their detailed comments and criticisms. These comments and criticisms will be considered by the

Commission in formulating its final recommendation which will cover all of the Uniform Rules of Evidence. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford, California.

The Commission wishes to acknowledge the very substantial assistance it has received from its able and tireless research consultant, Professor James H. Chadbourn, and from the Special State Bar Committee appointed to study the Uniform Rules of Evidence: Mr. Joseph A. Ball, Chairman, Mr. Lawrence C. Baker, Vice Chairman, Mr. Stanley A. Barker, Vice Chairman, Southern Section, Mr. John B. Bates, Mr. Bryant M. Bennett, Mr. Warren M. Christopher, Mr. Morse Erskine, Sr., Mr. William J. Hayes, Mr. Stuart L. Kadison, Mr. Otto M. Kaus, Mr. Moses Lasky, Mr. Robert M. Newell, Mr. Jesse E. Nichols, Mr. W. Burleigh Pattee, Mr. William J. Schall, and Mr. J. E. Simpson. [Note: Membership of State Bar Committee will be corrected to reflect membership of Committee as of the date of publication.]

Herman F. Selvin, Chairman

John R. McDonough, Jr., Vice Chairman

James A. Cobey, Member of the Senate

Clark L. Bradley, Member of the Assembly

Joseph A. Ball

George G. Grover

Sho Sato

Vaino H. Spencer

Thomas E. Stanton, Jr.

Ralph N. Kleps, Legislative Counsel, ex officio

John H. DeMoully
Executive Secretary

July 1961

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature authorized and directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The Law Revision Commission has completed a careful study of Article VIII of the Uniform Rules of Evidence. This article, consisting of Rules 62 through 66, relates to the admissibility of hearsay evidence in proceedings conducted by or under the supervision of a court. The tentative recommendation of the Commission on Article VIII is set forth herein.

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[1] A copy of a printed pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 60 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

GENERAL SCHEME OF UNIFORM RULES OF EVIDENCE

The Commission's tentative recommendation on URE Rules 62-66 must be read in the context of the general scheme of the Uniform Rules of Evidence, the essence of which lies in Rule 7:

> Rule 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules. Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

The explanatory comment of the Commissioners on Uniform State Laws on Rule 7 is as follows:

> This rule is essential to the general policy and plan of this work. It wipes the slate clean of all disqualifications of witnesses, privileges and limitations on the admissibility of relevant evidence. Then harmony and uniformity are achieved by writing back onto the slate the limitations and exceptions desired. All of the other rules, except the very few touching upon related matters or procedure, revolve around and are limitations on and modifications of Rule 7. This is not a new approach. It follows the pattern of the A.L.I. Model Code of Evidence, which in turn was based on the concept of Professor Thayer and others that all things relevant or logically probative are prima facie admissible unless limitations are imposed by another rule.
>
> Thus all relevant hearsay would be admissible under this rule but for Rule 63 which bars hearsay generally, with carefully specified exceptions.
>
> Illegally acquired evidence may be inadmissible on constitutional grounds -- not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule. [Emphasis added]

With one important qualification, which is discussed in the comment which follows it, the opening paragraph of URE Rule 63 states the basic

common-law rule of the inadmissibility of extrajudicial declarations offered to prove the truth of the matter stated -- i.e., "hearsay" evidence:

> 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:

Subdivisions (1) through (31) of URE Rule 63 state a series of exceptions to the general rule of the inadmissibility of hearsay evidence stated in the opening paragraph of the Rule. The comment of the Commissioners on Uniform State Laws on the general scheme of Rule 63 is as follows:

> This rule follows Wigmore in defining hearsay as an extra-judicial statement which is offered to prove the truth of the matter stated . . . . The policy of the rule is to make all hearsay, even though relevant, inadmissible except to the extent that hearsay statements are admissible by the exceptions under this rule. In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness . . . . The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made. The element of unavailability of the declarant or the fact that the statement is the best evidence available is a factor in a very limited number of situations, but for the most part is a relatively minor factor or no factor at all. Most of the following exceptions are the expressions of common law exceptions to the hearsay rule. Where there is lack of uniformity among the states with respect to a particular exception a serious effort has been made to state the rule which seems most sensible or which reflects the weight of authority . . . . The exceptions reflect some broadening of scope as will be noted in the comments under the particular sections. These changes not only have the support of experience in long usage in some areas but have the support of the best legal talent in the field of evidence. Yet they are conservative changes and represent a rational middle ground between the extremes of thought and should be acceptable in any fact-finding tribunal, whether jury, judge or administrative body.

By way of contrast to the systematic and comprehensive approach of the Uniform Rules relating to hearsay evidence, the existing California

law is both unsystematic and incomplete. Although this State has numerous statutory provisions relating to hearsay evidence, there is no statutory definition of hearsay evidence. Nor are the existing exceptions to the general rule that hearsay evidence is inadmissible clearly stated as such. Moreover, the existing statutes relating to hearsay are not systematically compiled to facilitate reference to them.

The Commission approves the general scheme of the Uniform Rules relating to hearsay evidence.

REVISION OF URE RULES 62-66

The Law Revision Commission tentatively recommends that URE Rules 62-66 be revised as hereinafter indicated. It will be seen that the Commission has concluded that many changes should be made in Rules 62-66. In some cases the suggested changes go only to language. In others, however, they reflect a considerably different point of view on matters of substance from that taken by the Commissioners on Uniform State Laws. In virtually all such instances the rule proposed by the Law Revision Commission is less liberal as to the admissibility of hearsay evidence than that proposed by the Commissioners on Uniform State Laws. Nevertheless, the tentative recommendation of the Commission would make a considerably broader range of hearsay evidence admissible in the courts of this State than is presently the case.

In the discussion which follows, the text of the Uniform Rule or a subdivision thereof is set forth as proposed by the Commissioners on Uniform State Laws with the amendments tentatively recommended by the Law Revision Commission shown in strike-out and italics. Each provision is followed by a comment of the Law Revision Commission. Where the

Commission has proposed a modification which relates only to the form of the rule or the purpose of which is obvious upon first reading, no explanation of the Commission's revision is stated. In other cases the reasons for the Law Revision Commission's disagreement with the Commissioners on Uniform State Laws are stated. For a detailed analysis of the various rules, see the research study prepared by the Commission's research consultant.

(34)

RULE 62. DEFINITIONS.

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

(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~~"] 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 paragraph (a) of this subdivision.

(5) "State" includes each of the United States and 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.~~]

(6) [~~(7)~~] Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" includes situations where the [~~witness~~] declarant 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 or~~] 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 subdivision (6) of this rule, [~~But~~] a [~~witness~~] declarant is not unavailable as a witness:

(a) If the judge finds that [~~his~~] 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 [~~witness~~] declarant from attending or testifying [~~,~~] or [~~to~~] (ii) the culpable act or neglect of such [~~party~~] proponent; [~~,~~] or

(b) If unavailability is claimed [~~under clause (4) of the preceding paragraph~~] 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. [~~and that the probable importance of the testimony is such as to justify the expense of taking such deposition.~~]

COMMENT

This Rule defines terms used in Rules 62 - 66. The Rule as proposed by the Commissioners on Uniform State Laws has been considerably revised in form in the interest of clarity of statement and subdivision (6) thereof has been omitted because "a business" is used only in subdivisions (13) and (14) of Rule 63 and the term is defined there.

RULE 63. HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS.

Opening Paragraph: General Rule Excluding Hearsay Evidence.

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:

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 truth of the

matter inferred. To put the matter another way, in such cases actions speak louder than words.

The word "except" introduces 31 subdivisions which define various exceptions to the hearsay rule. These and several additional subdivisions added by the Commission are commented upon individually below.

Subdivision (1): Previous Statement of Trial Witness.

(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 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) substantially 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, in the case of prior consistent statements, to rebut a charge of recent fabrication. 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. Moreover, when a party needs to use a prior inconsistent statement of a witness at the trial as necessary evidence in order to make out his prima facie case or his defense, he should be able to use the statement as substantive evidence. In many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial.

Paragraph (c), which makes admissible what is usually referred to as "past recollection recorded," makes no radical departure from existing law. The language stating the circumstances under which such evidence may be introduced, which the Commission believes provide sufficient safeguards of the trustworthiness of such statements to warrant their admission into evidence, is taken largely from and embodies the substance of the language of C.C.P. § 2047. There are, however, two substantive differences between paragraph (c) and existing California law:

First, our present law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts were fresh in his memory and (3) that the witness knows that the facts are correctly stated in the writing. On the other hand, under paragraph (c) the writing may be made

not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness's statement at the time it was made. In addition, since there is no requirement under paragraph (c) that the witness himself know that the writing is a correct record of his statement, the testimony of the person who recorded the statement may be used to establish that the writing is a correct record of the statement. The foundation requirement of the present law excludes any record of a declarant's statement if the person recording the statement was not acting "under the direction" of the declarant. Yet such a statement is trustworthy if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under paragraph (c) the document or other writing embodying the statement is admissible while under the present law the declarant reads the writing on the witness stand and it is not otherwise made a part of the record.

Subdivision (2): Affidavits; Depositions Taken in the Action; Testimony at Preliminary Examination or Former Trial in Criminal Action.

(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 Rule 63. Both simply preserve the existing law respecting the admissibility of affidavits which, being extrajudicial statements, are 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 URE 63(3) 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

[illegible] special circumstances a 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.

This subdivision is merely a specific application of the principle reflected in Rule 63(32) and Rule 63A that the Uniform Rules should not make inadmissible hearsay evidence that is admissible under existing California statutes.

Subdivision (2a): Testimony in Former Action Between Same Parties.

(2a) In a civil action or proceeding, testimony of a witness given in a former action or proceeding between the same parties or their predecessors in interest, relating to the same matter, if the judge finds that the declarant is unavailable as a witness. As used in this subdivision "former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered.

COMMENT

There is no equivalent provision in the URE but its absence appears to be due to oversight rather than deliberate ommission.

The proposed provision restates the existing law - C.C.P. § 1870(8) as interpreted by the California courts - except that it will permit such evidence to be introduced in a wider range of cases than does existing law which conditions admissibility of testimony in a former action or prior trial 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. There would seem to be no valid distinction between admitting the testimony of a dead witness and admitting that of one who is legally not available.

Subdivision (3): Testimony in Another Action or Proceeding.

(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 URE 63(3)(b). The modification narrows 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 action between the same parties, relating to the same matter, or was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered.

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 described 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.

The reason for the deletion of URE 63(3)(a) is stated in the comment to URE 63(2).

Subdivision (4): Contemporaneous and Spontaneous Statements.

(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 contemporaneousness 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 URE 63(4)(c). Its decision was not an easy one to reach. Rule 63(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 different decision. The Commission was substantially influenced in reaching its decision by the fact that Rule 63(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. 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 63(4)(c) than would plaintiffs and it seems undesirable thus to weight the scales in a type of action which is so predominant in our courts.

Subdivision (5): Dying Declarations.

(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. [†]

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 lie 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 URE 63(5) was probably an oversight; in any event it seems desirable to make it clear that "double hearsay" and the declarant's conjecture as to the matter in question are not admissible.

Subdivision (6): Confessions.

~~(6) [In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged is admissible 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 substantially restates the existing law governing the admissibility of defendants' confessions and admissions in criminal actions or proceedings. While the Commission has departed rather widely from the language of URE 63(6), it is believed that paragraph (a) states a principle which is not only broad enough to encompass all the situations covered by URE 63(6) but 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, are nevertheless within its spirit.

Paragraph (b) is technically unnecessary since the statute could not admit what the Constitutions of this State and of the United States exclude. It seems desirable to state that 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.

Subdivision (7): Admissions by Parties.

(7) Except as provided in subdivision (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;]~~

COMMENT

In making extrajudicial statements of a party admissible against him this exception merely restates existing law. The first clause was added by the Commission to make explicit what the draftsmen of the URE undoubtedly intended, that admissions of a defendant in a criminal action are governed by subdivision (6).

The Commission has omitted the URE provision that an extrajudicial statement is admissible against a party sued in a representative capacity only if the statement was made by him while acting in such capacity. The basis of the admissions exception to the hearsay rule is that because the statements are the declarant's own he does not need to cross-examine. Moreover, the party has ample opportunity to deny, explain or qualify the statement in the course of the proceeding. These considerations appear to the Commission to apply to any extrajudicial statement made by one who is a party to a judicial action or proceeding in a representative capacity, whether or not the statement was made in that capacity. Moreover, the Commission believes that more time would be spent in many cases in trying to ascertain in what capacity a particular statement was made than could be justified by whatever validity the distinction made by the draftsmen of the URE might be thought to have.

Subdivision (8): Authorized and Adoptive Admissions.

(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. [-;-]

COMMENT

This exception restates in substance the existing law with respect to authorized and adoptive admissions.

Subdivision (9): Vicarious Admissions.

(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 partnership 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. [;]

COMMENT

URE 63(8)(a) makes authorized extrajudicial statements admissible. Paragraph (9)(a) goes beyond this, making admissible against a party specified unauthorized extrajudicial statements of an agent, partner or

employee. A statement is admitted under paragraph (a), however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions. The practical scope of paragraph (a) is quite limited. If the declarant is unavailable at the trial, the self-inculpatory statements which it covers would be admissible under URE 63(10) because they would be against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by paragraph (a) would be admissible as inconsistent statements under URE 63(1). Thus, paragraph (a) has independent significance only as to self-exculpatory statements of agents, partners and employees who do not testify at the trial as to matters within the scope of the agency, partnership or employment. One justification for this narrow exception is that because of the relationship which existed at the time the statement was made it is unlikely that it would have been made unless it were true. Another is that the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

Paragraph (a) is more liberal than the existing California law --C.C.P. Section 1870(5)--in two respects. First, under existing law the statement of the agent, partner or employee cannot be used to prove the existence of the agency, partnership or employment; the existence of the relationship must be shown by independent evidence, i.e., testimony of the declarant or another. On the other hand, paragraph (a) does not require independent proof of the agency, partnership or employment, and in some cases the declarant's statement might itself establish the fact that the relationship existed. However, Rule 8 might be interpreted to

require independent proof of the relationship. Rule 8 is ambiguous and has not yet been acted upon by the Commission. Second, paragraph (a) will permit admission of not only statements made in the scope of the agency but also statements which do not themselves fall within the scope of the agency but which concern matters within the scope of the agency. Under existing California law only the former statements are admissible.

Paragraph (b) relates to the admissibility of hearsay statements of co-conspirators against each other. The Commission has substituted for the provision proposed by the Commissioners on Uniform State Laws language which restates existing California law as found in Section 1870(6) of the Code of Civil Procedure. The Commission believes that the more liberal URE rule of admissibility would be unfair to criminal defendants in many cases.

Paragraph (c) restates in substance the existing California law, which is found in Section 1851 of the Code of Civil Procedure, except that paragraph (c) limits this exception to the hearsay rule to civil actions or proceedings. Most cases falling within this exception would also be covered by URE 63(10) which makes admissible declarations against interest. However, to be admissible under URE 63(10) the statement must have been against the declarant's interest when made whereas this requirement is not stated in paragraph (c). Moreover, the statement is admissible under paragraph (c) irrespective of the availability of the declarant whereas under revised Rule 63(10) the statement is admissible only if the declarant is unavailable as a witness.

Subdivision (10): Declarations Against Interest.

(10) [~~Subject to the limitations of exception (9),~~] 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. [;]

COMMENT

Insofar as this subdivision makes admissible a statement which was against the declarant's pecuniary or proprietary interest when made, it restates in substance the common-law rule relating to declarations against interest except that the common-law rule is applicable only when the declarant is dead. The California rule on declarations against interest, which is embodied in Sections 1853, 1870(4) and 1946 of the Code of Civil Procedure, is perhaps somewhat narrower in scope than the common-law rule.

The justifications for the common-law exception are necessity, the declarant being dead, and trustworthiness in that men do not ordinarily make false statements against their pecuniary or proprietary interest. The Commission believes that these justifications are sound and that they

apply equally to the provisions of subdivision (10) which broaden the common-law exception. Unavailability for other causes than death creates as great a necessity to admit the statement. Men are no more likely to make false statements unreasonably subjecting themselves to civil or criminal liability, rendering their claims invalid, or subjecting themselves to hatred, ridicule or social disapproval than they are to make false statements against their pecuniary or proprietary interest.

The Commission has departed from URE 63(10) by (1) limiting subdivision (10) to nonparty declarants (incidentally making the cross reference to exception (6) unnecessary); (2) writing into it the common-law requirement that the declarant have personal knowledge of the subject and (3) conditioning admissibility on the unavailability of the declarant. With these limitations subdivision (10) states a desirable exception to the hearsay rule.

Subdivision (11): Voter's Statements.

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

COMMENT

The Commission declines to recommend URE 63(11) which would make admissible an extrajudicial statement "by a voter concerning his qualifications to vote or the fact or content of his vote." The Commission is not convinced either that there is any pressing necessity for such an exception or that there is a sufficient guarantee of the trustworthiness of such extrajudicial statements to warrant an exception to the hearsay rule for them.

Subdivision (12): Statements of Physical or Mental Condition of Declarant.

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

(a) 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) The declarant's 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. [;] or

(c) The declarant that he has or has not made a will, or a will of a particular purport, or has or has not revoked his will.

COMMENT

Paragraphs (a) and (c) restate existing California law in substance. Paragraph (c) is, of course, subject to the provisions of Sections 350 and 351 of the Probate Code which relate to the establishment of the content of a lost or destroyed will.

Paragraph (b) states a new exception to the hearsay rule. While testimony may now be given relating to extrajudicial statements of the type described, it is received solely as the basis for an expert's opinion and not as substantive evidence. The Commission believes that the circumstances in which such statements are made provide a sufficient guarantee of their trustworthiness to justify admitting them as an exception to the hearsay rule.

The provision that a statement covered by subdivision (12) is not admissible if the judge finds that it was made in bad faith is a desirable safeguard. It is not believed to be more restrictive than the discretion presently given to the trial judge insofar as statements covered by paragraph (a) are concerned.

Subdivision (13): Business Records.

(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.

COMMENT

This is the "business records" exception to the hearsay rule as stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e - 1953h of the Code of Civil Procedure) rather than the slightly different language now proposed by the Commissioners on Uniform State Laws. If there is any difference in

substance between the two provisions, the Commission believes that it is preferable to continue with existing law which appears to have provided an adequate business records exception to the hearsay rule for nearly 20 years. This subdivision does not, however, include the language of Section 1953f.5 of the Code of Civil Procedure because that section inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf or other form. The Commission has concluded that the case-law rule is satisfactory and that Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act.

Subdivision (14): Absence of Entry in Business Records.

(14) Evidence of the absence [~~of a memorandum or record~~] from the [~~memoranda or~~] records of a business (as defined in subdivision (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.

COMMENT

This exception has been recast to make it parallel to subdivision (13). With the safeguards provided the evidence is believed to be both relevant and trustworthy.

Evidence of this nature is probably now admissible in California; but it is not clear whether it is admitted under an exception to the hearsay rule or as direct evidence inasmuch as such evidence does not concern an extrajudicial statement but rather the absence of one and the inferences

to be drawn therefrom.

Under Rule 62, it is likely that such evidence would not be regarded as hearsay. However, the Commissioners on Uniform State Laws suggest and the Commission believes that it is desirable to remove any doubt on the admissibility of such evidence by the enactment of subdivision (14).

Subdivision (15): Reports of Public Officers and Employees.

(15) Subject to Rule 64, statements of fact contained in a written report [~~s-er-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; [~~,~~]

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

COMMENT

Subdivision (15) states a broader exception to the hearsay rule for reports of public officers and employees than does its existing counterpart, Section 1920 of the Code of Civil Procedure which is limited to "entries in public or other official books or records." The Commission believes that an adequate safeguard of the trustworthiness of the statements made admissible is found in the fact that reports made in the performance of official duty or employment are likely to be carefully and accurately prepared.

Revised subdivision (15) states a narrower rule of admissibility than does URE 63(15) in that it admits only statements of fact contained in official reports and does not extend to the author's findings of fact or conclusions.

Subdivision (16): Reports Required to be Filed in Public Office.

(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. [~~;~~]

COMMENT

This exception relates to such official reports filed by private persons as birth, marriage and death certificates filed by doctors, ministers and undertakers, all of which are now admissible in this State under various special statutes. Although these special statutes will continue in effect under Rule 63A, subdivision (16) would apply to these and to any other similarly prepared and filed reports which may be authorized by law. The nature of such reports provides, the Commission believes, a sufficient guarantee of their accuracy and hence trustworthiness to warrant an exception to the hearsay rule to cover them.

The Commission declined to incorporate in subdivision (16) a cross

reference to URE 64, which provides that evidence to which it relates will be received only if the proponent has delivered a copy of it 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. The Commission believes that in light of the availability of modern discovery procedures, which provide the adverse parties adequate opportunity to protect themselves against surprise, there is no justification for requiring the proponent of evidence admissible under subdivision (16) to deliver copies of it to the other parties when no such requirement of pretrial disclosure now exists as to this kind of evidence or, for that matter, to other documentary evidence. Moreover, evidence admissible under subdivision (16) will be useful to impeach a witness only if the witness has no previous notice that the proponent of the impeaching evidence plans to use it at the trial.

Subdivision (17): Content of Official Record.

(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. [;]

COMMENT

Paragraph (a) makes it possible to prove the content of an official record or of an entry therein by hearsay evidence in the form of a writing purporting to be a copy of the record or entry, provided the copy meets the requirements of authentication under Rule 68. It should be noted that paragraph (a) does not make the official record or entry itself admissible; warrant for its admission must be found in some other exception to the hearsay rule.

Paragraph (b) makes it possible to prove the absence of a record in an office by hearsay evidence in the form of a writing from the official custodian thereof stating that no such record has been found after a diligent search, provided the writing meets the requirements of authentication under Rule 69.

Both exceptions are justified by the likelihood that such statements made by custodians of official records are highly likely to be accurate and by the necessity of providing a simple and inexpensive method of proving such facts.

The reason for the omission of the URE cross reference to Rule 64 is the same as that given in the Commission's comment on subdivision (16).

Subdivision (18): Certificate of Marriage.

(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. [.]

COMMENT

This exception is broader than existing California law, which is found in Sections 1919a and 1919b of the Code of Civil Procedure. These sections are limited to church records and hence, as respects marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure whereas certificates made admissible by subdivision (18) need only meet the general authentication requirement of Rule 67 that "Authentication may be by evidence sufficient to sustain a finding of . . . authenticity. . . ."

It seems unlikely that this exception would be utilized in many cases both because it will be easier to prove a marriage by the official record thereof under subdivision (16) or a copy thereof under subdivision (17) and because such evidence is likely to have greater weight with the

jury. The Commission believes, however, that where the celebrant's certificate is offered it should be admissible. The fact that the certificate must be one made by a person authorized by law to perform marriages and that it must meet the authentication requirement of Rule 67 provides sufficient guarantees of its trustworthiness to warrant this exception to the hearsay rule.

The reason for the omission of the URE cross reference to Rule 64 is the same as that given in the Commission's comment on subdivision (16).

Subdivision (19): Records of Documents Affecting an Interest in Property.

(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. [.]

COMMENT

This exception largely restates existing California law as found in Section 1951 of the Code of Civil Procedure (documents relating to real property) and Section 2963 of the Civil Code (chattel mortgages).

The reason for the omission of the URE express reference to Rule 64 is the same as that given in the Commission's comment to subdivision (16).

Subdivision (20): Judgment of Previous Conviction.

(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. [*]

COMMENT

This exception has no counterpart in our present law. The Commission believes that it is a justifiable innovation, however, inasmuch as the facts established by the judgment were either (1) admitted in the prior proceeding or (2) established beyond a reasonable doubt in the mind of the trier of fact in a proceeding in which the person against whom the evidence is now offered had an opportunity to cross-examine witnesses and otherwise dispute the facts established by the judgment.

Revised subdivision (20) is of more limited scope than URE 63(20). The evidence is admissible only against a person who was adjudged guilty of a felony in the prior proceeding, not against others. Moreover, a party may relieve himself of any prejudice which might arise from the proof of his prior felony conviction by admitting the facts sought to be established by the judgment.

Subdivision (21): Judgment Against Persons Entitled to Indemnity.

(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. [~~.~~]

COMMENT

This exception restates in substance a principle of existing California law as found in Section 2778(6) of the Civil Code. The evidence here made admissible is not, of course, conclusive as between the parties involved but may under Section 1963(17) of the Code of Civil Procedure create a disputable presumption that the judgment correctly determined or set forth the rights of the judgment debtor and judgment creditor, which presumption may be controverted by other evidence.

Subdivision (22): Judgment Determining Public Interest in Land.

(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. [†]

COMMENT

URE 63(22) creates a new exception to the hearsay rule insofar as the law of this State is concerned. However, the exception is supported by the case law of some jurisdictions. It is of very limited scope and is justified because litigation relating to the public domain is likely to be conducted and decided with unusual care.

Subdivision (23): Statement Concerning One's Own Family History.

(23) If the judge finds that the declarant is unavailable as a witness, 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] unless the judge finds that the declarant [~~is unavailable~~] made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth.

COMMENT

As drafted URE 63(23) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure except that Section 1870(4) requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Rule 62 makes the statement admissible under URE 63(23).

The Commission has amended URE 63(23) to provide that a statement to which it applies is not admissible if the court finds that when the statement was made there was an existing controversy over the precise

point to which the statement refers and the statement was made under such circumstances that the declarant had a motive to exceed or fall short of the truth. In such circumstances, the Commission believes, there is simply not a sufficient guarantee of the trustworthiness of the extrajudicial statement to warrant its introduction into evidence.

Subdivision (24): Statement Concerning Family History of Another.

(24) Unless the judge finds that the declarant made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth, 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;~~]

COMMENT

As drafted URE 63(24)(a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure except that under the latter the statement is admissible only if the declarant is dead whereas under the former unavailability for any of the reasons specified in Rule 62 is sufficient.

URE 63(24)(b) is new to California law but the Commission believes that it is a sound extension of the present law to cover a situation that is within its basic rationale - i.e., to a situation where the declarant was a family housekeeper or doctor or so close a friend as to be "one of the family" for purposes of being included by the family in discussions of its history.

Here again, and for the same reason given in its Comment to subdivision (23), the Commission has added language which will permit the trial judge to refuse to admit a declaration of this kind where it was made under such circumstances that there is not an adequate guarantee of its trustworthiness.

Subdivision (25): Statement Concerning Family History Based on Statement of Another Declarant.

[~~(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.~~]

COMMENT

The Commission does not recommend the adoption of URE 63(25). This exception would make it possible to prove by the hearsay statement of one declarant that another declarant made a hearsay statement where the first statement made falls under subdivision (23) or (24) of Rule 63 but the second statement does not fall under any of the recognized exceptions to the hearsay rule. The Commission can see no justification for thus forging a two-link chain of hearsay just because the first hearsay declaration would have been admissible if it could have been shown by competent evidence to have been made. There is nothing to guarantee the trustworthiness of the second hearsay statement.

Subdivision (26): Reputation in Family Concerning Family History.

(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.

COMMENT

Subdivision (26) restates in substance the existing California law, which is found in subdivision (11) of Section 1870 of the Code of Civil Procedure, except that Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." The Commission does not believe that this qualification need be made a part of subdivision (26) because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in subdivisions (23) and (24), might be.

Paragraph (b) makes explicit the kinds of evidence that are covered by URE 63 (26). In doing so it restates existing law in substance.

Subdivision (27): Community Reputation Concerning Boundaries, General History and Family History.

(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;~~]

COMMENT

Paragraph (a) restates in substance the existing California law as found in subdivision (11) of Section 1870 of the Code of Civil Procedure.

Paragraph (b) is a wider rule of admissibility than California's present rule, as found in subdivision (11) of Section 1870 which provides in relevant part that proof may be made of "common reputation existing previously to the controversy, respecting facts of a public or general interest more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor does the Commission believe that it is necessary to include in paragraph (b) the qualification that the reputation existed previous to the controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy.

Paragraph (c) restates what has been held to be the law of California under Code of Civil Procedure Section 1963(30) insofar as proof of the fact of marriage is concerned. However, this paragraph has no counterpart in California law insofar as proof of other facts relating to pedigree is concerned, proof of such facts by reputation now being limited to reputation in the family. The Commission believes that paragraph (c) as proposed by the Commissioners on Uniform State Laws is too broad in that it might be construed in particular cases to permit proof of what is essentially idle neighborhood gossip relating to such matters as legitimacy and race ancestry. Accordingly, the Commission has limited this paragraph to proof by community reputation of the date or fact of birth, marriage, divorce or death.

Subdivision (28): Reputation as to Character.

(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. [;]

COMMENT

Subdivision (28) restates existing California law in substance.

Subdivision (29): Recitals in Documents Affecting Property: Ancient Documents.

(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 statement would have been admissible if made by the writer while testifying

COMMENT

Paragraph (a) goes beyond existing California law, as found in subdivision (34) of Section 1963 of the Code of Civil Procedure, in that the latter, which applies to ancient documents generally, conditions admissibility on the document's being more than 30 years old. The Commission believes that there is sufficient likelihood that the statements made in a dispositive document will be true to warrant the admissibility of such documents without regard to their age.

Paragraph (b) restates in substance existing California law as found

in subdivision (34) of Section 1963 of the Code of Civil Procedure as it has been interpreted by our courts. This exception to the hearsay rule is based primarily on the sheer necessity of relying on such evidence since the declarant is likely to be dead or to have forgotten the facts stated in the writing. The requirement that the writing has, for at least 30 years, been generally acted upon as true by persons having an interest in the matter is some guarantee of its trustworthiness. Moreover, the Commission is not aware of any dissatisfaction on the part of the bench or bar with Section 1963(34).

Subdivision (29) of Rule 63 is made subject to Rule 64, thus requiring that the party intending to rely on a document or other writing falling within this exception deliver a copy of the document or other writing to the other parties within a reasonable time before trial. Copies of such documents or writings will not in many cases be available from other sources. Moreover, substantial time may be required to investigate their authenticity, particularly as respects writings admissible under paragraph (b).

Subdivision (30): Commercial Lists and the Like.

(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. [;]

COMMENT

Subdivision (30) has no counterpart in the California statutes. However, there has been some indication in judicial decisions that this exception may exist in California.

The Commission recommends subdivision (30) because the use of such publications at the trial will greatly simplify and thus expedite the proof of the matters contained in them. The trustworthiness of such publications is adequately guaranteed by the fact that, being prepared for the use of a trade or profession, they must be made with great care and accuracy to induce its members to purchase them.

Subdivision (31): Learned Treatises.

(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.]~~ Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, to prove facts of general notoriety and interest.

COMMENT

Revised subdivision (31) consists of the language of Section 1936 of the Code of Civil Procedure as modified in form only to conform to the general format of the hearsay statute recommended by the Commission.

The admissibility of published treatises, periodicals, pamphlets and the like has long been a subject of considerable controversy in this State, much of it centered upon the desirability of permitting excerpts from medical treatises to be read into evidence. The State Bar has made at least one special study of this subject. The Commission believes that this matter is both too complicated and too controversial to be resolved in connection with considering the adoption of the Uniform Rules of Evidence. Hence it proposes simply to codify existing law but with the recommendation that the Legislature call for a thorough study of the subject by an appropriate agency in the future.

Subdivision (32): Evidence Admissible Under Other Laws.

(32) Hearsay evidence declared to be admissible by any other law of this State.

COMMENT

There are many statutes in the California codes that provide for the admission of various types of hearsay evidence. Subdivision (32) will make it clear that hearsay evidence which is admissible under any other statute will continue to be admissible.

No comparable exception is included in URE Rule 63 because URE Rules 62-66 purport to provide a complete system governing the admission and exclusion of hearsay evidence.

RULE 63A. SAVINGS CLAUSE.

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.

COMMENT

No comparable provision is included in the URE, but the Commission has inserted this provision to make it clear that the Rule 63 exceptions and the existing code provisions authorizing the admission of hearsay evidence are to be treated as cumulative. The proponent of hearsay evidence may justify its introduction upon the basis of a URE exception or an existing code provision or both.

Some of the existing statutes providing for the admission of hearsay evidence will, of course, be repealed when the URE is enacted. The Commission hereinafter recommends the repeal of all 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. The statutes that will not be repealed when the URE is enacted are, for the most part, narrowly drawn statutes which make a particular type of hearsay evidence admissible under specifically limited circumstances. It is neither desirable nor feasible to repeal these statutes. Rule 63A will make it clear that these statutes are not impliedly repealed by Rule 63.

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

Rule 64. Any writing admissible under [exceptions] subdivision (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.

COMMENT

This requirement seems reasonable as applied to Rule 63 (15) and (29).

The reason for the Commission's deletion of the reference to exceptions (16), (17), (18) and (19) in Rule 64 as drafted by the Commissioners on Uniform State Laws is stated in the Commission's comment following Rule 63(16). The reason for the addition of a cross reference to Rule 63 (29) is stated in the Commission's comment thereto.

The Commission has tentatively concluded that, when the Uniform Rules are prepared in bill form, a provision should be included in the bill to make it clear that the adoption of Rule 64 is not intended to have any effect on the discovery legislation enacted in California in 1957.

(34)

RULE 65. CREDIBILITY OF DECLARANT

Rule 65. 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.

COMMENT

This rule deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. Under existing California law, a witness may be impeached by a prior inconsistent statement only if a proper foundation is laid by calling his attention to the statement and permitting him first to explain it. URE Rule 65 makes it unnecessary to lay such a foundation to impeach a hearsay declarant.

Although generally in accord with California law, Rule 65 would permit the use of some evidence that cannot now be used to impeach a hearsay declarant. Our decisions indicate that when testimony given by a witness at a former trial is read into evidence at a subsequent trial because the witness is not then available, a party who had the opportunity to lay the necessary foundation to impeach the witness at the first trial may impeach the witness at the second trial only if the impeacher can show that he had no knowledge of the impeaching evidence at the time of the first trial. The Commission believes, however, that even where the impeacher had knowledge of the impeaching evidence at the time of the first trial the trier of fact at the second trial should be allowed to consider the impeaching evidence. Accordingly, since the witness is unavailable at the time his former testimony is read in evidence, a foundation cannot be laid and must necessarily be dispensed with.

No California case has been found which deals with the problem of whether a foundation is required when the hearsay declarant is available as a witness at the trial. The Commission believes that no foundation for impeachment should be required in this case. The party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies that tend to impeach him.

RULE 66. MULTIPLE HEARSAY.

Rule 66. 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.

COMMENT

This rule would make it possible to prove by the hearsay statement of one declarant that another declarant made a hearsay statement where each of the statements falls within an exception to Rule 63. The Commission is not aware of any California case where this limited use of "double hearsay" evidence has been considered. But since each statement must fall within an exception to the hearsay rule there is a sufficient guarantee of the trustworthiness of both statements to justify this modest qualification of the hearsay rule.

This rule may, on occasion, be applied more than once so that "multiple hearsay" may be admitted. For instance, evidence of former testimony is admissible under Rule 63(3). The evidence of such former testimony may be in the form of the reporter's official report, which is admissible under Rule 63(15). A properly authenticated copy of the report would be admissible under Rule 63(17). Even though "triple hearsay" is here involved, the Commission believes that there is a sufficient guarantee of the trustworthiness of each statement, for each statement must fall within an exception to the hearsay rule.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

Scattered through the various codes are a number of statutes relating to hearsay evidence. Some of these statutes deal with the problem of hearsay generally, while others deal with the admissibility and proof of certain specific documents and records or with a specific type of hearsay in particular situations. The Commission has carefully studied these statutes in the light of the Commission's tentative recommendation concerning Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence.

The Commission tentatively recommends the repeal of those code provisions that set forth general exceptions to the hearsay rule which are inconsistent with or substantially coextensive with the exceptions provided in subdivision (1) through (31) of Rule 63 as revised by the Commission. The Commission, however, does not recommend the repeal of the numerous provisions dealing with a particular type of hearsay evidence in specific situations. These provisions are too numerous and too enmeshed with the various acts of which they are a part to make specific repeal a desirable or feasible venture. Moreover, many of these provisions were enacted for reasons of public policy germane to the acts of which they are a part and not for considerations relating directly to the law of evidence. For example, the provisions of Section 2924 of the Civil Code, which makes the recitals in deeds executed pursuant to a power of sale prima facie evidence of compliance with certain procedural requirements and conclusive evidence thereof in favor of bona fide purchasers, are to further a policy of protecting titles to property acquired pursuant to such deeds. The Commission has not considered these policies in its

study of the Hearsay Article of the Uniform Rules of Evidence, for these policies are not germane to a study to determine what hearsay is sufficiently trustworthy to have value as evidence. Therefore, the Commission does not recommend any change in these statutes; and, to remove any doubt as to their continued validity, the Commission has hereinbefore recommended the addition of provisions to the Uniform Rules of Evidence to make it clear that other laws authorizing the admission of hearsay evidence which are not repealed will have continued validity.

Set forth below is a list of the statutes which, in the opinion of the Commission, should be revised or repealed. The reason for the suggested revision or repeal is given after each section or group of sections.[1] References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

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[1] A number of the sections listed below refer to the "declaration, act or omission" of a person in defining an exception to the hearsay rule. The superseding provisions of the Uniform Rules of Evidence refer only to a "statement." Rule 62 defines a "statement" as a declaration or assertive conduct, that is, conduct intended by the declarant as a substitute for words. Rule 63 in stating the hearsay rule provides only that "statements" offered to prove the truth of the matter asserted are hearsay and inadmissible. Hence, insofar as these sections of the Code of Civil Procedure refer to nonassertive conduct or to statements which are themselves material whether or not true, these sections are no longer necessary for evidence of such facts is not hearsay evidence under the Uniform Rules.

Code of Civil Procedure

Section 1848. This section should be repealed. It deals with the extent to which out-of-court declarations, acts or omissions may be used to the prejudice of a party, and this is covered by the opening paragraph of Rule 63 and the numerous exceptions thereto.

Section 1849. This section will be superseded and should be repealed. If a predecessor in interest of a party is unavailable as a witness, his declarations against interest in regard to his title are admissible under Rule 63(10). If the declarant is available as a witness, he may be called and asked about the subject matter of the declaration; and if he testifies inconsistently, the prior statement may then be shown under Rule 63(1)(a) to prove the truth of the matter stated.

Section 1850. This section should be repealed. It is superseded by Rule 63(4) providing an exception to the hearsay rule for contemporaneous and spontaneous declarations.

Section 1851. This section should be repealed. It is superseded by the exception stated in Rule 63(9)(c).

Section 1852. This section should be repealed. It is superseded by the pedigree exceptions contained in subdivisions (23), (24), (26) and (27) of Rule 63.

Section 1853. This section should be repealed. It is an imperfect statement of the declaration against interest exception and is superseded by Rule 63(10).

Section 1870.

Subdivision 2 should be deleted. It is superseded by the admissions exception contained in Rule 63(7).

Subdivision 3 should be deleted. It is superseded by the admissions exception stated in Rule 63(8)(b).

Subdivision 4 should be deleted. The first clause is superseded by the pedigree exception contained in Rule 63(23). The second clause is superseded by the exception relating to declarations against interest contained in Rule 63(10). The third clause is superseded by the dying declaration exception contained in Rule 63(5).

Subdivision 5 should be deleted. The first sentence, relating to vicarious admissions of partners and agents, is superseded by the exceptions contained in Rule 63(8)(a) and 63(9)(a). The second sentence, relating to vicarious admissions of joint owners or joint debtors or other persons with joint interests, is superseded by Rule 63(10) inasmuch as the statements involved are declarations against interest and the declarant is unavailable. If the declarant is available as a witness, he may be called and asked about the subject matter of the statement, and if he testifies inconsistently, the prior statement may be shown under Rule 63(1)(a) as evidence of the truth of the matter stated. If the declarant is unavailable and the statement cannot be classified as a declaration against interest, the Commission does not believe that the statement is sufficiently trustworthy to be introduced as evidence.

Subdivision 6 should be deleted. It is superseded by the exception relating to admissions of co-conspirators contained in Rule 63(9)(b).

Subdivision 7 should be deleted. It is superseded by Rule 63(4) relating to contemporaneous and spontaneous declarations.

Subdivision 8 should be deleted. It is superseded by subdivisions (2), (2a) and (3) of Rule 63 which relate to former testimony.

Subdivision 11 should be deleted. It is superseded by the community reputation exception contained in Rule 63(27).

Subdivision 13 should be deleted. It is superseded by the reputation exceptions contained in Rule 63(26) and Rule 63(27).

Section 1893. This section should be revised to read:

> 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~~].

The language deleted is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1901. This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Sections 1905, 1906, 1907, 1918 and 1919. These sections should be repealed. They are superseded by subdivisions (15), (17) and (19) of Rule 63 pertaining to the admissibility of official records and copies thereof.

Section 1920. This section should be repealed. It is superseded by Rule 63(15) and (16) pertaining to statements in official records.

Section 1920a. This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1921. This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1926. This section should be repealed. It is superseded by the official written report exception contained in Rule 63(15).

Section 1936. This section should be repealed. It has been incorporated in the Uniform Rules as Rule 63(31).

Section 1946. This section should be repealed. The first subdivision is superseded by the declaration against interest exception of Rule 63(10); the second subdivision is superseded by the business records exception contained in Rule 63(13); and the third subdivision is superseded by the official reports exception contained in Rule 63(14).

Section 1947. This section should be repealed. It is superseded by the business records exception contained in Rule 63(13).

Section 1951. The last clause of this section is superseded by Rule 63(19) pertaining to the proof of official records of documents affecting interests in real property and should be deleted. The revised section would read as follows:

> 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 acknowledgment or proof, be read in evidence in any action or proceeding, without further proof [; also, the original record

~~a-witness-may-testify-from-such-a-writing,-though-he-ret.·in~~

~~no-recollection-of-the-particular-facts,-but-such-evidence~~

~~must-be-received-with-caution.~~]

TEXT OF REVISED ARTICLE VIII OF UNIFORM RULES OF EVIDENCE

The following is the text of Article VIII of the Uniform Rules of Evidence as tentatively revised by the Law Revision Commission.

VIII. Hearsay Evidence

RULE 62. Definitions. As used in Rules 62 through 66:

(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 officer or employee of a state or territory of the United States" includes:

(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 paragraph (a) of this subdivision.

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

(6) Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" includes situations where the declarant is:

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

(b) Disqualified from testifying to the matter.

(c) Dead or unable to testify at the hearing because of physical or mental illness.

(d) Absent beyond the jurisdiction of the court to compel appearance by its process.

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

(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 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.

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) 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) 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.

(2a) In a civil action or proceeding, testimony of a witness given in a former action or proceeding between the same parties or their predecessors in interest, relating to the same matter, if the judge finds that the declarant is unavailable as a witness. As used in this subdivision,"former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered.

(3) 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 supevision 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.

(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 (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.

(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 in the belief that there was no hope of his recovery.

(6) 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 subdivision (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 representative capacity.

(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.

(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 partnership 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 (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) 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 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) [Deleted]

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

(a) The declarant's 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.

(b) The declarant's 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.

(c) The declarant that he has or has not made a will, or a will of a particular purport, or has or has not revoked his will.

(13) 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 from the records of a business (as defined in subdivision (13) of this rule) of a record of an asserted act, 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 records of all such acts, conditions or events, at or near the time 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 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 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.

(16) 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) (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) 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.

(19) 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

(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) If the judge finds that the declarant is unavailable as a witness, 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, unless the judge finds that the declarant made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth.

(24) Unless the judge finds that the declarant made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth, 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) The declarant was related to the other by blood or marriage; or

(b) 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.

(25) [Deleted]

(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 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) 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 date or fact of birth, marriage, divorce or death of a person resident in the community at the time of the reputation.

(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 material matter, contained in:

(a) 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.

(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 statement would have been admissible if made by the writer while testifying.

(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) Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, to prove facts of general notoriety and interest.

(32) Hearsay evidence declared to be admissible by any other law of this State.

RULE 63A. Savings Clause. 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.

RULE 64. Discretion of Judge under Exceptions to Exclude Evidence. Any writing admissible under subdivision (15) 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.

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.

RULE 66. Multiple Hearsay. A statement with 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 meets the requirements of an exception.

3/3/61

Memorandum No. 11 (1961)

Subject: Uniform Rules of Evidence - Rule 63 - Subdivisions (15) and (21)

This memorandum will discuss the necessity for Rule 63(15) of the URE and some of the questions that may arise if it is deleted and C.C.P. §§ 1920 and 1926 are repealed. It will also discuss possible revision of Rule 63(21) of the URE.

Subdivision (15)

In regard to subdivision (15), the staff was asked to present a report on the need for the subdivision in view of the provisions of subdivision (13) pertaining to business records.

Subdivision (13) permits the admission of any record of an act, condition or event if the custodian or some other qualified witness testifies as to its manner of preparation and the judge finds that it was made in the regular course of business and that the sources of information and method of preparation indicate its trustworthiness. It is well settled in California that this language as it now appears in the Uniform Business Records as Evidence Act (C.C.P. §§ 1953e-1935h) applies to records maintained and prepared by the Government. (Nichols v. McCoy, 38 Cal.2d 447 (1952)(record of blood alcohol test from County Coroner's office); Brown v. County of Los Angeles, 77 Cal. App.2d 814 (1947)(record of indegent relief granted by county); Fox v. San Francisco Unified School District, 111 Cal. App.2d 885 (1952)(school personnel performance reports).)

The California cases have held that business records are admissible under the business records exception only to prove facts within the knowledge of the person making the record or facts reported to the recorder by a person with personal knowledge thereof who was under a duty to report them. (Witkin, California Evidence 327). The California cases have excluded business records in which the facts stated are based upon the statements of persons under no duty to give the information to the recorder. The courts state the general proposition that evidence is not admissible, even though contained in a business record, if the recorder or the person within the business who reported to the recorder could not competently testify concerning the same matter. (McGowan v. Los Angeles 100 Cal. App.2d 303 (1951).) Thus in Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959) a report on the cause of a fire prepared by a ranger as part of his duties was excluded because the report was based on the statements of others who had no duty to give such information. In Maclean v. San Francisco, 151 Cal. App.2d 133 (1957) the trial court excluded a police accident report because no foundation was laid showing that the statements contained in it were based on the personal observations of the reporting officers. The appellate court said the exclusion was proper if the officers did not observe the events reported, and if they did observe the events, the appellant was not prejudiced by the exclusion of the evidence because the officers were actually called to testify and did testify as to the matters within their personal knowledge.

Subdivision (15) as modified by the Commission in February (see minutes p. 7) provides that statements of fact in reports made within the scope of official duty are admissible if the reporting officer could competently testify thereto if called as a witness and had a duty to (a) perform the act reported, (b) observe the act reported or (c) investigate the facts concerning the act reported.

Paragraphs (a) and (b) of (15) appear to be narrower than the business records exception stated in (13). Under both exceptions, the court must find that the recorder had a duty -- either a business or official duty -- to record the matters in the record, but subdivision (15) requires the officer making the record to perform or observe the reported act. Under the business records exception, it is not necessary for the recorder to observe the acts recorded so long as someone in the business had a duty to report the facts to the recorder and the recorder had the duty to record the matters reported.

The meaning of paragraph (c) is not altogether clear. The preliminary language under subdivision (15) restricts the exception to "statements of fact." This might be construed to mean statements of such facts as are observed by the recorder. But if so, subdivision (c) seems to be merely a repetition of paragraphs (a) and (b). Under this construction, all of subdivision (15) appears to be somewhat narrower than subdivision (13), for under subdivision (15) the recorder must have observed or performed the acts recorded whereas (13) does not impose this requirement.

Paragraph (c), however, might also be construed to apply to statements of fact based upon the investigation of the officer whether

or not he personally observed the facts recorded. Of course, the preliminary language requires the court to find that the officer could competently testify to the facts recorded if called as a witness. But under this construction, (15) might be considered broader than (13) in that opinion evidence might be admissible under (15) although inadmissible under (13). In this connection, two recent criminal cases are significant. These cases indicate that there may be a distinction between the business records exception and the present official records exception (C.C.P. §§ 1920, 1926) insofar as statements of opinion are concerned.

People v. Terrell, 138 Cal. App.2d 35 (1955), was a prosecution for abortion. A hospital record was introduced which contained the diagnosis of "prob. criminal abortion." The appellate court held that it was error to admit the hospital record under the business records exception for two reasons. The first reason was that the report contained a conclusion to which the doctor who made the notation could not have testified if called as a witness. The second reason was that opinions are not admissible under the business records exception because there is no way to determine whether the person giving the opinion was or was not qualified to express the opinion. The court said that business records may be admitted to prove an action, condition or event and "a conclusion is neither an act, condition or event." However, the court did not reverse the conviction because it found that the error was non-prejudicial in the light of the other testimony. In People v. Williams, 174 Cal. App.2d 364 (1959) the coroner's autopsy record

was introduced in a murder case to show the path of the bullet and the cause of death. On appeal, the admission of this record was objected to on the ground that it contained opinion evidence, and the Terrell case was cited as authority for excluding the evidence. The court distinguished the Terrell case on the ground that the autopsy report was a public record which is admissible as evidence of the facts stated under C.C.P. § 1920, thus implying that opinion evidence is admissible under § 1920 but not under the business records exception. However, the court was also "well satisfied from the reading of the testimony . . . that the [report] did not constitute opinions and conclusions such as those with which the court was concerned in People v. Terrell."

The authority of Terrell may be questioned. Other cases indicate that medical diagnoses made in hospital reports are admissible as business records even though the diagnoses are statements of expert opinion. (McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696 (1945); People v. Gorgol, 122 Cal. App.2d 281 (1953).) Aside from these two cases (Terrell and Williams) the courts have generally excluded evidence offered under the official records exception upon the same grounds that they exclude evidence under the business records exception. (Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959) (ranger's report on cause of fire inadmissible as based on hearsay); Pruett v. Burr, 118 Cal. App.2d 188 (1953); Reisman v. Los Angeles School District, 123 Cal. App.2d 493 (1954); McGown v. Los Angeles, 100 Cal. App.2d 386 (1950); Hoel v. Los Angeles, 136 Cal. App.2d 295 (1955).)

In any event, even under the business records exception, a court might admit "findings of fact" or "conclusions" if the court

could find that the sources of information were sufficiently trustworthy. Construing the somewhat similar federal business records statute, the Court of Appeals for the Second Circuit held that the findings of an accident investigation board appointed by an airline were admissible to prove the cause of airplane accidents. (Pekelis v. Transcontinental and Western Air Inc., 187 F.2d 122 (1951), cert. denied, 341 U.S. 951 (1951).) However, the Second Circuit has been imposing a "motive to misrepresent" test in determining the trustworthiness of business records. (See Hoffman v. Palmer, 129 F.2d 976 (1942); 4 Stan. L. Rev. 288 (1952).) This test has not been applied generally elsewhere and no California case has been found sanctioning the application of such a test. In the Pekelis case, the Second Circuit held the investigation board's report admissible against the airline. Presumably it would not have permitted it to be admitted for the airline on the ground that it was made under circumstances that were "dripping with motivations to misrepresent." (Hoffman v. Palmer, 129 F.2d at 991.)

Thus, even if (15)(c) were construed as broadly as it might be, it still might be no broader than the business records exception as applied to governmental records.

From the foregoing, it appears that subdivision (15) as presently worded would admit no evidence that is not admissible under the Uniform Business Records as Evidence Act. It is possible though that opinion evidence based upon personal observation of the recording officer might come in under subdivision (15) and would be excluded under subdivision (13) on the authority of the Terrell and Williams cases.

The Commission apparently intended to forbid the introduction of

opinions and conclusions, for "findings of fact" and "conclusions" were deleted from the original URE version of this subdivision. If this is the intention of the Commission, all of subdivision (15) might well be deleted as unnecessary. If this is done, the staff believes that it would be desirable to amend subdivision (13) so that it clearly states what the cases have held concerning the government's records. A possible revision is as follows:

> 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 subdivision, "a business" includes every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

It should be noted that the deletion of subdivisions (15) and (16) may change the law to a certain extent if C.C.P. §§ 1920 and 1926 are also repealed. Sections 1920 and 1926 permit the introduction of entries in public or other official books or records made in the course of duty by a public officer or "another person." As pointed out previously, the cases generally have required the recorder of information received under the business records exception to have personal knowledge of the matters recorded or the person in the business who reported the facts

to the recorder to have personal knowledge thereof. In Orange County Water District v. Riverside, 173 Cal. App.2d 137, (1959) the court considered summaries of reports filed pursuant to a legal duty by water users indicating the amount of water produced by the well they were using. These reports were filed with the District each 6 months. As no objection was made to the summaries on the ground that they did not accurately reflect the original reports, the court held that the summaries were admissible because the original records would have been admissible under § 1920. It may be doubted whether the water users in this case could have been considered persons within the business as the courts have required under the business records act. However, the actual language of the business records act would permit the admission of these records if the court determined that the reports were sufficiently trustworthy.

Subdivision (16) would have admitted these records directly. Subdivision (16) also would have admitted vital statistics records from other states. The Commission deleted the subdivision on the ground that the vital statistics statutes in the Health and Safety Code would permit the admission of vital statistic records. However, Health and Safety Code § 10577 pertains only to records of this State. Thus, vital statistics records of other states must be admitted, if at all, under the business records exception contained in (13). It is, of course, possible that the court would find that the sources of information were sufficiently trustworthy to permit the introduction of such records. However, it is also possible that the persons recording the information might be considered persons not within the business and the records might be excluded as based on hearsay.

Subdivision (21)

At the February meeting, the staff was directed to report on the desirability of adding a reference to warranty to the proposed subdivision and to redraft the subdivision.

Civil Code § 2778 sets forth the rules for construing an indemnity contract when a contrary intention does not appear in the agreement. Subdivisions 6 and 7 declare that if a person (an indemnitor) who has agreed to indemnify another (an indemnitee) is notified of any action against the indemnitee and neglects to defend the action, a recovery in the action is conclusive against the indemnitor. If the indemnitor is not given reasonable notice of the action or is not allowed to control its defense, the judgment against the indemnitee is only presumptive evidence against the indemnitor.

If a grantee of real property has received the property by a deed with a title warranty and is sued for the possession of the property, he may give notice of the suit to the warrantor or any previous warrantor in the chain of title and request him to defend the action. If the notice is given, the warrantor is bound by the judgment. (McCormick v. Marcy, 165 Cal. 386 (1913).) There is an early holding, though, that in the absence of notice, the judgment is not admissible in a subsequent action between the warrantor and the warrantee. (Peabody v. Phelps, 9 Cal. 213, 226 (1858): "Of the action the defendant received no legal notice, and the judgment cannot, therefore, be evidence against him of the paramount title in Larkin.")

So far as personal property is concerned, it appears that a judgment obtained for breach of warranty against a seller may be used as evidence in an action against a preceding seller based upon a similar warranty. The following language from Reggio v. Braggiotti, 7 Cush. 166 (Mass. 1855) was cited with approval in Erie City Iron Works v. Tatum, 1 Cal. App. 286, 292 (1905):

> The measure of damages, in an action brought for breach of an implied warranty of the genuineness of an article sold as opium, is the value of an article corresponding to the warranty, deducting the value, if anything, of the article sold; and if the vendor [vendee] has in the meantime sold the article with a like warranty, the sum paid on a judgment obtained against him, in an action brought by his vendee for a breach of that warranty is prima facie evidence of the amount which he can recover of his vendor; and if he gave notice to his vendor of the commencement of that action, he may also recover his taxable costs therein; but he can in no case recover counsel fees paid for the defense thereof."

From the foregoing it appears that judgments are sometimes evidence in warranty cases and sometimes are not. In any event, it would appear to be desirable to make judgments admissible in those warranty cases where they are not now admissible and are not conclusive. A suggested revision is as follows:

(21) To prove any fact essential to the judgment, evidence of a final judgment which under the law of this State is not conclusive against the adverse party when offered by the judgment debtor in an action or proceeding to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, to enforce a warranty to protect him against the liability determined by the judgment or to recover damages for breach of a warranty identical with a warranty determined by the judgment to have been breached.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

[COVER]

State of California

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

July 1961

LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN
Governor of California
and to the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the California law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn of the School of Law, University of California at Los Angeles. This report covers the portion of the Uniform Rules upon which preliminary work has been completed by the Commission. In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence. Other portions of the Uniform Rules will be covered in subsequent reports.

The tentative recommendation of the Law Revision Commission concerning Article VIII of the Uniform Rules of Evidence is being released at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation.

Communications should be addressed to the California Law Revision Commission, School of Law, Stanford, California.

July 1961

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature authorized and directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Law Revision Commission on Article VIII of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 62 through 66, relates to the admissibility of hearsay evidence in proceedings conducted by or under the supervision of a court.

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[1] A copy of a printed pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 60 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

GENERAL SCHEME OF URE RULES 62-66

The opening paragraph of Rule 63 provides:

> 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:

With one important qualification, hereafter discussed,[1] this paragraph states the common-law hearsay rule. Subdivisions (1) through (31) of URE Rule 63 state a series of exceptions to the hearsay rule. The comment of the Commissioners on Uniform State Laws on the general scheme of Rule 63 is as follows:

> This rule follows Wigmore in defining hearsay as an extrajudicial statement which is offered to prove the truth of the matter stated . . . . The policy of the rule is to make all hearsay, even though relevant, inadmissible except to the extent that hearsay statements are admissible by the exceptions under this rule. In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness . . . . The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made. The element of unavailability of the declarant or the fact that the statement is the best evidence available is a factor in a very limited number of situations, but for the most part is a relatively minor factor or no factor at all. Most of the following exceptions are the expressions of common law exceptions to the hearsay rule. Where there is lack of uniformity among the states with respect to a particular exception a serious effort has been made to state the rule which seems most sensible or which reflects the weight of authority . . . . The exceptions reflect some broadening of scope as will be noted in the comments under the particular sections. These changes not only have the support of experience in long usage in some areas but have the support of the best legal talent

1. See the Comment of the Law Revision Commission to Rule 63 (opening paragraph), page 9.

in the field of evidence. Yet they are conservative changes and represent a rational middle ground between the extremes of thought and should be acceptable in any fact-finding tribunal, whether jury, judge or administrative body.

REVISION OF URE RULES 62-66

The Law Revision Commission tentatively recommends that URE Rules 62-66 be revised as hereinafter indicated and that the California law be revised to conform thereto. It will be seen that the Commission has concluded that many changes should be made in Rules 62-66. In some cases the suggested changes go only to language. In others, however, they reflect a considerably different point of view on matters of substance from that taken by the Commissioners on Uniform State Laws. In virtually all such instances the rule proposed by the Law Revision Commission is less liberal as to the admissibility of hearsay evidence than that proposed by the Commissioners on Uniform State Laws. Nevertheless, the tentative recommendation of the Commission would make a considerably broader range of hearsay evidence admissible in the courts of this State than is now the case.

In the discussion which follows, the text of the Uniform Rule or a subdivision thereof as proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Law Revision Commission are shown in strikeout type and italics. Each provision is followed by a comment of the Law Revision Commission. Where the Commission has proposed a modification which relates only to the form of the rule or the purpose of which is obvious upon first reading, no explanation of the Commission's revision is stated.

In other cases the reasons for the Law Revision Commission's disagreement with the Commissioners on Uniform State Laws are stated.

For a detailed analysis of the various rules and the California law relating to hearsay, see the research study beginning on page _____. This study was prepared by the Commission's research consultant.

RULE 62. DEFINITIONS.

Rule 62. As used in [~~Rule 63 and its exceptions and in the following rules,~~] Rules 62 through 66;

(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~~"] 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,~~] an officer or employee of:

(a) This State or any county, city, district, authority, agency or other political subdivision of this State.

(b) Any other state or territory of the United States or any public entity in any other state or territory that is substantially equivalent to the public entities included under paragraph (a) of this subdivision.

(5) "State" includes each of the United States and 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.~~]

(6) [~~(7)~~] Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" [~~includes situations where~~] means that the [~~witness~~] declarant 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 or~~] 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 and the proponent of his statement could not in the exercise of reasonable diligence have secured the presence of the declarant at the hearing. [~~, or~~]

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

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

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

(b) If unavailability is claimed [~~under clause (d) of the preceding paragraph~~] 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. [~~and that the probable importance of the testimony is such as to justify the expense of taking such deposition.~~]

COMMENT

This Rule defines terms used in Rules 62-66. The Rule as proposed by the Commissioners on Uniform State Laws has been considerably revised in form in the interest of clarity of statement.

The significance of the definition of "statement" contained in URE 62(1) is discussed in the comment to the opening paragraph of Rule 63.

URE Rule 62(6) has been omitted because "a business" is used only in subdivisions (13) and (14) of Rule 63 and the term is defined there.

Rule 62 defines the phrase "unavailable as a witness," and this phrase is used in URE Rules 62-66 to state the condition which must be met whenever the admissibility of hearsay evidence is dependent upon the present unavailability of the declarant to testify. The admissibility of evidence under certain hearsay exceptions provided by existing California law is also dependent upon the unavailability of the hearsay declarant to testify. But the conditions consituting unavailability under existing law vary from exception to exception without apparent reason. Under some exceptions the evidence is admissible if the declarant is dead; under others, the evidence is

admissible if the declarant is dead or insane; under others, the evidence is admissible if the declarant is absent from the jurisdiction. For these varying standards of unavailability, Rule 62 substitutes a uniform standard.

The phrase "unavailable as a witness" as defined in Rule 62 includes, in addition to cases where the declarant is physically unavailable (dead, insane, or absent from the jurisdiction), situations in which the declarant is legally unavailable (exempted from testifying on the ground of privilege or disqualification). There would seem to be no valid distinction between admitting the statements of a dead, insane or absent declarant and admitting those of one who is legally not available to testify. Of course, if the out-of-court declaration is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege will not make the declaration admissible. The exceptions to the hearsay rule that are set forth in the subdivisions of Rule 63 do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law -- such as privilege -- which renders the evidence inadmissible, the court is not compelled to admit the evidence merely because it falls within an exception to the hearsay rule. Rule 62, therefore, will permit the introduction of hearsay evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or inadmissible for some other reason.

The last clause of URE Rule 62 has been deleted by the Commission for it adds nothing to the preceding language.

RULE 63. HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS.

Opening Paragraph: General Rule Excluding Hearsay Evidence.

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is 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 defined in 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 does not define as 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 truth of the

matter inferred. To put the matter another way, in such cases actions speak louder than words.

The word "except" introduces 31 subdivisions drafted by the Commissioners on Uniform State Laws which define various exceptions to the hearsay rule. These and several additional subdivisions added by the Commission are commented upon individually below.

Subdivision (1): Previous Statement of Trial Witness.

(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;]~~ A statement made by a person who is a witness at the hearing, but not made at the hearing, 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 contained in a writing which (i) was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory, (ii) was made by the witness himself or under his direction or by some other person for the purpose of recording the witness's statement at the time it was made and (iii) is offered after the witness testifies that the statement he made was a true statement of such fact and after the writing is authenticated as an accurate record of the statement.

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 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) substantially 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, in the case of prior consistent statements, to rebut a charge of recent fabrication. 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. Moreover, when a party needs to use a prior inconsistent statement of a trial witness in order to make out a prima facie case or defense, he should be able to do so. In many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation.

Paragraph (c), which makes admissible what is usually referred to as "past recollection recorded," makes no radical departure from existing law. The language stating the circumstances under which such evidence may be introduced, which the Commission believes provide sufficient safeguards of the trustworthiness of such statements to warrant their admission into evidence, is taken largely from and embodies the substance of the language of C.C.P. § 2047. There are, however, two substantive differences between paragraph (c) and existing California law:

First, our present law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the fact recorded in the writing actually

occurred or at such other time when the fact was fresh in his memory and (3) that the witness "knew that the same was correctly stated in the writing." On the other hand, under paragraph (c) the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness's statement at the time it was made. In addition, since there is no requirement under paragraph (c) that the witness himself knew that the writing is a correct record of his statement, the testimony of the person who recorded the statement may be used to establish that the writing is a correct record of the statement. The foundation requirement of the present law excludes any record of a declarant's statement if the person recording the statement was not acting "under the direction" of the declarant. Yet such a statement is trustworthy if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under paragraph (c) the document or other writing embodying the statement is admissible while under the present law the declarant reads the writing on the witness stand and it is not otherwise made a part of the record unless it is offered by the adverse party.

Subdivision (2): Affidavits.

(2) [~~Affidavits to the extent admissible by the statutes of this state;~~]

COMMENT

The Commission does not recommend the adoption of subdivision (2). Rule 63(32) and Rule 63A will continue in effect the present statutes which set forth the conditions under which affidavits are admissible.

Subdivision (3): Testimony in Another Action or Proceeding.

(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 in a 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 party against whom the testimony was offered in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the party against whom the testimony is offered 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 URE 63(3)(b). The modification narrows 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 action between the same parties, relating to the same matter, or was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered.

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 described 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.

Rule 63(3)(b) as revised by the Commission permits former testimony to be used in a civil action if the party against whom the evidence was offered in the previous action had the right and opportunity to cross-examine the declarant with a motive similar to that of the party against whom the evidence is offered. Thus, the party against whom the evidence is offered may be required to rely on the sufficiency of the cross-examination conducted by another person. However, Rule 63(3)(c) as revised by the Commission permits former testimony to be used in criminal proceedings only if the party against whom the evidence is offered was also the party against whom the evidence was offered in the previous proceeding. This distinction has been made to preserve the right of the person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty are at stake -- as they are in a criminal trial -- the Commission does not believe that the accused should be compelled to rely on the sufficiency of prior cross-examination conducted on behalf of some other person.

The Commission recommends against the adoption of URE 63(3)(a). This paragraph 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). The provisions then enacted respecting admissibility of depositions are narrower than URE 63(3)(a). 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. Rule 63(32) and Rule 63A will continue in effect the existing law relating to use of depositions as evidence at the trial.

Subdivision (4): Contemporaneous and Spontaneous Statements.

(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 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) may go beyond existing law. The Commission believes that there is an adequate guarantee of the trustworthiness of such statements in the contemporaneousness 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.

The Commission has deleted paragraph (c) of URE 63(4). This paragraph 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 different decision. The Commission was substantially influenced in reaching its decision by the fact that Rule 63(4)(c) would make routinely taken statements of witnesses in personal injury actions admissible whenever such witnesses are 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. Moreover, as such litigation and preparation therefor is routinely handled, defendants are more often in possession of statements meeting the specifications of Rule 63(4)(c) than are plaintiffs; and it is undesirable thus to weight the scales in a type of action which is so predominant in our courts.

Subdivision (5): Dying Declarations.

(5) A statement by a person [~~unavailable as a witness because of his death~~] since deceased if the judge finds that it would be admissible if made by the declarant at the hearing and was made 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. [†]

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 homicide 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 lie 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 substituted "since deceased" for "unavailable as a witness because of his death" so that the question whether the proponent caused the declarant's death to prevent him from testifying may not be considered in determining the admissibility of the declaration. (See URE

62(7)(a).) If the declaration would tend to exonerate the proponent of the evidence, the Commission does not believe a dying declaration should be withheld from the jury even though there is other evidence from which the judge might infer that the proponent caused the declarant's death to prevent him from giving incriminating testimony.

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 that would be admissible if made by the declarant at the hearing. The Commission's research consultant suggests that the omission of this language from URE 63(5) was probably an oversight; in any event it seems desirable to make it clear that the declarant's conjecture as to the matter in question is not admissible.

Subdivision (6): Confessions.

(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, but only if the judge finds that the statement was made freely and voluntarily and was not 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; or

(c) During a period while the defendant was illegally detained by a public officer or employee of the United States or a state or territory of the United States.

COMMENT

Paragraphs (a) and (b) and the preliminary language of this subdivision substantially restate the existing law governing the admissibility of defendants' confessions and admissions in criminal actions or proceedings. While the Commission has departed rather widely from the language of URE 63(6), it is believed that paragraph (a) states a principle which is not only broad enough to encompass all the situations covered by URE 63(6) but 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, are nevertheless within its spirit.

Paragraph (b) is technically unnecessary since the statute could not admit what the Constitutions of this State and of the United States exclude. It seems desirable to state that 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.

Paragraph (c) states a condition of admissibility that now exists in the federal courts but which has not been applied in the California courts. This paragraph will grant an accused person a substantial protection for his statutory right to be brought before a magistrate promptly, for the rule will prevent the State from using the fruits

of the illegal conduct of law enforcement officers. The right of prompt arraignment is granted to assure a person the maximum protection for his constitutional rights. Paragraph (c) will implement this purpose by depriving law enforcement officers of an incentive to violate the accused's right to be brought quickly within the protection of our judicial system.

Subdivision (7): Admissions by Parties.

(7) As against himself in either his individual or representative capacity, a statement by a person who is a party to [~~the~~] a civil action or proceeding 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;~~]

COMMENT

In making extrajudicial statements of a party admissible against him this exception merely restates existing law. The Commission has revised the subdivision so that it is applicable only in a civil action or proceeding. This revision makes explicit what the draftsmen of the URE undoubtedly intended, that admissions of a defendant in a criminal action are governed by subdivision (6).

The Commission has omitted the URE provision that an extrajudicial statement is admissible against a party appearing in a representative capacity only if the statement was made by him while acting in such capacity. The basis of the admissions exception to the hearsay rule is that because the statements are the declarant's own he does not need to cross-examine. Moreover, the party has ample opportunity to deny, explain or qualify the statement in the course of the proceeding. These considerations appear to the Commission to apply to any extrajudicial statement made by one who is a party to a judicial action or proceeding either in a personal or a representative capacity. More time might be spent in many cases in trying to ascertain in what capacity a particular statement was made than could be justified by whatever validity the distinction made by the draftsmen of the URE might be thought to have.

Subdivision (8): Authorized and Adoptive Admissions.

(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. [-,-]

COMMENT

This exception restates in substance the existing law with respect to authorized and adoptive admissions.

Subdivision (9): Vicarious Admissions.

(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 [~~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 [~~,~~] and concerned a matter within the scope of the agency, partnership or employment and (ii) the statement is offered after, or in the judge's discretion subject to, proof by independent evidence of the existence of the relationship between the declarant and the party; 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. [~~;~~]

COMMENT

URE 63(8)(a) makes authorized extrajudicial statements admissible. Paragraph (9)(a) goes beyond this, making admissible against a party specified extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under paragraph (9)(a), however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions. The practical scope of paragraph (a) is quite limited. If the declarant is unavailable at the trial, the self-inculpatory statements which it covers would be admissible under URE 63(10) because they would be against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by paragraph (a) would be admissible as inconsistent statements under URE 63(1). Thus, paragraph (a) has independent significance only as to self-exculpatory statements of agents, partners and employees who do not testify at the trial as to the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under subdivision (10), it would be inadmissible as an authorized admission under subdivision (8), but it would be admissible under paragraph (a) of subdivision (9). One justification for this narrow exception is that because of the relationship which existed at the time the statement was made it is unlikely that it would have been made unless it were true. Another is that the existence of the relationship makes it highly likely that the party will be able

to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

The Commission has substituted for paragraph (a) of the URE subdivision language which substantially restates existing California law as found in Section 1870(5) of the Code of Civil Procedure. The revised paragraph is, however, somewhat more liberal than the existing California law; it makes admissible not only statements that the principal has authorized the agent to make but also statements that concern matters within the scope of the agency. Under existing California law only the former statements are admissible.

Paragraph (b) relates to the admissibility of hearsay statements of co-conspirators against each other. The Commission has substituted for the provision proposed by the Commissioners on Uniform State Laws language which restates existing California law as found in Section 1870(6) of the Code of Civil Procedure. The Commission believes that the more liberal URE rule of admissiblity would be unfair to criminal defendants in many cases.

Under paragraph (a) as revised by the Commission, the court may in its discretion receive the agent's statement in evidence subject to the later introduction of independent evidence establishing the relationship between the declarant and the party. Under paragraph (b), however, the court is not granted this discretion, for independent evidence of the existence of the conspiracy is required to be introduced before the statements of co-conspirators are introduced against the defendant. The discretion of the court has been limited in this respect to prevent the possibility that the co-conspirators' statements may be

improperly used by the trier-of-fact to establish the fact of the conspiracy and, in cases where the conspiracy is not ultimately established, to prevent the prejudicial effect this evidence may have upon trier-of-fact in resolving the question of guilt on other crimes with which the defendant is charged.

Paragraph (c) restates in substance the existing California law, which is found in Section 1851 of the Code of Civil Procedure, except that paragraph (c) limits this exception to the hearsay rule to civil actions or proceedings. Most cases falling within this exception would also be covered by URE Rule 63(10) which makes admissible declarations against interest. However, to be admissible under URE 63(10) the statement must have been against the declarant's interest when made whereas this requirement is not stated in paragraph (c). Moreover, the statement is admissible under paragraph (c) irrespective of the availability of the declarant whereas under revised Rule 63(10) the statement is admissible only if the declarant is unavailable as a witness. Some of the evidence falling within this exception, would also be admissible under URE Rule 63(21) which makes admissible against indemnitors and persons with similar obligations judgments establishing the liability of their indemnitees.

Subdivision (10): Declarations Against Interest.

(10) [~~Subject to the limitations of exception (6),~~] If the declarant is not a party to the action or proceeding and the judge finds that the declarant is unavailable as a witness and 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 the risk of civil or criminal liability or so far [~~rendered~~] tended to render invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social [~~disapproval~~] disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [~~;~~]

COMMENT

Insofar as this subdivision makes admissible a statement which was against the declarant's pecuniary or proprietary interest when made, it restates in substance the common-law rule relating to declarations against interest except that the common-law rule is applicable only when the declarant is dead. The California rule on declarations against interest, which is embodied in Sections 1853, 1870(4) and 1946 of the Code of Civil Procedure, is perhaps somewhat narrower in scope than the common-law rule.

The justifications for the common-law exceptions are necessity, the declarant being dead, and trustworthiness in that men do not ordinarily make false statements against their pecuniary or proprietary interest. The Commission believes that these justifications are sound and that they

apply equally to the provisions of subdivision (10) which broaden the common-law exception. Unavailability for other causes than death creates as great a necessity to admit the statement. Reasonable men are no more likely to make false statements subjecting themselves to civil or criminal liability, rendering their claims invalid, or subjecting themselves to hatred, ridicule or social disgrace than they are to make false statements against their pecuniary or proprietary interest.

The Commission has departed from URE 63(10) by (1) limiting subdivision (10) to nonparty declarants (incidentally making the cross reference to exception (6) unnecessary); (2) writing into it the present requirement of C.C.P. § 1853 that the declarant have "sufficient knowledge of the subject" and (3) conditioning admissibility on the unavailability of the declarant. With these limitations subdivision (10) states a desirable exception to the hearsay rule.

Subdivision (11): Voter's Statements.

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

COMMENT

The Commission is not convinced that there is any pressing necessity for this exception or that there is a sufficient guarantee of the trustworthiness of the statements that would be admissible under this exception.

Subdivision (12): Statements of Physical or Mental Condition of Declarant.

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

(a) 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 except as provided in paragraphs (b), (c) and (d) of this subdivision 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. [~~(1)~~]

(b) The declarant's 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. [~~(2)~~]

(c) A declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will.

(d) The declarant's intent, plan, motive or design at a time prior to the statement when the prior intent, plan, motive or design of the declarant is itself an issue in the action or proceeding and the declarant is unavailable as a witness.

COMMENT

Paragraphs (a) and (c) restate existing California law in substance. Paragraph (c) is, of course, subject to the provisions of

Section 350 and 351 of the Probate Code which relate to the establishment of the content of a lost or destroyed will.

Paragraph (b) states a new exception to the hearsay rule. While testimony may now be given relating to extrajudicial statements of the type described, it is received solely as the basis for an expert's opinion and not as substantive evidence. The Commission believes that the circumstances in which such statements are made provide a sufficient guarantee of their trustworthiness to justify admitting them as an exception to the hearsay rule.

Paragraph (d) may broaden the state of mind exception as now declared by the California courts. Decisions now justify the admission of declarations of a previous state of mind upon the theory that there is a sufficient continuity of mental state so that a declaration showing the declarant's then existing belief concerning the previous mental state is relevant to determine what the previous mental state was. Under this rationalization, and under the state of mind exception as stated in paragraph (a), it is possible that a distinction might be drawn between substantially equivalent statements on the basis of the particular words used. For example, if the issue is whether a deed was given to another person with intent to pass title, a statement by the donor that he does not own the property in question or a statement by the donor that the donee does own the property in question would be admissible as evidence of his present state of mind which would be relevant to show the previous intent to pass title. However, it is possible that the statement by the donor, "I gave that property to B,"

might be excluded because the words on the surface do not show present state of mind but show merely memory of past events. To preclude the drawing of any such distinction, paragraph (d) abandons the "continuity of state of mind" rationalization for the admission of declarations which show a previous mental state and provides directly for the admission of such declarations to prove a previous intent, plan, motive or design of the declarant. Under this paragraph, though, declarations of a previous mental state are admissible to prove that mental state only when the mental state itself is an issue in the case. Such statements are not admissible under this paragraph if the relevance of the previous mental state is to prove previous acts or conduct of the declarant. This limitation is necessary to preserve the hearsay rule itself.

The provision that a statement covered by subdivision (12) is not admissible if the judge finds that it was made in bad faith is a desirable safeguard. It is not believed to be more restrictive than the discretion presently given to the trial judge insofar as statements covered by paragraph (a) are concerned.

Mtg

5/26/61

Memorandum No. 15 (1961)

Subject: Establishment of Priorities for 1963 Legislative Program

The Commission is now able to determine the success of its 1961 legislative program. The staff suggests that this is an appropriate time for the Commission to establish tentative priorities for the matters that should be completed prior to the 1963 legislative session.

The attached exhibits are included to provide helpful background information concerning the scope of the topics the Commission is authorized to study (Exhibit II - yellow pages) and the status of each such topic (Exhibit I - green pages).

The staff suggests that the priorities for the work during the next two years be established as indicated below. The staff suggests these priorities primarily to place this matter before the Commission for its consideration.

Priority

1 - Study No. 52(L) - Sovereign Immunity. (Authorized in 1957)

2 - Study No. 36(L) - Condemnation - Pretrial and Discovery. (Authorized in 1956)

A tentative recommendation will be presented to the Commission on this topic at the June 1961 meeting.

3 - Study No. 34(L) - Uniform Rules of Evidence (Authorized in 1956)

We should prepare at least a tentative recommendation on the following portions of this topic:

a. Article VIII (Rules 62-66) - Hearsay Evidence
b. Article V (Rules 23-40) - Privileges
c. Article IX (Rules 67-72) - Authentication and Content of Writings

4 - Study No. 36(L) - Condemnation - Date of Valuation. (Authorized in 1956)

5 - Study No. 53(L) - Whether Personal Injury Damages Should be Separate Property. (Authorized in 1957)

6 - Study No. 57(L) - Law Relating to Bail. (Authorized in 1957)

7 - Study No. 36(L) - Condemnation - Incidental Business Losses. (Authorized in 1956)

8 - Study No. 42 - Trespassing Improvers. (Authorized in 1957)

9 - Study No. 46 - Arson. (Authorized in 1957)

There is no doubt that the studies listed above are more than we can hope to consider during the 1961-1963 period.

In addition to the above studies, the staff suggests that the Commission consider submitting a recommendation regarding Section 1248b of the Code of Civil Procedure. The research consultant recommended a revision of this section in the study on The Reimbursement for Moving Expenses When Property Is Acquired for Public Use. Section 1248b provides that for purposes of condemnation certain types of fixed machinery and equipment are considered to be a part of the realty. However, the section presently applies only to equipment and machinery designed for and used in manufacturing or industrial plants. It does not apply to commercial property.

In the study on Taking Possession and Passage of Title, the research consultant pointed out that Section 4986 of the Revenue and Taxation Code, insofar as it relates to cancellation of taxes in eminent domain proceedings, is defective. The Commission may want to submit a recommendation

to the 1963 Legislature concerning the problem of cancellation of taxes in eminent domain proceedings. The most acute problem in the area of tax refunds is, of course, taken care of by the Commission's recommendation to the 1961 Legislature in S.B. No. 204 relating to refunds when taxes have been paid.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

STATUS

Study No.	Subject	Year Authorized	Completed Research Report Received?	Comments
12	Taking Instructions to Jury Room	1955	Need a new study-have not retained a research consultant	Commission made recommendation in 1957. Bill not pushed by Commission because of various mechanical problems involved in getting a copy of the instructions to jury which were not taken care of in bill or considered in previous study. Commission determined in 1958 to carry this study forward and has reaffirmed that decision several times since then. However, pressure of other work has not permitted staff or Commission to devote any attention to this study.
21	Confirmation of Partition Sales	1956-study expanded in 1959	Need a new study-have not retained a research consultant	Staff study was prepared on this topic. It was submitted to several practitioners and at their suggestion the topic was broadened in 1959 (by legislative action) to include the entire subject of partition actions.
26	Escheat -- What Law Governs	1956	Need a new study-have not retained a research consultant	This topic involves a rather narrow point and perhaps the staff could prepare the necessary study if time permits.
27	Putative Spouse	1956	Research consultant has not completed study	Professor J. Keith Mann of Stanford Law School is our research consultant on this study. Because of other work, he has

Study No.	Subject	STATUS: Year Authorized	STATUS: Completed Research Report Received?	Comments
27	Putative Spouse (Continued)			not been working on the study. He does not plan to work on it in the near future. He is unable to give us any specific date when it will be completed. He does not believe that he will recommend any legislative action in this field. If he decides not to prepare the study, we will need to get another research consultant.
29	Post-Conviction Sanity Hearings	1956	Yes	We have encumbered funds in a prior year to print the recommendation on this topic. The Governor has appointed a special commission (Governor's Commission on Problems of Insanity Relating to Criminal Offenders) that will consider this matter.
30	Custody Jurisdiction	1956	We have an inadequate study	We paid for the study on this topic because the funds would no longer have been available for payment in the ordinary course after June 30, 1959. Payment was made with the understanding that the research consultant, Dean Kingsley of U.S.C. Law School, would continue to work with the Commission on the study.
34(L)	Uniform Rules of Evidence	1956-A legislative assignment	Study complete except for few minor matters	Commission is now working on the tentative recommendation on the article on hearsay. We have encumbered funds in prior fiscal years to print the following portions of this study: Hearsay ($3,450); Privilege ($3,200); Rules 67-72 ($600).

STATUS

Study No.	Subject	Year Authorized	Completed Research Report Received?	Comments
35(L)	Post-Conviction Procedure	1956 - A legislative assignment	We have retained a consultant but do not have his study	The Commission received a study from Mr. Paul Selvin recommending that the Uniform Post-Conviction Procedures Act not be adopted in California. The Commission concurred in that recommendation and is now awaiting a study concerning improvements in the details of the existing California law. Professor Herbert L. Packer of Stanford is our consultant on the second study. However, there has been a misunderstanding as to the scope of the study he is to make and we may have to retain another consultant to prepare this research study.
36(L)	Condemnation Law and Procedure	1956 - A legislative assignment	Portions completed	We will receive the balance of this research study in sufficient time to submit a complete revision of the title on eminent domain to the 1963 legislative session. We have encumbered funds in prior fiscal years to print the following portions of this study (not printed for 1961 Legislature): Pretrial Conferences and Discovery ($1,220); Allocation of Award ($1,220) and Incidental Business Losses (approximately $500). We have also budgeted additional moneys to print the balance of this topic.
39	Attachment, Garnishment and Property Exempt from Execution	1957	Research consultant retained	The Commission anticipates that this will be its major study during the 1963-65 period and will be the subject of a recommendation in 1965. We may find it necessary to submit several recommendations covering various portions of this topic.

Study No.	Subject	Year Authorized	STATUS: Completed Research Report Received?	Comments
41	Small Claims Court Law	1957	We have a staff research study that needs some revision	When time permits the staff may be able to complete this study.
42	Trespassing Improvers	1957	We have research study set in type	The staff will need to do quite a bit of research on the rights of various persons who may have security interests in property improved by another before this study will be ready to be considered by the Commission. The funds to print this study will become unavailable in June 1961. However, we have already expended the major portion of these funds.
43	Separate Trial on Issue of Insanity	1957	Yes	We have encumbered funds from a prior fiscal year to print the recommendation on this topic. The Governor has appointed a special commission that will consider this matter. (See comment to Study No. 29)
44	Suit in Common Name	1957	We have an inadequate study	When time permits the staff may be able to put this study in a form that will provide a sound basis for Commission action. The study will need considerable work.
45	Mutuality re Specific Performance	1957	We have retained a research consultant	We have not yet received a research report on this topic. We have not set a deadline for our research consultant (Professor Orrin B. Evans of U.S.C.) but we have written to him to determine when he will submit the study.

Study No.	Subject	Year Authorized	STATUS: Completed Research Report Received?	Comments
46	Arson	1957	Yes	We have encumbered funds from a prior fiscal year to print our report on this topic.
47	Modification of Contracts	1957	We do not have a research consultant	
49	Rights of Unlicensed Contractor	1957	We have an inadequate study	This study will require considerable work by the staff before it is ready to be considered by the Commission.
50	Rights of Lessor Upon Abandonment by Lessee	1957	We have retained a research consultant	We have not yet received a research study on this topic. We are checking with our consultant (Professor Harold Verrall of U.C.L.A.) to determine when he will complete the study.
51	Right of Wife To Sue for Support After Ex Parte Divorce	1957	See comment	We received a good research report on this topic but the Supreme Court subsequently reversed its prior decisions and made the research study obsolete. We should either abandon this topic or secure a new research report containing recommendations as to the procedures to be followed in obtaining support after an ex parte divorce.
52(L)	Sovereign Immunity	1957 - A legislative assignment	We have retained a research consultant	We expect to receive an excellent research report on this topic early in 1961 and have decided to make a recommendation on this topic in 1963.

Study No.	Subject	STATUS: Year Authorized	STATUS: Completed Research Report Received?	Comments
53(L)	Whether Personal Injury Damages Should Be Separate Property	1957 - A legislative assignment	We have retained a research consultant	We will receive a research report on this topic early in 1961 and could make this a topic for a recommendation in 1963.
55(L)	Power To Deny New Trial on Condition that Damages Be Increased	1957 - A legislative assignment	Yes	We have some concern as to the quality of this study.
57(L)	Law Relating to Bail	1957	Yes-study not yet available in mimeographed form	The research study consists of 200 pages of text. The study is very concise and contains specific recommendations as to the terms of a revised statute governing bail. Each existing statute section is carefully analyzed and recommendations for its revision are made. It will take quite a bit of time to consider this topic.
59	Service of Process by Publication	1958	Yes-study not yet available in mimeographed form	This study was prepared free of charge by the Harvard Student Legislative Research Bureau. It will require considerable work by the staff before it will be in a form suitable for consideration by the Commission.
60	Representation Relating to Credit of Third Person	1958	We do not have a research consultant	
61	Election of Remedies Where Different Defendants Involved	1958	We have retained a research consultant	Our research consultant advises us that we cannot count on this as a topic on which we can make a recommendation in 1963.

EXHIBIT II

The following is an explanation of the scope of each topic now on the current agenda of the Commission. Topics that will be disposed of by a recommendation to the 1961 legislative session are not included. If the topic is one assigned to the Commission upon request of the Commission, the explanation is taken (with a few exceptions) from the annual report of the Commission where the particular topic was described.

Study No. 12: A study to determine whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases.

Penal Code Section 1137 authorizes a written copy of the court's instructions to be taken into the jury room in criminal cases. It has been held, however, that Sections 612 and 614 of the Code of Civil Procedure preclude permitting a jury in a civil case to take a written copy of the instructions into the jury room. There seems to be no reason why the rule on this matter should not be the same in both civil and criminal cases.

The Commission made a recommendation on this topic to the 1957 Legislature. However, following circulation by the Commission to interested persons throughout the State of its printed pamphlet containing the recommendation and study on this matter, a number of questions were raised by members of the bench and bar relating to practical problems involved in making a copy of the court's instructions available to the jury in the jury room. Since there would not have been an adequate opportunity to study these problems and amend the bill during the 1957 Session, the Commission determined not to seek enactment of the bill but to hold the matter for further study.

Study No. 21: A study relating to partition sales.

This is a study to determine whether the provisions of the Code of Civil Procedure relating to partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs the confirmation of private judicial partition sales. (As expanded in 1959 - Res.ch. 218).

Study No. 26: A study to determine whether the law relating to escheat of personal property should be revised.

In the recent case of Estate of Nolan the California District Court of Appeal held that two savings bank accounts in California totaling $16,000, owned by the estate of a decedent who had died without heirs while domiciled in Montana, escheated to Montana rather than California. The Supreme Court denied the Attorney General's petition for hearing.

There is little case authority as to which state, as between the domicile of the decedent and any other, is entitled to escheat personal property. In some cases involving bank accounts it has been held that they escheat to the domiciliary state; in others, that they escheat to the state in which the bank is located. The Restatement of Conflict of Laws takes the position that personal property should escheat to the state in which the particular property is administered.

In two recent cases California's claim as the domicile of the decedent to escheat personal property has been rejected by sister states where the property was being administered, both states applying rules favorable to themselves. The combination of these decisions with that of the California court in Estate of Nolan suggests that California will lose out all around as the law now stands.

Study No. 27: A study to determine whether the law relating to the rights of a putative spouse should be revised.

The concept of "putative spouse" has been developed by the courts of this State to give certain property rights to a man or a woman who has lived with another as man and wife in the good faith belief that they were married when in fact they were not legally married or their marriage was voidable and has been annulled. The essential requirement of the status of putative spouse is a good faith belief that a valid marriage exists. The typical situation in which putative status is recognized is one where a marriage was properly solemnized but one or both of the parties were not free to marry, as when a prior marriage had not been dissolved or a legal impediment making the marriage void or voidable existed.

The question of the property rights of the parties to an invalid marriage generally arises when one of the parties dies or when the parties separate. It is now well settled that upon death or separation a putative spouse has the same rights as a legal spouse in property which would have been community property had the couple been legally married. This rule has been developed by the courts without the aid of legislation. The underlying reason for the rule apparently is the desire to secure for a person meeting the good faith requirement the benefits which he or she believed would flow from the attempted marriage.

The courts have held that a putative spouse is not entitled to an award of alimony. They have also held, however, that a putative wife

has a quasi-contractual right to recover from the putative husband (or his estate), the value of the services rendered to him during marriage less the value of support received from him. While in all of the cases in which this right has been recognized there was no quasi community property, it is not clear whether the existence of such property would preclude recovery in quasi contract. The earlier cases recognizing the quasi-contractual right all involved situations where one spouse had fraudulently misrepresented to the other that they were free to marry; the theory on which recovery was allowed was that the defendant had been unjustly enriched by services rendered in reliance upon his misrepresentation. But this rationale has apparently been abandoned in two recent cases. In one, the defendant's misrepresentation was innocent but recovery was nonetheless allowed. In the other, there was no misrepresentation but the court permitted recovery on the ground that the defendant had been guilty of misconduct which would have constituted grounds for divorce had the parties been married.

The Commission believes that several questions relating to the position of the putative spouse warrant study:

1. Is the theory of recovery in quasi contract either theoretically proper or practically adequate for the solution of the problem presented? The theory seems to have been abandoned recently by the courts, at least in part. Moreover, it will not justify recovery by one who has not been able, because of illness or other incapacity, to perform services which exceed in value the support received; yet, in most circumstances, such a claimant has the greater practical need for a recovery.

2. Should the existence of conduct which would be grounds for divorce justify recovery without regard to misrepresentations? If so, should it not be recognized that what is really involved is quasi alimony rather than recovery on the ground of unjust enrichment?

3. Should a putative spouse be able to recover both quasi community property and quasi alimony?

4. Where one of the spouses has died should the other spouse be given substantially the same rights which he or she would have had if the parties had been validly married?

Study No. 29: A study to determine whether the law respecting post-conviction sanity hearings should be revised.

Section 1367 of the Penal Code provides that a person cannot be punished for a public offense while he is insane. The Penal Code contains two sets of provisions apparently designed to implement this general rule. One set pertains to persons sentenced to death and the other set to persons sentenced to imprisonment.

Persons Sentenced to Death. Sections 3700 to 3704 of the Penal Code provide for a hearing to determine whether a person sentenced to death is insane and thus immune from execution. The hearing procedure is initiated by the warden's certification that there is good reason to believe that the prisoner has become insane. The

question of the prisoner's sanity is then tried to a jury. If he is found to be insane he must be taken to a state hospital until his reason is restored. If the superintendent of the hospital later certifies that the prisoner has recovered his sanity, this question is determined by a judge sitting without a jury. If the prisoner is found to be sane he is returned to the prison and may subsequently be executed.

The Commission believes that a number of important questions exist concerning the procedure provided for in Penal Code Sections 3700 to 3704. For example, why should the issue of the prisoner's sanity be determined by a jury in the initial hearing but not in a later hearing to determine whether his reason has been restored? Why should the statute explicitly state that the prisoner is entitled to counsel on a hearing to determine whether he has been restored to sanity and make no provision on this matter in the case of the initial hearing? Does this mean that the prisoner is not entitled to counsel at the initial hearing under the rule expressio unius est exclusio alterius? If so, is this desirable? Who has the burden of proof as to the issue of the prisoner's sanity and does this differ as between the initial and later hearings? What standard of sanity is to be applied? Shall the court call expert witnesses? May the parties do so? Does the prisoner have the right to introduce evidence and cross-examine witnesses? In People v. Riley, the court held that (1) a prisoner found to be insane has no right of appeal and (2) a unanimous verdict is not necessary because the hearing is not a criminal proceeding. Are these rules desirable?

Persons Sentenced to Imprisonment. Penal Code Section 2684 provides that any person confined to a state prison who is mentally ill, mentally deficient, or insane may be transferred to a state hospital upon the certification of the Director of Corrections that in his opinion the rehabilitation of the prisoner would be expedited by treatment in the hospital and upon the authorization of the Director of Mental Hygiene. The code contains no provision for a hearing of any kind and the decision of the Director of Corrections and the Director of Mental Hygiene is final. If the superintendent of the state hospital later notifies the Director of Corrections that the prisoner "will not benefit by further care and treatment in the state hospital," the Director of Corrections must send for the prisoner and return him to the state prison. The prisoner has no right to a hearing before he is returned to prison. Section 2685 of the Penal Code provides that the time spent at the state hospital shall count as time served under the prisoner's sentence.

Sections 2684 and 2685 appear to present a number of important questions. Does the standard provided for removal of a prisoner to the state hospital or for returning him to the state prison--whether his rehabilitation would be expedited by treatment at the hospital and whether he would not benefit by further treatment there--conflict with the general mandate of Section 1367 that a person may not be punished while he is insane? If so, should a

different standard and a different procedure be established to avoid the punishment of insane prisoners? Should the time spent in the state hospital by a prisoner adjudged insane for purposes of punishment be counted as part of time served under his sentence?

Study No. 30: A study to determine whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.

There are in this State various kinds of statutory proceedings relating to the custody of children. Civil Code Section 138 provides that in actions for divorce or separate maintenance the court may make an order for the custody of minor children during the proceeding or at any time thereafter and may at any time modify or vacate the order. Civil Code Section 199 provides that, without application for divorce, a husband or wife may bring an action for the exclusive control of the children; and Civil Code Section 214 provides that when a husband and wife live in a state of separation, without being divorced, either of them may apply to any court of competent jurisdiction for custody of the children. Furthermore, anyone may bring an action under Probate Code Section 1440 to be appointed guardian of a child.

These various provisions relating to the custody of children present a number of problems relating to the jurisdiction of courts; for example: (1) Do they grant the courts jurisdiction to afford an adequate remedy in all possible situations? (2) When a proceeding has been brought under one of the several statutes does the court thereafter have exclusive jurisdiction of all litigation relating to the custody of the child? (3) Do the several statutes conflict or are they inconsistent as to whether the court awarding custody under them has continuing jurisdiction to modify its award?

(1) There appear to be at least two situations in which the only remedy of a parent seeking custody of a child is through a guardianship proceeding under Probate Code Section 1440. One is when a party to a marriage obtains an ex parte divorce in California against the other party who has custody over the children and resides with them in another state. If the second party later brings the children to California and becomes a resident of a county other than the county in which the divorce was obtained, the only procedure by which the first party can raise the question of custody would seem to be a guardianship proceeding under Probate Code Section 1440 in the county where the children reside. Although the divorce action remains pending as a custody proceeding under Civil Code Section 138, the court cannot enter a custody order because the children are residents of another county. A custody proceeding cannot be brought under either Section 199 or Section 214 of the Civil Code because the parents are no longer husband and wife. Another situation in which a guardianship proceeding may be the only available remedy is

when a foreign divorce decree is silent as to who shall have custody of the children. If the parties later come within the jurisdiction of the California courts, it is not clear whether the courts can modify the foreign decree to provide for custody and, if so, in what type of proceeding this can be done. It would appear desirable that some type of custody proceeding other than guardianship be authorized by statute for these and any other situations in which a guardianship proceeding is now the only available remedy to a parent seeking custody of his child.

(2) The various kinds of statutory proceedings relating to custody also create the problem whether, after one of these proceedings has been brought in one court, another proceeding under the same statute or under a different statute may be brought in a different court or whether the first court's jurisdiction is exclusive. This question can be presented in various ways, such as the following: (a) If a divorce court has entered a custody order pursuant to Civil Code Section 138, may a court in another county modify that order or entertain a guardianship proceeding under Probate Code Section 1440 or--assuming the divorce was denied but jurisdiction of the action retained--entertain a custody proceeding under Civil Code Sections 199 or 214? (b) If a court has awarded custody under Civil Code Sections 199 or 214 while the parties are still married, may another court later reconsider the question in a divorce proceeding under Civil Code Section 138 or a guardianship proceeding under Probate Code Section 1440? (c) If a guardian has been appointed under Probate Code Section 1440, may a divorce court or a court acting pursuant to Civil Code Sections 199 or 214 later award custody to the parent who is not the guardian?

A few of these matters were clarified by the decision of the California Supreme Court in Greene v. Superior Court, holding that a divorce court which had awarded custody pursuant to Civil Code Section 138 has continuing jurisdiction and a court in another county has no jurisdiction to appoint a guardian of the children under Probate Code Section 1440. The Supreme Court stated that the general objective should be to avoid "unseemly conflict between courts" and indicated that a proper procedure would be to apply to the divorce court for a change of venue to the county where the children reside.

It is not clear whether the exclusive jurisdiction principle of the Greene case either will or should be applied in all of the situations in which the question may arise. An exception should perhaps be provided at least in the case where a divorce action is brought after a custody or guardianship award has been made pursuant to Civil Code Sections 199 or 214 or Probate Code Section 1440, on the ground that it may be desirable to allow the divorce court to consider and decide all matters of domestic relations incidental to the divorce.

(3) There appear to be at least two additional problems of jurisdiction arising under the statutory provisions relating to

custody of children. One is whether a court awarding custody under Civil Code Section 214 has continuing jurisdiction to modify its order. Although both Sections 138 and 199 provide that the court may later modify or amend a custody order made thereunder, Section 214 contains no such provisions. Another problem is the apparent conflict between Section 199 and Section 214 in cases where the parents are separated. Section 199 presumably can be used to obtain custody by any married person, whether separated or not, while Section 214 is limited to those persons living "in a state of separation." The two sections differ with respect to the power of the court to modify its order and also with respect to whether someone other than a parent may be awarded custody.

Study No. 34(L): A study to determine whether the law of evidence should be revised to confirm to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

This is a legislative assignment (not authorized by the Legislature upon the recommendation of the Commission).

Study No. 35(L): A study to determine whether the law respecting habeas corpus proceedings, in the trial and appellate courts, should, for the purpose of simplification of procedure to the end of more expeditious and final determination of the legal questions presented, be revised.

This is a legislative assignment (not authorized by the Legislature upon the recommendation of the Commission).

Study No. 36(L): A study to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens.

This is a legislative assignment (not authorized by the Legislature upon the recommendation of the Commission).

Study No. 39: A study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised.

The Commission has received several communications bringing to its attention anachronisms, ambiguities, and other defects in the law of this State relating to attachment, garnishment, and property exempt from execution. These communications have raised such questions as: (1) whether the law with respect to farmers' property exempt from execution should be modernized; (2) whether a procedure should be established to determine disputes as to whether particular earnings of judgment debtors are exempt from execution; (3) whether Code of Civil Procedure Section 690.26 should be amended to conform to the

1955 amendments of Sections 682, 688 and 690.11, thus making it clear that one-half, rather than only one-quarter, of a judgment debtor's earnings are subject to execution; (4) whether an attaching officer should be required or empowered to release an attachment when the plaintiff appeals but does not put up a bond to continue the attachment in effect; and (5) whether a provision should be enacted empowering a defendant against whom a writ of attachment may be issued or has been issued to prevent service of the writ by depositing in court the amount demanded in the complaint plus 10% or 15% to cover possible costs.

The State Bar has had various related problems under consideration from time to time. In a report to the Board of Governors of the State Bar on 1955 Conference Resolution No. 28, the Bankruptcy Committee of the State Bar recommended that a complete study be made of attachment, garnishment, and property exempt from execution, preferably by the Law Revision Commission. In a communication to the Commission dated June 4, 1956 the Board of Governors reported that it approved this recommendation and requested the Commission to include this subject on its calendar of topics selected for study.

Study No. 41: A study to determine whether the Small Claims Court Law should be revised.

In 1955 the Commission reported to the Legislature that it had received communications from several judges in various parts of the State relating to defects and gaps in the Small Claims Court Law. These suggestions concerned such matters as whether fees and mileage may be charged in connection with the service of various papers, whether witnesses may be subpoenaed and are entitled to fees and mileage, whether the monetary jurisdiction of the small claims courts should be increased, whether sureties on appeal bonds should be required to justify in all cases, and whether the plaintiff should have the right to appeal from an adverse judgment. The Commission stated that the number and variety of these communications suggested that the Small Claims Court Law merited study.

The 1955 Session of the Legislature declined to authorize the Commission to study the Small Claims Court Law at that time. No comprehensive study of the Small Claims Court Law has since been made. Meanwhile, the Commission has received communications making additional suggestions for revision of the Small Claims Court Law: e.g., that the small claims court should be empowered to set aside the judgment and reopen the case when it is just to do so; that the plaintiff should be permitted to appeal when the defendant prevails on a counterclaim; and that the small claims form should be amended to (1) advise the defendant that he has a right to counterclaim and that failure to do so on a claim arising out of the same transaction will bar his right to sue on the claim later and (2) require a statement as to where the act occurred in a negligence case.

This continued interest in revision of the Small Claims Court Law induced the Commission again to request authority to make a study of it.

Study No. 42: A study to determine whether the law relating to the rights of a good faith improver of property belonging to another should be revised.

The common law rule, codified in Civil Code Section 1013, is that when a person affixes improvements to the land of another in the good faith belief that the land is his, the thing affixed belongs to the owner of the land in the absence of an agreement to the contrary. The common law denies the innocent improver any compensation for the improvement he has constructed except that when the owner has knowingly permitted or encouraged the improver to spend money on the land without revealing his claim of title the improver can recover the value of the improvement, and when the owner sues for damages for the improver's use and occupation of the land the improver can set off the value of the improvement.

About three-fourths of the states have ameliorated the common law rule by the enactment of "betterment statutes" which make payment of compensation for the full value of the improvement a condition of the owner's ability to recover the land. The owner generally is given the option either to pay for the improvement and recover possession or to sell the land to the improver at its value excluding improvements. Usually no independent action is given the improver in possession, although in some states he may sue directly if he first gives up the land.

California, on the other hand, grants the improver only the limited relief of set-off when the owner sues for damages and the right to remove the improvement when this can be done. It would seem to be unjust to take a valuable improvement from one who built it in the good faith belief that the land was his and give it to the owner as a complete windfall. Provision should be made for a more equitable adjustment between the two innocent parties.

Study No. 43: A study to determine whether the separate trial on the issue of insanity in criminal cases should be abolished or whether, if it is retained, evidence of the defendant's mental condition should be admissible on the issue of specific intent in the trial on the other pleas.

Section 1026 of the Penal Code provides that when a defendant pleads not guilty by reason of insanity and also enters another plea or pleas he shall be tried first on the other plea or pleas and in such trial shall be conclusively presumed to have been sane at the time the crime was committed. This provision was originally interpreted by the Supreme Court to require exclusion of all evidence of mental condition in the first trial, even though offered to show that the defendant lacked the mental capacity to form the specific intent required for the crime charged--e.g., first degree murder. This interpretation was criticized on the ground that a defendant might be so mentally defective as to be unable to form the specific

intent required in certain crimes and yet not be so insane as to prevail in the second trial on the defense of insanity. In 1949 the Supreme Court purported to modify somewhat its view of the matter in People v. Wells. The court's opinion states that evidence of the defendant's mental condition at the time of the crime may be introduced in the first trial to show that the defendant did not have the specific intent required for the crime charged but not to show that he could not have had such intent. This distinction does not seem to be a very meaningful or workable one or to meet adequately the criticisms made of the earlier interpretation adopted by the court. A study should now be made to determine (1) whether the separate trial on the defense of insanity should be abolished, with all issues in the case being tried in a single proceeding or (2) if separate trials are to be continued, whether Section 1026 should be revised to provide that any competent evidence of the defendant's mental condition shall be admissible on the first trial, the jury being instructed to consider it only on the issue of criminal intent.

Study No. 44: A study to determine whether partnerships and unincorporated associations should be permitted to sue in their common names and whether the law relating to the use of fictitious names should be revised.

Code of Civil Procedure Section 388 provides that when two or more persons associated in any business transact such business under a common name they may be sued by such common name. However, such associates may not bring suit in the common name. In the case of a partnership or association composed of many individuals this results in an inordinately long caption on the complaint and in extra expense in filing fees, neither of which appears to be necessary or justified.

Sections 2466 to 2471 of the Civil Code also have a bearing on the right of partnerships and unincorporated associations to sue. These sections provide, inter alia, that a partnership doing business under a fictitious name cannot maintain suit on certain causes of action unless it has filed a certificate naming the members of the partnership, and that a new certificate must be filed when there is a change in the membership. These provisions, which have been held to be applicable to unincorporated associations, impose a burden on partnerships and associations.

Study No. 45: A study to determine whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised.

Civil Code Section 3386 provides:

> § 3386. Neither party to an obligation can be compelled specifically to perform it, unless the

other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

Section 3386 states substantially the doctrine of mutuality of remedy in suits for specific performance as it was originally developed by the Court of Chancery. The doctrine has been considerably modified in most American jurisdictions in more recent times. Today it is not generally necessary, to obtain a decree of specific performance, to show that the plaintiff's obligation is specifically enforceable, so long as there is reasonable assurance that plaintiff's performance will be forthcoming when due. Such assurance may be provided by the plaintiff's past conduct, or his economic interest in performing, or by granting a conditional decree or requiring the plaintiff to give security for his performance.

Civil Code Section 3386 states a much more rigid rule. It is true that Section 3386 is considerably ameliorated by Civil Code Sections 3388, 3392, 3394 and 3423(5) and by court decisions granting specific performance in cases which would fall within a strict application of the doctrine of mutuality of remedy. On the other hand, the mutuality requirement has in some cases been applied strictly, with harsh results.

On the whole, the California decisions in terms of results may not be far out of line with the more modern and enlightened view as to mutuality of remedy. But insofar as they have reached sensible results it has often been with difficulty and the result has been inconsistent with a literal reading of Section 3386. And not infrequently poor decisions have resulted. A study of the requirement of mutuality of remedy in suits for specific performance would, therefore, appear to be desirable.

Study No. 46: A study to determine whether the provisions of the Penal Code relating to arson should be revised.

Definition of Arson. Chapter 1 of Title 13 of the Penal Code (Sections 447a to 451a) is entitled "Arson." Section 447a makes the burning of a dwelling-house or a related building punishable by a prison sentence of two to twenty years. Section 448a makes the burning of any other building punishable by a prison sentence of one to ten years. Section 449a makes the burning of personal property, including a streetcar, railway car, ship, boat or other water craft, automobile or other motor vehicle, punishable by a sentence of one to three years. Thus, in general, California follows the historical approach in defining arson, in which the burning of a dwelling-house was made the most serious offense, presumably because a greater risk to human life was thought to be involved. Yet in modern times the burning of other buildings, such as a school, a theatre, or a church, or the burning of such

personal property as a ship or a railway car often constitutes a far graver threat to human life than the burning of a dwelling-house. Some other states have, therefore, revised their arson laws to correlate the penalty not with the type of building or property burned but with the risk to human life and with the amount of property damage involved in a burning. A study should be made to determine whether California should similarly revise Chapter 1 of Title 13 of the Penal Code.

Use of Term "Arson" in Statutes. When the term "arson" is used in a penal or other statute, the question arises whether that term includes only a violation of Penal Code Section 447a, which alone labels the conduct which it proscribes as "arson," or whether it is also applicable to violations of Penal Code Sections 448a, 449a, 450a and 451a, which define other felonies related to the burning of property. For example, Penal Code Section 189, defining degrees of murder, states that murder committed during the perpetration of arson, or during attempted arson, is murder in the first degree. There is nothing in that section which makes it clear what is meant by "arson." On the other hand, Penal Code Section 644, concerning habitual criminals, refers specifically to "arson as defined in Section 447a of this code." On the basis of these enactments it could be argued that "arson" is only that conduct which is proscribed by Section 447a. Yet in In re Bramble the court held that a violation of Section 448a was "arson." Thus, there is considerable doubt as to the exact meaning of the term "arson" in relation to the conduct proscribed by Penal Code Sections 448a, 449a, 450a, and 451a.

Study No. 47: A study to determine whether Civil Code Section 1698 should be repealed or revised (modification of contracts).

Section 1698 of the Civil Code, which provides that a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise, might be repealed. It frequently frustrates contractual intent. Moreover, two avoidance techniques have been developed by the courts which considerably limit its effectiveness. One technique is to hold that a subsequent oral agreement modifying a written contract is effective because it is executed, and performance by one party only has been held sufficient to render the agreement executed. The second technique is to hold that the subsequent oral agreement rescinded the original obligations and substituted a new contract, that this is not an "alteration" of the written contract and, therefore, that Section 1698 is not applicable. These techniques are not a satisfactory method of ameliorating the rule, however, because it is necessary to have a lawsuit to determine whether Section 1698 applies in a particular case.

If Section 1698 is to be retained, the question arises whether it should apply to all contracts in writing, whether or not required to be written by the statute of frauds or some other statute. It

is presently held to apply to all contracts in writing and is thus contrary to the common law rule and probably contrary to the rule in all other states. This interpretation has been criticized by both Williston and Corbin who suggest that the language is the result of an inaccurate attempt to codify the common law rule that contracts required to be in writing can only be modified by a writing.

Study No. 49: A study to determine whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised.

Section 7031 of the Business and Professions Code provides:

> § 7031. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract.

The effect of Section 7031 is to bar the affirmative assertion of any right to compensation by an unlicensed contractor, whether in an action on the illegal contract, for restitution, to foreclose a mechanics' lien, or to enforce an arbitration award unless he can show that he was duly licensed.

The courts have generally taken the position that Section 7031 requires a forfeiture and should be strictly construed. In fact, in the majority of reported cases forfeiture appears to have been avoided. One technique has been to find that the artisan is not a "contractor" within the statute, but is merely an "employee." But this device is restricted by detailed regulations of the Contractor's State License Board governing qualifications for licenses and the scope of the statutory requirements. Another way around the statute has been to say that there was "substantial" compliance with its requirements. In addition, Section 7031 has been held not to apply to a suit by an unlicensed subcontractor against an unlicensed general contractor on the ground that the act is aimed at the protection of the public, not of one contractor against a subcontractor. Similarly, the statute does not bar a suit by an unlicensed contractor against a supplier of construction material. And the statute has been held not to apply when the contractor is the defendant in the action.

But with all of these qualifications Section 7031 has a wide area of application in which it operates to visit a forfeiture upon the contractor and to give the other party a windfall.

Many jurisdictions, taking into account such factors as moral turpitude on both sides, statutory policy, public importance, subservience of economic position, and the possible forfeiture involved, allow restitution to an unlicensed person. But in California, Section 7031 expressly forbids "any action" and this prohibition of course includes restitution. The court can weigh equities in the contractor's favor only where the contractor is the defendant. If the contractor is asserting a claim, equities generally recognized in other jurisdictions cannot be recognized because of Section 7031.

Study No. 50: A study to determine whether the law respecting the rights of a lessor of property when it is abandoned by the lessee should be revised.

Under the older common law, a lessor was regarded as having conveyed away the entire term of years, and his only remedy upon the lessee's abandonment of the premises was to leave the property vacant and sue for the rent as it became due or to re-enter for the limited purpose of preventing waste. If the lessor repossessed the premises, the lease and the lessor's rights against the lessee thereunder were held to be terminated on the theory that the tenant had offered to surrender the premises and the lessor had accepted.

In California the landlord can leave the premises vacant upon abandonment and hold the lessee for the rent. The older rule in California was, however, that if he repossessed the premises, there was a surrender by operation of law and the landlord lost any right to rent or damages against the lessee. More recently it has been held by our courts that if the lessor re-enters or re-lets, he can sue at the end of the term for damages measured by the difference between the rent due under the original lease and the amount recouped under the new lease.

Should the landlord not be given, however, the right to re-enter and sue for damages at the time of abandonment? In some states this has been allowed, with certain restrictions, even in the absence of a clause in the lease. And it has been held in many states that the landlord may enter as agent of the tenant and re-lease for a period not longer than the original lease at the best rent available. In this case, the courts have said, the landlord has not accepted a surrender and may therefore sue for damages. But this doctrine was repudiated in California and it is doubtful that it can be made available to the lessor without legislative enactment.

Civil Code Section 3308 provides that the parties to a lease may provide therein that if the lessee breaches any term of the lease,

> the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period.
>
> The rights of the lessor under such agreement shall be cumulative to all other rights or remedies. . . .

Thus the landlord is well protected in California if the lease so provides. The question is whether he should be similarly protected by statute when the lease does not so provide.

Study No. 51: A study to determine whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both parties, should be permitted to maintain an action for support.

The California Supreme Court, after this study was authorized, held that an ex parte divorce does not terminate the husband's obligation to support his former wife. Hence, this study now primarily involves the question of the procedure to be followed to maintain an action for support after an ex parte divorce.

Study No. 52(L): A study to determine whether the doctrine of sovereign immunity should be modified.

This is a legislative assignment (not authorized by the Legislature on recommendation of the Commission).

The doctrine of governmental immunity--that a governmental entity is not liable for injuries inflicted on other persons--has long been generally accepted in this State. The constitutional provision that suits may be brought against the State "as shall be directed by law," does not authorize suit against the State save where the Legislature has expressly so provided. Moreover, a statute permitting suit against the State merely waives immunity from suit; it will not be construed to admit liability nor waive any legal defense which the State may have unless it contains express language to that effect.

The general rule in this State is that a governmental entity is liable for damages resulting from negligence in its "proprietary" activities. But such an entity is not liable for damages resulting from negligence in its "governmental" activities unless a statute assumes liability. An example of a statute assuming liability for damages for "governmental" as well as "proprietary" activities is the Vehicle Code which imposes liability for negligent operation of motor vehicles on governmental units.

The doctrine of sovereign immunity has been widely criticized.

The distinction between "proprietary" and "governmental" functions is uncertain as to its application in particular cases with the consequence that it is productive of much litigation.

At the 1953 Conference of State Bar Delegates a resolution was adopted favoring the abrogation of the doctrine of sovereign immunity and appointing a committee to study the problem. The committee's report, dated August 5, 1954, presents an excellent preliminary analysis of the problem and recommends that the study be carried forward.

Study No. 53(L): A study to determine whether personal injury damages should be separate property.

This is a legislative assignment (not authorized by the Legislature on recommendation of the Commission).

The study involves a consideration of Civil Code Section 163.5, enacted in 1957. This statute contains a number of defects. The general problem will require a consideration of the rule imputing the negligence of one spouse to the other.

In this State the negligence of one spouse is imputed to the other in any action when the judgment would be community property. A judgment recovered by a spouse in a personal injury action until the enactment of C.C. § 163.5 in 1957 was community property. Thus, when one spouse sued for an injury caused by the combined negligence of a third party and the other spouse, the contributory negligence of the latter was imputed to the plaintiff, barring recovery. The reason for the rule was said to be that it prevented the negligent spouse from profiting, through his community interest in the judgment, from his own wrong.

The State Bar has considered a number of proposals to change or modify the former rule. These have included proposals that a recovery for personal injury be made separate property (this was the solution adopted in 1957 in C.C. § 163.5); that the recovery not include damages for the loss of services by the negligent spouse nor for expenses that would ordinarily be payable out of community property; and that the elements of damage considered personal to each spouse be made separate property.

Study No. 55(L): A study as to whether a trial court should have the power to require, as a condition for denying a motion for a new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by the jury.

This is a legislative assignment (not authorized by the Legislature upon the recommendation of the Commission).

Study No. 57(L): A study to determine whether the laws relating to bail should be revised.

This is a legislative assignment (not authorized by the Legislature upon recommendation of the Commission).

Study No. 59: A study to determine whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court.

Two recent decisions by the United States Supreme Court have placed new and substantial constitutional limitations on service of process by publication in judicial proceedings. Theretofore, it had generally been assumed that, at least in the case of proceedings relating to real property, service by publication meets the minimum standards of procedural due process prescribed by the Fourteenth Amendment to the United States Constitution. However, in Mullane v. Central Hanover Bank & Trust Co., decided in 1950, the Supreme Court held unconstitutional a New York statute which authorized service on interested parties by publication in connection with an accounting by the trustee of a common trust fund under a procedure established by Section 100-c(12) of the New York Banking Law. The Court stated that there is no justification for a statute authorizing resort to means less likely than the mails to apprise persons whose names and addresses are known of a pending action. Any doubt whether the rationale of the Mullane decision would be applied by the Supreme Court to cases involving real property was settled by Walker v. City of Hutchinson, decided in 1956, which held that notice by publication of an eminent domain proceeding to a land owner whose name was known to the condemning city was a violation of due process.

The practical consequence of the Mullane and Walker decisions is that every state must now review its statutory provisions for notice by publication to determine whether any of them fail to measure up to the requirements of the Fourteenth Amendment. A preliminary study indicates that few, if any, California statutes are questionable under these decisions, inasmuch as our statutes generally provide for notice by mail to persons whose interests and whereabouts are known. However, a comprehensive and detailed study should be undertaken to be certain that all California statutory provisions which may be affected by the Mullane and Walker decisions are brought to light and that recommendations are made to the Legislature for such changes, if any, as may be necessary to bring the law of this State into conformity with the requirements of the United States Constitution.

Study No. 60: A study to determine whether Section 1974 of the Code of Civil Procedure should be repealed or revised.

Section 1974 of the Code of Civil Procedure, enacted in 1872, provides that no evidence is admissible to charge a person upon a representation as to the credit of a third person unless the representation, or some memorandum thereof, be in writing and either subscribed by or in the handwriting of the party to be charged. Section 1974 is open to the criticism commonly leveled at statutes of frauds, that they shelter more frauds than they

prevent. This result has been avoided by the courts to a considerable extent with respect to the original Statute of Frauds by liberal construction of the Statute and by creating numerous exceptions to it. However, Section 1974 has been applied strictly in California. For example, in Baron v. Lange an action in deceit failed for want of a memorandum against a father who had deliberately misrepresented that his son was the beneficiary of a large trust and that part of the principal would be paid to him, thus inducing the plaintiff to transfer a one-third interest in his business on the son's note.

Only a few states have statutes similar to Section 1974. The courts of some of these states have been more restrictive in applying the statute than has California. Thus, some courts have held or said that the statute does not apply to misrepresentations made with intention to defraud but fraudulent intent will not avoid Section 1974. Again, some states hold the statute inapplicable when the defendant had an interest in the action induced, but this interpretation was rejected in Bank of America v. Western Constructors, Inc. And in Carr v. Tatum the California court failed to apply two limitations to Section 1974 which have been applied to similar statutes elsewhere: (1) construing a particular statement to be a misrepresentation concerning the value of property rather than one as to the credit of a third person; (2) refusing to apply the statute where there is a confidential relationship imposing a duty of disclosure on the defendant. Indeed, the only reported case in which Section 1974 has been held inapplicable was one where the defendant had made the representation about a corporation which was his alter ego, the court holding that the representation was not one concerning a third person.

Section 1974 was repealed as a part of an omnibus revision of the Code of Civil Procedure in 1901 but this act was held void for unconstitutional defects in form.

Study No. 61: A study to determine whether the doctrine of election of remedies should be abolished in cases where relief is sought against different defendants.

Under the common law doctrine of election of remedies the choice of one among two or more inconsistent remedies bars recourse to the others. The doctrine is an aspect of the principle of res judicata, its purpose being to effect economy of litigation and to prevent harassment of a defendant through a series of actions, based on different theories of liability, to obtain relief for a single wrong. The common law doctrine has been applied in cases where the injured party seeks relief first against one person and then against another, although one of its principal justifications, avoidance of successive actions against a single defendant, is inapplicable to such a situation.

The doctrine of election of remedies has frequently been criticized. In 1939 New York abolished the doctrine as applied to cases involving different defendants, on the recommendation of its Law Revision Commission.

The law of California with respect to the application of the doctrine of election of remedies to different defendants is not clear. Our courts have tended, in general, to apply the doctrine only in estoppel situations--i.e., where the person asserting it as a defense can show that he has been prejudiced by the way in which the plaintiff has proceeded--and this limitation has been recently applied in cases involving different defendants. In other cases, application of the doctrine has been avoided by holding that the remedies pursued against the different defendants were not inconsistent. In still other cases which do not appear to be distinguishable, however, the doctrine has been applied to preclude a plaintiff from suing one person merely because he had previously sued another. Since it is difficult to predict the outcome of any particular case in this State today, legislation to clarify and modernize our law on this subject would appear to be desirable.

6/12/61

Memorandum No. 19(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence
(Hearsay)

There is attached to this memorandum the Hearsay Article of the URE as it has been revised to date. The following matters are noted for your particular attention:

Rule 62(6)(a). The Commission deferred further considration of this at the May meeting. It will be made the subject of a separate memorandum.

Rule 63(3). As it now reads, this subdivision is ambiguous. Whether it applies to testimony given at a former trial of the same action or proceeding is uncertain. It says that it applies to "testimony given under oath or affirmation as a witness in another action or proceeding. . . ."

Section 1870(8) of the Code of Civil Procedure is the section of the code that now permits the admission of former testimony. It states that evidence may be given of 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 language, "a former action between the same parties", has been construed to apply to a former trial of the same action or proceeding in which it is offered. (People v. Bird, 132 Cal. 261 (1901); Gates v. Pendleton, 71 C.A. 752 (1925), hg. den.) The language now recommended, "another

action or proceeding," does not seem to be sufficiently different from "a former action" to warrant a different result. However, to preclude the possibility that the change from "former" to "another" will be construed to compel a change in result, the staff recommends that "former" be substituted for "another" and that the following language be added at the end of Rule 63(3):

As used in this subdivision, "former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered."

If this suggestion is adopted, Rule 63(3) should be adjusted to conform and would read as follows:

(3) 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~~] a former action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a 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~~] former 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 party against whom the testimony was offered in the [~~other~~]

former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the party against whom the testimony is offered was a party to the [~~other~~] former 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~~] in an action or proceeding other than the action or proceeding in which the testimony is offered is not admissible.

As used in this subdivision, "former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered.

There are other problems in connection with this subdivision that will be taken up in a subsequent memo concerning Rule 62(6)(a) and Penal Code Section 686. However, for the present, it should be pointed out that there is a different standard for the admission of former testimony in Penal Code Section 686. This need not concern the Commission at the present time, for Penal Code Section 686 declares a rule of confrontation, not a rule of hearsay. The defendant may waive his right of confrontation and introduce evidence that is admissible under the hearsay rule. But the fact that evidence is admissible

as an exception to the hearsay rule does not necessarily make such evidence admissible against the defendant in a criminal case, for such evidence may be excluded under the confrontation rule. (See People v. Bird, 132 Cal. 261 (1901).)

Rule 63(13). The last paragraph of the Comment is language not yet approved by the Commission.

Rule 63(15). The Comment to this subdivision has not been approved.

Rule 63(16). The present Health and Safety Code sections relating to vital statistics are concerned with birth, fetal death, death or marriage records. Hence, this subdivision has been revised to apply to these types of records. The proposed language of the subdivision and the proposed Comment have not been approved.

Rule 63(17). The footnotes to the Comment and the last sentence of the Comment have not been approved.

Rule 63(18)(19). The last sentences in the Comments have been slightly revised.

Rule 63(20). The punctuation in the Comment has been revised to carry out the scheme the Commission adopted in part at the May meeting.

Rule 63(21). This subdivision has been revised to carry out the action of the Commission. Neither the subdivision nor the Comment have been acted upon as yet. Consideration should be given to deleting the last sentence of this subdivision. It adds nothing to the existing law and is not appropriate for inclusion in the URE Hearsay Article; moreover, the Comment makes clear that the subdivision does not affect the effect to be given to the judgment.

Rule 63(22). Except for the first two sentences, the entire Comment is new.

Rule 63(25). The last sentence of the Comment is new.

Rule 63(26a). This is a new subdivision created out of former (26)(b)(ii).

Rule 63(28). The subdivision as revised has not been approved. The Comment also has not been approved.

Rule 63(29). The second sentence of the Comment is new. The second paragraph of the Comment has been rewritten.

Rule 63(30). The Comment has been revised to accomodate the changes made in the subdivision at the May meeting.

Rule 63(31). Further consideration of this subdivision was deferred at the May meeting. The staff suggests the changes in language shown by strikeout and underline in the Comment as a way of resolving the impasse that has developed.

Rule 64. The Comment needs to be approved.

Rule 65. The Comment has been revised.

Rule 66. The Comment has been revised to indicate that cases may be found in which such evidence has been admitted.

Rule 66A. This is the former Rule 63A. Inasmuch as the Commission decided that this would not be codified but would be included as an uncodified section of the enactment, the staff believes that the section is more appropriately located at the end of the URE article. Slight modifications in the Comment have been made to accomodate the revision.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

In this portion of the recommendation, the code sections to be repealed have been set forth verbatim. The Commission should now

decide whether any changes are to be made in the form of the comments.

C.C.P. § 2016. The Commission should defer consideration of the proposed revision until Rule 62(6)(a) is considered in detail.

C.C.P. § 2047. This revision was made to carry out the direction of the Commission at the May meeting. The specific language and the explanation have not been considered by the Commission.

Penal Code §§ 686, 1345 and 1362. These sections are set out here so that the recommendation may be complete. Consideration of the proposed revisions and the explanations, though, should be deferred until Rule 62(6)(a) is considered in detail.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

6/15/61

First Supplement to Memorandum No. 19(1961)

Subject: Uniform Rules of Evidence (HEARSAY); RULE 62(6)(a)

At the May meeting of the Commission, concern was expressed that Rule 62(6)(a) may defeat a privilege otherwise provided by the URE privilege rules. Because of this concern, no decision was made in regard to the staff's recommended changes in C.C.P. § 2016 and Penal Code §§ 686, 1345 and 1362; for the Commission did not wish to substitute the "unavailable as a witness" standard contained in Rule 62(6)(a) for the standards of unavailability contained in the cited code sections unless it was sure that the substitution would not permit the admission of privileged information. This memorandum will discuss Rule 62(6)(a) and how it will operate in relation to the various privileges and hearsay exceptions.

Rule 62(6) defines the term "unavailable as a witness" as it is used in certain URE hearsay exceptions. Subdivision (6)(a) provides that a person is unavailable as a witness if he is exempted from testifying concerning the matter to which his statement is relevant on the ground of privilege.

A person must be "unavailable" within the meaning of the defined phrase as a condition for the admissibility of his out-of-court statement under the following exceptions to the URE hearsay rule:

1. Rule 63(3) - former testimony.
2. Rule 63(10) - declarations against interest.
3. Rule 63(12)(c) and (d) - statements relating to the making or nature of the declarant's will, statements of previous intent, plan, motive or design where such mental state is itself an issue.
4. Rule 63(23) - statements concerning the declarant's own family history.
5. Rule 63(24) - statements concerning pedigree of other members of declarant's family.

Rule 62(6)(a) probably will not be applied to any great extent insofar as the exceptions numbered 3, 4 and 5, above, are concerned. The declarants in those situations are more than likely to be dead. However, there may be many opportunities to apply the rule to permit admission of former testimony and declarations against interest. Hence, this memorandum will deal only with these exceptions. The memorandum will consider the operation of 62(6) in relation to the attorney-client privilege, the physician-patient and the privilege against self-incrimination. From a consideration of the operation of Rule 62(6)(a) in connection with these privileges, the Commission should be able to determine whether Rule 62(6)(a) is a desirable provision.

Attorney-client privilege

Case 1. D is charged with the commission of a sex offense against a child. D claims that the charge arises out of mistaken identity and that X actually committed the

offense. X has written a letter to Avaricious, a lawyer, for advice as to his legal rights, stating in the letter that he committed the offense. At the trial of D, X is called as a witness, but X denies his guilt. X is then asked to tell what he wrote to Avaricious. X invokes the attorney-client privilege, and his claim of privilege is upheld. Avaricious, too, is called, but X again invokes the privilege. Gumshoe, a private detective, is then called. Gumshoe relates that he rifled Avaricious' office and found the letter from X. Objections on the grounds of hearsay and privilege. D argues that the letter contains a declaration against penal interest and is admissible under Rule 63(10) because X is unavailable as a witness on the ground of privilege.

Ruling: Objection on the ground of privilege sustained. Under the Uniform Rules -- Rule 26(2)(c)(ii) -- this ruling is proper. The hearsay exception for declarations against interest does not make such declarations admissible; the exception declares that, if the declarant is unavailable at the trial because of privilege, the declaration is not inadmissible under the hearsay rule. Any other rule of exclusion is still operative. Here, there is another rule of exclusion. Rule 26 provides that the client has a privilege to prevent "any person from disclosing the communication if it came to the knowledge of such person (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client . . . ." The communication

involved in the given case came to the knowledge of Gumshoe in a proscribed manner; hence, X, the client, has a privilege to prevent Gumshoe from disclosing the communication.

Case 2. Same case as in case 1. At the preliminary hearing, Avaricious testifies that he saw a person resembling D near the scene of the crime shortly before the crime was committed. Under cross-examination at the preliminary hearing, Avaricious -- having received no fee from X -- relates X's confession; however, he explains that X's confession is not credible because X is suffering from an emotional problem that causes him to confess falsely to antisocial conduct. X is not present at the hearing and does not consent to Avaricious' testimony. At the trial, D seeks to introduce the testimony of Avaricious at the preliminary hearing. D claims the testimony is admissible as former testimony under Rule 63(3) because Avaricious is now unavailable as a witness on the ground of privilege, that the declaration against interest of X to which Avaricious testified is admissible under Rule 63(10) because X is unavailable on the ground of privilege, and both such declarations are now admissible under Rule 66 (multiple hearsay). Objection on the ground of privilege.

Ruling: Objection sustained. Under Rule 26(2)(c)(iii) the ruling is proper. Here, again, there is a rule of exclusion that prohibits the introduction of evidence that is not inadmissible under Rule 63. Rule 26 provides that the client has a privilege to prevent "any person from

disclosing the communication if it came to the knowledge of such person . . . (iii) as a result of a breach of the lawyer-client relationship." The communication was revealed at the preliminary hearing in violation of the lawyer-client relationship despite the nonpayment of the fee (People v. Singh, 123 C.A. 365 (1932)); hence, X, the client, has a privilege to prevent anyone from disclosing what Avaricious said concerning the communication at the preliminary hearing.

Physician-Patient

Case 3. D is also the defendant in a civil assault case arising out of the same offense involved in Cases 1 and 2. X has also consulted Headshrinker, a psychiatrist, in order to obtain psychiatric care and treatment so that he can be cured of his propensity for antisocial conduct of this sort. In order for Headshrinker to provide proper treatment, X has revealed the offense in a written narrative statement which he has given to Headshrinker. At the trial, D calls X as a witness and asks X concerning his statements to Headshrinker; but X invokes the physician-patient privilege. Headshrinker, too, is prevented from testifying by a timely invocation of the privilege. D then calls Gumshoe. Gumshoe relates that he rifled Headshrinker's office and found X's statement. D offers the statement in evidence. Objections on the grounds of hearsay and privilege.

Ruling: Objections overruled. Under Uniform Rule 27, the physician-patient privilege does not protect the patient

against disclosure of communications by persons who obtained knowledge or possession of the communication without the knowledge or consent of the patient. Rule 27 permits the patient to prevent disclosure of the communication by a witness if the witness is (i) the patient himself, (ii) the physician or (iii) "any other peson who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty or non-disclosure by the physician . . . ." Here, Gumshoe falls within none of the categories. Hence, in his hands the communication is not subject to the physician-patient privilege. Under the Uniform Rules, the evidence is not inadmissible hearsay. It is a declaration against penal interest under Rule 63(10) and the declarant is unavailable as a witness under Rule 62(6)(a) because of privilege.

It should be noted, though, that if 62(6)(a) were deleted from the rules, the statement -- even though not privileged -- would be inadmissible hearsay. If it is undesirable from a policy standpoint to permit the introduction of this type of evidence, the staff suggests that the privilege be broadened to protect it. But the evidence should not be excluded by the hearsay rule, for it is just as reliable as it would be if X had become unavailable because he left the vicinity or because of insanity.

Case 4. In the criminal trial of D, Headshrinker is called as a witness and asked about X's confession. Objections on the grounds of hearsay and privilege.

Ruling: Objections overruled. The physician-patient privilege does not apply in a criminal case under either the Uniform Rules or existing California law. However, the statement is hearsay and does not fall within the declaration against interest exception, for X is available as a witness and has testified by denying the commission of the offense. Nonetheless, the statement is admissible under Rule 63(1) as a prior inconsistent statement which may be received as proof of the truth of the matters stated.

Case 5. After D has been acquitted in the criminal trial as a result of Headshrinker's testimony, the civil action against D is brought to trial. D again calls Headshrinker to testify to X's confession. X, however, invokes the physician-patient privilege and the court properly refuses to permit Headshrinker to testify. D then offers Headshrinker's testimony in the previous criminal action. Objections on the grounds of hearsay and privilege.

Ruling: Objections overruled. As pointed out before, the physician-patient privilege allows the patient to prevent disclosure of a confidential communication only by (i) the patient himself, (ii) the physician or (iii) "any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician . . . ." Headshrinker's prior testimony was not a breach of his duty of nondisclosure, for he had no duty of nondisclosure in the criminal case. The evidence here, whether in the form of

testimony by a person who heard the former testimony or in the form of an authenticated transcript, does not fall within the proscribed categories. Therefore, it is not subject to the privilege. The testimony is not inadmissible under the hearsay rule, for it is admissible as former testimony under Rule 63(3)(b).

Again, Headshrinker's former testimony would be inadmissible as former testimony if Rule 62(6)(a) were deleted. Even though not privileged, the evidence would be inadmissible hearsay because Headshrinker is not "unavailable as a witness." Again, if the Commission believes that it is desirable for policy reasons to exclude this evidence, the staff believes the privilege should be broadened. The evidence should not be excluded by the hearsay rule. If D were fortunate and Headshrinker were killed or if Headshrinker merely left the jurisdiction, the former testimony would come in despite X's assertion of privilege, for Headshrinker would clearly be "unavailable." This evidence is no less reliable merely because X can successfully invoke the physician-patient privilege to prevent Headshrinker from testifying.

Self-Incrimination

Case 6. The facts are the same as in the foregoing cases. But, when X is called at the criminal trial of D, X refuses to testify on the ground of self-incrimination. D calls Headshrinker to testify to X's confession. Objection on the grounds of hearsay and privilege (physician-patient).

Ruling: Objections overruled. The physician-patient privilege is not applicable in criminal cases. The statement is a declaration against penal interest and is admissible under Rule 63(10) because X is unavailable as a witness on the ground of privilege (self-incrimination).

If Rule 62(6)(a) were deleted, the statement would be inadmissible hearsay because X is not "unavailable as a witness." Peculiarly enough, if X had fled, that fact would have been admissible to prove X's guilt because that fact is not hearsay; if X had denied his guilt, his confession would have been admissible as an inconsistent statement without regard to unavailability; and if X had merely removed himself 150 miles -- beyond the court's subpoena power -- his confession would be admissible because he had become "unavailable." His prior confession is no less trustworthy when he appears and refuses to talk than it is when he refuses to come near enough so that he can be compelled to appear. Therefore, the confession -- subject to no privilege -- should not be excluded on the ground of hearsay.

Conclusion

The foregoing examples are sufficient to show that Rule 62(6)(a) does not operate to impair any of the privileges. If the privilege is broad, like the attorney-client privilege, the holder of the privilege is fully protected against

disclosures by eavesdroppers and against disclosures in violation of the confidential relationship. Nothing in 62(6)(a) impairs the protection given by the privilege. It does not permit the introduction of any evidence protected by the privilege. On the other hand, if the privilege is narrow, 62(6)(a) will at times permit confidential communications to be introduced -- but only because the evidence sought to be introduced is not within the privilege. In these situations, the evidence will be admitted if the declarant goes 150 miles away because the information is not privileged; but, unless 62(6)(a) is approved, the same unprivileged evidence will be excluded -- not on the ground of privilege, but on the ground of hearsay -- if the declarant appears at the trial and refuses to say anything.

The staff believes that 62(6)(a) declares a logical and desirable standard for "unavailability" and that it should be retained. If the protections provided by the privileges are not broad enough, the privilege rules should be revised to provide the protection desired.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

6/19/61

Second Supplement to Memorandum No. 19(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Hearsay - Revised Rule 63(3); C.C.P. § 2016; P.C. §§ 686, 882, 1345, and 1362.)

This memorandum will consider the desirability of substituting the "unavailable as a witness" standard of Revised Rule 62(6) and (7) for the standards now set forth in C.C.P. § 2016. The memorandum will also consider the desirability of amending Penal Code §§ 686, 1345, and 1362 to accommodate the Commission's recommendations relating to hearsay.

In connection with the problems involved in these code sections, Revised Rule 63(3) will also be considered, for there are still some ambiguities left in that subdivision. Since the decisions to be made in regard to Revised Rule 63(3) may influence the decisions to be made upon the other problems, Revised Rule 63(3) will be discussed first.

REVISED RULE 63(3)

The problem involved in Revised Rule 63(3) is whether a deposition taken in a former action, but not introduced in evidence in the former action, is admissible in the subsequent action. The preliminary language of Revised Rule 63(3) states that it applies to "testimony given under oath or affirmation as a witness in another action or proceeding . . . or testimony in a deposition taken in compliance with law in such an action or proceeding . . . ." This language seems to imply that testimony in unintroduced depositions may be introduced in the subsequent trial, for the term beginning "testimony given under oath . . ."

seems broad enough to include deposition testimony that is actually read into evidence. However, paragraph (a) of Revised Rule 63(3) provides that former testimony may be introduced if it "is offered against a party who offered it in evidence on his own behalf in the other action . . . or against [his] successor in interest." Unless a deposition is introduced at the trial, the testimony taken in the deposition is not offered on behalf of anyone. The witness in a deposition "'belongs' to neither side." C.C.P. § 2016(f) provides "A party shall not be deemed to make a person his own witness for any purpose by taking his deposition." A deponent does become the witness of a party if the party introduces the deposition in evidence. (C.C.P. § 2016(f).) Hence, it appears that former testimony contained in deposition taken, but not introduced in evidence, in another action may not be introduced in a subsequent action under paragraph (a), for such evidence was not offered by anyone "on his own behalf" in the former action. This result seems proper, though, for a person does not vouch for the testimony in an unoffered deposition in the same way that he does for evidence that he introduces at a trial. Hence, no change is recommended in paragraph (a).

Paragraph (b) of Revised Rule 63(3) permits former testimony to be introduced in a civil action if "the issue is such that the party against whom the testimony was offered in the other action or proceeding had the right and opportunity for cross-examination" with a motive similar to that which the party against whom the evidence is offered has. Because of the reference to "party against whom the testimony was offered", the paragraph cannot be applied to testimony in a deposition if the deposition was not offered in evidence. The deposition section itself, C.C.P. § 2016,

does not liberalize the rule. It provides that the deposition may be used in a different action when the first action is dismissed and the second action involves the same parties, or their successors, and the same subject matter. So far as other actions than the ones specifically mentioned are concerned, § 2016(d) apparently leaves the matter to the general operation of the hearsay rule. Take this example:

An accident occurs between an automobile, driven by Hotrod, and a Greyhound bus driven by Lushwell. Commuter, a passenger on the bus, is injured. Hotrod begins an action against Greyhound and Lushwell. Hotrod takes the deposition of Bystander who testifies that the bus "was way over the white line" and that "the driver was drunk." Greyhound settles with Hotrod, and his action never comes to trial. Commuter then begins his action against Greyhound. Bystander can no longer be found (his neighbors report that he left on a round-the-world cruise as soon as Commuter's action was filed). At the trial, Commuter offers Bystander's deposition. Objection on the ground of hearsay.

Ruling: Objection sustained. Commuter offers to prove that Greyhound financed Bystander's trip. Objection to the deposition still sustained. The deposition is not admissible under C.C.P. § 2016, for that section covers only (1) the action in which the deposition is taken and, (2) if the action in which the deposition is taken is dismissed, another action involving the same parties (or their successors) and the same subject matter . Section 2016 does not purport to cover the testimony-in-former-actions problem. The deposition is not admissible under Revised Rule 63(3)(a) or (b)

because it was never "offered" on behalf of or against anyone in a previous action. The deposition is not admissible under Revised Rule 63(3)(c), for that subdivision applies only to criminal actions or proceedings. The fact that Bystander is unavailable, or the fact that Bystander is unavailable at the instance of Greyhound, does not change the ruling, for the statement is hearsay under Rule 63 and falls within no exception.

In constrast with paragraphs (a) and (b), paragraph (c) of Rule 63(3) does not require the deposition to have been offered in the prior action. Thus, if in the given example Lushwell is prosecuted for felony drunk driving, Bystander's deposition is no longer inadmissible hearsay. This is because paragraph (c) merely requires that the party against whom the testimony is offered have the right and opportunity for cross-examination in the former proceeding with a similar motive to that which he has in the criminal proceeding. There is no requirement that the deposition in the former action be offered on behalf of or against anyone. (It should be noted, however, that unless Pen. C. § 686 is amended, Revised Rule 63(3), insofar as it applies to criminal proceedings, relates only to the right of the defendant to introduce former testimony; for the prosecution is limited by the defendant's right of confrontation under Pen. C. § 686. This will be discussed more fully later.)

The Commission should also note that paragraph (c) apparently forbids the introduction of testimony at the preliminary in a subsequent action even though the evidence may have been introduced in the trial of the former action. So far as existing law is concerned, it appears that depositions taken in prior actions, but not offered in evidence in such

actions, are admissible as former testimony in subsequent actions between the same parties or their successors in interest under the provisions of C.C.P. § 1870(8). (Briggs v. Briggs, 80 Cal. 253 (1889) .) The Commission has tentatively determined to repeal C.C.P. § 1870(8) on the grounds that it is superseded by Revised Rule 63(3).

The questions to be resolved by the Commission, then, are:

1. Should a deposition taken in a prior action, but not introduced in evidence in such action, be admissible in a later civil action against anyone who has a motive to cross-examine similar to that of any party to the prior action?

If so, this may be accomplished by revising the first portion of paragraph (b) to read. "(b) In a civil action or proceeding, the issue is such that [~~the~~] a party [~~against whom the testimony was offered in the other~~] to the former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar . . . ."

2. Should a deposition taken in a prior action, but not received in evidence in such action, be admissible in a subsequent action only if the party against whom the evidence is sought to be introduced was a party to the former action?

If so, this may be accomplished by leaving paragraph (b) as is -- applying only to introduced depositions -- and by amending paragraph (c) to delete the "criminal action" limitation.

3. Should the testimony at a preliminary hearing in a prior criminal action, if received in evidence in such action, be admissible in a subsequent criminal action?

If so, this may be accomplished by revising the exception

in paragraph (c) to read: ". . . except that testimony given at a preliminary examination, but not received in evidence, in the other action or proceeding is not admissible."

4. Should a deposition taken in a prior action, but not received in evidence in such action, be inadmissible in a subsequent criminal action?

If so, this may be accomplished by revising the exception in paragraph (c) to read: ". . . except that testimony given at a preliminary hearing or in a deposition, but not received in evidence, in the other action or proceeding is not admissible."

In considering the foregoing questions, the Commission should keep in mind that, as Pen. C. § 686 now reads, Rule 63(3)(a) and (c) only limits the matters that may be introduced by the defendant in a criminal case. Under Penal Code § 686, the prosecution may not introduce former testimony from any previous case. (See People v. Bird, 132 Cal. 261 (1901).)

Another problem involved in Revised Rule 63(3) relates to its introductory language, "Subject to the same limitations and objections as though the declarant were testifying in person. . . ." This language indicates that the competency of the testimony is to be judged as of the time it is offered in evidence. In Professor Chadbourn's study, dated September 29, 1958, on "Whether Rules Which Disqualify Certain Persons as Witnesses Also Disqualify Hearsay Declarants" he indicates that certain rules of disqualification clearly apply only as of the time that the former testimony was given. For instance, the

disqualification for insanity or infancy is clearly determined as of the time that the former testimony was given. The applicable rule insofar as the disqualification of a spouse is concerned is not so clear. [1]

So far as the Dead Man's Statute is concerned, the law is again uncertain.[2]

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1 In People v. Chadwick, 4 Cal. App 63 (1906), defendant was prosecuted for forgery, his wife testifying without objection at the trial. Defendant was then prosecuted for perjury in the first trial. The transcript of his wife's testimony at the first trial was read without objection in the second trial. Defendant invoked the spouse rule to prevent the wife from testifying at the second trial. On appeal, the District Court of Appeal affirmed and stated the broad proposition that the wife's prior testimony was admissible because the spouse rule does not prevent the showing of admissible hearsay declarations by the wife. The Supreme Court denied a hearing, but it commented that the judgment of the District Court of Appeal was sufficiently supported by the fact that no objection was raised to the introduction of the transcript. The court also said that such portions of the transcript as were needed to show the materiality of the defendant's perjured testimony were also admissible against him. The Chadwick case has been cited since for its broad statement that the spouse rule does not prevent the introduction of admissible hearsay declarations by a spouse (First National Bank v. De Moulin, 56 Cal. App. 313 (1922) People v. Peak, 66 Cal. App.2d 894(1944)); and several cases may be found in which admissible hearsay has been held not to be excluded by the spouse rule (e.g., People v. Swaile, 12 Cal. App. 192(1909) (letter from defendant to wife containing confession admitted); but no other case has been found involving the former testimony problem.

2 In Rose v. Southern Trust Company, 178 Cal. 580 (1918), the Supreme Court held that the deposition of a party and the testimony of a party taken in a former action against the decedent while the decedent was alive were inadmissible in an action to enforce a claim against the estate even though former testimony of the decedent was also introduced. The court relied in part upon Mitchell v. Haggenmeyer, 51 Cal. 108 (1875), which held that a deposition taken in the action against the estate prior to the enactment of the Dead Man's Statute was inadmissible on the trial of the action after the enactment of the deadman's statute. In McClenahan v. Keyes, 188 Cal. 574 (1922), the Supreme Court held that a defendant executor waived the Dead Man's Statute by taking the plaintiff's deposition, for a party must make his objections to the competency of a witness at the time of the taking of the deposition. These cases have not been overruled. However, in Kay v. Laventhal, 78 Cal. App. 293 (1926), a district court of appeal, without citation of any authority, held that the deposition of a plaintiff taken while the decedent was alive is admissible against the estate. The

The Commission may resolve the uncertainties in the existing law by revising Rule 63(3) to indicate clearly the time when the competency of the former testimony is to be determined. The staff recommends that the more recent cases (see footnote 2) be followed and that the competency of the former testimony be judged in all cases as of the time the former testimony was given. Specific language to achieve this result is not suggested. But the staff suggests that the policy question be resolved so that appropriate changes may be made upon revision of Rule 63(3) to incorporate other suggested changes.

Supreme Court denied a hearing. McKee v. Lynch, 40 Cal. App.2d 216 (1940), followed Kay v. Laventhal, and the court pointed out that the numerous authorities -- including Rose v. Southern Trust Company -- holding that the plaintiff's deposition is not admissible if it was taken during the decedent's life were cited and discussed at length in the petition for a hearing presented to the Supreme Court in Kay v. Laventhal. A hearing was also denied in the McKee case. It was recently followed again in Hays v. Clark, 175 Cal. App.2d 565 (1959). Thus, there are two inconsistent lines of authority -- one established by the Supreme Court, the other by opinions of the District Courts of Appeal which the Supreme Court has refused to review. The scope of evidence to be excluded by the Dead Man's Statute is, of course, a matter to be determined when the statute is considered.

C.C.P. § 2016

The question to be resolved in connection with this section is whether the standard for unavailability as a condition for the introduction of a deposition taken in the same action should be consistent with the standard for unavailability as a condition for the introduction of testimony taken in a prior action, i.e., whether the URE standard of unavailability should be substituted for the standards for unavailability under C.C.P. § 2016.

"Unavailability" under C.C.P. § 2016 may be compared with "unavailability" under Revised Rule 62(6) by the following table. Where unavailability is relied on, the respective sections permit the testimony to be introduced if the declarant is:

Rule 62(6)	C.C.P. § 2016
(a) Privileged from testifying about the matter	No provision
(b) Disqualified from testifying to the matter	No provision
(c) Dead or unable to testify because of physical or mental illness.	(i) Dead; (iii) Unable to attend or testify because of age, sickness, infirmity, or imprisonment.
(d) Absent beyond reach of court's process and proponent could not have secured his presence with reasonable diligence.	(ii) Beyond 150 miles or out of State, unless it appears proponent procured the absence.
(e) Absent and proponent does not know and has been unable to discover whereabouts with reasonable diligence	(iv) Absent and proponent has been unable to procure attendance by subpena

Revised Rule 62(7) provides that a declarant is not unavailable if any of the listed conditions is due to the procurement or wrongdoing of the proponent. There is no similar condition in C.C.P. § 2016 applicable to all of the conditions listed.

C.C.P. § 2016 also permits a deposition to be used when such exceptional circumstances exist as to make such use desirable. This provision is not considered here because it is not a condition involving unavailability.

It is apparent from the foregoing table that there is not a great amount of difference between the standards except insofar as Revised Rule 62(6) adds privilege and disqualification as grounds for unavailability. To understand what the substitution of the URE standard would mean, then, it is necessary to consider how the additional Revised Rule 62(6) grounds, - privilege and disqualification - would operate in connection with C.C.P. § 2016.

In the First Supplement to Memorandum No. 19(1961), it was pointed out that Revised Rule 62(6)(a) does not permit privileged evidence to be introduced. It only permits unprivileged evidence to be introduced which would be introduced anyway if the declarant stayed at least 150 miles from the court. The operation of Revised Rule 62(6) will be similar in relation to C.C.P. § 2016. Take this example:

Self-incrimination. [This privilege is chosen because it is about the only one that would not be waived by testifying in a deposition anyway.]

> P, a pedestrian, is struck by a green Buick while crossing a street in a cross-walk. The automobile does not stop. P sues D, alleging that D is the driver and that D failed to stop for a red light. D denies committing the offense. D locates a witness, W, who will testify at the trial that the car involved had a dented left rear fender and a license number beginning ZT . . . .

D then locates X, the owner of a green Buick meeting W's description, and takes his deposition. X, still thinking he is in the clear, admits in the deposition that he owns a green Buick, that it has a dented left rear fender, that its license number is ZTC 335, and that he was driving it at the particular time involved. At the trial, D calls W, then calls X. X, seeing that D has discovered his complicity, invokes the privilege against self-incrimination. D then offers X's deposition. Objection on the ground of hearsay.

Ruling: Objection sustained. The testimony does not fall within the declaration against penal interest exception, nor does it fall within any other exception to the hearsay rule. The witness is not "unavailable" as defined in C.C.P. § 2016, so the testimony is not admissible under that section. Of course, the judge might rule that "such exceptional circumstances exist as to make it desirable . . . to allow the deposition to be used." But, there is no assurance in Section 2016 that the judge will so rule.

If the "unavailability" standards of Revised Rule 62(6) were substituted, the evidence would be clearly admissible.

It should be noted that, if the action against D were a different civil action than the one in which the deposition was taken, the deposition would be admissible as former testimony under Revised Rule 63(3) because the Rule 62 standard of unavailability is there used. However, if D were prosecuted for the "hit-run," the deposition would not be admissible, for under Revised Rule 63(3)(c) the party against whom the deposition is being

offered - the prosecution - was not a party to the former proceeding. This matter will be developed more fully in the discussion of Penal Code § 686.

So far as Revised Rule 62(6)(b) is concerned, the addition of disqualification as a ground for unavailability under § 2016 would probably not change the existing law. The important thing to note is that, when a deposition is introduced, objection may be made to the deposition or any part of it for any reason which would require the exclusion of the evidence if the witness were then present and testifying. (C.C.P. § 2016(3).) Hence, if the deposition of a witness is inadmissible under the Dead Man's Statute, his deposition would remain inadmissible for subdivision (e) would still remain in C.C.P. § 2016. As pointed out previously, it is somewhat difficult to determine just what the existing law is.

But in any event, it is unlikely that the substitution of Revised Rule 62(6) will have any great effect on the existing law; for the admissibility of depositions taken from witnesses who are incompetent at the time of trial will depend upon the interpretation given by the Supreme Court to the provision that such depositions are subject to any objection which "for any reason . . . would require the exclusion of the evidence if the witness were then present and testifying."

As the amendment to § 2016 recommended by the staff would not effect any great change in the law, as the amendment would make the standards for the admissibility of former testimony and depositions the same insofar as these standards depend on unavailability, and as the amendment might, in some cases, permit unprivileged and competent evidence to be introduced which now might be excluded, the staff recommends that § 2016 be amended as indicated in the draft attached to Memorandum No. 19(1961).

When the Commission considered Rule 63(3), it assumed that the rule would be applicable to prosecution and defendant alike. Hence, standards were placed in the subdivision to protect the defendant's right of confrontation. For instance, former testimony is admissible in a criminal case only if the person against whom the evidence is offered was a party to the former action; and testimony at a preliminary hearing of a previous action is inadmissible. The Commission explained these requirements in the Comment as protections for the defendant's right of confrontation and cross-examination.

This assumption was not correct, however, and the carefully thought out policies for protecting the defendant actually curtail the defendant's rights. In People v. Bird, 132 Cal. 261 (1901), the Supreme Court pointed out that Penal Code Section 686 prohibits the prosecution from introducing former testimony except as provided in that section; but the defendant is not restricted by Section 686 - he may introduce any former testimony admissible under the general hearsay rule. Under Section 686, the prosecution may introduce only testimony taken at the preliminary hearing in the same case, testimony in a deposition taken in the same case and testimony given on a former trial of the same case. Insofar as the former testimony exception is broader, it is a rule of evidence available only to the defendant. As Section 686 has not been modified by the Commission, Revised Rule 63(3)(c) prohibits only the defendant from introducing testimony at a prior trial to which the prosecution was not a party and prohibits only the defendant from introducing former testimony given at the preliminary hearing of a different action.

If the Commission desires Revised Rule 63(3) to have the full meaning that was intended when the Commission redrafted this subdivision, Penal

Code § 686 should be amended to provide an exception for hearsay generally. Then Rule 63(3) would be operative in criminal actions to the same extent that other exceptions to the hearsay rule are operative. Such an amendment would also be desirable as a declaration of the existing law insofar as hearsay generally is concerned.

It was pointed out in the prior memorandum (No. 7 Supp. (1961)) that the second exception stated in Penal Code § 686 inaccurately states the existing law. Section 686 provides that a deposition taken under Section 882 may be read if the witness is dead, insane or cannot with due diligence be found within the state. However, Penal Code § 882 provides that depositions taken under its provisions may be read, except in cases of homicide, if the witness is unable to attend because of death, insanity, sickness, or infirmity, or continued absence from the state. Moreover, Penal Code § 686 does not provide for the reading of depositions which are admissible under Penal Code §§ 1345 and 1362. These contradictions in the present statutory law should be corrected by substituting a general reference to depositions that are admissible in criminal actions for the present incorrect cross-reference to Penal Code § 882.

Penal Code §§ 1345 and 1362

The staff has previously suggested the substitution of a reference to Rule 62 for the present standards of unavailability contained in these sections. Section 1345 relates to depositions of witnesses who may be unable to attend the trial. The section states that such depositions may be read by either party if the witness is unable to attend by reason of death, insanity, sickness, infirmity or continued absence from the state. For practical purposes, the only change that will be made by the substitution of the cross-reference to Rule 62 will be to add privilege and disqualification as grounds of unavailability. Take this example:

> D is charged with manslaughter. D claims that X is the real culprit. X is ill and in prison anyway, so he testifies in a deposition that he in fact did commit the crime. The prosecution doesn't believe X and goes ahead with D's trial. At the time of trial, X has fully recovered and regrets having made his previous statement. D calls X as a witness, but X invokes the privilege against self-incrimination. D then offers the deposition. Objection.
>
> Ruling: Objection sustained. X is not unavailable as defined in Section 1345 at the present time. If the Rule 62 definition of unavailability were substituted, the deposition would be admissible just as it would be under existing law if X had remained ill.

Section 1362 relates to depositions of material witnesses who are out of the state. Such depositions may be taken only on application of the defendant.

The staff suggests the substitution of the Rule 62 definition of unavailability so that the defendant may introduce the deposition even though the witness actually attends the trial and invokes either privilege or disqualification and refuses to testify.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Meeting

6/30/61

Second Supplement to Memorandum No. 15(1961)

Subject: Continuation of Study of the Uniform Rules of Evidence.

Mr. Lawrence C. Baker, Chairman of the State Bar Committee to Consider the Uniform Rules of Evidence, forwarded to me a copy of the minutes of the June 20, 1961 meeting of the Northern Section of the Committee. His letter of transmittal stated: "Will you please take particular notice of the last paragraph of these minutes."

The last paragraph of the minutes states:

> At this point the Committee discussed the question of the general direction which its work and that of the Law Revision Commission had been taking. We have been at work for more than three years during which many changes have been proposed by both the Committee and the Law Revision Commission. These changes may well deprive the so-called Uniform Law of any semblance of uniformity with relation to the law as it may be adopted by other states. This being so the question arises in the minds of the Committee members as to the end which is sought here to be achieved. Is our purpose merely to adopt a new code of evidence for the State of California, and if that be so, is there a need for such a code? Doubts were expressed as to such need. Is our purpose to adopt a uniform law which will likewise be adopted in other states with preservation of the principle of uniformity? If the latter be the case, it would appear that our purpose has failed and the question therefore arises as to whether there is any point in continuing the study.

Although not listed on the agenda previously distributed to you, this matter should be discussed at the July meeting of the Commission so that Mr. Baker may be advised of the Commission's reaction to the view expressed by the Northern Section of the State Bar Committee. I have already advised Mr. Baker that the Commission will consider this matter at its July meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Meeting

Third Supplement to Memorandum No. 19(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rule 63(10))

The Southern Section of the State Bar Committee has suggested that the phrase "Except as against an accused in a criminal proceeding" be added at the beginning of the subdivision. Its reasons are as follows:

> It seemed to the members of the Southern Section that in the absence of language which would operate to prevent subdivision (10) from applying to an accused in a criminal proceeding, subdivision (10) would open a possible back door that would let in the declarations of co-conspirators without the safeguards that so carefully have been set up in subdivision (9)(b). The specific evil that concerns the Southern Section is that any statement made by a conspirator in the course of conspiracy may be admissible under subdivision (10) because it subjects the declarant to the risk of prosecution, and yet admitting such declarations under subdivision (10) would completely circumvent the safeguards that have been set up in subdivision (9).

The staff believes that the amendment suggested by the Southern Section is too broad. There is merit to the Southern Section's objection, however, and the defect can be corrected by a more modest limitation such as "(10) Subject to the limitations of subdivision (9)(b), ..."

Respectfully submitted,

Joseph B. Harvey

7/5/61

Fourth Supplement to Memorandum No. 19(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Hearsay)
Rule 63(3)

In Memorandum No. 19(1961) and the second supplement thereto, Rule 63(3) was discussed and several problems were pointed out. In this memorandum, Rule 63(3) is revised to reflect the changes suggested in the previous memoranda. To accommodate all of the suggested changes, Rule 63(3) has been broken up into three subdivisions -- one dealing with former testimony introduced against the party who previously introduced it, one dealing with former testimony from a declarant that a party had the opportunity to cross-examine on a previous occasion and one dealing with former testimony from a declarant that another person had an opportunity to cross-examine on a previous occasion. The text of the three subdivisions may be considerably shortened if the terms "former testimony" and "former action or proceeding" are defined. The staff recommends that definitions of these terms be added to Rule 62. Although the organization of Rule 63(3) has been substantially altered, the changes in language are not drastic and are shown by strikeout and underline. Following each subdivision, there is a comment indicating the reasons for the language used. Attached to this memorandum on pink paper are the revised rules and comments thereon as they will appear in the Commission's recommendation if the staff recommendations are adopted.

The proposed revisions are as follows:

Rule 62. As used in Rules 62 through 66:

* * *

(8) "Former testimony" means testimony given under oath or affirmation as a witness in [another] a former action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a deposition taken in compliance with law in such an action or proceeding.

COMMENT: This definition is that now stated in the preliminary language of Rule 63(3). The alterations shown are changes from the preliminary language of Rule 63(3) as now approved. The language of Rule 63(3) set forth above will be indicated by an omission (. . .) in the text of the rules set forth below.

(9) "Former action or proceeding" means not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the hearing is being conducted.

COMMENT: This definiton is, in substance, that recommended by the staff at pages 1-3 of Memorandum No. 19(1961). It clarifies the status of former testimony given in the same action under Rule 63(3). The term "the hearing" used in this definition appears in several places in Rules 62-66 and is defined in the general URE definition section, Rule 1, as follows: "'The hearing' unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing."

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:

* * *

(3) [~~Subject to the same limitations and objections as though the declarant were testifying in person,~~] Former testimony [. . . ~~but only~~] if the judge finds that the declarant is unavailable as a witness at the hearing and that [~~such~~] the former testimony is offered against a party who offered it in evidence on his own behalf in the former action or proceeding or against the successor in interest of such party.

COMMENT: This rule is now contained in Rule 63(3)(a). The omitted language, which is indicated here by the deletion (. . .), is the language used to define "former testimony" in Rule 62(8), above. The evidence involved here is not "subject to the same limitations and objections as though the declarant were testifying in person" because the evidence is offered against the person who previously offered it. If the evidence is sufficiently competent to establish such person's claim against another, he should not be heard to complain when another uses such evidence to establish a claim against him.

(3a) Subject to [~~the same limitations and objections as though the declarant were testifying in person,~~] any objection the party against whom the former testimony is offered could have taken and did not fail to make at the time the former testimony was given, former testimony [. . . ~~but only~~] if the judge finds that the declarant is unavailable as a witness at the hearing and that [~~in a criminal action or proceeding,~~] the party against whom the testimony is offered was a party to the [~~other~~] former action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing [~~in the action or proceeding in which the testimony is offered~~] except that the testimony given at a preliminary examination, but not received in evidence at the trial, in [~~the other~~] a criminal action or proceeding other than the action or proceeding in which the testimony is offered is not admissible under this subdivision.

COMMENT: This subdivision states in substance the rule now found in Rule 63(3)(c). The criminal action limitation is removed so that the subdivision may apply to all cases in which the evidence is offered against a person who was a party to the former action.

The provision for objection has been related to the time the former testimony was given. This is certainly the existing rule insofar as objections going to the mental competency of the witness are concerned. (See Chadbourn's study on "Whether rules which disqualify certain persons as witnesses also disqualify hearsay declarants" dated September 29, 1958, pp. 4-5.) Whether this is the existing law insofar as objections based upon the Dead Man's Statute are concerned is not clear, although the later cases indicate that it is. (See Second Supplement to Memorandum

No. 19(1961), note 2, page 7.) The proposed revision may change the law insofar as objections based upon the spouse disqualification rule are concerned, but here also the existing law is not clear. (See Second Supplement to Memorandum No. 19(1961), note 1, page 7.) The objection provision has also been limited so that a party may not raise objections that he failed to raise when the former testimony was given. The word "taken" is used in the objection provision in the same manner as it is used in Penal Code §§ 1345 and 1362, which provide for the admission of depositions in criminal actions.

Testimony in depositions taken, but not offered in evidence, in former actions is admissible under this subdivision, for there is no requirement that the former testimony be offered for or against anyone in the prior action. This appears to be existing law. (Briggs v. Briggs, 80 Cal. 253 (1889).)

Although evidence given at the preliminary hearing of a different criminal action is not admissible under this subdivision, the defendant in a criminal action may introduce such evidence against the prosecution under subdivision (3) above, and anyone may introduce such evidence in a civil action under subdivision (3b) below.

(3b) Subject to [~~the same limitations and objections as though the declarant were testifying in person,~~] any objection the party against whom the former testimony is offered could have taken at the time the former testimony was given, former testimony [. . . ~~but only~~] if the judge finds that the declarant is unavailable as a witness at the hearing, [~~and~~] that the former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding and that the issue is such that [~~the party against whom the testimony was offered in the other~~] a party to the former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing. [~~in the action or proceeding in which the testimony is offered~~]

COMMENT: This subdivision restates the rule now contained in Rule 63(3)(b). Under this revision, the former testimony with which it is concerned may be introduced against the prosecution in a criminal proceeding. Thus, as under existing law, the defendant has as much right to introduce

evidence in a criminal proceeding as he does in a civil proceeding, for the prosecution is not protected by any right of confrontation. (See Second Supplement to Memorandum No. 19(1961) pp. 13-15.)

As under (3a), testimony in depositions taken, but not offered in evidence, in a former action is admissible under this subdivision for there is no requirement that such former testimony be offered for or against anyone.

As the party against whom the testimony may be admitted under this subdivision may not have been a party to the former action, he is given the right to raise any objection to the former testimony that he could have raised at the time the former testimony was given.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

RULE 62. DEFINITIONS.

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

(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~~"] 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.~~] an officer or employee of:

(a) This State or any county, city, district, authority, agency or other political subdivision of this State.

(b) Any other state or territory of the United States or any public entity in any other state or territory that is substantially equivalent to the public entities included under paragraph (a) of this subdivision.

(5) "State" includes each of the United States and 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.~~]

(6) [~~(7)~~] Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" [~~includes situations where~~] means that the [witness] declarant 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-or] 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 and the proponent of his statement could not in the exercise of reasonable diligence have secured the presence of the declarant at the hearing. [,-or]

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

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

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

(b) If unavailability is claimed [under-clause-(d)-of-the-preceding paragraph] 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. [and-that-the-probable-importance-of-the-testimony-is-such-as-to-justify the-expense-of-taking-such-deposition.]

(8) "Former testimony" means testimony given under oath or affirmation as a witness in a former action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a deposition taken in compliance with law in such an action or proceeding.

(9) "Former action or proceeding" means not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the hearing is being conducted.

COMMENT

This Rule defines terms used in Rules 62-66. The Rule as proposed by the Commissioners on Uniform State Laws has been considerably revised in form in the interest of clarity of statement.

The significance of the definition of "statement" contained in URE 62(1) is discussed in the comment to the opening paragraph of Rule 63.

URE Rule 62(6) has been omitted because "a business" is used only in subdivsions (13) and (14) of Rule 63 and the term is defined there.

Rule 62 defines the phrase "unavailable as a witness," and this phrase is used in URE Rules 62-66 to state the condition which must be met whenever the admissibility of hearsay evidence is dependent upon the present unavailability of the declarant to testify. The admissibility of evidence under certain hearsay exceptions provided by existing California law is also dependent upon the unavailability of the hearsay declarant to testify. But the conditions constituting unavailability under existing law vary from exception to exception without apparent reason. Under some

exceptions the evidence is admissible if the declarant is dead; under others, the evidence is admissible if the declarant is dead or insane; under others, the evidence is admissible if the declarant is absent from the jurisdiction. For these varying standards of unavailability, Rule 62 substitutes a uniform standard.

The phrase "unavailable as a witness" as defined in Rule 62 includes, in addition to cases where the declarant is physically unavailable (dead, insane, or absent from the jurisdiction), situations in which the declarant is legally unavailable (exempted from testifying on the ground of privilege or disqualification). There would seem to be no valid distinction between admitting the statements of a dead, insane or absent declarant and admitting those of one who is legally not available to testify. Of course, if the out-of-court declaration is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege will not make the declaration admissible. The exceptions to the hearsay rule that are set forth in the subdivisions of Rule 63 do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law -- such as privilege -- which renders the evidence inadmissible, the court is not compelled to admit the evidence merely because it falls within an exception to the hearsay rule. Rule 62, therefore, will permit the introduction of hearsay evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or inadmissible for some other reason.

The last clause of URE Rule 62 has been deleted by the Commission for it adds nothing to the preceding language.

Subdivisions (8) and (9) have been added to permit convenient use of the defined terms in the former testimony exceptions, Rule 63(3), (3a) and (3b). The definition of former action or proceeding given in subdivision (9) is the same as that given by the California courts to the term "former action" contained in subdivision 8 of Code of Civil Procedure Section 1870.

Subdivision (3): Testimony in Former Action or Proceeding.

(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;~~] Former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that the former testimony is offered against a party who offered it in evidence on his own behalf in the former action or proceeding or against the successor in interest of such party.

COMMENT

The Commission recommends against the adoption of URE 63(3)(a). This paragraph 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 unavailability of the deponent. In 1957 the Legislature enacted a statute (C.C.P. §§ 2016 - 2035) dealing comprehensively with discovery and the circumstances and conditions under which a deposition may be used at the trial of the action in which the deposition is taken. The provisions then enacted respecting admissibility of depositions are narrower than URE 63(3)(a). The Commission believes that it would be unwise to recommend substantive revision of the 1957 discovery legislation before substantial experience has been had thereunder. Rule 63(32) and Rule 66A will continue in effect the existing law relating to the use of a deposition as evidence at the trial of the action in which the deposition is taken. Under existing law, the admissibility of depositions in other actions is apparently governed by the former testimony exception to the hearsay rule contained in subdivision 8 of Code of Civil Procedure Section 1870. Under the Uniform Rules as revised by the Commission, the admissibility of depositions in other actions will be governed by the former testimony exception contained in subdivisions (3), (3a) and (3b) of Rule 63.

The Commission recommends a substantial modification of URE 63(3)(b). URE 63(3)(b) as proposed by the Commissioners on Uniform State Laws has two important preliminary qualifications of admissibility: (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. The Law Revision Commission recommends that the first qualification be retained but that the second be substantially modified. Under the Commission's modification, the extent to which former testimony is objectionable depends upon whether the party against whom the evidence is

introduced was a party to the former proceeding and, if so, whether he permitted the evidence to be introduced at that time without objection. To accommodate this revision, the Commission has proposed three subdivisions dealing with former testimony: subdivision (3) which covers former testimony which is offered against a person who previously offered the testimony in his own behalf, subdivision (3a) which covers former testimony which is offered against a person who had the right and opportunity to cross-examine the declarant at the time the former testimony was given and subdivision (3b) which covers former testimony which is offered against a person whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant at the time the former testimony was given.

These provisions narrow the scope of the former testimony exception to the hearsay rule which is proposed by the Commissioners on Uniform State Laws. At the same time, they go beyond existing California law which admits testimony taken in another legal proceeding only if the proceeding was a former action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered. The testimony is made admissible only in the quite limited circumstances described in subdivisions (3), (3a) and (3b). 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.

Subdivision (3a): Testimony in Former Action or Proceeding.

(3a) Subject to any objection the party against whom the former testimony is offered could have taken and did not fail to make at the time the former testimony was given, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that the party against whom the testimony is offered was a party to the former action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing except that testimony given at a preliminary examination, but not received in evidence at the trial, in a criminal action or proceeding other than the action or proceeding in which the testimony is offered is not admissible under this subdivision.

COMMENT

This subdivision is discussed in the comment to subdivision (3).

Subdivision (3b): Testimony in Former Action or Proceeding.

(3b) Subject to any objection the party against whom the former testimony is offered could have taken at the time the former testimony was given, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing, that the former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding and that the issue is such that a party to the former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

COMMENT

This subdivision, together with subdivisions (3) and (3a), is discussed in the comment to subdivision (3). Former testimony is admissible in criminal cases under subdivision (3b) only against the prosecution. This limitation has been made to preserve the right of the person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty are at stake -- as they are in a criminal trial -- the Commission does not believe that the accused should be compelled to rely on the sufficiency of prior cross-examination conducted on behalf of some other person.

7/12/61

Fifth Supplement to Memorandum No. 19(1961)

Attached as Exhibit I are the minutes of the meeting held on June 10, 1961, by the Southern Section of the State Bar Committee to Consider the Uniform Rules of Evidence.

An examination of the minutes will disclose that some of the subdivisions of Rule 63 as previously approved by the Commission have now been approved by both sections of the State Bar Committee. Some of these subdivisions have been since redrafted by the Commission to improve the form of the subdivisions. It is not suggested that these subdivisions be reconsidered by the Commission. When the Commission completes its work on the tentative recommendation on hearsay and sends it to the State Bar Committee, the staff will advise the State Bar Committee on these changes.

The Southern Section notes the following matters in connection with the proposed adjustments and repeals of existing code sections. These should be considered by the Commission.

1. Both the Northern and Southern Sections believe that C.C.P. § 1849 should not be repealed. See Exhibit I, page 4. The Commission recommends repeal of this section.

2. The Southern Section believes that the second sentence of subdivision 5 of C.C.P. § 1870 should be retained. See Exhibit I, pages 5 and 6. The Commission recommends deletion of this sentence.

3. The Southern Section agrees with the Commission that C.C.P

§ 1848 should be repealed. However, the Commission may want to revise the comment under this section in the tentative recommendation in view of the comment of the Southern Section concerning this section. See Exhibit I, page 4.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

EXCERPT FROM

MINUTES OF MEETING OF SOUTHERN SECTION OF STATE BAR COMMITTEE

TO CONSIDER UNIFORM RULES OF EVIDENCE

[June 10, 1961]

Rule 63, subdivision (20).

The Baker letter states that the Northern Section has voted to adopt subdivision (20) as revised by the Law Revision Commission; that it does not appear that the Southern Section has acted upon this proposal.

The records of the Southern Section differ from those of the North. Our records show that prior to the joint meeting with the Law Revision Commission on October 8, 1958, the full State Bar Committee had disapproved subdivision (20) of Rule 63 on the ground that, while a judgment of previous conviction is relevant and probative, it is too prejudicial. At the 1958 joint meeting with the Commission, the State Bar Committee affirmed its disapproval of subdivision (20).

The only formal record that the Southern Section has with respect to action taken by the Northern Section on subdivision (20) is the record contained in the minutes of the meeting of the Northern Section held on April 23, 1958. Those minutes state as follows:

> "After an extended discussion, the Committee voted to disapprove Subdivision (20) in toto. It is the Committee's belief that the extension of the admissibility of proof of commission of a felony which the Subdivision permits is undesirable because the introduction of such evidence is always highly prejudicial to the person who was so convicted and the Committee believes that the countervailing argument of convenience is not sufficient to justify

the introduction of evidence so prejudicial. In addition, under the comparatively loose California practice, it's often not possible to determine precisely what fact or facts was or were essential to sustain a particular judgment of conviction of a felony."

Although Mr. Baker's letter dated March 16, 1961, to the Law Revision Commission indicates that the Northern Section as presently constituted has reconsidered and altered its former position, we are able to find no record of when such reconsideration took place or of the Northern Section's reasons for changing its position.

On the basis of this past record, the members of the Southern Section again gave consideration to the desirability of approving subdivision (20) in the form approved by the Commission. After reconsideration, the Southern Section concluded that the previous position of the State Bar Committee was sound; that evidence of a previous felony conviction is too prejudicial to warrant admissibility as an exception to the hearsay rule, despite its relevancy and probative value. Therefore, subdivision (20) was disapproved.

Rule 63, subdivision (23).

It was noted that the Northern Section, although agreeing that the Commission's wording of subdivision (23) may be somewhat awkward, nevertheless has approved the Commission's draft of this subdivision.

Previously, the Southern Section had suggested that the word "controversy" was too broad and might be construed as relating to non-legal as well as legal controversies; that the language of the subdivision regarding motive, etc. would have little practical application except as to the matter of age; and that, logically, the question of whether there was an existing controversy or a motive to misstate should go to weight rather than to admissibility.

After reconsideration, the Southern Section concluded that (i) since the Northern Section and the Commission are in agreement as to the language of this subdivision, the Southern Section should, for the sake of uniformity, withdraw its earlier objections regarding language; (ii) since any recommendation that would make motive for misstatement a matter of weight rather than admissibility would constitute a deviation from present California law that would have little, if any, chance for legislative approval, the Southern Section should withdraw its previous suggestion in that regard. The Southern Section then approved the Commission's current redraft of subdivision (23).

Rule 63, subdivision (24).

The Southern Section voted to approve the Commission's redraft of subdivision (24), for the same reasons that are given in support of the action taken upon reconsideration of subdivision (23).

Rule 63, subdivision (32).

The Southern Section previously had approved the Law Revision Commission's proposed new subdivision (32) but was of the opinion that since subdivisions (1) through (32) of Rule 63 establish standards of admissibility rather than inadmissibility, the wording of subdivision (32) should reflect this. The Northern Section, while recognizing that there may be some theoretical merit to the Southern Section's view, has indicated that it is content to accept the Commission's wording.

Upon reconsideration, the Southern Section decided to approve the Commission's draft of subdivision (20), but with the suggestion that two minor changes in the Commission's language might improve the wording. The changes suggested are shown by the underlined words in the following suggested

revised text:

"(32) Any hearsay evidence not made admissible by subdivisions (1) through (31) of this rule but declared by other law of this State to be admissible."

Repeal of sections of Code of Civil Procedure.

The Southern Section then considered the Commission's proposed repeal of certain sections of the Code of Civil Procedure and its proposed deletion of parts of other sections. The action taken by the Southern Section with respect to each of the code sections considered is indicated below, subject, of course, to the assumption that URE Rules 62-66, as revised, become law.

-- C.C.P. § 1848: Proposed repeal of this section was approved, despite the fact that Prof. Chadbourn does not recommend repeal (he fails to comment at all) and despite the fact that the section does not appear to have any particular applicability to the rules on hearsay. The members of the Southern Section felt that C.C.P. § 1848 is so ambiguous and, on its face, so idiotic that no useful purpose would be served by retaining it.

-- C.C.P. § 1849: The Southern Section agreed with the Northern Section that C.C.P. § 1849 should remain a part of our law and should not be repealed; that the matters covered by § 1849 are not covered by anything in the hearsay rules as adopted by the Commission.

-- C.C.P. § 1850: Proposed repeal of this section was approved.

-- C.C.P. § 1851: Proposed repeal of this section was approved.

-- C.C.P. § 1852: Proposed repeal of this section was approved.

-- C.C.P. § 1853: Proposed repeal of this section was approved.

-- C.C.P. § 1901: Proposed repeal of this section was approved.

-- C.C.P. § 1905: Proposed repeal of this section was approved.

-- C.C.P. § 1906: Proposed repeal of this section was approved.

-- C.C.P. § 1907: Proposed repeal of this section was approved.

-- C.C.P. § 1918: Proposed repeal of this section was approved.

-- C.C.P. § 1919: Proposed repeal of this section was approved.

-- C.C.P. § 1920: Proposed repeal of this section was approved.

-- C.C.P. §1920a: Proposed repeal of this section was approved.

-- C.C.P. § 1921: Proposed repeal of this section was approved.

-- C.C.P. § 1926: Proposed repeal of this section was approved.

-- C.C.P. § 1936: Proposed repeal of this section was approved.

-- C.C.P. § 1946: Proposed repeal of this section was approved.

-- C.C.P. § 1947: Proposed repeal of this section was approved.

-- C.C.P. §§ 1953e-1953h: Proposed repeal of these sections was approved.

-- C.C.P. § 1870: With one exception, the Scuthern Section agreed with the Commission that subdivision (2) through (8), and subdivisions (11) and (13), of C.C.P § 1870 should be deleted. The exception is that it seems to the Southern Section that the second sentence of subdivision (5) should remain a part of our law, although its language necessarily would have to be modified somewhat. As far as

the Southern Section has been able to determine, the subject matter of the second sentence of subdivision (5) is not covered in any of the new hearsay rules. Prof. Chadbourn, in his study, recommends that the second sentence of C.C.P. § 1870(5) should remain a part of our law.

-- C.C.P. §1951: Concurred in the recommendation made by the Commission that C.C.P. § 1951 should be reconsidered when the Uniform Rules relating to authentication are considered.

-- C.C.P. § 2047: Approved the Commission's recommendation that the first two sentences of this section be retained and that the last sentence be deleted.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BERROTERAN v. S.C. (FORD MOTOR COMPANY)**
Case Number: **S259522**
Lower Court Case Number: **B296639**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **fcohen@horvitzlevy.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S259522_OBOM_FordMotorCompany
REQUEST FOR JUDICIAL NOTICE	S259522_MJN_FordMotorCompany
ADDITIONAL DOCUMENTS	S259522_01 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_02 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_03 of 14 - Exhs. to MJN
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/13/2020

Date

/s/Frederic Cohen

Signature

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