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 4 OF 14, PAGES 759-992 OF 3537

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

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8/8/61

Memorandum No. 28(1961)

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

Attached on yellow paper is the tentative recommendation on hearsay revised in accordance with the actions taken by the Commission at its July meeting. The following matters should be noted:

Revision of URE Rules 62-66, page 3. The staff has added footnote 3 appearing at the bottom of page 3.

Rule 62. In the comment, footnote 4 and the "i.e." clause to which the footnote is appended have been added to clarify the manner in which Rule 62 will operate. The last paragraph of the comment has also been added to explain subdivisions (8) and (9) which were added by the Commission at its last meeting.

Rule 63(3) and (3a). Inasmuch as the language of the "subject to" clauses at the beginning of subdivision (3) and subdivision (3a) as approved by the Commission at the July meeting is identical, these subdivisions have been combined into one subdivision (3) relating to former testimony which is offered against the party who was a party to the action in which the former testimony was given. Subdivision (3b), as approved by the Commission at its July meeting, has been renumbered (3a). This subdivision could not be combined with the other subdivisions relating to former testimony because the "subject to" clause is substantially different.

The staff has changed the language of the "subject to" clause in

subdivision (3a) in order to carry out the policy decisions adopted by the Commission at its July meeting. Under the revision all objections are open to the party against whom the evidence is offered; however, objections based on competency or privilege are determined as of the time the former testimony was given.

The comments to subdivisions (3) and (3a) are new.

Rule 63(9a). At its July meeting, the Commission directed the staff to prepare language which would preserve the rule stated in Code of Civil Procedure § 1849 relating to admissions of predecessors in interest. Although Section 1849 mentions only predecessors in interest of real property, California permits declarations of predecessors in interest to be used against successors to either real or personal property. (Smith v. Goethe, 159 Cal. 628, 115 Pac. 223 (1911).) Accordingly, paragraph (a) of subdivision (9a) has been drafted so that it covers both real and personal property.

A similar principle is involved in the admissions of joint owners, joint debtors or other persons jointly interested. Such statements are admissible now under subdivision 5 of Code of Civil Procedure Section 1870. In the draft recommendation which was presented at the July meeting, the staff recommended that this subdivision be repealed. The explanation, as it appeared in the July draft, was as follows:

> This subdivision 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) insofar 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. [Except for the last sentence, this explanation for deleting the second sentence of § 1870(5) is the same as the explanation that was given for repealing § 1849.]

The Commission should note that the exception dealing with declarations of joint obligors, joint obligees, joint tenants and predecessors in interest was apparently omitted from the Uniform Rules by design and not by inadvertence. The Uniform Law Commissioners explain that these subdivisions "adopt the policy of Model Code Rules 506, 507 and 508." (Comment, URE 63(7).) The American Law Institute explanation for omitting this exception to the hearsay rule is as follows:

> The common law rules covering the first three situations [declarations of joint obligors or joint obligees, declarations of joint tenants, and declarations of predecessors in interest] do not expressly require that the declaration be against the interest of the declarant. In the cases dealing with declarations of joint obligors and joint obligees, and joint tenants, the admitted declarations are always against such interest. In cases dealing with declarations of a predecessor in interest, the English courts admit only those affecting the quantity or quality of the declarant's interest, and all the admitted declarations are against interest. The American cases admit also declarations which affect only the declarant's power to convey. In all but two or three stray instances, the admitted declarations were against interest. There is no reason why a hearsay declaration. . . which is self serving or which has no indicium of verity should be received against the party merely because he happens to be in the relation of joint obligor, or joint owner, or predecessor in interest with the declarant. The application of the common law rules has resulted in absurd distinctions, particularly in bankruptcy actions and actions for wrongful debt and on policies of insurance. This Rule, therefore, rejects the statement of the common law to this extent, and takes care of these declarations under Rule 509 [declarations against interest]. In so doing, it is contrary to only two or three decisions, none of which carefully considered the problem. [Model Code pp. 252-253.]

The foregoing argument assumes the availability of the declarant, for under the Model Code all hearsay evidence was admissible if the

declarant was unavailable. Although this Commission has rejected the Model Code's principle that hearsay from unavailable declarants should be admissible, the reasons stated for omitting this common law exception to the hearsay rule are as germane to our present problem as they were to the Model Code. The Uniform Law Commissioners were apparently persuaded by this rationale for they, too, omitted this exception from the Uniform Rules even though they rejected the Model Code's underlying principle that hearsay is admissible if the declarant is unavailable.

Paragraph (b) of subdivision (9a) has been drafted to state the existing exception for declarations of joint owners, joint debtors or other persons jointly interested which is now contained in the second sentence of C.C.P. § 1870(5). Although the question of whether the principle of § 1870(5) should be continued in the Rules of Evidence has not been decided as a policy matter, the staff has written this exception into subdivision (9a) and has made appropriate adjustments in the recommendations relating to the repeal and adjustment of existing statutes in order to be consistent with the action taken by the Commission in regard to § 1849. The staff, however, is persuaded by the ALI argument, and recommends the repeal of both §§ 1849 and 1870(5) with the explanation previously appended to § 1870(5) (quoted above).

As subdivision (9a) is new, neither the subdivision nor the comment thereto have been approved as to language.

Rule 63(10). The underscored language at the end of the subdivision has been added to carry out the action of the Commission at the July meeting. In the Comment, limitation "(4)" has been added to the last paragraph because of the change made in the subdivision by the Commission.

Rule 63(12). The next to the last paragraph of the comment has been added to explain more fully the limitations of subdivision (12).

Rule 63(15). The comment has been revised as directed by the Commission at its July meeting.

Rule 63(22). The third sentence of the comment has been added as a justification for this exception to the hearsay rule. The Commission was unable to agree on a justification for this exception at the July meeting. This explanation is that given by the American Law Institute in its report on this exception as it appeared in the Model Code of Evidence. (Model Code p. 524.)

Rule 63(29). In order to express more accurately the existing California law the entire comment has been rewritten. You will note that the first paragraph of the comment no longer indicates that paragraph (a) goes beyond existing California law. This revision appears to be justified by such cases as Russell v. Langford, 135 Cal. 356 (1902), which held that a statement in a will was admissible as proof of the truth of its contents even though the will was but a year old when the action was tried.

Adjustments and Repeals of Existing Statutes. At the July meeting some question was raised concerning the repeal of statutes referring to "declaration, act or omission" in reliance upon a provision of the Uniform Rules which refers only to statements. Please note footnote 8 at the bottom of page 77 which was placed in the recommendation to explain how the Uniform Rules supersede such sections.

Code of Civil Procedure

Section 1848. The Southern Section of the State Bar Committee agrees

with the Commission that Section 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. The Southern Section stated:

> 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.

Section 1849. The comment has been revised in view of the action of the Commission at the July meeting.

Section 1870(5). The comment relating to the second sentence of this subdivision has been revised in order to make it consistent with the action taken by the Commission when it considered Section 1849.

Section 2016. The question to be resolved here 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. Moreover, if D were prosecuted for the "hit-run," the deposition would be admissible, for under Revised Rule 63(3a) the party against whom the deposition is being offered - the prosecution - would have an interest and motive for cross-examination similar to that of the plaintiff in the civil action in which the deposition was taken. Substituting a reference to Rule 62 for the definition of unavailability now contained in § 2016, therefore, would merely permit depositions to be used in the action in which taken to the same extent that testimony and depositions in other actions can be used where the ground for such use is "unavailability."

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(e).) 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 in the Second Supplement to Memo. 19(1961) (see note 2 on page 7), 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 attached tentative recommendation.

Section 2047. This section and the comment thereto were revised 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. Some of the problems involved in Penal Code § 686 were developed quite fully in the Supplement to Memorandum No. 7(1961) dated 2/6/61. That discussion will not be repeated here. It is sufficient to point out here that § 686 states the defendant's right to confront the witnesses against him. Three exceptions are stated:

(1) Testimony at the preliminary examination may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(2) Testimony of a prosecution witness contained in a deposition taken under the provisions of Section 882 of the Penal Code may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(3) Testimony of a witness for either prosecution or defense given on a former trial of the same action may be read if the witness is "deceased, insane, out of jurisdiction" or "cannot with due diligence be found within the state."

Although the right of confrontation might be considered to be applicable to hearsay generally, the cases have apparently construed this section so that it applies to hearsay that is admitted under the former testimony exception only. Hence, hearsay is admissible despite the declaration of this section and despite the fact that the particular hearsay involved does not fall within one of the stated exceptions of this section.[1]

When the Commission considered Rule 63(3), it assumed that the rule would be applicable to prosecution and defendant alike. Hence, standards were drafted to protect the defendant's right of confrontation. This

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1. People v. Alcalde, 24 Cal.2d 177 (1944)(hearsay of victim admitted under state of mind exception); People v. Weatherford, 27 Cal.2d 401 (1945)(hearsay of decedent admitted under declaration against interest and state of mind exceptions); People v. Gordon, 99 Cal. 227 (1893)(testimony of witness at prior trial of same action inadmissible - third exception to right of confrontation was not enacted until 1911).

assumption was not correct. 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.

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. Without such an amendment, much of the language of Rule 63(3) and (3a) is meaningless.

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. Under § 1362, the deposition is admissible if the deponent is "unable to attend the trial." 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. Take this example:

> D has a reputation as a mobster, but has never been convicted of a serious crime. D is charged with bribery of public officials. X, a former public official suspected of receiving the bribe, has made his way to Mexico, and all attempts to extradite him have proved unsuccessful. D takes X's deposition under §§ 1349-1362 of the Penal Code. In the deposition, X testifies that D had nothing to do with the alleged bribe.
>
> As the prosecution does not want to lose a golden opportunity to convict D of something, it offers to transport X to the trial of D and to return him again to Mexico without arresting him on the bribery charge. X attends the trial under these circumstances. X is not called by the prosecution, but is called by D. X invokes the self-incrimination privilege. D offers the deposition. Objection.
>
> Ruling. Objection sustained. Under § 1362, the deposition

is admissible only if the deponent is unable to attend the trial. Since X is in attendance, even though he is privileged to refuse to testify, his deposition is inadmissible.

The substitution of the Rule 62 definition of "unavailability" would permit D to use X's deposition in these circumstances just as he would if X had still been in Mexico at the time of the trial.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

8/4/61

[COVER]

State of California

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

December 1961

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

December 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 URE 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,[2] 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 URE 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

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2. 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, revised as hereinafter indicated, be enacted as the law in California.[3] It will be seen that the Commission has concluded that many changes should be made in URE 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 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.

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[3] The final recommendation of the Commission on the Uniform Rules will indicate the appropriate code section numbers to be assigned to the rules as revised by the 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 [~~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 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.

(9) "Another action or proceeding" includes a former hearing or trial of the same action or proceeding.

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 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, i.e., where he is prevented from testifying by a claim of privilege[4] or is disqualified from testifying. 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

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[4] Under URE Rules 23-40, which will be the subject of a later recommendation of the Commission, a privilege must be claimed by the holder, or by some person

inadmissible, the court is not authorized 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) and (3a). The definition of "another 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.

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entitled to claim it for him, in order to be operative. Hence, under Rule 62, it will be necessary for the declarant to be called as a witness and for the privilege to be claimed before the court may find the declarant unavailable on the ground of privilege.

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;[5] 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

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5. Rule 22 will be the subject of a later study and recommendation by the Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:
As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing

statement at the time it was made, (iii) is offered after the witness testifies that the statement he made was a true statement of such fact and (iv) is offered after the writing is authenticated as an accurate record of the statement.

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

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 66A will continue in effect the present statutes which set forth the conditions under which affidavits are admissible.

Subdivision (3): Former Testimony Offered Against a Party to the 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;] Subject to the same limitations and objections as though the declarant were testifying in person other than objections to the form of the question which were not made at the time the former testimony was given or objections based on competency or privilege which did not exist at that time, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) The former testimony is offered against a party who offered it in evidence on his own behalf in another action or

proceeding or against the successor in interest of such party; or

(b) The party against whom the testimony is offered was a party to the action or proceeding in which the testimony was given 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 in a criminal action or proceeding testimony given at a preliminary examination in a criminal action or proceeding other than the action or proceeding in which the testimony is offered and testimony in a deposition taken in another action or proceeding is not admissible under this paragraph unless it was received in evidence at the trial of such other action or proceeding.

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) and (3a) of Rule 63.

The Commission recommends a 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 modified. Under the Commission's modification, the nature of the objections which may be taken to former testimony 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. In addition, the Commission's modification makes clear that the validity of objections based on privilege or on the competency of the hearsay declarant is determined by reference to the time the former testimony was given. Existing California law is not clear in this respect; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given but others indicate that competency and privilege are

to be determined as of the time the former testimony is offered in evidence.

To accomodate this revision, the Commission has proposed two subdivisions dealing with former testimony: subdivision (3) which covers former testimony which is offered against a person who was a party to the proceeding in which the former testimony was given and subdivision (3a) 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. However, the former testimony is admissible only if the party against whom it is offered previously offered it in his own behalf or if a party to the previous action had the right and opportunity to cross-examine the declarant at the time the former testimony was given with an interest and motive similar to that which the person against whom the evidence is offered has at the hearing. Thus, for example, a judge will exclude former testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action if he determines that the deposition was taken for discovery purposes and that a party did not subject the witness to a thorough cross-examination in order to avoid a premature revelation of the weaknesses in his testimony or in the adverse party's case. In such a situation, the

interest and motive for cross-examination on the previous occasion is substantially different than the interest and motive of the party against whom such evidence is being offered at the trial of another action.

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): Former Testimony Offered Against a Person Who May Not Have Been a Party to the Former Action or Proceeding.

(3a) Subject to the same limitations and objections as though the declarant were testifying in person other than objections based on competency or privilege which did not exist 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 action or proceeding in which the former testimony was given 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 is discussed in the comment to subdivision (3).

Former testimony is admissible in criminal cases under subdivision (3a) 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.

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 in 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 the 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 (9a): Declarations of Predecessors in Interest, Joint Owners, Joint Debtors and Other Persons Jointly Interested.

(9a) 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 a person from whom the party derived title to real or personal property and the statement concerned the property and was made while such person held title to the property.

(b) The statement is that of a joint owner, joint debtor or other person jointly interested with the party and (i) the statement was made before the termination of such relationship and concerned a matter within the scope of such relationship 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.

COMMENT

Paragraph (a) of this subdivision restates in substance the principle of the existing California law found in Section 1849 of the Code of Civil Procedure. Although Section 1849 literally applies only to real property, the existing California case law permits declarations of predecessors in interest to be used against successors to either real or personal property.

Paragraph (b) of this subdivision restates in substance the existing California law found in the second sentence of subdivision 5 of Section 1870 of the Code of Civil Procedure.

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 , except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.[~~;~~]

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"; (3) conditioning admissibility on the unavailability of the declarant and (4) prohibiting the use of such a declaration against the defendant in a criminal case if the declarant was in custody when the statement was made. 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)-(a)~~]

(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. [~~(1)-(a)~~]

(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 to prove such prior intent, plan, motive or design when it is itself an issue in the action or proceeding and the declarant is unavailable as a witness but not to prove any other fact.

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, in one respect, 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.

In another respect, though, paragraph (d) narrows the state of mind exception as presently declared by the California courts. In a recent criminal case, the California Supreme Court permitted statements reporting threats by the defendant to be introduced to show the state of mind of the declarant--to show the declarant's fear of the defendant--when the purpose of showing that state of mind was, not merely to show the declarant's fear, but to give rise to the inference that the defendant engaged in acts which gave rise to the fear. Previously, the courts uniformly had held that state of mind evidence could not be used to prove past acts, either of the declarant or of any other person. Paragraph (d) restores this limitation by permitting a statement of a past state of mind to be used to prove only that state of mind when the state of mind of the declarant is itself an issue and forbidding a statement of past state of mind to be used to prove any other fact. In this respect, paragraph (d) supplements paragraph (a) which does not permit evidence of a present memory or belief to be used to prove the fact remembered or believed. The Commission believes that this limitation is necessary to preserve 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 subdivision, "a business" includes every kind of business, governmental activity, 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 is not contained in the Uniform Act and inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookeeeping system, whether original or copies, and whether in book, card, looseleaf or some 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.

The Commission has added the words "governmental activity" to the definition of "a business" so that it may be clear from the face of the statute that records maintained by any governmental agency, including records maintained by other states and the federal government, are admissible if the foundational requirements are met. This addition reflects existing California law, for the Uniform Business Records as Evidence Act has been construed to be applicable to governmental records.

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 that the absence of a record of an act, condition or event warrants an inference that the act or event did not occur or the condition did not exist.

COMMENT

The evidence admissible under this subdivision is probably now admissible in California; but the courts have not clearly indicated 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 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;]~~

COMMENT

The Commission does not recommend subdivision (15). Much of the evidence referred to in this subdivision is admissible under the provisions of subdivision (13). If a report or finding of a public officer cannot meet the foundational requirements of subdivision (13), there is not a sufficient guarantee of the trustworthiness of the report or finding to warrant its admission into evidence.

Subdivision (16): Reports of Vital Statistics.

(16) [~~Subject to Rule 64,~~] Writings made as a record [,] or report [~~or finding of fact~~] of a birth, fetal death, death or marriage, if the judge finds that [~~(a)~~] the maker was [~~authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was~~] required by statute to file the writing 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 subdivision as revised by the Commission is limited to official reports concerning birth, death and marriage. Reports of such events occurring within the State are now admissible under the provisions of Section 10577 of the Health and Safety Code. The revised subdivision will broaden the exception to include similar reports from other jurisdictions. The Commission believes that the URE subdivision states too broad an exception to the hearsay rule in view of the great number and variety of reports that must be filed with various administrative agencies.

The cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

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.[6] 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

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6. Rule 68 will be the subject of a later study and recommendation by the Law Revision Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:
A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a)

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 cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

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the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

7. Rule 69 will be the subject of a later study and recommendation by the Law Revision Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:

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

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~~] fact, time and place of the marriage, 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 Health and Safety Code Section 10577 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 cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

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] A 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 cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

Subdivision (20): Judgment of Previous Conviction.

[~~(20)--Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment;~~]

COMMENT

The Commission declines to recommend subdivision (20). There is no counterpart to this exception in our present law. Evidence admitted under this subdivision would likely be given undue weight and would therefore be highly prejudicial to the party against whom it is introduced. There is no pressing necessity for creating such an exception: if the witnesses in the criminal trial are no longer available, their former testimony will in many cases be admissible under subdivision (3) of Rule 63; if the witnesses are still available, they can be called to testify concerning the disputed facts.

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~~] any fact which was essential to the judgment, evidence of a final judgment if offered by [a] the judgment debtor in an action or proceeding to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment; [~~, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;~~]

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of a warranty substantially the same as a warranty determined by the judgment to have been breached.

COMMENT

URE 63(21) restates in substance a principle of existing California law. The subdivision has been revised to incorporate a similar principle found in the cases dealing with warranties. The purpose of the subdivision is to make clear that such judgments are not inadmissible because they are hearsay. The effect to be given such judgments when introduced must be determined by other law. See, for example, Civil Code Section 2778(5) and (6) and Code of Civil Procedure Sections 1908 and 1963(17).

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]~~ United States or a state or territory of the United States or governmental subdivision thereof in land, if ~~[offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;]~~ the judgment was entered in an action or proceeding to which the entity whose interest or lack of interest was determined was a party.

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. Certainly evidence of this sort is superior to reputation evidence which is admissible on questions of boundary both under subdivision (27) and Code of Civil Procedure Section 1870(11). The Commission has revised the subdivision to require that the public entity involved be a public entity in the United States and a party to the litigation resulting in the judgment. The materiality condition has been deleted as unnecessary, for it merely reiterates the general principle that evidence must be material to be admissible.

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;~~] statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from 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 revised URE 63(23) to provide that a statement to which it applies is not admissible if the court finds that the statement was made under such circumstances that the declarant had a motive to deviate from the truth in making the statement.

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

(24) Unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from 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 - e.g., 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, as in 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 in such circumstances as to cast doubt upon 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 earlier statement made falls under subdivision (23) or (24) of Rule 63 but the subsequent 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.

Of course, if both statements are within exceptions to the hearsay rule, the evidence will be admissible under Rule 66.

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

(26) Evidence of reputation among members of a family, to prove the truth of the matter reputed, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage [;].

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.

Subdivision (26a): Entries Concerning Family History.

(26a) To prove 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, entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts or tombstones, and the like.

COMMENT

This subdivision restates in substance the existing California law found in subdivision (13) of Section 1870 of the Code of Civil Procedure.

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 trait of a person's character at a specified time is material,]~~ To prove the truth of the matter reputed, evidence of ~~[his]~~ a person's general reputation with reference ~~[thereto]~~ to his character or a trait of his character 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 the existing California law in substance. The materiality condition stated in the URE subdivision was omitted as unnecessary, for it merely reiterates the general principle that evidence must be material to be admissible. Of course, character evidence is admissible only when the question of character is material to the matter being litigated. The only purpose of the subdivision is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule.

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

(29) 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.

COMMENT

Paragraph (a) restates in substance the existing California law relating to recitals in dispositive instruments. Although language in some cases appears to require that the dispositive instrument be ancient, cases may be found in which recitals in dispositive instruments have been admitted without regard to the age of the instrument. The Commission believes that there is a 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. The words "offered as tending to prove the truth of the matter stated" have been deleted from the URE subdivision because they are unnecessary.

Paragraph (b) clarifies the existing California law relating to the admissibility of recitals in ancient documents by providing that such recitals are admissible under an exception to the hearsay rule. Section 1963(34) of the Code of Civil Procedure provides that a document more than 30 years old is presumed genuine if it has been generally acted upon as genuine by persons having an interest in the matter. The Supreme Court, in dictum, has stated that a document meeting this section's requirements is presumed to be genuine -- presumed to be what it purports to be -- but that the genuineness of the document imports no verity to the recitals contained therein. Recent cases decided by district courts of appeal, however, have held that the recitals in such a document are admissible to prove the truth of the facts recited. And in some of these cases the courts have not insisted that the hearsay statement itself be acted upon as true by persons with an interest in the matter; the evidence has been admitted upon a showing that the document containing the statement is genuine. The Commission does not believe that the age of a document is a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence. Accordingly, paragraph (b) makes clear that the hearsay statement itself must have been generally acted upon as true for at least a generation by persons having an interest in the matter.

Subdivision (30): Commercial Lists and the Like.

(30) [~~Evidence of~~] Statements [~~of matters of interest to persons engaged in an occupation~~], other than opinions, 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 by persons engaged in that occupation and is~~] generally used and relied upon by [~~them,~~] persons engaged in an occupation as accurate.

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 used in the business community for the purpose for which they are offered in evidence, they must be made with care and accuracy to gain the confidence and reliance of the persons who purchase them.

The words "to prove the truth of any relevant matter so stated" have been deleted from the URE subdivision because they are unnecessary.

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. Many of the criticisms that are made concerning the present California statute might be resolved by removing some of the present limitations upon the scope of cross-examination of expert witnesses. The Commission plans to study and report on the scope of permissible cross-examination at a later date in connection with its study of the Uniform Rules of Evidence.

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 which is not repealed in connection with the enactment of these rules 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 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO EXCLUDE EVIDENCE

~~[Rule 64.--Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.]~~

COMMENT

The Commission does not recommend the adoption of Rule 64. No such requirement of pretrial disclosure now exists as to the evidence referred to in Rule 64 or, for that matter, to other documentary evidence. The Commission believes that modern discovery procedures provide the adverse parties adequate opportunity to protect themselves against surprise.

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 not inadmissible for the purpose of discrediting the declarant, though he is given and has 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. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it makes clear that the rule applying to impeachment of a witness - that 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 - does not apply to a hearsay declarant.

Thus, Rule 65 would permit the introduction of evidence to impeach a hearsay declarant in one situation where such impeaching evidence would now be excluded. 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, his testimony cannot be impeached by evidence of an inconsitent statement unless the would-be impeacher laid the necessary foundation for impeachment at the first trial or can show that he had no knowledge of the impeaching evidence at the time of the first trial. The Commission believes, however, that the trier of fact at the second trial should be allowed to consider the impeaching evidence in all cases.

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 63(1)(a) provides that evidence of prior inconsistent statements made by a witness at the trial may be admitted to prove the truth of the matters stated. In contrast to Rule 63(1)(a), the evidence admissible under Rule 65 may not be admitted to prove the truth of the matter stated. Inconsistent statements that are admissible under Rule 65 may be admitted only to impeach the hearsay declarant. Unless the declarant is a witness and subject to cross-examination upon the subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

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~~] 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.

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. Although California cases may be found in which such evidence has been admitted, the Commission is not aware of any California case where the admissibility of "multiple hearsay" evidence has been analyzed and discussed. But since each statement must fall within an exception to the hearsay rule there is a sufficient guarantee of the trustworthiness of the statements to justify this qualification of the hearsay rule.

The Commission has revised the rule to make it clear that, on occasion, several hearsay statements may be admitted under this rule. 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 record, which is admissible under Rule 63(13). 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 of them must fall within an exception to the hearsay rule.

RULE 66A. SAVINGS CLAUSE

Rule 66A. Nothing in Rules 62 to 66, inclusive, shall be construed to repeal by implication any other provision of law relating to hearsay evidence.

COMMENT

No comparable provision is included in the URE, but the Commission has added this provision to make it clear that Rules 62-66 and the existing code provisions dealing with 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. This savings clause will make it clear that these statutes are not impliedly repealed by Rule 63.

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 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 subdivisions (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.[8] References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

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[8] 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 provides:

> 1848. The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another.

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 provides:

> 1849. Declarations of predecessor in title evidence. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

This section should be repealed. It is superseded by Rule 63(9a)(a) relating to admissions of predecessors in interest.

Section 1850 provides:

> 1850. Declarations which are a part of the transaction. Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction.

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 provides:

> 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.

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

Section 1852 provides:

> 1852. Declaration of decedent evidence of pedigree. The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

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 provides:

> 1853. Declaration of decedent evidence against his successor in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

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(2) provides in part:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

2. The act, declaration, or omission of a party, as evidence against such party;

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

Section 1870(3) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;

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

Section 1870(4) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;

This subdivision 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).

Section 1870(5) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party,

within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;

This subdivision 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(9a)(b).

Section 1870(6) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;

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

Section 1870(7) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty;

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

Section 1870(8) provides:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;

This subdivision should be deleted. It is superseded by subdivision (3) of Rule 63 which relates to former testimony.

Section 1870(11) provides:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;

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

Section 1870(13) provides:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family Bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

This subdivision should be deleted. It is superseded by the reputation and pedigree exceptions contained in Rule 63(26), Rule 63(26a) 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 provides:

> 1901. A copy of a public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such writing.

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 provide:

> 1905. A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

> 1906. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country.

1907. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;
2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,
3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

1918. Other official documents may be proved, as follows:

1. Acts of the executive of this state, by the records of the state department of the state; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the legislature or congress, or either house thereof.
2. The proceedings of the legislature of this state, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.
3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.
4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.
5. Acts of a county or municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such county or corporation.
6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.
7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.
8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal, of the country or sovereign, that the document is a valid and subsisting

document of such country, and the copy is duly certified by the officer having the legal custody of the original, provided, that in any foreign country which is composed of or divided into sovereign and/or independent states or other political subdivisions, the certificate of the country or sovereign herein mentioned may be executed by either the chief executive or the head of the state department of the state or other political subdivision of such foreign country in which said documents are lodged or kept, under the seal of such state or other political subdivision; and provided, further, that the signature of the sovereign of a foreign country or the signature of the chief executive or of the head of the state department of a state or political subdivision of a foreign country must be authenticated by the certificate of the minister or ambassador or a consul, vice consul or consular agent of the United States in such foreign country.

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof.

1919. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

These sections should be repealed. They are superseded by subdivisions (13), (17) and (19) of Rule 63 pertaining to the admissibility of governmental records and copies thereof.

Section 1920 provides:

1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

This section should be repealed. It is superseded by the business records exception contained in subdivision (13) and by various specific exceptions that will continue to exist under subdivision (32) and Rule 66A.

Section 1920a provides:

1920a. Photographic copies of the records of the Department of Motor Vehicles when certified by the department, shall be admitted in evidence with the same force and effect as the original records.

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

Section 1921 provides:

> 1921. A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

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

Section 1926 provides:

> 1926. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

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

Section 1936 provides:

> 1936. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

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

Section 1946 provides:

> 1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:
>
> 1. When the entry was made against the interest of the person making it.
> 2. When it was made in a professional capacity and in the ordinary course of professional conduct.
> 3. When it was made in the performance of a duty specially enjoined by law.

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 business records exception contained in subdivision (13) and the various specific specific exceptions which will continue under subdivision (32) and Rule 66A.

Section 1947 provides:

> 1947. When an entry is repeated in the regular course of business, one being copies from another at or near the time of the transaction, all the entries are equally regarded as originals.

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 an action or proceeding, without further proof [~~; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof~~].

Sections 1953e through 1953h provide:

> 1953e. The term "business" as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> 1953f. A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of

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

1953f.5. Subject to the conditions imposed by Section 1953f, open book accounts in ledgers, whether bound or unbound, shall be competent evidence.

1953g. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

1953h. This article may be cited as the Uniform Business Records as Evidence Act.

These sections should be repealed. They are the Uniform Business Records as Evidence Act which has been incorporated in the Uniform Rules as Rule 63(13).

Section 2016. This section should be revised so that it conforms to the Uniform Rules. The revision merely substitutes "unavailable as a witness" for the more detailed language in Section 2016 and makes no significant substantive change in the section. The revised portion of the section would read as follows:

* * *

(d) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party to the record of any civil action or proceeding or of a person for whose immediate benefit said action or proceeding is prosecuted or defended, or of anyone who at the time of taking the deposition was an officer, director, superintendent, member, agent, employee, or managing agent of any such party or person may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence; or [~~dead; or (ii) that the witness is at a greater distance than 150 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition, or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v)~~] (ii) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Section 2047. This section should be revised to delete the last sentence which is superseded by Rule 63(1)(c). The remainder of the section should be revised to remove the limitation upon the type of writings that may be used to refresh recollection. As when a witness's recollection is refreshed he testifies to present recollection rather than to the matter contained in the refreshing memorandum, there is no reason to require the memorandum to meet the necessarily strict standards that a document purporting to contain recorded memory must meet. The section should also be revised to grant the adverse party the right to see not only the documents used to refresh a witness's recollection in the court room but also the documents used to refresh the witness's recollection just before he entered the court room. Revised Section 2047 would read as follows:

2047. ~~[When-Witness-May-Refresh-Memory-From-Notes.]~~ If a witness ~~[is-allowed-to-refresh]~~ refreshes his memory respecting a fact ~~[,-by-anything-written-by-himself,-or-under-his-direction,-at-the-time-when-the fact-occurred,-or-immediately-thereafter,-or-at-any-other-time-when-the fact-was-fresh-in-his-memory,-and-he-knew-that-the-same-was-correctly stated-in-the-writing.--But-in-such-case]~~ by a writing either while testifying or prior thereto, the writing must be produced, and may be seen by the adverse party ~~[,]~~ who may, if he chooses , cross-examine the witness about it ~~[,]~~ and may read it to the jury. ~~[So,-also,-a-witness-may testify-from-such-a-writing,-though-he-retain-no-recollection-of-the particular-facts,-but-such-evidence-must-be-received-with-caution.]~~

Penal Code

Section 686. This section now sets forth three exceptions to the right of defendant in a criminal trial to confront the witnesses against him. These exceptions purport to state the conditions under which the court may admit testimony taken at the preliminary hearing, testimony taken in a former trial of the action and testimony in a deposition that is admissible under Penal Code Section 882. The section inaccurately sets forth the existing law, for it fails to provide for the admission of hearsay evidence generally or for the admission of testimony in a deposition that is admissible under Penal Code Sections 1345 and 1362, and its reference to the conditions under which depositions may be admitted under Penal Code Section 882 is not accurate. As Rule 63(3) and (3a) covers the situations in which testimony in another action or proceeding and testimony at the preliminary hearing is admissible as exceptions to the hearsay rule, Section 686 should be revised by eliminating the specific exceptions for these situations and by substituting for them a general cross reference to admissible hearsay. The present statement of the conditions under which a deposition may be admitted should also be deleted, and in lieu of the deleted language there should be substituted language that accurately provides for the admission of depositions under Penal Code Sections 882, 1345 and 1362. The revised section would read:

686. In a criminal action the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except [~~that~~] :

(a) [~~Where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane or cannot with due diligence be found within the state; and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted.~~] Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this State.

(b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this State.

Sections 1345 and 1362. These sections should be revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Rule 63(3) and (3a). The revised sections would read:

1345. The deposition, or a certified copy thereof, may be read in evidence by either party on the trial [~~,-upon-its appearing~~] if the judge finds that the witness is [~~unable-to attend,-by-reason-of-his-death,-insanity,-sickness,-or-infirmity, or-of-his-continued-absence-from-the-state~~] unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. [~~Upon-reading-the-deposition-in-evidence,~~] The same objections may be taken to a question or answer contained [~~therein~~] in the deposition as if the witness had been examined orally in court.

1362. The depositions taken under the commission may be read in evidence by either party on the trial [~~,-upon-it-being shewn~~] if the judge finds that the witness is [~~unable-to-attend from-any-cause-whatever;-and~~] unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. The same objections may be taken to a question in the interrogatories or to an answer in the deposition [~~,~~] as if the witness had been examined orally in court.

CALIFORNIA LAW REVISION COMMISSION

9/18/61

Memorandum No. 39(1961)

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

Attached to this memorandum on blue paper is the tentative recommendation relating to hearsay. It has been revised in accordance with the directions of the Commission at the August meeting. Editorial changes have been made in virtually all of the comments relating to various subdivisions. These changes have been made in the light of suggestions made by individual commissioners. As the changes are not substantive they are not indicated in the tentative recommendation. The matters noted and discussed below have not as yet been finally determined by the Commission.

Rule 62(6).

At the August meeting the Commission decided that the language of paragraph (c) and (d) should be revised to conform to the language used to define unavailability in Code of Civil Procedure § 2016. The Commission withheld a decision on whether paragraph (e) should also be revised to conform to the language used in Code of Civil Procedure § 2016(d)(3)(iv). In this connection the staff was asked to do research upon the meaning of the language in § 2016, "that the party offering the deposition has been unable to procure the attendance of the witness by subpoena." The staff was asked to determine whether this language requires a showing of diligence on the part of the person offering the deposition into evidence.

The research study attached as Exhibit I (pink pages) indicates that apparently a showing of diligence is required under the existing language of Code of Civil Procedure Section 2016(d)(3)(iv). Inasmuch as

the requirement does not clearly appear from the language of Section 2016, the staff recommends that the language of paragraph (e) of Rule 62(6) be retained in the form that it appears in the tentative recommendation. This language has been previously approved by the Commission.

Rule 62(8).

This subdivision has been revised to include the matter formerly contained in subdivisions (8) and (9). This revision was made to make clear that the former testimony exceptions do not apply to depositions taken in the same case.

Rule 63(3).

The staff suggests that the preliminary language of this rule would be easier to understand if it were rephrased. The staff suggests that the words "and objections based on competency or privilege which did not exist at that time" be deleted so that the introductory clause would read:

> (3) Subject to the same limitations and objections as though the declarant were testifying in person (other than objections to the form of the question which were not made 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 following sentence should be added to subdivision (3):

> Objections to former testimony offered under this subdivision which are based on the competency of the declarant or upon privilege shall be determined by reference to the time the former testimony was given.

Rule 63(3.1)

The staff suggests a similar change in this subdivision. The clause "(other than objections based on competency or privilege which did not

exist at the time the former testimony was given)" should be deleted and the sentence suggested above under subdivision (3) added at the end of the subdivision.

Rule 63(6).

In connection with paragraph (c) of this subdivision, the staff has noted that two bills have been introduced in the Congress of the United States relating to this rule as it is applied in the federal courts. S 2067, introduced in the Senate on June 13, would repeal this rule for all federal courts. HR 7053, approved by the House of Representatives on June 13 and sent to the Senate, would repeal the rule for the District of Columbia. Both bills are now pending in the Senate. The staff will keep the Commission advised if there is any change in the status of these bills.

Rule 63(9).

Commissioner Stanton has questioned the absence of a reason for limiting subdivision (9)(c) to civil actions or proceedings. The staff does not know why this exception was limited to civil actions or proceedings and, accordingly, could not state a reason in the comment. The existing law--Code of Civil Procedure Section 1851--is not limited to civil actions or proceedings and the staff is unaware of any reason for adding the limitation to subdivision (9)(c).

A further discussion of Section 1851 and subdivision (9)(c) appears later in this memorandum in connection with the problem of whether Section 1851 should be repealed.

Rule 63(22).

At the August meeting a sentence explaining the reason for this

exception was deleted. The sentence read:

> Certainly evidence of this sort is superior to reputation evidence which is admissible on questions of boundary both under subdivisions (27) and Code of Civil Procedure Section 1870(11).

The Commission then directed the staff to do research upon this exception to determine the reasons given for it in the cases recognizing the exception.

The research study on this matter is attached as Exhibit II (yellow pages). The study traces the historical development of the exception. As the study indicates, the best justification for the exception is as follows: Reputation as to matters of public interest is received generally because it is usually the best evidence, from the nature of the case, that can be produced. A judgment, however, in an adversely litigated case is a more reliable form of evidence than reputation; hence, since we are seeking the best evidence that from the nature of the case can be produced, a judgment upon a matter of public concern should be received if reputation is going to be received.

The Commission should note that the English doctrine is applicable to judgments in cases litigated between private parties. It is not limited--as subdivision (22) now is--to judgments in which a public body is represented.

If subdivision (22) is to be retained, the staff recommends the retention of the sentence (quoted above) which was deleted at the August meeting.

Rule 63(29)(29.1).

The staff has placed the language that formerly appeared in (29)(b) in a new subdivision numbered (29.1). This is merely a technical change;

the language of the two subdivisions is as previously approved by the Commission.

Adjustments and Repeals of Existing Statutes

Code of Civil Procedure Section 1851.

At the August meeting, the Commission deferred action upon this section pending a report from the staff upon the cases arising under it. This report is attached as Exhibit III (green pages). The staff has concluded that Section 1851 permits admission of a form of hearsay evidence not now covered in the URE. When the liability of a defendant in an action is grounded upon the liability of another, Section 1851 permits the admission of a judgment against such other person as evidence of such liability. To make the URE rules complete as to the use of judgments as hearsay evidence, the staff suggests the addition of a subdivision (21.1) which, with its comment, would read as follows:

(21.1) When one of the issues in a civil action or proceeding is the legal liability, obligation or duty of a third person, evidence of a final judgment against such person to prove such legal liability, obligation or duty, when offered by a person who was a party to the action or proceeding in which the judgment was rendered.

COMMENT

This subdivision restates in substance a principle of existing California law which is found in Section 1851 of the Code of Civil Procedure.

If proposed subdivision (21.1) is approved, the staff recommends the

addition of a paragraph to the Comment on subdivision (9). The added paragraph would read:

> Subdivision (21.1) supplements the rule stated in paragraph (c). It permits the admission of judgments against a third person when one of the issues between the parties is a legal liability of the third person and the judgment determines that liability. Together, paragraph (c) and subdivision (21) codify the holdings of the cases applying Code of Civil Procedure Section 1851.

Sections 1893 and 1901. At the August meeting, the question arose as to whether the reference to "public writings" which appears in both of these sections embraces more than the "official record" reference contained in subdivision (17). The staff has concluded that, if there is any difference between the terms, the term "public writings" is probably the narrower term. A research memorandum, labeled Exhibit IV, is attached hereto on white paper.

On the basis of this conclusion, the staff recommends that Section 1893 be modified and that Section 1901 be repealed as indicated in the tentative recommendation. This action has been previously approved by the Commission.

Sections 1920 and 1926. At the August meeting, the staff was asked to review the cases arising under these sections to determine whether these sections give a presumption of verity to the recitals in public

documents of various sorts (such as ordinances) so that such documents may be introduced as evidence without calling the custodian or some other witness to identify the record and testify as to its mode of preparation. The staff's research memorandum on this subject (on goldenrod paper) is attached to this memorandum as Exhibit V.

The staff has concluded that these sections are not needed to create a presumption in favor of the recitals in public documents. This purpose is adequately achieved by the presumption that official duty has been regularly performed. (C.C.P. § 1963(15).) If these sections serve any purpose, it is to permit the court to determine that the mode of preparation of a public record is such as to indicate its trustworthiness from evidence other than the testimony of the custodian or other qualified witness -- as, for instance, by judicial notice. If these sections are repealed and subdivision (13) is relied on as the sole authority for the introduction of official reports, a qualifying witness will be required to testify in each case.

The staff believes that it is desirable to preserve the rule that a court may admit official reports without hearing testimony from a qualifying witness in those situations where it can determine from judicial notice and the presumption that official duty has been regularly performed that the official report is reliable and not based upon hearsay. This rule may be preserved either by amending subdivision (13) to indicate that the identity and mode of preparation of a record may also be established by evidence other than the testimony of the custodian or other qualified witness. The rule may also be preserved by revising subdivision (15)

so that it restates existing law in this regard; and the staff recommends this alternative. The revised subdivision (15) and the comment thereto would read as follows:

(15) [~~Subject to Rule 64~~] A written report[~~s or findings of fact~~] made by a public [~~official~~] officer or employee of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such [~~official~~] officer or employee and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. [~~it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation~~]

COMMENT

Subdivision (15) has been revised to restate in substance the existing California law as found in Code of Civil Procedure Sections 1920 and 1926 as they have been interpreted by our courts.

Paragraphs (a) and (b) as proposed in the URE permitted the admission of official reports only if the officer who made the report had personal knowledge of the facts reported. Under existing California law, an official report may be admitted even though the public officer making the report does not have personal knowledge of the facts if a person with such personal knowledge reported the facts to the public officer pursuant

to a legal or official duty. No reason is apparent for limiting this exception to the hearsay rule as proposed in the URE.

Paragraph (c) as proposed in the URE would permit the introduction of police reports based on statements of witnesses interviewed at the scene of an accident and other official reports of a similar nature. Such reports are not admissible now because they are not based upon statements made to the reporting officer pursuant to a legal or official duty. There is not a sufficient guarantee of the trustworthiness of such reports or findings to warrant their admission into evidence.

The evidence that is admissible under this subdivision as revised is also admissible under subdivision (13), the business records exception. However, subdivision (13) requires a witness to testify as to the identity of the record and its mode of preparation in every instance. Under this subdivision, as under existing law, the court may admit an official report without requiring a witness to testify as to its identity and mode of preparation if the court has judicial notice that the report was prepared in such a manner as to assure its trustworthiness.

The cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

Penal Code § 686. Some of the problems involved in Penal Code § 686 were developed quite fully in the Supplement to Memorandum No. 7(1961) dated 2/6/61. That discussion will not be repeated here. It is sufficient to point out here that § 686 states the defendant's right to confront the witnesses against him. Three exceptions are stated:

(1) Testimony at the preliminary examination may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(2) Testimony of a prosecution witness contained in a deposition taken under the provisions of Section 882 of the Penal Code may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(3) Testimony of a witness for either prosecution or defense given on a former trial of the same action may be read if the witness is "deceased, insane, out of jurisdiction" or "cannot with due diligence be found within the state."

Although the right of confrontation might be considered to be applicable to hearsay generally, the cases have apparently construed this section so that it applies to hearsay that is admitted under the former testimony exception only. Hence, hearsay is admissible despite the declaration of this section and despite the fact that the particular hearsay involved does not fall within one of the stated exceptions of this section.[1]

When the Commission considered Rule 63(3), it assumed that the rule would be applicable to prosecution and defendant alike. Hence, standards were drafted to protect the defendant's right of confrontation. This

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1. People v. Alcalde, 24 Cal.2d 177 (1944)(hearsay of victim admitted under state of mind exception); People v. Weatherford, 27 Cal.2d 401 (1945)(hearsay of decedent admitted under declaration against interest and state of mind exceptions); People v. Gordon, 99 Cal. 227 (1893)(testimony of witness at prior trial of same action inadmissible - third exception to right of confrontation was not enacted until 1911).

assumption was not correct. 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.

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. Without such an amendment, much of the language of Rule 63(3) and (3a) is meaningless.

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. Under § 1362, the deposition is admissible if the deponent is "unable to attend the trial." 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. Take this example:

> D has a reputation as a mobster, but has never been convicted of a serious crime. D is charged with bribery of public officials. X, a former public official suspected of receiving the bribe, has made his way to Mexico, and all attempts to extradite him have proved unsuccessful. D takes X's deposition under §§ 1349-1362 of the Penal Code. In the deposition, X testifies that D had nothing to do with the alleged bribe.
>
> As the prosecution does not want to lose a golden opportunity to convict D of something, it offers to transport X to the trial of D and to return him again to Mexico without arresting him on the bribery charge. X attends the trial under these circumstances. X is not called by the prosecution, but is called by D. X invokes the self-incrimination privilege. D offers the deposition. Objection.
>
> Ruling. Objection sustained. Under § 1362, the deposition

is admissible only if the deponent is unable to attend the trial. Since X is in attendance, even though he is privileged to refuse to testify, his deposition is inadmissible.

The substitution of the Rule 62 definition of "unavailability" would permit D to use X's deposition in these circumstances just as he would if X had still been in Mexico at the time of the trial.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

(Memo 39(1961)) EXHIBIT I 9/18/61

Research relating to Rule 62(6)

At the August meeting the staff was asked to do research upon the meaning of the language in Code of Civil Procedure Section 2016 "that the party offering the deposition has been unable to procure the attendance of the witness by subpoena." The staff was to determine whether this language requires a showing of diligence on the part of the person offering the deposition into evidence.

The language in Section 2016 was, of course, taken from Rule 26 of the Federal Rules of Civil Procedure. Although there is not a great deal of case law construing this provision of the Federal Rules, there has been some indication in the cases that more is required than a mere showing that the deponent is not present at the hearing. For instance, in Cullers v. Commissioner of Internal Revenue, 237 Fed.2d 611 (8th Cir. 1956) a deposition was held to be excluded from evidence properly where no showing was made of meeting any of the requirements of subdivision (d)(3) of Rule 26. Again in Andrews v. Hotel Sherman, 138 Fed.2d 524 (7th Cir. 1943) the court excluded a deposition from evidence with the statement (at page 529): "The deposition showed on its face that [the deponent] resided in Chicago and was employed at the Palmer House, and there is no showing that he was unable to be present in court to give his

testimony for any of the reasons set forth in § 26(d) of the Federal Rules of Civil Procedure . . . . It was not error to exclude this deposition."

It may be, however, that the showing required need not be extensive. In Frederick v. Yellow Cab Co. of Philadelphia, 200 Fed.2d 483 (3rd Cir. 1952), the deposition of an eye witness was taken because he was in the habit of being out of the city on business one or more days of each week. The witness was extensively cross-examined in the deposition. When the deposition was offered counsel stated that the witness was out of town, that he had called the witness' office and the secretary had said that the witness would be gone on the day of the trial and the following day. The court held, over objection, that the deposition was properly admitted under Rule 26(d)(3) on the ground that the proponent was "unable to procure the attendance of the witness by subpoena." The court said: "Unquestionably the showing on this issue was scant. Yet there was no showing at all in opposition . . . . On what was before him, the trial judge apparently concluded that the witness was in fact out of the jurisdiction and, therefore, that the procurement of his attendance by subpoena had not been practicable." It is apparent from reading this language that the court was confusing two provisions of Rule 26. Rule 26(d)(3) provides for the admission of a deposition either if the witness is out of the jurisdiction or if the proponent is unable to procure his evidence by subpoena. In this case it is apparent that the

court considered the proponent's showing as going to the absence of the deponent from the jurisdiction. If the showing for that purpose was adequate, whether he was able to procure his attendance by subpoena or not was irrelevant. The proponent's ability to procure the deponent's attendance by subpoena becomes material only if there is no showing that the deponent is out of the jurisdiction, for either ground suffices to permit the admission of the deposition.

Arizona, and a few other states, have also adopted the Federal Rules on the admission of depositions. In Slow Development Company v. Coulter, 353 P.2d 890, 895 (Ariz. 1960), the court held that a deposition was properly admitted under this paragraph because due diligence had been shown. Illinois, too, has adopted the Federal Rules on the admission of depositions. In John v. Tribune Company, 171 N.E.2d 432 (Ill. App. 1960), a deposition was admitted upon a showing by the proponent that his employee had attempted to subpoena the witness on the day before the trial and that a firm of attorneys that had represented the witness said that she was in Wisconsin. The court, on appeal, stated (at p. 442):

> The deposition should not have been permitted in evidence unless the defendant made a showing that the attendance of the absent witness could not have been procured by the use of reasonable diligence. An attempt to procure the witness the day before trial has been held to be a lack of diligence.

The authority of this case, however, as an interpretation of the Federal Rules is somewhat questionable, for in adopting the Federal

Rules Illinois modified them to a certain extent. Under the Illinois rules, a distinction is made between discovery depositions and evidence depositions. Under Illinois Supreme Court Rule 19--10 (Smith-Hurd Illinois Annot. Stats. c. 110 § 101.19--10) the admissibility of discovery depositions is quite limited. Evidence depositions, though, may be admitted for substantially the same reasons that depositions may be admitted under the Federal Rules. The committee report on the portion of the Illinois rules dealing with the admissibility of evidence depositions states:

> Subsection (3) is based upon Federal Rule 26(d)(3). Apart from language made necessary by the distinction between evidence and discovery depositions, this subsection differs from the Federal Rule in two respects: absence from the county rather than being beyond a one hundred mile radius of the place of trial is made the test in clause (b)(2); and a motion under clause (b)(5) respecting use of the deposition under exceptional circumstances must be made in advance of trial.

Clause (b)(4) of subsection (3) was modified before its adoption by the Illinois Supreme Court to read:

> The party offering the deposition has exercised due diligence but has been unable to procure the attendance of the deponent by subpoena.

It is apparent from the comment of the committee upon subsection (3) that they regarded this modification of language as clarifying rather than as changing the Federal Rule.

Commentators upon the Federal Rule, too, indicate that a showing of diligence is probably necessary under this portion of the Federal Rules. In 38 Col. L. Rev. 1436, 1447 (1938) in an article entitled "The New Federal Deposition-Discovery

Procedure," written by James A. Pike and John W. Willis, the following appears:

> The clause allowing the use of depositions when the proponent "has been unable to procure the attendance of the witness by subpoena" is new in federal practice and is evidently intended to cover a case in which the party cannot effectively prove that the deponent is over one hundred miles from the court, but has been unable to serve a subpoena on him. A showing of some diligence will probably be required.

In a note appended to this passage from the article it is stated:

> Return of subpoena "non est" is not enough to show non-availability . . . . At common law, inability to find deponent after diligent search was a ground of admission.

From the foregoing cases and comments it appears that a showing of diligence is probably required under the existing language of Code of Civil Procedure Section 2016(d)(3)(iv). Inasmuch as the requirement does not clearly appear from the language of Section 2016 the staff recommends that the language of paragraph (e) of Rule 62(6) be retained in the form that it appears in the tentative recommendation. This language has been previously approved by the Commission.

(Memo. # 39(1961)

EXHIBIT II

Research relating to Rule 63(22)

At the August meeting a sentence explaining the reason for this exception was deleted. The sentence read:

> Certainly evidence of this sort is superior to reputation evidence which is admissible on questions of boundary both under subdivision (27) and Code of Civil Procedure Section 1870(11).

The Commission directed the staff to do research upon this exception to determine the reason given for it in the cases recognizing the exception.

The source of the rule lies in the cases dealing with reputation. The general English rule relating to reputation is:

> Evidence of reputation is admissible where the question relates to a matter of general or public interest; as, for example, to the boundaries of a town, parish, or manor, or to the boundaries between counties, parishes, hamlets or manors, or between a reputed manor and the land belonging to a private individual, or between old and new land in a manor.
>
> [However,] evidence of reputation is inadmissible in cases of a private nature, for example, as to the boundaries of a waste over which some only of the tenants of a manor claim a right of common appendant, or as to the boundaries between two private estates, except where the private boundaries coincide with public ones. [3 Halsbury's Laws of England, 3d ed. 383-385.]

Originally the rule seems to have been that the verdict of a jury was itself evidence of reputation. The doctrine seems to have arisen in City of London v. Clerke, a Maltman, Carth. 416 (1691). That case did not involve a boundary, but involved the right of the city to collect a duty on malt brought to the city on the west country barges. It was there held that verdicts in four prior cases against west country maltmen were admissible. The reason given was that prior payments of such a duty by

other west country maltmen would have been admissible, therefore the prior recoveries against the other maltmen should also be admissible. Chief Justice Holt stated by way of illustration:

> If a Lord of a Manor claims Suit of his Tenants ad molendinum by Custom, &c. and in an Action recovers against one Tenant, that Recovery may be given in Evidence in a like Action to be brought against other Tenants upon the Reason supra, unless the Defendant can shew any Covin or Collusion between the Parties in the first Action, &c. quod nota.

In Tooker v. Duke of Beaufort, 1 Burr. 146 (1757), a commission under the seal of the Court of Exchequer to inquire as to the boundaries of a manor and the verdict of the jury made upon the inquisition were held admissible in a later action, though not conclusive.

Reed v. Jackson, 1 East 355 (1801), was an action for trespass. The defendant pleaded a public right of way over the land in question. The plaintiff offered in evidence the verdict he had obtained in another action against a different defendant who had also pleaded a public right of way. The evidence was held admissible. Justice Lawrence said "Reputation would have been evidence as to the right of way in this case; a fortiori therefore, the finding of twelve men upon their oaths."

These cases may be explained upon the ground that juries were originally selected from the vicinity and, therefore, should be expected to be familiar with the reputation in the neighborhood as to matters of public interest. This, at least, was the explanation given by Baron Alderson in Pim v. Curell, 6 M & W 234, 254 (1840) ("That was when the jury were summoned de vicineto, and their functions were less limited than at present"), and it is also Wigmore's view (5 Wigmore, Evidence 459 (3d ed. 1940)). Talbot v. Lewis, 6 C & P 603 (1834), also supports this view. There, Baron Parke held a 1635 verdict showing the boundaries of a manor admissible "as being the

opinion of persons whom we must presume to have been cognizant of the facts, it having reference to a subject on which reputation is evidence."

Eventually, of course, the English judges recognized that a verdict is not evidence of reputation. In Brisco v. Lomax, 3 N & P (1838), Justice Patteson remarked, "It is difficult to say that this commission was admissible as reputation, because the freeholders, being drawn at large from the County of York, could have no personal knowledge of the subject. . . . The verdicts are not by themselves evidence of reputation; but where reputation is admissible in evidence, verdicts are also." Eventually, too, the doctrine was broadened so that a decree of an equity court could be received. In Laybourn v. Crisp, 4 M & W 320 (1838), a decree was held admissible, Baron Parke stating: "I have never heard it doubted, that a decree of a Court of Equity is evidence of reputation in the same manner as a verdict." Some of the judges, too, became dissatisfied with the basis for the doctrine. During the argument in Evans v. Rees, 10 Ad. & El. 151 (1839), Justice Patteson remarked "I never could understand why the opinion of twelve men should be evidence of reputation", and Justice Coleridge said, "Though the doctrine is perhaps established as to the admissibility of verdicts, it does not appear to be founded on any satisfactory principle."

Hence, in Neill v. Duke of Devonshire, L.R. 8 A.C. 135 (1882), the House of Lords attempted to give another explanation. There, former equity decrees were held admissible on a question of a public right to use a fishery. Chancellor Selborne conceded that "such evidence, though admissible in cases in which evidence of reputation is received, is not itself in any proper sense, evidence of reputation. It really stands upon a higher

and larger principle; especially in cases, like the present, of prescription. An adverse litigation before a competent court, supported by proofs on both sides, and ending in a final decree, comes within the category of res gestae, and of 'declarations accompanying acts' . . . ."

Lord O'Hagan agreed that the decrees "were admissible, not as evidence of reputation, . . . but of something higher and better than reputation," but he did not ground his decision on "res gestae." Rather, he believed the evidence better than reputation because "the decree was final, determining the only question before the court, and for its determination necessitating the production of evidence, the judicial conviction founded upon it, that a real, peaceable and unequivocal possession of the very subject matter now in dispute was enjoyed by the Earl of Cork 200 years ago. . . ." Lord Blackburn's reasoning was similar. His argument was that, although hearsay is generally excluded, "yet where the point to be proved is ancient possession before the time of living memory there is a wide class of exceptions, grounded on this; that there being no possibility of producing living witnesses to testify as to things that happened so long ago, the matter must remain unproved, unless the best evidence which, from the nature of the thing, can be produced, be received. And where the question is one of public interest, . . . evidence of reputation is admissible. The evidence afforded by a record shewing that a Court of competent jurisdiction inquired into and pronounced upon the state of facts, and the question of usage at a time before living memory, is perhaps not properly evidence of reputation that the state of facts, and the question of usage at that time were as there pronounced to be. But it is as strong or stronger than reputation, and the authorities are agreed that it is

admissible, at least in cases where reputation would be admissible."

Lord Blackburn's argument is the most convincing. It is merely that reputation is received generally because it is usually the best evidence, from the nature of the case, that can be produced. A judgment, however, in an adversely litigated case is a more reliable form of evidence than reputation; hence, since we are seeking the best evidence that from the nature of the case can be produced, a judgment upon a matter of public concern should be received if reputation is going to be received.

(Memo. #39(1961)) EXHIBIT III

Research Relating to C.C.P. § 1851

At the August meeting, the Commission directed the staff to do research upon the meaning of Section 1851 of the Code of Civil Procedure. The Commission was particularly interested in the type of evidence that is admitted under its provisions and the type of case in which it is applied.

Section 1851 provides:

> 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.

First, as to the nature of the evidence admitted, two classes of cases may be found. One class of cases involved statements of a person (hereinafter sometimes called "the principal obligor") upon whose liability the person sued depends. These cases all involve statements that would be admissions if the declarant were sued directly. For example, in Standard Oil Co. v. Houser, 101 Cal. App.2d 480 (1950), the defendant guaranteed payment of a corporation's debts in order to induce the plaintiff to issue a credit card to the corporation. The corporation went bankrupt, and in an action against the guarantor to recover the amount of credit extended, the corporation's delivery receipts for gas and oil were held admissible against the guarantor as evidence that gas and oil had been received as indicated. Similarly, in Mahoney v. Founders' Insurance Co., 190 ACA 492 (1961), the deposition of the principal obligor was held admissible in an action against the surety company on his bond even though the principal obligor was present at the

trial. The court held that the deposition was admissible against the surety under Section 1851 as an admission of the principal obligor.

The other class of evidence admitted under Section 1851 consists of judgments against the person upon whose liability the defendant's obligation depends. In cases where such judgments are not conclusive, they are admitted as prima facie evidence under Section 1851. Ellsworth v. Bradford, 186 Cal. 316 (1921), is illustrative. At that time, California's Civil Code provided that a stockholder of a corporation was personally liable for a proportionate share of the corporate debts incurred while he was a stockholder. This liability was a direct and primary liability as an original debtor, and not a secondary liability as a surety or guarantor for the corporation. In Ellsworth v. Bradford, supra, the court held that a judgment against the corporation was evidence of the corporate indebtedness in an action against the stockholder upon his personal liability. Again, in Nordin v. Bank of America, 11 Cal. App.2d 98 (1936), the plaintiff had sued Eagle Rock Bank. The trial court's judgment was for Eagle Rock. Eagle Rock then sold out to Bank of America, who assumed Eagle Rock's liabilities. On appeal from the judgment for Eagle Rock, the appellate court reversed and ordered judgment entered for the plaintiff. Plaintiff then sued Bank of America. The judgment against Eagle Rock was held to be prima facie evidence of Eagle Rock's liability in the action against Bank of America.

No case has been found in which the "for" provision of Section 1851 has been applied. Certainly, so far as statements are concerned, the primary obligor's out-of-court statements would be inadmissible in an action against him as self-serving hearsay; hence, they would be

inadmissible under Section 1851. So far as judgments are concerned, a different principle is applied if the person on whose liability the defendant's obligation depends wins a judgment in the first action. This is the principle of estoppel by judgment. Under this principle, the judgment in favor of the primary obligor in the first action is conclusive, not prima facie evidence, in favor of the person secondarily liable in the second action. The rationale of the estoppel by judgment doctrine is set forth in C. H. Duell, Inc. v. Metro-Goldwyn-Mayer Corp., 128 Cal. App. 376 (1932). In that action, the defendant was sued for illegally inducing Lillian Gish to breach her contract with the plaintiff. The defendant, however, was exonerated because in a previous action by the plaintiff against Lillian Gish for breach of contract the plaintiff lost. The court said:

> As a general proposition of law we might concede that the principle res judicata applies only between parties to the original judgment or to parties in privity with them. However, it seems settled law that lack of privity in the former action does not prevent an estoppel where the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other. Thus it is settled by repeated decisions that . . . . in actions of tort, if the defendant's responsibility is necessarily dependant upon the culpability of another who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way.

The rule is stated more succinctly in Triano v. F. E. Booth and Company, 120 Cal. App. 345 (1932): "[A] judgment in favor of the immediate actor is a bar to an action against one whose liability is derivative from or dependent upon the culpability of the immediate actor."

From the foregoing it appears that Section 1851 has been applied

in order to permit the introduction of admissions of a principal obligor and judgments against a principal obligor in an action brought against another person whose liability depends upon the liability of the principal obligor. No cases have been found permitting the introduction of any other type of evidence under this section. In particular, no cases have been found applying the section to permit the introduction of evidence which would have been evidence "for" the principal obligor.

We turn then to the relationship of the parties involved in the application of Section 1851. The section has been applied to its greatest extent in the principal-surety cases. These cases apply this section to permit the admissions of the principal to be used as evidence against the sureties. (Butte County v. Morgan, 76 Cal. 1 (1888).) There is not a great deal of distinction to be drawn between these cases and the principal-guarantor cases such as Standard Oil Company v. Houser, 101 Cal. App.2d 480 (1950).

However, the section has also been applied where the liability of the defendant is not a secondary liability such as that of a guarantor or a surety. Ellsworth v. Bradford, 186 Cal. 316 (1921), involved a direct and independent liability of the stockholder. Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193 (1956), is similar in principle to the Ellsworth case. The Ingram case involved the statutory liability of the owner of a motor vehicle. The defendant had sold the car to X without complying with the Vehicle Code provisions relating to the transfer of ownership. At the time of the accident someone other than X was driving and the question arose whether X had given the driver permission to drive the car. A statement of X, "If I had known anything like this was going to happen,

I wouldn't have let her borrow the car," was held properly admissible against the defendant owner under Section 1851.

Although it is difficult to discover a distinguishing principle, for some reason Section 1851 has never been cited nor discussed in any of the cases dealing with the liability of an employer under the doctrine of respondeat superior. It would appear that a respondeat superior case would fall within both the language of Section 1851 and the principle upheld in Ingram v. Bob Jaffee Co., supra, and Ellsworth v. Bradford, supra. A review of the cases involving admissions of employees in respondeat superior cases indicates that the first cases arising involved statements by the employee which did not inculpate the employee himself. (For example, see Luman v. Golden Ancient Channel Mining Co., 140 Cal. 700 (1903).) Obviously these statements would not be admissions of an employee in an action against him and would be inadmissible hearsay. (Note, however, such statements are admissible against the employer under Rule 63(9)(a).) Later cases, involving admission of the employee's own liability, merely cite the former cases holding that the employee was not authorized to make that type of statement. (See for example Kimic v. San Jose-Los Gatos etc. Ry Co., 156 Cal. 379 (1909).) Thus in Shaver v. United Parcel Service, 90 Cal. App. 764 (1928) the driver's statement, "I could have stopped but I thought the trailer was going to stop," was admitted only as to the driver and not as to the employing corporation. (If both employer and employee are sued and the employer conducts the defense, a judgment against the employee is binding on the employer, even though the only evidence against the employee is his own admission. Gorzeman v. Artz, 13 Cal. App.2d 660 (1936).) Yet

the liability of the employing corporation was dependent upon the liability of the driver in that situation to the same extent that the liability of the motor vehicle owner was dependent upon the permission of the transferee in Ingram v. Bob Jaffee Co., supra. The liability of the employing corporation was dependent upon the driver's liability, too, in the same manner that the liability of the shareholder was dependent upon the corporate liability in Ellsworth v. Bradford, supra.

Subdivision (9)(c) of Rule 63 embodies the rule set forth in Section 1851 insofar as it applies to admissions of the principal obligor. The language of (9)(c) does not appear to be limited in any way so that there might be a narrower rule of admissibility under (9)(c) than there is under Section 1851. Subdivision (9)(c) does not cover the cases applying Section 1851 which involved judgments against the principal obligor. Moreover, subdivision (21), which relates to judgments against persons entitled to indemnity, does not cover the judgments which are now admitted under Section 1851. Subdivision (21) applies only in the situation in which the judgment is against the surety or the person otherwise secondarily liable and the judgment is offered in an action brought against the principal obligor by the judgment debtor. It does not apply where the judgment is against the principal obligor or the immediate actor and is offered by the judgment creditor. Although the statutes creating the stockholder's liability no longer exist, there are other situations in which the principle of Ellsworth v. Bradford, supra, will be applicable. As a matter of fact, the cases indicate that a judgment against the principal obligor would be admissible as prima facie evidence against another person in any case in which an admission

of the principle obligor would be admissible against another person under Section 1851. The Uniform Rules, as revised by the Commission to date, do not cover this aspect of Section 1851. Accordingly, the staff believes that it is necessary to retain Section 1851 or to draft another subdivision to include its rule insofar as it pertains to judgments. The staff recommends a new subdivision 21.1 reading as follows:

(21.1) When one of the issues in a civil action or proceeding is the legal liability, obligation or duty of a third person, evidence of a final judgment against such person to prove such legal liability, obligation or duty, when offered by a person who was a party to the action or proceeding in which the judgment was rendered.

COMMENT

This subdivision restates in substance a principle of existing California law which is found in Section 1851 of the Code of Civil Procedure.

(Memo 39(1961)) 9/18/61

EXHIBIT IV

Research on Sections 1893 and 1901

At the August meeting, the Commission asked the staff to review the cases interpreting Sections 1893 and 1901 of the Code of Civil Procedure to determine whether the term "public writings" used in them is broader in meaning than the term "official record" used in subdivision (17). The staff has concluded that it is not. If there is any difference in the meaning of the two terms, the term "official record" as used in subdivision (17) is probably the broader.

Section 1888 defines "public writings" as "the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country" and "public records kept in this state of private writings." Section 1894 divides public writings into four classes: "1. Laws; 2. Judicial records; 3. Other official documents; 4. Public records, kept in this State, of private writings." All other writings are private writings. (Section 1889.)

Under these sections it has been repeatedly held that all writings by public officers in the course of their duties are not necessarily "public writings". (Pruett v. Burr, 118 Cal.

App.2d 188 (1953); Coldwell v. Board of Public Works, 187 Cal. 510 (1921).) A record in a public office is a "public writing" only if it is itself an act or record of an act of a public officer. (Mushet v. Dept. of Public Service, 35 Cal. App. 630 (1917).) In Coldwell v. Board of Public Works, the Supreme Court held that "a large number of incompleted and unapproved maps, plans, estimates, studies, reports, and memoranda relating more or less directly to the Hetch Hetchy project, some of which [were] prepared or [were] in the course of preparation by the City Engineer's assistants, some of which [had] been left there by employees of previous administrations but none of which [had] been finally approved by the City Engineer or filed with the Board of Public Works or made a part of any public or official transaction" were not public writings within the meaning of Section 1888 of the Code of Civil Procedure. The Coldwell case involved a citizen's attempt to secure by mandamus the right to view and make copies of certain documents and data in the City Engineer's office of the City of San Francisco. The petitioner relied on Section 1892 of the Code of Civil Procedure which gives all citizens the right to inspect and make copies of "public writings". The Supreme Court, however, held that this material did not constitute public writings until it received "some official approval." Until such time the documents could not "be considered the act or the record of an act of the City Engineer or the Board of Public Works." Nonetheless, the

court granted the petitioner the right to inspect the document upon the authority of Political Code Section 1032 (now Government Code Section 1227). This section states "the public records and other matters in the office of any officer" are open to the inspection of any citizen of the State. The Supreme Court held that, although the City Engineer's records were not public writings, they were "other matters" in the office of the City Engineer and, therefore, were open to inspection.

Section 1893 provides that a copy of a "public writing", properly certified, is admissible as evidence with like effect as the original writing. Subdivision (17) provides that a properly authenticated copy of an "official record" is admissible to prove the content of the record. It is possible that the term "official records" may be narrowly construed to be the equivalent of "public writings"; however, it is also possible that the term "official records" might be construed somewhat more broadly. It may be construed to apply to any records of an officer or pertaining to an office. Such an interpretation would be much broader than the term "public writings", since by statute the term "public writings" is limited to the written acts or records of acts of public officers or boards of officers. Inasmuch as it is unlikely that the term "official records" can be given a narrower construction than "public writings", and since it is possible that it will be given a broader construction, the staff recommends that Section 1893

be amended as indicated in the tentative recommendation and that Section 1901 be repealed. This recommended course of action has been previously approved by the Commission.

(Memo. # 39(1961)

EXHIBIT V

Research relating to C.C.P. Sections 1920-1926

At the August meeting the staff was asked to review the cases interpreting these sections. The Commission wanted to know whether it is these sections that give force to recitals in public documents such as ordinances. The Commission also wanted to know if these sections permit the introduction of public documents without the testimony of the custodian or some other qualifying witness as is required under the Uniform Business Records as Evidence Act.

These sections have been considered in part by the Commission on a previous occasion. When the Commission considered subdivision (15) of Rule 63, it first deleted paragraph (c) of subdivision (15). Paragraph (c) permitted the introduction of statements in officials records if the public officer who recorded the statement had a duty to investigate and to make findings upon the matter recorded. This deletion left subdivision (15) with only paragraphs (a) and (b). These paragraphs provided that a statement in a public record was admissible if a public officer had a duty to make the report and either performed the act reported or observed the event reported. The Commission concluded that (15), as so modified, permitted less evidence to be introduced than may be introduced under subdivision (13), inasmuch as subdivision (13) does not require the recorder to have observed or performed the act recorded. As subdivision (15), as so revised, was much more restrictive than subdivision (13), the Commission decided to delete subdivision (15) entirely.

In analyzing subdivisions (15) and (13), reference was made to Sections 1920 and 1926 as well as the Uniform Business Records as Evidence Act. The general conclusion was then reached that any evidence admissible under Sections 1920 or 1926, and any evidence admissible under subdivision (15) as revised, was also admissible under subdivision (13). Not considered at that time was the question whether Sections 1920 and 1926 dispense with certain foundational evidence which is required by subdivision (13). That will be considered at greater length in this memorandum.

So far as recitals in ordinances and similar documents are concerned the cases indicate that Sections 1920 and 1926 are not necessary to give these recitals any special validity. The presumption of verity which attaches to recitals in public documents of various sorts is either created by specific statute or flows from the presumption--that official duty was regularly performed--stated in subdivision (15) of Section 1963. (County of San Diego v. Seifert, 97 Cal. 594 (1893) (ordinance); Merced County v. Fleming, 111 Cal. 46 (1896) (ordinance); Bray v. Jones, 20 Cal.2d 858 (1942) (tax delinquent list); Rediker v. Rediker, 35 Cal.2d 796 (1950) (recital in foreign divorce decree); Boyer v. Gelhaus, 19 Cal. App. 320 (1912) (recital in tax redemption certificate).) Of course, cases may be found in which Section 1920 has been cited for the proposition that a statement in a public record is prima facie evidence of the facts recorded; however, it appears likely that these cases could as well have been decided on the basis of the presumption in Section 1963. A typical case is People v. Ontario, 148 Cal. 625 (1906) in which a finding that a petition was acted on at a regular or adjourned meeting of the city council was held to be supported by minute entry

indicating that the meeting was an adjourned meeting. The court relied on Section 1920 to arrive at its decision. However, it seems likely that the court could have relied on the presumption stated in Section 1963 just as the court did in County of San Diego v. Seifert, supra, where a similar problem was involved (regularity of meeting at which ordinance was adopted).

Although many cases can be found in which the rule of Sections 1920 and 1926 has been stated and followed -- that an entry in a public record is prima facie evidence of the facts stated, there are other cases indicating that these sections do not mean what they say in all situations. There are a large group of cases which have held that entries made by officers or boards of officers in the course of official duty are inadmissible hearsay. For instance, in Ogilvie v. Aetna Life Insurance Company, 189 Cal. 406 (1922), a written report of the findings of the county autopsy surgeon was offered in evidence. The Supreme Court said that the report should have been excluded as it was hearsay. In McGowan v. Los Angeles, 100 Cal. App.2d 386 (1950), a blood alcohol report from the county coroner's office was held inadmissible because no adequate foundation was laid showing that the blood analyzed was from the proper victim, even though the container of blood was so labeled. Yet in Nichols v. McCoy, 38 Cal.2d 447 (1952) a similar blood alcohol report was admitted because a proper foundation under the Uniform Business Records as Evidence Act was laid.

These cases hold that Sections 1920 and 1926 do not make an official report admissible when oral testimony of the same facts would be inadmissible. (Reisman v. Los Angeles City School District, 123 Cal. App.2d 493 (1954).) The McGowan and the Nichols cases seem to indicate, as

does Pruett v. Burr, 118 Cal. App.2d 188 (1953), that in some instances a foundation under the Uniform Business Records as Evidence Act must be laid even though the document is an official record and contains an entry by a public officer. There are, however, other cases involving public records and reports in which the foundational requirement set forth in the Uniform Business Records as Evidence Act was not laid. For instance, in People v. Williams, 64 Cal. 87 (1883), a census report certified by the superintendent of the census was admitted to show the population of the City of Santa Barbara. The certified copy sufficiently identified the document, but there is no indication that any witness was called to testify as to the mode of the document's preparation. Similarly, in Vallejo etc., R.R. Company v. Reed Orchard Company, 169 Cal. 545 (1915), a report of the State Agricultural Society showing the production of various counties in pounds, tons or other measures was held admissible even though no qualifying witness was called. It should also be noted that these cases also involved official records containing reports based on information not known personally to the recording officer.

Thus, it appears that in some cases it is necessary to call a witness to qualify the official reports under the Business Records as Evidence Act and in other cases it is not necessary. In some cases an official report has been held inadmissible because the recording officer could not give oral testimony as to the same facts; yet in other cases official records have been admitted under these sections when the officer who made the report could not have testified orally to the same facts.

So far as reports based on hearsay are concerned, the cases admitting such reports can probably be explained by the fact that the

admissible official reports are based upon statements which some person had a legal duty to make. The census records are based on a great many individual reports filed by individual enumerators. In Orange County Water District v. City of Riverside, 173 Cal. App.2d 137 (1959), the admitted reports were based upon reports of water users which were filed with the water district as required by law. Thus, these cases under analysis do not seem to lay down a requirement greatly different from that laid down by the Uniform Business Records as Evidence Act. Under the Business Records Act, too, the report need not be of facts personally known to the recorder so long as someone within the business had a business duty to report them. (Witkin, Evidence § 290.) Apparently, official records are also admissible even though the recorder did not have personal knowledge of the facts recorded so long as some person had a legal duty to report the facts to him. Official records based upon reports made by persons without such a legal duty seem to have been held inadmissible as a general rule.

The only remaining problem, then, is: when is it necessary to call a qualifying witness? Perhaps the fact that some cases admit official records without a qualifying witness and other cases do not may be explained by the fact that in some cases the court may take judicial notice of the manner in which the report was prepared and in other cases it cannot. For instance, in the Orange County Water District case, the court could determine the manner in which the report was prepared by reference to the statute requiring the reports to be filed and by relying on the presumption that the duty had been regularly performed. The same may be said of the census reports. As a matter of fact, in People v. Williams, supra, the court did cite the federal statutes setting forth

the census procedure. The explanation for McGowan v. Los Angeles, supra, and Nichols v. McCoy, supra, then would be that the court had no way of determining for itself the method in which the coroner's report was prepared so as to tie the report properly to the victim. Hence, it was necessary for a qualifying witness to testify. Accident reports (Hoel v. Los Angeles, 136 Cal. App.2d 295 (1955)) and other reports of a similar nature (Behr v. Santa Cruz County, 172 Cal. App.2d 697 (1959)) would be inadmissible under this rationale unless the qualifying witness were called to testify that the document contains a reliable report. In the absence of such testimony, the court cannot know whether or not the report is based on statements of persons who had no duty to report the facts to the officer.

If the foregoing is a correct analysis of the cases, it appears that subdivision (13) may require a foundation for the admission of official records to be laid by the testimony of a witness in all cases while such a foundation is not required in all cases by Sections 1920 and 1926. The language of subdivision (13) requires a qualifying witness in all instances; but, apparently the cases construing Sections 1920 and 1926 do not require such a qualifying witness when the court is able to take judicial notice that the report was prepared in a reliable manner. If the Commission wishes to preserve this aspect of Sections 1920 and 1926, it may take either of two courses of actions:

(1) Subdivision (13) may be revised by adding a provision that a record may be identified and its mode of preparation determined by evidence other than the testimony of the custodian or other qualifying witness. This revision would permit the court to determine the

trustworthiness of the record by taking judicial notice of the statutory requirements for the preparation of certain records.

(2) Another method of preserving the principle of Sections 1920 and 1926 would be to approve a modified version of subdivision (15). Such a version would read as follows:

> (15) Written reports made by a public officer or employee of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such officer or employee and that the sources of information, method and time of preparation were such as to indicate its trustworthiness.

Such a subdivision would, in effect, preserve the existing law by permitting the court to determine the trustworthiness of the record either by the testimony of a qualified witness or by taking judicial notice of the method in which the record was prepared.

If either revision is approved, the staff believes that Sections 1920 and 1926 may be repealed without changing existing law relating to the admission of official reports. The Commission has previously approved the repeal of these sections.

9/22/61

First Supplement to Memorandum No. 39(1961)

Subject: URE - Hearsay (Statements Relating to Boundary)

There is a common law exception to the hearsay rule that has been recognized in California cases even though it is not recognized in existing California statutes or in the URE. Because it appears neither in our present statutes nor in the URE, it has not as yet been considered by the Commission. The exception permits the introduction of the statements of deceased, distinterested persons upon questions of boundary. The exception is a narrow one and has received but limited application; however, it is presented to the Commission so that the entire field of hearsay evidence in California may be considered.

The California cases have defined the scope of the exception as follows:

> [T]he declarations on a question of boundary of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, and whether the boundary be one of a general or public interest, or be one between the estates of private proprietors. [Morton v. Folger, 15 Cal. 275, 280 (1860) per Field, C.J.]

The declarant, apparently, must have direct knowledge of the subject matter of his declaration. In the Morton case, supra, the testimony given in another action between other parties of the surveyor who originally laid out the boundaries of John A. Sutter's grant was held admissible, the surveyor being dead and his declaration relating to the location of the lines he had surveyed. In Morcom v. Baiersky, 16 Cal. App. 480 (1911), an 1870 map of a subdivision prepared by the surveyor

who prepared the recorded subdivision map was held admissible on a question of boundary. Cited with approval in the Morton case were numerous cases from other jurisdictions with similar holdings admitting statements such as that of a chain carrier in a survey party as to the location of certain monuments. A declaration of a surveyor as to the location of boundaries and monuments, however, is inadmissible if the surveyor was not the one who originally ran the line or established the monument in question. (Almaden Vineyards Corp. v. Arnerich, 21 Cal. App.2d 701 (1937); Spencer v. Clarke, 15 Cal. App. 512 (1911).)

Chief Justice Field indicated, and Wigmore (Evidence (3d ed.) §§ 1563 et seq.) corroborates, that the exception has been recognized in many jurisdictions in the United States. It arose because in the early unsettled condition of this country, many boundaries would have been unprovable if subsequent statements by the original surveyor or other members of the survey party were inadmissible. This was certainly the case in Morton v. Folger, supra, for at the time that boundary line was surveyed, there were only nomadic Indians in the neighborhood. The exception is of considerably less importance now that the State is well-settled. Only three California cases have been found applying the exception. One was in 1911 and two were in 1860.

If the Commission believes the exception of sufficient importance to retain, the following additional subdivision of Rule 63 is suggested:

(27.1) If the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement concerning the boundary of land unless

the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Mtg.

6/29/62

Memorandum No. 43(1962)

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

The State Bar Committee appointed to work with the Law Revision Commission on the Uniform Rules of Evidence has approved the tentative recommendation contained in the galley proofs previously sent to you. See the letter from the Chairman of the State Bar Committee (Exhibit I - attached blue pages).

The staff requests authority to print the tentative recommendation and study in the form in which it was previously sent to you. We propose that 5,000 copies be printed. (We ordinarily print 3,000 copies of recommendations and studies.) We do not propose that any policy on charging for the report be adopted at this time. We plan to determine the cost of producing an individual copy of the report when the pamphlets are printed. We then will determine whether we can make arrangements for the sale of the pamphlets on a reasonable basis. If we can, we will bring the matter of sale of this pamphlet and other pamphlets back to the Commission for a decision on the policy to be followed. We may, if no unusual demand for the Hearsay Pamphlet develops, continue the present policy of distributing our pamphlet publications free of charge.

We propose to add the following sentence to the letter of transmittal in the Hearsay Pamphlet: "Only the tentative recommendation of the Commission (as distinguished from the research study) is expressive of Commission intent." We would add this sentence after the first sentence

of the second paragraph of the letter of transmittal. (See galley proofs previously sent to you.) A similar statement is contained in the third bound volume. Nevertheless, that statement was not sufficient to prevent Professor Kagel's views from being attributed to the Commission in a recent article on the Arbitration Statute. We also plan to add to the letter of transmittal a brief statement concerning the method of pagination used in the report.

Note that the Northern and Southern Sections propose certain matters for reconsideration by the Commission even though the State Bar Committee as a whole has approved the tentative hearsay recommendation as contained in the galley proofs we recently sent to you:

(1) The Northern Section is opposed to Rule 63(6) as revised by the Commission and requests that the Commission reconsider its position. See Minutes of Northern Section attached as Exhibit II (yellow pages). Compare position of Southern Section of State Bar Committee on this matter (Exhibit III - pink pages). Both the Northern and Southern Sections suggest that Rule 63(6)(b) be deleted as unnecessary.

(2) The Northern Section is opposed to Rule 63(10) as revised by the Commission and requests that the Commission reconsider its position. The Northern Section suggests that the following language added by the Commission to Rule 63(10) be deleted: "except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States, is not admissible under this subdivision against the defendant in a criminal action or proceeding."

(3) The Southern Section approves Rule 63(21.1) but suggests that the Commission reconsider whether the requirement that the judgment be "offered by one who was a party to the action or proceeding in which the judgment was rendered" should be retained. See Minutes of Southern Section (Exhibit III - pink pages).

Exhibit IV (white pages) contains the text of Rule 63(6), (10) and (21.1) as revised by the Commission.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

LETTER FROM CHAIRMAN OF STATE BAR COMMITTEE

June 14, 1962

MR. JOHN H. DeMOULLY
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California.

Re: Committee to Consider Uniform Rules of Evidence

Dear Mr. DeMoully:

I have your letter of May 31, 1962 and have received the report of the Southern Section with regard to the hearsay exceptions.

I note that four members of the Southern Section participated in the final determination of that Section's position with regard to the hearsay exceptions. Only three members of the Northern Section so participated. Therefore, as Chairman of the Statewide Committee, and with the approval of the two members of the Northern Section other than myself who so participated, I rule that the Committee as a whole has now approved the final revision proposed by the Law Revision Commission.

However, the Northern Section remains opposed to Sections (6) and (10) of Rule 63, as revised by the Commission, and requests that the Commission reconsider its position. As stated in the report of the Northern Section of its meetings held on May 1st and May 10th the Northern Section cannot see that any purpose is subserved by placing the proposed subparagraph (b) in Section (6). The Constitution, after all, speaks for itself. It does not require reaffirmation by statute. Furthermore, it is not apparent to the Northern Section that any constitutional provisions limit the admission of confessions. Furthermore, the Northern Section feels that if a confession is voluntarily made while a person is illegally detained there is no reason why it should not be admissible. The same reasoning applies to the similar exception found in Section (10).

Sincerely yours,

s/ Lawrence C. Baker

Lawrence C. Baker
Chairman Committee to Consider
Uniform Rules of Evidence

(Memo. 43)(1962) EXHIBIT II

MINUTES OF MEETINGS

OF

NORTHERN SECTION OF
COMMITTEE TO CONSIDER
UNIFORM RULES OF EVIDENCE

Two meetings of those members of the Northern Section (for convenience hereinafter called the "Committee") who are concerned with the hearsay rules were held on May 1st and May 10th, 1962.

The Committee agreed with the analysis of the revisions by the Law Revision Commission (hereinafter called the "Commission") heretofore rendered by the Chairman and accordingly proceeded to consider sections (3), (4), (6), (10), (15), (16), (21) and (30) of Rule 63 and also Rule 64.

With respect to section (3) the Committee agreed that the changes made by the Commission were improvements and accordingly approved section (3), as revised by the Commission.

With respect to section (4) the fundamental difference between the Commission and the Committee is that the Committee would confine the admissibility of contemporaneous and spontaneous statements to situations where the declarant is unavailable while no such limitation is imposed by the Commission. Upon further consideration it appears to the Committee that the imposition of the limitation of unavailability springs from a misunderstanding by the whole Committee, both North and South, of the fundamental basis of the hearsay exception for spontaneous statements. This basis is that such statements, being spontaneous, have a probability of trustworthiness greater than might ordinarily be expected

from the declarant while on the stand, and being incapable of recapture except by those who heard the statements, there is an intrinsic necessity for their use totally independent of the declarant's availability. The present California rule does not appear to require unavailability of the declarant, and from the standpoint of general principle Wigmore says:

> "The Necessity Principle; Death, Absence etc., need not be shown. It has already been noticed (ante, § 1421) that through the Exceptions to the Hearsay rule run two general principles, one of which is that some necessity shall exist for resorting to hearsay statements. This Necessity, for the first six Exceptions, consists in the impossibility of obtaining from that person testimony on the stand; for the seventh it consists in the general scantiness of other evidence on the same subject; for the eighth, ninth, tenth, and eleventh, in the practical inconvenience of requiring the person's attendance upon the stand; and, for the thirteenth, in the superior trustworthiness of his extrajudicial statements as creating a necessity or at least a desirability of resorting to them for for unbiased testimony. It is this last reason that suffices equally for the present Exception. The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it.
>
> This reason, though rarely noted by the Courts, appears clearly to be the sufficient one."

The Committee therefore approved section (4) as revised by the Commission.

Turning to section (6) the Committee remains unable to agree with the Commission's proposed paragraph (b) which reads:

> "under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State."

The Committee cannot see that any purpose is subserved by placing such a provision in a statute. The Constitution, after all, speaks for itself. It does not require reaffirmation by statute. Furthermore, it is not apparent to the Committee that any constitutional provisions limit the admission of confessions. In this respect in III Wigmore on Evidence, 3rd Ed., Sec. 822, it is said:

"The principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony.

. . . . . .

The ground of distrust of such confessions made in certain situations is, in a rough and indefinite way, judicial experience."

(Emphasis the author's)

In Sec. 823 the author further says:

"Finally, a confession is not rejected because of any connection with the privilege against self-incrimination."

(Emphasis the author's)

The Committee, however, is aware of the holding in People v. Williams, 20 Cal. (2d) 273, that confessions obtained by physical abuse violates due process of law.

In its most recent revision the Law Revision Commission has added a new subsection (c) which reads as follows:

"during a period while the defendant was illegally detained by a public officer or an employee of the United States or a state or territory of the United States."

The Committee fails to find any relevancy of this subparagraph to the question of admissibility of confessions. If a confession is voluntarily made while a person is illegally detained it appears to the Committee that there is no reason why it should not be admissible.

The Committee therefore disapproved the revision of the Commission and approved the original URE version as heretofore revised by the Committee.

With respect to section (10) the Committee cannot find any connection between the following language added by the Commission:

"except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States, is not admissible under this subdivision against the defendant in a criminal action or proceeding."

and the exception for declarations against interest. As with the case of confessions it would appear to the Committee that there is no reason why any declaration against interest, voluntarily made, should not be admissible even though the declarant were in the custody of a public officer or employee.

The Committee therefore approved section (10), as revised by the Commission, but with the elimination of the quoted matter above set forth.

Upon consideration of section (15) the Committee concluded that the Commission's revisions substantially satisfied all of the doubts which the Committee harbored with respect to the original URE version and therefore approved section (15) as revised by the Commission.

With respect to section (16) the Northern Section had originally recommended that it be confined to vital statistics. As revised by the Commission it has been so confined and, in addition, the Commission has eliminated certain unintelligible phrases in the URE version.

The Committee therefore approved section (16) as revised by the Commission.

With respect to section (21), after further consideration the Committee agrees with the Commission that, as revised by the Commission, this section would not militate against application of those provisions of law which in certain circumstances attribute conclusiveness to a previous judgment against an indemnitee. It was noted that the Commission's revision eliminates unintelligible language contained in the original

URE version. The section, as revised by the Commission, was therefore approved.

Section (30) next came up for consideration. The Committee believes that the Commission's revision largely removes the doubts of the Committee with regard to the original URE version. The Committee suggests, however, that a greater probability of trustworthiness might be attained if, after the word "opinion", there should be restored the words "which is of general interest to persons engaged in an occupation". This is merely a suggestion and whether or not accepted by the Commission the Committee approves the section in its present form as revised by the Commission.

With respect to Rule 64 the Committee agreed with the Commission that the new discovery rules leave it unnecessary and therefore approved its elimination by the Commission.

The Northern Section therefore approves Rule 62 and 63 as revised by the Commission except that it disagrees with the Commission's revision of sections (6) and (10) of Rule 63. The Northern Section would also suggest, merely as a caveat, that a certain qualification be added to section (30) of Rule 63, as hereinbefore noted.

Statutory changes are approved.

LAWRENCE C. BAKER
Chairman Northern Section Committee
to Consider Uniform Rules of Evidence

Memo. No. 43(1962)

EXHIBIT III

MINUTES OF MEETING OF SOUTHERN SECTION COMMITTEE TO CONSIDER UNIFORM RULES OF EVIDENCE

[May 17, 1962]

The Southern Section of the Committee met on May 17, 1962, at Room 1111, Superior Oil Building, 550 S. Flower Street, Los Angeles.

Members present: Barker, Christopher, Henigson, Kadison

Members absent: Groman, Newell, Schall

The meeting was held for the purpose of reconsidering certain of the hearsay rules in the light of modifications made by the Law Revision Commission (the "Commission"). These modifications are reflected in the Commission's tentative recommendation concerning the Hearsay Article which was distributed to the members of the Committee on October 19, 1961, and later placed in galley proof form. References hereafter made in these minutes to the Commission's revised drafts of the rules in question shall be deemed, unless otherwise stated, to refer to the Commission's draft thereof as shown in the tentative recommendation distributed by the Commission in October, 1961.

Rule 63, subdivisions (3) and (3.1)

These subdivisions relate to the admissibility in a present action of testimony given in a former action. As recast by the Commission, subdivision (3) applies only to situations in which testimony in a former action is offered against a person who was a party to the former

action. Subdivision (3.1), a new subdivision, covers those situations in which testimony given in a former action is offered against a person who was not a party to the former action.

The Committee reviewed the Commission's revised draft of these subdivisions in the light of the draft of subdivision (3) previously agreed upon by the Committee and the Commission. The Committee also reviewed the analysis of these subdivisions made by Lawrence Baker in his report dated January, 1962.

The conclusion reached was that subdivision (3), as revised by the Commission, when read together with the new subdivision (3.1) proposed by the Commission, is a clearer and more precise statement of the former testimony exception to the hearsay rule than the drafts previously approved by the Committee. Accordingly, subdivisions (3) and (3.1) in their presently revised forms were approved.

Rule 63, subdivision (4)

This subdivision relates to the admissibility of spontaneous declarations.

The only substantive change which the Commission seems to have made from its previous version is the addition of the word "act" to the list of things which the declarant must have perceived, so that the phrase which formerly read "event or condition" now reads "act, event, or condition". This slight change was approved without dissent.

The Committee then reviewed, by reference to its files, the history of what now seems to be the only remaining area of disagreement with the Commission: namely, the need for a requirement that the declarant be unavailable. The requirement of unavailability is not imposed by the

Commission. Previously, the Committee had insisted that spontaneous declarations be admissible only if the declarant were unavailable as a witness or testified that he did not recall the event or condition involved. It may be of some interest to note how this came to be the Committee's view. The notes of the members of the Southern Section who were on the Committee when this problem first was considered in 1958 indicate that the unavailability requirement, although not a requirement under existing California law, was proposed by the Northern Section (at a meeting held April 23, 1958) in an effort to place some restriction on res gestae statements -- the idea being that, in the words of the Northern Section, "trial judges use res gestae as an excuse for letting in almost anything." The Southern Section, on the other hand, never was insistent upon the requirement that the witness be unavailable and, at its June 7, 1958, meeting, voted to the effect that unavailability not be a requirement for admissibility of spontaneous declarations because the very spontaneity of the declaration afforded a sufficient basis for concluding that the declaration was trustworthy. However, in a joint meeting on October 8, 1958, between the Committee as a whole and the Commission, it was agreed, by a slight margin, that the Northern Section's views should prevail. This has represented the view of the Committee as a whole up to the present time.

It was noted that the Northern Section, at its May, 1962, meetings, had reversed its former position and now agreed that unavailability of the declarant should not be a requirement for the admissibility of spontaneous declarations.

Upon further review of the problem of unavailability, the Southern Section again affirmed what initially was its position: namely, that

unavailability of the declarant should not be a requirement for admissibility of spontaneous declarations. Thus, the two Sections now appear to be in agreement with each other and with the Commission.

Subdivision (4), as presently revised by the Commission, thereupon was approved.

Rule 63, subdivision (6).

This subdivision relates to the admissibility of confessions.

The Committee reviewed the history of its past disagreement with the Commission on the matter of admissibility of confessions. The Committee previously has been of the view that the URE version of subdivision (6) should be adopted with the following changes: (i) deletion of the word "reasonably" in subparagraph (b) and, in the same subparagraph, change "public official" to "public officer or employee"; (ii) the addition of a new subparagraph (c) which would read: "or (c) under such other circumstances that the statement was not freely or voluntarily made."

The approach which the Committee as a whole always has taken (and which the Northern Section, judging from the minutes of its May 1962 meetings, still takes) is that the test which should govern the admissibility of confessions is this: Was the confession freely and voluntarily made? If so, it should be admissible. But if it was obtained under circumstances which cast doubt upon its voluntariness, it should be inadmissible as a matter of public policy, irrespective of the question of whether it was likely to have been true or false.

The Commission's previous approach, as we understood it, was that the test of admissibility should turn primarily on the issue of whether the

circumstances were such that the confession was likely to have been false; that the conduct of the authorities in obtaining the confession, although important, is a secondary consideration.

Upon reviewing the Commission's redraft of subdivision (6), it appeared to the members of the Southern Section that the Commission now has come very close to the Committee's thinking on the basic policy question. Under the Commission's present draft, the judge must find that the statement was freely and voluntarily made and, in addition, must find the existence or non-existence of other circumstances. In other words, the free and voluntary nature of the confession is an inherent condition which now must be met in all cases. This represents a substantial and important deviation from some of the Commission's earlier drafts which made the likelihood of truth or falsity the sole or principal test, but which did not require a finding that the confession must have been freely and voluntarily made.

With respect to subparagraph (b) of the Commission's revised draft, the members agreed with the Northern members that reference to the constitutional problem probably is unnecessary. However, they could see no harm in including the language of subparagraph (b).

With respect to subparagraph (c) of the Commission's revised draft, a majority of the members present agreed with the Commission that, as a matter of public policy, illegal detention should deprive the authorities of the right to use a confession obtained during the period of illegal detention. Mr. Henigson, however, was in favor of deleting subparagraph (c) on the ground that the advantages which result from the use of confessions which are actually freely and voluntarily made (although they happen to have been made during a period of illegal detention) outweigh the public policy

that is served by excluding such confessions. Thus, Mr. Henigson would agree with the Northern Section that the question of illegal detention should not be a factor.

By a majority vote [Henigson dissenting only with respect to subparagraph (c), which he would delete], the members voted to approve subdivision (6) in the form presently revised by the Commission.

Rule 63, subdivision (10)

This subdivision deals with the admissability of declarations against interest.

The Commission's presently revised draft of subdivision (6) appears to be substantially the same as that previously approved by the Committee, except that:

(i) the Southern Section of the Committee previously has insisted upon inserting, at the outset, the words "except as against the accused in a criminal proceeding";

(ii) the Commission now proposes to add, at the end of subdivision (10), language reading as follows: "except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against a defendant in a criminal action or proceeding."

The Southern Section previously has insisted upon some restriction upon the use of third-party declarations against interest as against an

accused in a criminal proceeding because of its fear that, in the absence of such a restriction, the prosecution could, for example, put the squeeze on a co-consipirator (not the accused) to make a declaration which implicates both the declarant and the accused and then use that declaration against the accused without having to comply with the requirements of subdivision (9) [relating to admissibility of declarations of co-conspirators].

After reviewing the new language which the Commission proposes to add to subdivision (10), the Southern Section concluded that the inclusion of that new language would serve a very material and salutary purpose and would go a long way towards reducing the previous fears of the members of the Southern Section that subdivision (10) would serve as a vehicle for getting around subdivision (9). Although the Northern Section apparently saw no useful purpose in the new language, the members of the Southern Section thought otherwise. It seemed to them that the new language makes a logical distinction between declarations which are likely to be trustworthy and those which are not; that an extra-judicial declaration against interest which is made by a third party (not the accused) against the accused is inherently more credible if made while the declarant is not in custody of the authorities than it is if made while the declarant is in custody. The conclusion finally arrived at was that the new language which the Commission proposes to add to subdivision (10) represents an acceptable compromise which meets to a substantial degree our previous objections to making third-party declarations against penal interest admissible

as against an accused in a criminal proceeding. The Southern Section members believe that it is not likely that a third person, particularly a co-conspirator, will make a declaration against interest which implicates himself and the accused unless the declarant is in custody when he makes the declaration, and that if the declarant makes the declaration while not in custody the statement is likely to be true.

Accordingly, the Commission's revised draft of subdivision (10) was approved.

Rule 63, subdivision (15)

This subdivision relates to the admissibility of written reports made by public officials in the performance of their duties.

It was noted that the Commission now has revised subdivision (15) to eliminate subparagraph (c) of the URE version of this subdivision. Subparagraph (c) would have made admissible written reports made by an official whose duty was merely to "investigate" the facts (i.e., a police officer who did not observe the accident but merely investigated it afterwards). Also, the Commission's revised draft would substitute a general provision stating that the admissibility of official reports is dependent upon a finding by the judge that the sources of information for, and the method of preparation of, the report are such as to indicate the trustworthiness of the report. This is basically the same approach that is used in determining the admissibility of business records.

The Committee concluded that applying the same approach to the problem of admissibility of official records as is used in connection

with business records is a practical solution to the problem. The Committee also decided to withdraw its former insistence that there be restrictions imposed upon the admissibility of official reports when the reporting official is employed by a governmental agency which is a party to or has a direct interest in the litigation. The Committee is willing to accept the argument that if the agency whose employee prepared the report has an interest in the litigation, this fact can be handled by treating it as something which goes to weight, bias, etc., and that a rule of complete exclusion may be unnecessarily harsh and may serve to keep out vital information which otherwise may not be obtainable.

Rule 63, subdivision (16)

This subdivision relates to the admissibility of reports made by persons who are not public officers but who nevertheless have a statutory duty to make reports.

It was noted that the Commission's revised draft apparently accepts the Northern Section's view that the only reports which should be made admissible by subdivision (16) are those of the vital statistics variety (birth, death, marriage). The Southern Section, although of the view that the URE version of subdivision (16) is far too broad, previously has been reluctant to limit the application of subdivision (16) to reports of birth, death, and marriage, pointing out that there are many other types of reports that generally are reliable and contain information that it would be difficult to obtain from other sources [examples are ships' logs, shipping registers, timber reports, surveyors'

reports, etc.]. However, the Southern Section has been unable to come up with any workable formula which would distinguish between those types of reports concerning which there would be little controversy and those whose reliability might be subject to serious question.

Upon reconsideration, the Southern Section decided to accept the views of the Northern Section and the Commission, and to approve subdivision (16) in the form approved by the Commission. Many reliable types of reports of the non-vital-statistics variety probably could come into evidence under some other hearsay exception, particularly the business records exception.

Attention was directed to the fact that in the Commission's galley proof of subdivision (16) the word "fetal" is misspelled "fatal".

Rule 23, subdivisions (21) and 21.1

These subdivisions relate to the admissibility of a prior judgment obtained against X when X thereafter brings an action against Y, based on the former judgment, to recover on an indemnity agreement with Y or to enforce a warranty given by Y to X.

The members of the Section concluded that the Commission's revised subdivision (21) sufficiently clarifies the ambiguities which the Committee had objected to in former drafts. Therefore, the Commission's redraft of subdivision (21) was approved.

With respect to the Commission's new subdivision (21.1), the Committee agreed to approve the Commission's draft subject to receiving an explanation from the Commission as to why subdivision (21.1) should be limited only to situations in which the judgment is offered by a

person who was a party to the action in which the judgment was rendered. The Southern Section members cannot readily see why it should make any difference whether the judgment is offered by a party or by a non-party.

Rule 63, subdivision (30)

This subdivision relates to the admissibility of matters contained in commercial lists, etc. which are generally relied upon as accurate by persons in the trade.

After some discussion, it was decided to approve the Commission's draft of subdivision (30).

Rule 64.

The Committee agreed with the Commission's view that the new discovery rules probably make Rule 64 unnecessary, and, therefore, the Commission's action in deleting Rule 64 was approved.

Statutory changes

The statutory changes recommended by the Commission were approved.

Summary

As a result of the action taken at this meeting and at previous meetings, it now appears that the Southern Section is in full agreement with the Commission with respect to the entire Hearsay Article [Rule 62 though 66.1, inclusive[.

Stanley A. Barker
Vice-Chairman

Memo. 43(1962)

EXHIBIT IV

TEXT OF RULE 63(6), (10) AND (21.1) AS REVISED

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;~~ As against the defendant in a criminal action or proceeding, 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

As revised by the Commission, 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.

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. For the sake of completeness, however, it is desirable to give express recognition to the fact that any rule of admissibility established by the Legislature is subject to the requirements of the Federal and State constitutions.

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 an accused 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 (10): Declarations Against Interest

(10) ~~Subject to the limitations of exceptions (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, except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.~~;~~

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.

URE 63(10) has been revised (1) to limit its scope to nonparty declarants (incidentally making the cross reference to exception (6) unnecessary); (2) to write into it the present requirement of Code of Civil Procedure Section 1853 that the declarant have "sufficient knowledge of the subject"; (3) to condition admissibility on the unavailability of the declarant; and (4) to prohibit the use of such a declaration against the defendant in a criminal case if the declarant was in custody when the statement was made.

Subdivision (21.1): Judgment Determining Liability, Obligation or Duty

(21.1) When the liability, obligation or duty of a third person is in issue in a civil action or proceeding, evidence of a final judgment against that person to prove such liability, obligation or duty, if offered by one who was a party to the action or proceeding in which the judgment was rendered.

COMMENT

This subdivision supplements the rule stated in subdivision (9)(c). Together, they codify the holdings of the cases applying Section 1851 of the Code of Civil Procedure.

12/5/62

Memorandum No. 83(1962)

Subject: Program for 1965 Legislative Session

The staff believes that this is an appropriate time to determine the topics that we will work on during the next two year period. This memorandum contains the staff's suggestions on this subject.

Attached as Exhibit I (yellow sheets) is a description of each topic on our current agenda. Exhibit II (green sheets) attached indicates the status of each such topic.

We obviously cannot cover all the topics on our current agenda by 1965. It is desirable to eliminate some topics now from further consideration during 1963-64. It would also be helpful to the staff if the Commission could tentatively establish some sort of priority for the various topics that we plan to consider if time permits during 1963-64. We do not recommend that we devote the major portion of our time to the subject of sovereign immunity.

Listed below are the topics that the staff recommends we consider for study during 1963-64. Any topic not listed would not be given further consideration during this period (except, perhaps, to drop the study from our current agenda of topics). The topics are listed in the order that we were authorized to study them by the Legislature. We suggest that we begin our study of the Privileges Article of the Uniform Rules of Evidence at the January meeting.

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

(1) Adjustments and Repeals of Special Statutes. We plan to present

a tentative recommendation on this subject as soon as we can prepare it. We hope that it will be possible to take care of these adjustments and repeals in 1963. If not, it should be a top priority for 1965.

(2) Dissolved Local Public Entities. The staff and the Commission have devoted considerable time to a tentative recommendation on this subject. We had to abandon our efforts to prepare it in time for the 1963 session. The staff would do the necessary additional research on this subject.

(3) Whose Employee? The research consultant's study points up the necessity of having statutory provisions that indicate how one can determine the public entity charged with the torts of certain employees -- for example, superior court judges. The staff would do the necessary additional research on this subject.

(4) Additional portions. We plan to have three additional research studies prepared on the portions of this subject that are most in need of study. We have discussed possible studies with our research consultant, Professor Van Alstyne. He will hand out material at the meeting indicating a number of areas that are in need of study.

STUDY NO. 53(L) - PERSONAL INJURY DAMAGES AS SEPARATE PROPERTY AND STUDY NO. 62 - IMPUTED CONTRIBUTORY NEGLIGENCE UNDER VEHICLE CODE SECTION 17150

The Commission determined that this is a matter that should receive a top priority for the 1965 session. The State Bar is interested in seeing that this matter is studied.

STUDY NO. 57(L) - LAW RELATING TO BAIL

We have what appears to be a good research study on this subject. We would like to make a recommendation to the 1965 legislative session if possible. We would not give this a high priority, but we believe that this is an area of the law that should be studied.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE

(1) Privileges Article. We have the research study for this portion set in type. The staff and the Commission have already devoted considerable time to consideration of this portion of the study.

(2) Rules 67-72 -- Authentication and Content of Writings. We have the research study for this portion set in type. This portion would be almost essential if we are to make a recommendation relating to the hearsay article to the 1965 Legislature.

(3) Additional portions. The portions of the Uniform Rules not listed above (excluding the hearsay article) include:

Article I. General Provisions (5 pages)

Article II. Judicial Notice (3 pages)

Article III. Presumptions (2 pages)

Article IV. Witnesses (2 pages)

Article VI. Extrinsic Policies Affecting Admissibility (5 pages)

Article VII. Expert and Other Opinion Testimony (3 pages)

(By pages, we mean the number of pages devoted to the particular article in the pamphlet containing the Uniform Rules of Evidence). We are not suggesting that we attempt to cover all the matters

above listed. Some of the Articles -- like Presumptions -- would be very difficult. It is interesting to note, however, that the Hearsay Article covers 15 pages, the Privileges Article covers 12 pages and the Authentication Article covers 4 pages.

The staff suggests we defer making any decision on what additional portions of the Uniform Rules, if any, we will study during 1963-64 until we have completed a tentative recommendation on the Privileges Article and the Authentication Article.

STUDY NO. 36(L) - CONDEMNATION LAW AND PROCEDURE

(1) Evidence. We submitted a recommendation on this in 1961. The bill passed the Legislature but was pocket vetoed by the Governor. Our consultant advises us that this is probably the most important area of study on this topic. There are only two disputed matters in the proposed legislation.

(2) Moving Expenses. We submitted a recommendation on this in 1961. The bill was referred to interim study to determine how much it would cost public entities. Recent federal legislation permits federal funds to be used for this purpose by States. There is no dispute on the legislation except for the basic policy. However, the legislation will need to be made consistent with the federal legislation.

(3) One new study. We will submit a recommendation as to the particular new aspect of this subject that should be studied after consulting with our consultant and with the Department of Public Works.

STUDY NO. 42 - TRESPASSING IMPROVERS

We have a research study set in type on this subject. From time to time in the past the Commission has considered this subject but has never been able to agree on a basic approach to the problem. We would like to dispose of this subject.

STUDY NO. 46 - ARSON

We have a research study set in type on this subject. The staff and the Commission have already devoted considerable time to the study of the subject.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 83(1962)

EXHIBIT I

The following is an explanation of the scope of each topic now on the current agenda of the Commission. 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 no 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.

Study No. 62: A study to determine whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the the contributory negligence of the driver of a vehicle to its owner.

The 1957 Legislature directed the Commission to undertake a study "to determine whether an award of damages made to a married person in a personal injury action should be the separate property of such married person." [Study No. 53(L)] A study of this subject involves more than a determination of the nature of property interests in damages recovered by a married person in a personal injury action; it also involves the question of the extent to which the contributory negligence of one spouse may be imputed to the other.

Prior to the enactment in 1957 of Section 163.5 of the Civil Code, damages recovered by a married person in a personal injury action were community property. Hence, the courts imputed the contributory negligence of one spouse to the other beasuse the negligent spouse otherwise would share in the compensation paid for an injury for which he was partially responsible. The result was that a nonnegligent spouse was in many instances totally deprived of compensation for injuries negligently caused by others. Section 163.5 prevents such imputation, but it has created many other problems that need legislative solution.

The Commission's preliminary study of these problems has revealed another problem which cuts across any recommendation which the Commission might make in regard to the property nature of a married person 's personal injury damages. Many, if not most, actions for the recovery of damages for personal injury in which the contributory negligence of a spouse is a factor arise out of vehicle accidents. Because contributory negligence is imputed to vehicle owners under Vehicle Code Section 17150, the potential results in terms of liability are quite varied and complex when an automobile

carrying a married couple is involved in an accident with a vehicle driven by a third party and both the driver spouse and the third party are negligent. Whether the innocent spouse may recover damages from a negligent third party depends in large part upon such factors--not germane to the question of culpability--as whether the automobile was held as community property or as joint tenancy property and whether a husband or a wife was driving when the innocent spouse was injured. In many situations, it is impossible to predict with certainty what the result would be.

It is clear that if a vehicle is community property registered in the name of the husband or in the names of both spouses, the contributory negligence of the husband will not be imputed to the wife, but the contributory negligence of the wife will be imputed to the husband. These results flow from the fact that the husband, as manager of the community property, is the only spouse who can consent (within the meaning of Section 17150) to the other's use of the vehicle. On the other hand, if the vehicle is community property registered in the wife's name, the contributory negligence of the wife will probably be imputed to the husband and the husband's contributory negligence may possibly be imputed to the wife, but these results are not predictable with certainty. It is also clear that if the vehicle is held in joint tenancy, the negligence of one spouse is imputed to the other in all cases because each joint owner may consent (within the meaning of Section 17150) to the use of the vehicle. However, if the vehicle is community property but is registered in the names of both spouses jointly, it is not clear whether the true nature of the property can be shown to prevent imputing the contributory negligence of the husband driver to the wife.

The problems arising out of Vehicle Code Section 17150 are not confined to cases in which married persons are involved. If, for example, an automobile owner is a passenger in his own automobile and is injured by the concurring negligence of the driver and a third person, he cannot recover damages from the third person, for the driver's contributory negligence is imputed to him. He could formerly recover from the driver on established principles but Section 17158 of the Vehicle Code, originally enacted to protect against fraudulent claims and collusive suits, was amended in 1961 to provide that the owner can no longer recover from the driver. Hence, an innocent vehicle owner, injured by the concurring negligence of his driver and another, can now recover damages from no one.

A primary purpose of Section 17150 would appear to be to protect innocent third parties from the careless use of vehicles by financially irresponsible drivers. This protection is achieved by its provision that a vehicle owner is liable to an innocent third party for its negligent operation. This policy is not, of course, furthered by depriving innocent vehicle owners of all rights of action against negligent third parties. However, another purpose of Section 17150 may be to discourage vehicle owners from lending them to careless drivers. This policy might be furthered by denying the owner the right to recover against negligent third parties.

The Commission believes that a study should be made to determine what policies Section 17150 should seek to accomplish. It may be that better ways can be found to control the lending of vehicles and to allocate the risk of injury to the owner of a vehicle by another than to impose the entire risk on the one person involved who is not negligent. Accordingly, the Commission recommends that it be authorized to study whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the contributory negligence of the driver of a vehicle to its owner.

EXHIBIT II

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	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. We decided to defer action on this study because the Governor's Commission on Problems of Insanity Relating to Criminal Offenders 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. We will need, however, to bring study up to date.	Commission has published a tentative recommendation on the article on hearsay. We have the following additional portions of this study set in type: Privileges Article; Rules 67-72.

Study No.	Subject	Year Authorized	STATUS: 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 was to make and we will have to retain another consultant to prepare this research study.
36(L)	Condemnation Law and Procedure	1956-A Legislative assignment	Substantially completed	We have made four recommendations on this subject.
39	Attachment, Garnishment and Property Exempt from Execution	1957	Research consultant retained	

STATUS

Study No.	Subject	Year Authorized	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.
43	Separate Trial on Issue of Insanity	1957	Yes	We have decided to defer this study. 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. Our research consultant is Professor Orrin B. Evans of U.S.C. We have written to him to determine when he will submit the study, but he has not set any time for delivery of the research report. Contract required study to be submitted not later than June 30, 1962.

STATUS

Study No.	Subject	Year Authorized	Completed Research Report Received?	Comments
L6	Arson	1957	Yes	We have the research study set in type.
'7	Modification of Contracts	1957	We do not have a research consultant	
'9	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	Yes	
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	Yes--but we need additional research studies	

Study No.	Subject	Year Authorized	STATUS: Completed Research Report Received?	Comments
53(L)	Whether Personal Injury Damages Should Be Separate Property	1957 - A legislative assignment	Yes	We deferred action on this study pending receipt of the study required by Topic No. 62.
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	
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 plans to deliver this study in September 1963.
62	Vehicle Code Section 17150 (imputed contributory negligence)	1962	We have retained a research consultant	Our research consultant plans to deliver this study in September 1963.

file

9/10/63

Memorandum No. 63-31

Subject: Procedure to be Followed in Study of Uniform Rules of Evidence

From time to time the Commission has agreed on various aspects of the procedure to be followed in the study of the Uniform Rules of Evidence. This memorandum has been prepared in response to the direction of the Commission at the June 1963 meeting. The memorandum summarizes previous decisions of the Commission and presents some policy questions for Commission decision.

SUMMARY OF PROCEDURE TO BE FOLLOWED IN STUDY OF URE

1. Preparation of tentative recommendations. The Commission will prepare tentative recommendations covering each article of the URE. Each tentative recommendation will also indicate the existing statutes that need to be amended or repealed to conform to the tentative recommendation. The tentative recommendation contains comments under each rule and under each existing statute section that indicate why the URE provision or existing statute has been changed and how the provisions recommended by the Commission compare with existing law. Where existing law is to be changed, either by a proposed rule or by amendment or repeal, the comment indicates the reason for the change. This is the form followed in the tentative recommendation on the Hearsay Article and the form we propose to follow in the tentative recommendation on the Privileges Article.

Before publishing a particular tentative recommendation, we will review the comments of the State Bar Committee. We have sent mimeographed materials (including various selected memoranda prepared for the Commission)

to the State Bar Committee. We have sent to the Committee tentative recommendations in various stages of preparation. We have provided the State Bar Committee with mimeographed copies of the research studies on the URE. In some cases, the State Bar Committee has reviewed particular URE rules before they have been considered by the Commission, and the Commission has considered the comments of the Committee at the time the Commission considered the rule. As far as the Commission is concerned, the procedure has worked well in the past and the staff proposes no change. (We are somewhat concerned about the reaction of the State Bar Committee when the Committee discovers that we have entirely rewritten our previous revision of the Privileges Article. The Committee may believe that it has completed its work on that Article.) The Commission and the State Bar Committee were able to reach complete agreement on the Hearsay Article before that tentative recommendation was published.

We do not plan to send mimeographed materials to other groups for review. We will send them the printed pamphlets containing the tentative recommendation (and the research study).

2. Publication of tentative recommendations. Some time ago the Commission decided that it will publish a series of pamphlets containing tentative recommendations on portions of the URE study. Each pamphlet will contain the portion of the research study pertinent to the tentative recommendation in that pamphlet. Each pamphlet will be similar in form to the one already published on Hearsay Evidence.

The Commission decided to publish the various tentative recommendations in this form in order to permit publication of portions of the material as soon as each portion is finished. This makes it possible for the staff

to meet the various publication deadlines by spreading the work over several years, rather than publishing all the material just before the 1965 legislative session. In addition, it provides interested persons with the tentative recommendations and portions of the research study in a convenient, easy to handle, up-to-date form at the earliest possible time. This will result in a saving in time that would otherwise be required to mimeograph and collate mimeographed material and in a saving in postage. Much of the research study is incomplete and not up-to-date; it would need to be retyped before it could be mimeographed for distribution.

In addition to publishing pamphlets containing the tentative recommendations and research studies, the Commission decided to publish each tentative recommendation (without the research study) in a separate pamphlet. This publication does not have a blue cover, and it is inexpensive to produce since it is merely press overrun of a portion of the material printed for the larger pamphlet. We provide a copy of the tentative recommendation in this form free of charge to any interested persons who request one.

3. Distribution of tentative recommendations for comments. As soon as the printed pamphlet on a particular URE article is available for distribution we would send a copy free of charge to each member of those groups we have requested to review the tentative recommendations. This matter is covered below since it presents policy decisions for Commission determination. We would set a deadline for comments at the time we distribute the printed pamphlets.

We also suggest that a press release be sent to the legal newspapers to advise all interested persons that the Commission is engaged on this

study and has tentative recommendations available for comment.

4. Review of existing statutes in Part IV of Code of Civil Procedure. After we have completed our study of the various articles of the URE, we will need to review the existing statutes in Part IV of the Code of Civil Procedure (relating to evidence) to determine whether they should be retained, amended or repealed. We will, of course, previously have determined what action should be taken on those sections that cover matters covered by the URE rules as revised by the Commission.

In making this review, the staff suggests that we take a very conservative view on recommending changes. We should eliminate obsolete and unnecessary provisions and revise provisions that make no sense. We might, for example, eliminate the Dead Man Statute since we have already studied that. You will recall, also, that the Commission has already recommended revision of the provisions of the existing statute relating to refreshing memory--even though the URE does not cover that problem. But the staff does not believe that it will be possible to consider each existing statute in the detail that we have considered the URE provisions. For example, the staff recommends that no changes be made in the Discovery Statute (other than those necessary to conform it to our URE provisions).

In preparing a schedule for work on this project, it does not appear that we could publish a tentative recommendation on the amendments and repeals we believe should be made of existing statutes not affected by the URE. We will, of course, clear these with the special committee of the State Bar and the final recommended amendments and repeals will be published in our final pamphlet in this series.

5. Interim hearings by legislative committees on tentative recommendations. We hope to be able to obtain extensive interim hearings on the tentative recommendations as soon as they are available in printed form. These hearings would be held during the next 14 months, and we would take the legislative reaction to the tentative recommendations into account at the time we formulate our final recommendation. We used the same procedure on the sovereign immunity package to acquaint members of the legislature with the problems, to "smoke out" opposition, and to obtain legislative reaction.

6. Preparation of New Code of Evidence. After we have reviewed the comments on the tentative recommendation and have completed our review of the existing statutes in Part IV of the Code of Civil Procedure, we will prepare a new code of evidence. This new code of evidence will supersede Part IV of the Code of Civil Procedure. It will include the revised URE rules (with appropriate statute section numbers assigned to the various rules), together with such additional sections of existing law as the Commission determines are to be included in the new code of evidence. All of these provisions will be placed in a logical order in the new evidence code.

7. Publication of Final Recommendation. When we have completed work on the new code of evidence and have obtained the comments of the State Bar (and if time permits, the comments of others), we will publish the Final Recommendation. This pamphlet will not contain any research studies--they will all be printed with the tentative recommendations previously published. The pamphlet will contain the new code as proposed by the Commission. Each section will have a comment that indicates whether the proposed section changes

existing California law. Where a change is recommended, the comment will indicate the reason for the change. The comment may contain material that will be helpful to a court in interpreting the section. The comment will not, however, indicate how the provision differs from the URE.

We would plan to have the proposed legislation printed in the form of a preprinted bill and would use the same type in printing our Final Recommendation. This would save a substantial amount of money, but will require that we have the bill ready to print in November 1964.

8. Hearings on Preprinted Bill. We hope to be able to obtain extensive hearing time in December 1964 and January 1965 for hearings on the preprinted bill. We used this same procedure on the sovereign immunity package and it made it possible to reduce the time required for hearing the bills during the session. Unless we are able to have exhaustive interim study by the appropriate legislative committees, we fear that the proposed code of evidence will be referred to interim study because there will not be time during the 1965 legislative session to consider it.

STAFF RECOMMENDATIONS

I. The Staff recommends that we employ a research consultant to prepare additional research studies, that his compensation be $1,500 (plus necessary travel expenses), and that the Chairman be authorized to execute an agreement with a consultant to be selected at the July meeting.

Professor Chadbourn has completed his research study and has been paid in full. The staff contemplates that each portion of the study will need to be supplemented on the average by one-third in order to bring it up-to-date and to cover matters not covered in the study as submitted. We do not believe that we can expect Professor Chadbourn to do this, although we expect him to review the additional material and the revisions we have made and will make. The revision and supplementing of the research study, together with the work in connection with the printing of the pamphlets containing the study, will require considerable staff effort. We anticipate that we will be able to do this with our present staff, although we believe that we will need to request substantial additional funds to cover printing during the fiscal year beginning on July 1, 1964.

The staff believes that we will need a new research consultant to assist us on the URE project. There are two reasons. First, we need a research study of the existing provisions of Part IV of the Code of Civil Procedure (Evidence)--a study that will advise us whether each section should be retained, revised or repealed. There are approximately 260 sections in Part IV of the Code of Civil Procedure. To some extent, Professor Chadbourn has already discussed some of these sections in his study of amendments and repeals of inconsistent sections. But there are

many other provisions that we must consider if we are to prepare a new evidence code.

Second, we need a new research consultant because we believe that he would be of assistance to us in our consideration of the various problems we must solve in our work on the URE. There may be specific research tasks that he could undertake, and his expert advice would be helpful on matters where no additional research is required. You will recall that Professor Chadbourn has joined the Harvard Law School Faculty and will no longer be able to attend our meetings.

Unfortunately, we do not have any significant amount of funds in the budget for compensation of a research consultant. We will need all the money we have in various budget categories to pay for the printing of our reports on the URE. We could perhaps spare $1,500 (maximum) for employment of a consultant on this project. In view of the amount of work that we anticipate we will expect the research consultant to produce, we do not believe that this is generous. We will, of course, pay his travel expenses which will also come from our present budget. (In connection with our financial problems, it should be noted that our annual budget is now in excess of $110,000.)

We probably will not print the study on the existing sections not affected by the URE. We will use portions of the study as comments to those sections where we are proposing to change existing law. This means that the consultant will not have the professional benefits that result from a publication of his work. On the other hand, we would list the consultant, together with Professor Chadbourn, as a research consultant to the Commission on this project. To the extent that we publish any material he prepares, we will give him any credit we can.

II. The Staff recommends that we attempt to obtain comments from selected groups, that we request local bar associations to study the tentative recommendations and give us comments, and that we make every effort to advise interested persons we are making this study.

We distributed our printed pamphlet containing the tentative recommendation and research study on Hearsay Evidence to approximately 437 persons. More than 200 of these persons were judges. See Exhibit III--green sheet--for summary of complimentary distribution. We did not receive a single comment as a result of this distribution.

It is apparent that we will need to make a specific written request to representative groups if we wish to receive comments. Exhibit IV--pink page--contains a list of representative persons. We have prepared letters requesting these groups to send us comments. If there is no objection to the groups listed, the chairman can sign the letters and we will see that they are mailed. We will provide these groups with a reasonable number of copies of the tentative recommendations and research studies (in printed form) free of charge.

At the last meeting, it was suggested that we might wish to contact local bar associations and request that they study our tentative recommendations. There are conflicting considerations to be taken into account in determining whether this action should be taken. On the one hand, the more persons who review the tentative recommendations with some care the more likely it is that particular "bugs" will be discovered. In addition, persons who participate in such a review may be convinced of the general desirability of the adoption of a new code of evidence. On the other hand, we should be able to reach an agreement on the new code of evidence with the State

Bar. Certainly, we will have the support of the State Bar with perhaps a few areas of controversy. Should we risk the prospect of having individual bar associations take a different view toward the final product? We know that the State Bar Committee consists of competent and reasonable persons; we have no knowledge of the persons who will be determining the position of the local bar associations. Moreover, when we ask for comments we must consider them and may be required to justify our rejection of suggestions. We may make substantial changes in tentative recommendations as a result of the comments we receive; but persons who review the tentative recommendations may form an adverse opinion of the new evidence code that we will be unable to change even though we have removed the objectionable features. All things considered, however, the staff believes that even though we may not create any substantial additional support for the new evidence code by having our tentative recommendations reviewed by local bar associations, we may be able to eliminate some "bugs" by obtaining this additional review.

We have contacted the State Bar and will soon receive a list of more than 100 local bar associations. Unless the Commission objects, we plan to send a form letter to each one advising them that we are making the study and indicating that we would appreciate receiving their comments on our tentative recommendations if they are willing to undertake to review them.

The staff believes that we should make every effort to advise interested persons we are making this study. Exhibit V--gold page--is a copy of a proposed press release we plan to send to each legal newspaper and to the State Bar Journal. We will send the press release to the legal newspapers with a letter suggesting the desirability of printing the tentative recommendations.

III. The Staff recommends that a work schedule be established for the evidence study and that the Commission meet this schedule, holding three-day meetings if we fall behind schedule.

It should be apparent that the preparation of tentative recommendations covering the various articles of the URE will require a rather strict set of deadlines if we are to complete this project for the 1965 legislative session. In connection with these deadlines, it must be kept in mind that it takes time to print a publication after the Commission has authorized it to be printed. The schedule must also allow time for interested persons to study the material and to submit comments. Finally, the work must be scheduled so that it is possible to schedule staff work on a basis that will permit the staff to maintain the schedule.

Exhibit I (blue sheet attached) is a summary of the deadlines recommended by the staff. We believe we must meet these deadlines if we are to finish this project for the 1965 legislative session. Note that after we complete work on the Privileges Article, we need to complete work on one tentative recommendation each month. We believe this is possible since the Hearsay Article and Privileges Article are the two longest articles in the rules.

Exhibit II (yellow sheets) is a work schedule showing what must be accomplished at each meeting for the next 18 months. We must keep up with this schedule month by month if we are to complete work on this project in time for the 1965 legislative session. As soon as we fall significantly behind the schedule, the Commission will have to begin to meet three days a month or hold meetings more often than once each month if it wishes to complete this project on schedule.

The staff believes that the Commission cannot consider any substantial additional assignments for recommendation to the 1965 legislative session

However, we believe that we should make a recommendation on moving expenses in eminent domain proceedings and one on liability of public entities for operation and ownership of public vehicles. We do not believe either of these will take any significant amount of time.

IV. The Staff recommends that we charge for publications that are produced in connection with the URE study only if the cost of the publication is in an amount that would justify charging $2.50 or more.

The Commission decided to make a charge for the Hearsay Evidence pamphlet. This pamphlet is being sold for $5.00 a copy (plus tax). We have distributed numerous copies free of charge to persons who are assisting us on this project. The charge for the publication is intended to discourage persons who have no real need for the publication, but who will want a copy if it is free. We do obtain some funds that are deposited in the General Fund and improve our relations with the Department of Finance by making a charge for large publications. See Exhibit III (green pages) for a list of persons who received free copies of the Hearsay Evidence pamphlet.

We also plan to charge for the Privileges pamphlet. The charge will be based on the cost of the pamphlet.

We would charge for the other pamphlets only if the cost of the publication justifies making a charge. If we do not charge for the pamphlet, we need to print additional copies to meet the increased demand for the pamphlet.

For publications for which we make a charge, we will have a press overrun so we can provide copies of the tentative recommendation (without the research study) on a complimentary basis.

We would like Commission approval of a general policy on this matter so that we do not have to take meeting time on each publication to determine whether there should be a charge. We will also have to consider the desires of the Department of Finance and the State Printing Department. We will need substantial funds in our budget for 1964-65 for printing and we believe we should charge for publications costing $2.50 or more.

EXHIBIT I

DEADLINES IN STUDY OF UNIFORM RULES OF EVIDENCE

SUBJECT MATTER	Tentative recommendation approved for printing	Tentative recommendation available in printed form	Comments reviewed
Article VIII--Hearsay	approved	now available	March 1964
Article V--Privileges*	September 1963	Jan. 1, 1964	April 1964
Article IX--Authentication*	October 1963	Jan. 1, 1964	March 1964
Article III--Presumptions	November 1963	March 1, 1964	May 1964
Article I--General Provisions	December 1963	March 1, 1964	May 1964
Article VI--Extrinsic Policies	January 1964	May 1, 1964	July 1964
Article II--Judicial Notice	February 1964	May 1, 1964	July 1964
Article IV--Witnesses	March 1964	June 1, 1964	August 1964
Article VII--Expert and Other Opinion Testimony	April 1964	July 1, 1964	August 1964
Review of existing statutes in Code of Civil Procedure Part on Evidence	March 1964 (not to be printed)		Review Comments of State Bar Committee September 1964
Final Recommendation--New Part of Code of Civil Procedure relating to Evidence	Approval for printing September 1964 meeting--Ready to print October 1, 1964	Pamphlet--available in printed form January 1965 Preprinted bill--available Nov. 1, 1964?	

*research study set in type

EXHIBIT II

SCHEDULE OF WORK ON UNIFORM RULES OF EVIDENCE

July 1963 Meeting

Finish work on Tentative Recommendation on Article V--Privileges

Continue work on Article IX--Authentication and Content of Writings

Begin work on Article III--Presumptions

August 1963 Meeting

Finish work on Tentative Recommendation on Article IX--Authentication and Content of Writings

Continue work on Article III--Presumptions

Begin work on Article I--General Provisions

September 1963 Meeting

Final approval for printing--Tentative Recommendation on Article V--Privileges (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article III--Presumptions

Continue work on Article I--General Provisions

Begin work on Article VI--Extrinsic Policies

October 1963 Meeting

Final approval for printing--Tentative Recommendation on Article IX--Authentication and Content of Writings (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article I--General Provisions

Continue work on Article VI--Extrinsic Policies

Begin work on Article II--Judicial Notice

November 1963 Meeting

Final Approval for printing--Tentative Recommendation on Article III--Presumptions (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article VI--Extrinsic Policies

Continue work on Article II--Judicial Notice

Begin work on Article IV--Witnesses

December 1963 Meeting

Final approval for printing--Tentative Recommendation on Article I--General Provisions (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article II--Judicial Notice

Continue work on Article IV--Witnesses

Begin work on Article VII--Expert and Other Opinion Testimony

January 1964 Meeting

Final approval for printing--Tentative Recommendation on Article VI--Extrinsic Policies (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article IV--Witnesses

Continue work on Article VII--Expert and Other Opinion Testimony

Start review of existing statutes in Code of Civil Procedure Part on Evidence

February 1964 Meeting

Final approval for printing--Tentative Recommendation on Article II--Judicial Notice (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article VII--Expert and Other Opinion Testimony

Continue review of existing statutes in Code of Civil Procedure Part on Evidence

March 1964 Meeting

Final approval for printing--Tentative Recommendation on Article IV--Witnesses (Consider State Bar Comments)

Complete review of existing statutes in Code of Civil Procedure Part on Evidence

Consider comments on Article VIII--Hearsay Evidence

Consider comments on Article IX--Authentication

April 1964 Meeting

Final Approval for printing--Tentative Recommendation on Article VII--Expert and Other Opinion Testimony (Consider State Bar Comments)

Consider comments on Article V--Privileges

May 1964 Meeting

Consider comments on Article I--General Provisions

Consider comments on Article III--Presumptions

Start work on preparation of new code of evidence

June 1964 Meeting

Continue work on new code of evidence

July 1964 Meeting

Consider comments on Article VI--Extrinsic Policies

Consider comments on Article II--Judicial Notice

Continue work on new code of evidence

August 1964 Meeting

Consider comments on Article IV--Witnesses

Consider comments on Article VII--Expert and Other Opinion Testimony

Continue work on new code of evidence

September 1964 Meeting

Final approval for printing--pamphlet containing final recommendation on Uniform Rules of Evidence and new code of evidence

Bill to be preprinted and same type used in pamphlet

November 1964 Meeting

Review preprinted bill

December 1964 Meeting

Review page proofs of pamphlet containing final recommendation and proposed legislation

Memo 63-31

EXHIBIT III

Distribution of URE pamphlet (complimentary)

State Bar Committee on URE	23
State Board of Governors	15
Judges	216
Law Libraries	
In state	36
Out of state	14
Legal Papers and Publications	14
Former Commissioners	5
State Bar	4
State Agencies	
California	40
Other States	10
Courts	14
Law Professors	33
Miscellaneous	13
Total	437

EXHIBIT IV

GROUPS TO BE REQUESTED TO COMMENT ON TENTATIVE RECOMMENDATION

Judicial Council
Ralph N. Kleps
Administrative Director of the Courts
4200 State Building
San Francisco 2, California

Hon. Richard H. Chambers
Judicial Conference for the
9th Circuit
Post Office Box 547
San Francisco 1, California

Mr. Fitz-Gerald Ames, Sr.
Chairman
NACCA Bar Association
335 Hayes Street
San Francisco, California

Mr. Richard Carpenter
Executive Director
League of California Cities
Hotel Claremont
Berkeley, California

George R. Richter, Chairman
California Commission on Uniform
State Laws
458 So. Spring Street
Los Angeles 13, California

Mr. Perry H. Taft
Association of Casualty &
Surety Companies
315 Montgomery Street
San Francisco 4, California

Mr. Jack Merelman
Legislative Consultant
County Supervisors Association
1100 Elks Building
Sacramento 14, California

Chief of Legal Section
Division of Contracts and
Rights-of-Way
Department of Public Works
Sacramento, California

Conference of California
Judges
Room 307, Hall of Justice
850 Bryant Street
San Francisco, California

Hon. Stanley Mosk
Attorney General
Library and Courts Bldg.
Sacramento, California

Memo 63-31

EXHIBIT V

PRESS RELEASE

LAW REVISION COMMISSION TO RECOMMEND NEW EVIDENCE CODE

The California Law Revision Commission plans to recommend a new code of evidence for enactment at the 1965 session of the Legislature. The new code will be the product of the Commission's seven-year study of the Uniform Rules of Evidence. The Uniform Rules were drafted by the National Conference of Commissioners on Uniform State Laws and were approved by that body in 1953.

A 318 page report on one portion of the study--Hearsay Evidence--was published by the Commission in August 1962. This report, consisting of the Commission's tentative recommendation and a research study, is being sold by the Documents Section of the California State Printing Office, North Seventh Street and Richards Boulevard, Sacramento, California. The report costs $5.00 plus 20 cents tax.

Reports covering other phases of the evidence study are now being prepared and will be published from time to time during the next 14 months.

The Board of Governors of the State Bar has appointed a special committee to work with the Commission on the evidence project. The Commission also wishes to receive comments on its tentative recommendations from other interested groups and from individual members of the bar. These comments will be considered in formulating the final recommendation.

Copies of tentative recommendations (without the research studies) are being provided free of charge to persons willing to review and comment on them. They may be obtained from the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

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
ADDITIONAL DOCUMENTS	S259522_04 of 14 - Exhs. to MJN
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ADDITIONAL DOCUMENTS	S259522_14 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

Cohen, Frederic (56755)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm